

## REFLECTIONS ON *BROWN*

Paul D. Carrington\*

We celebrate the anniversary of a great moment in our legal history. Fifty years ago, the Supreme Court changed our law bearing on race relations.<sup>1</sup> It did not, however, directly change the society that had made that law, nor did it much alter the behavior of those who were governed by it. It is important to keep that distinction in mind.

*Brown I* marked only the beginning of the end of *de jure* segregation, the despicable legal vestige of slavery. In celebrating that moment, we need to remember that the primary subject of the Court's decision, and the primary target of the lawyers who brought the case, was *de jure* segregation. Equality of educational opportunity, an objective we are still very far from attaining, was a secondary and distant aim. Those who see the subsequent history of public education as a defeat for the Court<sup>2</sup> were hoping for more than the Court supposed in 1954 that it could effect, and indeed more than it could effect then or now.

Racial integration, even to the limited extent that we have achieved it, has been perhaps America's greatest achievement as a nation. You can talk about military victories or scientific discoveries and inventions, and you may compare them

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\* Professor of Law, Duke University. This paper was written to be presented at Little Rock, April 2, 2004. I thank Chris Machera, Duke Law 2005, for help on the history of the Little Rock litigation and Kenny Ching, Duke Law 2006, for checking other sources.

1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2. E.g. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford U. Press 2004); Richard Kluger, *Simple Justice* (2d ed., Vintage 2004); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (U. Chi. Press 1991); see also e.g. *Black, White and Brown: The Landmark School Desegregation Case in Retrospect* (Clare Cushman & Melvin I. Urofsky eds., CQ Press 2004). Cass Sunstein imposes the same emphasis on the importance of *de jure* segregation in his review of Klarman's *From Jim Crow to Civil Rights*. Cass R. Sunstein, *Did Brown Matter?* 80 *New Yorker* 102 (May 3, 2004).

favorably if you like to those of the Greeks or of the Romans or other empires, or of other extraordinary cultures. But we ought take greater pride in our recognition of the equal rights at law of citizens without regard for color. It is a deplorably universal human trait to subordinate and disdain others different from ourselves. That trait has long blighted the human condition around the world. Our laws no longer express, and even reject, that destructive trait. Similar changes have since occurred elsewhere, but to the extent that this is so, the American example has provided a critical element—the belief that such a deliberate change in a shared culture is possible.

The Court was in 1954 speaking for a cause already in accelerating motion. As we salute its role we should surely give credit to many others. We ought begin with a salute to Thomas Jefferson and his colleagues who wrote the Declaration of Independence. It has, I regret, become the fashion to condemn Jefferson and others of his contemporaries for their failures to emancipate their slaves and for the timidity of their opinions on racial issues in the late stages of their lives.<sup>3</sup> The politically correct denunciation of these immortals reflects another widely shared human failing that prevents us from seeing the world as others at different times and places have seen it. My late friend Leon Higginbotham, an African American, had it right in saying that:

the unsophisticated might argue that the Declaration of Independence had no ultimate impact of significance in eradicating slavery or diminishing racial discrimination. Yet in the corridors of history, there is a direct nexus between the egalitarian words uttered, even if not yet meant, and many of the changes that later took place.

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The irony of the unfulfilled American dream of equality is that of all those in the long line of dreamers who have sought the ultimately just society, none had to seek out

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3. Jefferson's teacher and mentor, George Wythe, and George Washington emancipated their slaves pursuant to Virginia law enacted during the Revolution. That law was repealed after the slave revolts of the early nineteenth century. Moreover, both Jefferson and Madison were debtors whose creditors would have borne the cost of emancipation. Still the most balanced account of Jefferson's timidity is David Brion Davis, *The Problem of Slavery in the Age of Revolution* 164-184 (Cornell U. Press 1975).

alien sources for moral authority. They had only to say to the American people: fulfill the largest promise in your first statement as a nation.<sup>4</sup>

If Jefferson had personal failings, that is not a reason to deny him his place in the “long line of dreamers.” His words, whatever his anxieties, were among those animating the lawyers of the National Association for the Advancement of Colored People who sustained the legal pressure on the institutions of Jim Crow.

We should also give credit to the early frontiersmen who grew up in the early nineteenth century on the western slopes of the Appalachians to become the first American nationalists and the most ardent advocates of communitarian democracy. Equal Rights was the name they gave to their demands. “Free labor, free schools, free trade, and free speech” was their cry.<sup>5</sup> They opposed slavery and religious intolerance, and were the chief source of the public school movement in most of the nation. While the Fourteenth Amendment’s Equal Protection Clause can hardly be said to be an explicit expression of their politics, its words resounded with their sentiments. Thomas Cooley, who was born in frontier New York, grew up in the Equal Rights tradition and became the most eminent American judge, legal scholar, and law teacher of the last half of the nineteenth century. As Chief Justice of Michigan in 1869, he led his court to order the desegregation of the Detroit public schools. This was one year after ratification of the Fourteenth Amendment and seventy-five years before the Supreme Court addressed the issue.<sup>6</sup> Cooley’s court was enforcing a Michigan statute providing merely that public schools should be open to residents of the district in which they were located. He noted, however, that inasmuch as the statute controlled, it did “not become important to consider what would otherwise have been the law.”<sup>7</sup> There is little question that Cooley and those who shared his professional judgment would not have paused in enforcing

4. A. Leon Higginbotham, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* 383-84 (Oxford U. Press 1978).

5. By their adversaries, members of the Equal Rights Party were designated Barnburners. For a collection of Barnburner utterances, see *A Collection of the Political Writings of William Leggett* (T. Sedgwick ed., Taylor & Dodd 1840).

6. *People ex rel. Workman v. Bd. of Educ.*, 18 Mich. 400 (1869).

7. *Id.* at 413.

the Equal Protection Clause to assure the Equal Rights of the children of the racial minority. *Brown* was an overdue triumph for those of his persuasion. Public education was then perpetuated and advanced in the late nineteenth and early twentieth century by the Progressives of that era, to whom we are also in debt for *Brown*.<sup>8</sup>

Give credit also to the many Southerners who survived the Confederacy, the Reconstruction, and the era of Redemption by the South's ruling class to continue to nurture humane and egalitarian sentiments in the South. Brutal as were the laws of the former Confederate states, and unspeakable as the lynchings by the Ku Klux Klan were, there was always an undercurrent of a more constructive and humane sentiment.<sup>9</sup> The Klan had, for example, a ubiquitous adversary in the Association of Southern Women Against Lynching led by Jessie Daniel Ames of Georgetown, Texas.<sup>10</sup> We might suitably in 2004 honor the memory of Mrs. Ames and her colleagues.

She was not alone. Felix Frankfurter perceived that there were many such Southerners who would welcome desegregation. He had met them among his students at the Harvard Law School. He exaggerated their influence, but he did not mistake their presence or their feelings. Gunnar Myrdal confirmed their presence in the 1930s in his majestic study of the institution of segregation.<sup>11</sup> One did not have to be keenly sensitive to react to the barbarism that was part of the culture I knew as a child in Texas.

Let me give one example from my own experience. Because so many men were in military service, the great Barnum & Bailey circus was short-handed when it came to Dallas in the fall of 1942. It advertised free admission for kids who would come to the fair grounds to help unload its boxcars.

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8. See Lawrence A. Cremin, *The Transformation of the School: Progressivism in American Education 1876-1957* (Vintage 1964).

9. This was perhaps most evident in the late nineteenth century when the biracial Populists dominated the politics of North Carolina. See W.J. Cash, *The Mind of the South 169-171* (Knopf 1941); John Hope Franklin & Alfred A. Moss, Jr, *From Slavery to Freedom: A History of Negro Americans* 234 (6th ed., Knopf 1988).

10. See Jacquelyn Dowd Hall, *Revolt against Chivalry: Jessie Daniel Ames and the Women's Campaign against Lynching* (Colum. U. Press 1979).

11. Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (Harper & Rowe 1944).

With a schoolmate, I rode my bike across the city in the wee morning hours to get a job. We were assigned, with two other eleven-year olds, to unload a boxcar of hay for the elephants. We made a great mountain of hay bales outside the place where the great circus tent was being pitched. Then for two hours, the four of us played King-of-the-Mountain on the mountain we had erected, throwing one another turn after turn down the haystack. It was, as you can imagine, wonderful fun and we quickly became fast friends. When it was time for the show, my schoolmate and I were given tickets, but the other two mountaineers were not. The circus attendant in charge shamefacedly told them that they could not come in because they were Negroes. I can still, over sixty-one years after the event, see their faces.

My classmate and the ticket taker were as appalled as I was. They, too, may well remember the event. And we were not rare in our reaction to such experiences. I recall also that Negroes were allowed to attend the State Fair of Texas on only one of the fourteen days that the Fair was in session, and on that day, my neighbors and I were not allowed to attend. Reacting to such rules, I and many of my fellow undergraduates at the University of Texas in the spring of 1949 petitioned the governing Board of Regents to break the color line and admit Heman Sweatt to our university's law school. I believe we expressed a majority opinion among the University's students. It is likely that the Regents were personally conflicted but in fear of the reaction to such a decision.

Our sensitivities in 1949 were elevated, I have no doubt, by the state of the world. Nazi Germany had taught us what lies at the end of the racist road. And Communism was offering its false promise to all those who felt aggrieved by the conflicts between classes, including Americans of African ancestry. Racial conflict risked enlarging the class war.<sup>12</sup> The elimination of that risk was a motive for desegregation. Perhaps therefore we also in 2004 owe a salute to the victims of the Holocaust and of Soviet imperialism. Many in Europe can be said to have died for us.

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

We ought also to give credit to the military experience shared by many Americans. There had been black military heroes in every American war. It was the military who were the first to desegregate, and they did so without a court order, on the command of President Truman. As a draftee in 1955, I experienced infantry training in a newly desegregated Sixth Division. We were assigned bunks in alphabetical order, so that I shared my life for eight weeks with James Brooks, who had been shining shoes at the Corpus Christi railroad station, with Forrest Brown, a warehouse guard from Oakland, and with Manuel Cerda, a grocery clerk from San Antonio. Brooks and Brown were African American, Cerda Hispanic. Like most lawyers, I was a lousy infantryman, and survived the experience of infantry training because those three buddies gave me indispensable support. Few veterans who shared adventures of that sort could tolerate the sight of separate drinking fountains.

Of course, the aspiration to break the color barrier was more common outside the former states of the Confederacy. A majority of Americans favored desegregation and their failure to achieve it was in part due to flaws in our Constitution. A truly representative national Congress would, long before 1954, have taken steps in that direction pursuant to section five of the Fourteenth Amendment. As Jack Balkin put it, Harry Truman was willing in 1948 to bet his presidency on the issue of civil rights.<sup>13</sup> But senators elected to represent Southern states, with electorates from which African American voters were effectively excluded, blocked the civil rights legislation advanced by Truman.

This was merely further evidence that the federal government is often not representative of the people it purports to govern as, indeed, it was not intended to be by those who wrote the Constitution of the United States. A century before the failed Civil Rights Act of 1948, Frederick Grimké had observed the structural inadequacy of our legislatures and the enlarged political role of courts resulting from that inadequacy.<sup>14</sup> In the three decades beginning in 1919, Charles Beard repeatedly

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13. *What Brown v. Board of Education Should Have Said* 19 (Jack M. Balkin ed., N.Y.U. Press 2001).

14. Frederick Grimké, *The Nature and Tendency of Free Institutions* (2d ed., H.W. Derby & Co. 1856) (reprinted in 1968 by Harvard U. Press).

called attention to the same deficiencies.<sup>15</sup> Robert Dahl has recently renewed the observation.<sup>16</sup> Had Congress been a democratic institution of the sort promised by the Declaration of Independence, or even if the Fifteenth Amendment had been enforced so that state governments in the South had represented all their people, public institutions in America would have been open to all their citizens no later than 1948. We should therefore salute the memory of Harry Truman, and Hubert Humphrey, and the other early champions of civil rights legislation.

Perhaps above all, we should give credit for our great national achievement to Martin Luther King and his supporters who put their lives at risk to call attention to the injustice of segregation, thereby exciting the will to reform even among many Southerners previously of the Confederate sort.<sup>17</sup> There can be no need for me to elaborate on their role. We should today be raising a toast to Rosa Parks. She was more important and more admirable in what she did, than the nine old men who decided *Brown*. And there were others, including many who, long before King called upon us to do so, exposed themselves to arrest or private violence, and even risked being lynched, for the purpose of calling attention to the evil of Jim Crow laws. Even before *Brown*, Harry Moore and his wife had been murdered for their efforts to desegregate schools in Florida.<sup>18</sup> Such sacrifices had made their cause ultimately irresistible in a nation of people who had been schooled on the words of the Declaration.

And when one thinks of judges who should be honored, it is not the Justices who should come first to mind. While some previously segregated schools were quickly opened in compliance with *Brown*, "all deliberate speed" was no speed at all in some states and many school districts. Many members of the federal judiciary were required to expose themselves to personal risk as well as extreme hostility in their efforts to enforce the Court's rhetoric in *Brown*. Let us not forget

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15. E.g. Charles Austin Beard, *American Government and Politics* (Macmillan 1920).

16. E.g. Robert A. Dahl, *How Democratic Is the American Constitution?* (Yale U. Press 2002).

17. The story is best told by David Garrow, *Bearing the Cross: Martin Luther King Jr. and the Southern Christian Leadership Conference* (HarperCollins 1986).

18. See Ben Green, *Before His Time: The Untold Story of Harry T. Moore, America's First Civil Rights Martyr* (Free Press 1999).

Alabama's Judge Frank Johnson and others who withstood the test posed for them by *Brown*.<sup>19</sup> No Justice did what they did.

We must also give credit to the Congress of the United States that, however belatedly, enacted the Civil Rights Acts of 1964<sup>20</sup> and 1965.<sup>21</sup> True, those enactments did little more than revive the Fourteenth and Fifteenth Amendments that the courts had been unable and perhaps even unwilling to enforce in the seventy-five years preceding *Brown*.<sup>22</sup> Those enactments were what the draftsmen rather clearly had in mind when they added the final section five to the Fourteenth Amendment, which explicitly authorizes Congress to enact "appropriate legislation" to secure enforcement of the Equal Protection Clause. But until Congress faced up to the issues, the federal courts were gasping for breath if not wavering in the task that the Court had set for them.

While we are saluting judicial heroes, a lesson to be learned and not forgotten is that *Brown* failed to take hold in much of the South until Congress sent the Department of Justice on the mission of enforcement with popular moral support generated by the movement led by King. Congress was prodded to take that very important step by the Executive Branch in the person of President Lyndon Johnson.<sup>23</sup> And in 1970, the administration of President Richard Nixon initiated the final stages of desegregation in the most intransigent states.<sup>24</sup> They were responding, the conservative Senator Everett Dirksen said, to "an inexorable moral force."<sup>25</sup>

The Court was to say the least diffident in its 1955 *Brown II* decision<sup>26</sup> enforcing the change in our law that it had

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19. See Jack Bass, *Unlikely Heroes: The Dramatic Story of the Southern Judges Who Translated the Supreme Court's Brown Decision into a Revolution for Equality* (Simon & Schuster 1981).

20. 42 U.S.C. §1981 (2004) (available at <http://uscode.house.gov>).

21. 42 U.S.C. §1973 (2004) (available at <http://uscode.house.gov>).

22. For an account of the failure with respect to the Fourteenth Amendment, see Earl M. Maltz, *The Fourteenth Amendment and the Law of the Constitution* (Carolina Academic Press 2004).

23. For a brief account, see James T. Patterson, *Grand Expectations: The United States 1945-1974* at 542-546 (Oxford U. Press 1996).

24. George P. Shultz, *How a Republican Desegregated the South's Schools*, 152 N.Y. Times A23 (Jan. 8, 2003).

25. 110 Cong. Rec. 13320 (1964) (statement of Sen. Everett Dirksen).

26. *Brown v. Bd. of Educ.*, 349 U.S. 301 (1955).



proclaimed the previous year. It was then and is to me a half century later a sad fact that no remedy was provided to Linda Brown, who could have been admitted to her school in Topeka forthwith. The Court's failure to enforce her right seems to have been the result of the Chief Justice's preoccupation with what he perceived to be a need for unanimity. But the compromise phrase, "with all deliberate speed," was taken by others, and not unreasonably so, as an invitation to delay compliance forever.

We must, alas, therefore, in 2004 recall as well the "massive resistance" to that moral force. It was first expressed in the Southern Manifesto of 1956 denouncing *Brown* as contrary to law, and a decision to be resisted by "all lawful means."<sup>27</sup> It was almost invited by the Court's diffident expression of hope for "deliberate speed" which brought a moment of prosperity to a generation of Southern politicians who promised and practiced, "massive resistance" to "racial mixing." Some of them, I am ashamed to say, were lawyers. In its more respectable form, their segregationist program was presented as *interposition*, i.e., the legitimate rejection by a state of interpretations of the federal Constitution deemed by it to be unlawful usurpations of its sovereignty.

But as we recall that shame, we should recall those lawyers who put themselves at risk for speaking out against the Manifesto. Lewis F. Powell, then an eminent private lawyer in Richmond, promptly proclaimed the doctrine to be "simply legal nonsense."<sup>28</sup> My late friend Robert Leflar, an eminent law professor at the University of Arkansas, likewise declared that there was "no legal basis whatever" for the doctrine of interposition.<sup>29</sup> My friend William Murphy, a law professor at the University of Mississippi, joined Powell and Leflar in their rejection of the idea in a book review published in the *Mississippi Law Journal*.<sup>30</sup> This was more than the White

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27. 102 Cong. Rec. 4459, 4460 (1956) (statement of Sen. Walter F. George). For a recent reflection, see Robert J. Cottrol, Raymond T. Diamond, & Leland B. Ware, *Brown v. Board of Education: Caste, Culture and Constitution 187-189* (U. Press of Kan. 2003).

28. Mark Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court 1936-1961* at 240 (Oxford U. Press 1994).

29. Tony Freyer, *The Little Rock Crisis: A Constitutional Interpretation* 73 (Greenwood Press 1984).

30. William P. Murphy, *Book Review*, 29 Miss. L.J. 110 (1957) (reviewing James Jackson Kilpatrick, *The Sovereign States* (Henry Regnery Co. 1957)).

Citizens' Council could bear. Not only was Murphy fired at Mississippi over the vehement protest of his dean and colleagues, but the trustees at Vanderbilt University were successfully pressured to withhold approval of an offer of a visiting appointment that had been tendered by their law school. Happily, Murphy landed an appointment at the University of Missouri, and he is now my neighbor in North Carolina. But repudiation by Powell, Leflar, Murphy, and many others of repute did not prevent extensive efforts to perpetuate interposition as segregationist doctrine, in Arkansas as elsewhere in the South.

We all remember the vivid photograph of the 101st Airborne Division leading the children up the steps into Little Rock Central High School in 1958 to enforce the decision of the Court in *Cooper v. Aaron*.<sup>31</sup> They were commanded to do so by President Dwight Eisenhower on the advice of his Attorney General, Herbert Brownell.<sup>32</sup> From what we know,<sup>33</sup> it is at least possible that the President had himself been tempted to echo the utterance long attributed to President Andrew Jackson and say that "Chief Justice Warren has issued his order, now let him enforce it."<sup>34</sup> If he was so tempted, we owe a salute to Herbert Brownell for his intervention to save the day. But the use of military force was not decisive. Even in Little Rock, the presence of an airborne division did not lead to acceptance of a mere court decision that purported to change the social order.

Indeed, Central High School was closed to all students in 1958-59. The School Board's new pupil assignment plan was then held invalid in 1961.<sup>35</sup> Its "freedom of choice" plan passed muster in 1966,<sup>36</sup> but failed a challenge in 1970.<sup>37</sup> Through diverse travails involving efforts to consolidate school districts, a settlement for Little Rock schools was reached in 1990 that

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31. 358 U. S. 1 (1958).

32. Herbert Brownell & John Burke, *Advising Ike: The Memoirs of Herbert Brownell* 365-384 (U. Press of Kan. 1993).

33. Stephen Ambrose, *Eisenhower* 409 (Simon & Schuster 1984); Emmet John Hughes, *The Ordeal of Power*, 242-46 (Atheneum Books 1963).

34. On Jackson's alleged utterance, see Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. S. History 589 (1973).

35. *Norwood v. Tucker*, 287 F.2d 798 (8th Cir. 1961).

36. *Clark v. Bd. of Educ. of Little Rock Sch. Dist.*, 369 F.2d 661 (8th Cir. 1966).

37. *Clark v. Bd. of Educ. of Little Rock Sch. Dist.*, 426 F.2d 1035 (8th Cir. 1970).

“closely resembled consolidation.”<sup>38</sup> The matter of compliance with the Court’s order in *Cooper v. Aaron* remains today on the docket of the United States District Court for the Eastern District of Arkansas.

Memories of the resistance to *Brown* are important to retain, and should be placed alongside knowledge of the complexities confronted when comprehensive enforcement is attempted. We should never suppose that law is an instrument with which to effect quick and easy social change. Societies, perhaps especially democratic societies, do not change on command. They change in response to situations. Law can lend support to reformist impulses independently motivated, but people do not change their minds merely because judges tell them to.

Moreover, there are inevitably secondary consequences of those social changes in which law plays an instrumental role. We know that action begets reaction in all human affairs. It is often impossible to foresee the secondary and tertiary consequences of what we do. It is especially unlikely that we could in 1954 have predicted the remote consequences of a change as complex as desegregation. We ought not celebrate a great event of fifty years ago without at least trying to take notice of its remote consequences not foreseeable by those participating at the time.

I identify two for your reflection. First, consider what has happened to public education in America in the last half century, and wonder if *Brown* might have contributed to a general decline in the effectiveness of many of our schools. The NAACP lawyers rightly recognized that public education was the most vulnerable point at which to attack Jim Crow. Unfortunately, the same characteristics of schools making this so also made the schools harder to change. There was some resistance, to be sure, to the desegregation of public parks and swimming pools, and to many other applications of the civil rights laws. And the racist impulse abides in many personal relationships among neighbors and co-workers. But schools have been by far the hardest nut to crack for the reasons that they engage intimate feelings of family identity and intersect

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38. *Little Rock Sch. Dist. v. Pulaski County Spec. Sch. Dist. No. 1*, 921 F.2d 1371 (8th Cir. 1990), *vacated*, 949 F.2d 253 (8th Cir. 1991).

with the ubiquitous ambitions of Americans to achieve social and economic status. Because schools have been so hard to change, it is possible to see some unintended harms to them resulting from the demise of racial segregation.

Of course we are in no position to assess accurately whether our schools are overall improving or deteriorating over time. People who try to supply quantified answers to such a question should not be taken too seriously.<sup>39</sup> I am sure that our schools have improved for African American children in the Southern states.<sup>40</sup> But I do not know about the rest.<sup>41</sup> Experienced schoolteachers in numerous communities across the country have told me that parent-teacher meetings are not what they used to be. If so, this may be a symptom of a larger problem. The idea of the public school was that by sharing our children as a democratic community, we extend the influence of the parents most interested in the development of their children to the children of other parents who for whatever reasons are less able to guide their development.<sup>42</sup> The public school was a coming together of neighbors to pursue a communitarian purpose served by the teacher as an assistant or surrogate to a community of parents whose job was to socialize as well as instruct children. If indeed many American parents are less interested in their children's schools in 2004 than were their forebears in 1954, it is possible that desegregation without social integration has played an unfortunate role in that decline by diminishing citizens' sense of community and elevating the risks

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39. E.g. James S. Coleman et al., *Equality of Educational Opportunity* 21-22 (Off. of Educ., U.S. Dept. of Health, Educ. & Welfare 1966).

40. For a brief account of the education of Negro children in the South before Reconstruction, see Henry J. Parkinson, *The Imperfect Panacea: American Faith in Education 1865-1965* (McGraw-Hill 1968).

41. E.g. 20 U.S.C. § 6301 (2004) (setting out the aims of the No Child Left Behind Act, including improvements in assessment, accountability, teacher preparation, curricula and curricular materials, standards, flexibility, enrichment, acceleration, school reform, and parental involvement) (available at <http://uscode.house.gov>).

42. For an account of the emergence of American public schools, see Michael B. Katz, *The Irony of Early School Reform: Educational Innovation in Mid-Nineteenth Century Massachusetts* (Harvard U. Press 1968). Their continued development is reported by Marvin Lazerson, *Origins of the Urban School: Public Education in Massachusetts, 1870-1915* (Harvard U. Press 1971), and David B. Tyack, *The One Best System: A History of Urban Education* (Harvard U. Press 1974).

of alienation, thereby weakening the moral infrastructure of parental support for our schools.

Surely there are many other possible causes if our schools are less effective than once they were; these include television entertainment, computer games, the reduction in family size, single parents, the advent of the two-career family with more money and less time to spend on their children, technological change, suburbanization and the advent not merely of suburbs but of communities walled in and gated to keep out alien influences. As we have “mainstreamed” children with various learning disabilities and assigned to our public schools responsibility for such sensitive matters as sex education, some schools may have been overloaded with difficult or disputed aims for which they may be less suited. We have witnessed not only white flight, but black flight as well when the situations permitted it. Because the minorities are disproportionately impecunious, their children are over-represented in the schools facing the most challenging educational missions, and under-represented in the schools serving the most stable and supportive communities. For these or perhaps other reasons, private day schools flourish in many cities, and perhaps as many as a million children are home-schooled. The children who are ill-served are most often the children of the poor, and the race of their parents is generally only incidental. There are, of course, many other causes for the plights of our public schools and of the children of the poor. I do not suggest that desegregation is a major source of those problems. I mean only to present that possibility as an example of a secondary and unfortunate consequence that was not foreseen as a possible effect of *Brown* by many of us who cheered the decision.

Derrick Bell was among the first to call attention to the risk of loss of community support for schools, but not until 1976, when he observed that not all black parents wanted to surrender the control of their children to predominantly white institutions.<sup>43</sup> As a staunch advocate of metropolitan bussing in northern cities in the 1970s, it was not a concern of mine even though I was at the time very much involved in public education as a member of a local school board and fully aware of the needs

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43. See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976).

of schools for community support.<sup>44</sup> I recall as a measure of my own blindness, my astonishment at the negative reaction of the Inkster, Michigan, school board when in 1973 I offered to represent them in a suit to merge their underfinanced district with that of neighboring Dearborn, then the “richest district” in the state in terms of local tax revenues. The predominantly black population of Inkster had no interest whatever in sending their children to Dearborn schools, where, it was presumed, they and their parents would inevitably be regarded as aliens to be subordinated, even if the amount of money being spent on their education would be increased four-fold.

A second, more direct, secondary effect of *Brown* has been an inflation of the Supreme Court’s sense of itself. The opinion of the Court in *Brown I* was not especially convincing as a legal argument. The weakness of the opinion not only made it vulnerable to the Southern Manifesto’s protest that the decision was a lawless act, but exposed it to thoughtful criticism in two Holmes Lectures presented at the Harvard Law School by two of the wisest American lawyers of the age, Learned Hand<sup>45</sup> and Herbert Wechsler.<sup>46</sup> Each found the opinion lacking persuasiveness despite his deep sympathy with the Court’s political objective. In the vast literature on *Brown I*, there has been very little said in defense of the Court’s opinion. It was accepted by most of the legal profession as an invocation of natural law: not an application of a pre-existing legal text or tradition, but a proclamation of a universal principle applicable to all men and women at all times and perhaps of divine origin. This seemed most evident when the Court extended its holding to the District of Columbia, to which the Equal Protection Clause was not explicitly applicable.<sup>47</sup>

The idea of natural law was implicit in the text of the Declaration of Independence when it spoke of “unalienable

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44. I was mindful of the need for community involvement in expressing my views on the movement rising in the 1960s to equalize school funding. *On Egalitarian Overzeal: A Polemic against the Local School Property Tax Cases*, 1972 U. Ill. L. Forum 232 (1972); *Financing the American Dream: Equality and School Taxes*, 73 Colum. L. Rev. 1227 (1973).

45. Learned Hand, *The Bill of Rights* 54-55 (Harvard U. Press 1958).

46. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

47. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

rights.” It is also celebrated in traditional Catholic doctrine, and was enthusiastically advocated in the 1940s by Clarence Manion, the eminent law dean at Notre Dame.<sup>48</sup> But our Constitution is a written text and does not commission the Court to enforce any right that the Justices in their superior wisdom might deem to be unalienable.

This was not, I think, an oversight by James Madison and his colleagues. There is a problem with natural law. It requires very special qualifications for those who presume to discern and enforce it. Because it is immune to competitive politics, it is thus a repudiation of the right to self-government, at least when those who discern and enforce it are in no way accountable to the people for their interpretations. Which the Supreme Court of the United States assuredly is not. Its members when invoking natural law proclaim themselves to be an American College of Cardinals who presume to tell us how to live and what to think.

The claim of the Court to the high status of interpreter of natural law was articulated in its decision regarding the desegregation of Little Rock Central High School. In *Cooper v. Aaron*, the Court for the first time expressed the view that it alone was empowered to interpret the Constitution and that anyone taking an oath to uphold that document was bound by its interpretation and could recognize no other.<sup>49</sup> With those words, it not only scorned the Southern Manifesto, but rose above its own past. It had forgotten numerous moments of defiance or noncompliance by the other branches of the federal government such as that of Presidents Jackson and Lincoln, and by state officials who had adhered to their own interpretations of constitutional texts. The Court had theretofore, with rare exception, performed its work with a measure of diffidence born partly from its awareness that it was but one mortal element in a complex constitutional order owing respect to the prerogatives and responsibilities of others whose support it very much needed.

The Court should have learned from its experience with desegregation in the decade following *Brown* that people seldom

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48. E.g. Clarence Manion, *Lessons in Liberty: A Study of God in Government* (U. Notre Dame Press 1939).

49. *Cooper*, 358 U.S. at 18-19.

change their opinions to conform to its opinions.<sup>50</sup> That it learned the opposite lesson was made clear in the imbroglio following its much-celebrated and much-maligned decision in *Roe v. Wade*.<sup>51</sup> Like the decision in *Brown*, the opinion of the Court in that case was strikingly unconvincing even to many lawyers and citizens who favor a woman's right to choose, and who were in the process of changing the laws of most states to affirm that right. Whereas the decision in *Brown* was rooted in the text of the Equal Protection Clause, and perhaps plausibly in the text of the Due Process Clause, there was no constitutional text on which *Roe* could be based. But having desegregated our schools, the Court was confident that it could supply American women with the right to choose without need of authorization from a legislative body commissioned to represent the people. The advent of the Right to Life Movement<sup>52</sup> was a direct reaction to the Court's false estimation of its own power and influence. The result was less than free choice for women, because those in deep disagreement with the Court, having no forum for direct political response, were moved to the practice of civil disobedience and even terrorism.<sup>53</sup> And the issue of Life or Choice quickly came to dominate the politics of federal judicial appointment, and even to play an important role in presidential elections. How to reverse the decision has been in many minds a central issue for every presidential election since 1980. It is indeed possible that President Reagan and both Presidents Bush owe their elections to *Roe v. Wade*.

Nevertheless, when the Rehnquist Court confronted the possibility of overruling *Roe*, it did not merely reaffirm its former decision. It went on to explain that a decision to overrule such an important decision would call its own legitimacy into question and invite continued protest. It called upon the people of the United States, as "people who aspire to live according to the Rule of Law," to understand that this ideal required them to understand that *only the Court* is "invested with the authority to

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50. For further development of this point, see Rosenberg, *supra* n. 2.

51. *Roe v. Wade*, 410 U.S. 113 (1973).

52. *Tipping the Scales: The Christian Right's Legal Crusade against Choice* (Ctr. for Reproductive L. & Policy 1998).

53. Patricia Baird-Windle & Eleanor J. Bader, *Targets of Hatred: Anti-abortion Terrorism* (Palgrave 2001).



decide their constitutional cases and speak before all others for their constitutional ideals.”<sup>54</sup> In other words, you don’t even have to be an officer sworn to uphold the Constitution to be bound to accept the Court’s views. All of us who respect the idea of law are somehow bound to accept the Court’s wisdom about the natural law in which our “unalienable rights” are embedded. I share Scot Powe’s assessment that “[s]earching for worse modern constitutional doctrine than this would be fruitless.”<sup>55</sup> It might be equally fruitless to search for a more self-aggrandizing statement than this. I do not myself regard a fetus as a human life, but I respect the right of my fellow citizens passionately to disagree with me and the Court on the point. No American, even one sworn to uphold the Constitution, is obliged to respect the utterances of nine elders even when they, as they must, risk consequences when their behavior is defiant of those utterances. That, after all, was what Martin Luther King was explicitly teaching us, that bad law ought be respectfully disobeyed no matter who made it. There is thus a resemblance between those who bore the cross with King and some of those who bear it for unborn fetuses, at least those who have not practiced or supported terrorism. Those of us who respected and followed King owe the Right to Lifers a measure of respect even if we are in profound disagreement with them on the scientific and religious issues the Court commissioned itself to decide.

In its consideration of other matters bearing on sexuality, the Court has again demonstrated its inclination to make natural law in disregard of the text of the Constitution. One need not favor the criminal punishment of homosexuality to regard Justice Kennedy’s opinion in *Lawrence v. Texas*<sup>56</sup> as an offensive arrogation. Robert Post assures us that the opinion is “the opening bid in a conversation that the Court expects to hold with the American public.”<sup>57</sup> Perhaps so, but there is little in our

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54. *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992).

55. L.A. Powe, Jr., *Book Review: The Not So-Brave New Constitutional Order*, 117 Harv. L. Rev. 669 (2003) (reviewing Mark V. Tushnet, *The New Constitutional Order* (Princeton U. Press 2003)).

56. 539 U.S. 558 (2003).

57. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 104 (2003).

experience to confirm that such a conversation is possible. To whom might the Court listen? Is there any way to communicate with it other than by taking to the streets as the Right to Lifers did? As was the case in *Roe*, there was already in place a trend decriminalizing homosexuality, with scant resistance in most communities. Whether the Court's action will improve the social acceptability of homosexuality, in the way that legislation enacted by representatives of the people can, or will have the reverse effect remains to be seen.<sup>58</sup>

Then there is *Bush v. Gore*.<sup>59</sup> The text of the Constitution is as clear as sunlight as to how a contest over a presidential election is to be resolved. In important respects, the constitutional process set forth in Article Two is clumsy and anti-democratic. There is only one feature of it that made good sense in 1789 and that makes good sense today. And that is that the Supreme Court of the United States should have nothing to do with the selection of the President of the United States who selected its members. Of the thirteen persons in the nation having the greatest personal stake in the outcome of an election, nine sit on the Court. The identity of the President controls whether a Justice is to sit in the majority and exercise for years the gratifying power of proclaiming law with which all citizens are expected and required to agree, or is left merely to fulminate in a minority. For that reason, all nine Justices should have recused themselves from deciding the most purely political question ever presented to the Court. There was no serious pretext that the decision of the Court in *Bush v. Gore* was an application of law faithful to the controlling text. It must be viewed as an expression of a personal preference by five Justices who think that the rest of us should accept what they tell us even when the subject is one they are forbidden by law to address.

We are thus indeed now living in a nation subordinated to judicial supremacy. One result is that the selection of life-tenured federal judges has been placed on the central stage of

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58. On prior experience with the Court as an agent of social change, see Lee Epstein & Joseph E. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (U.N.C. Press 1992); Robert F. Nagel, *Judicial Power and American Character: Censoring Ourselves in an Anxious Age* (Oxford U. Press 1994); and Rosenberg, *supra* n. 2.

59. 531 U.S. 98 (2000).

American politics. A secondary result of this development is that those who are selected and confirmed as Justices must be persons deemed suited to the task of discerning and enforcing natural law. It is to me troubling that persons selected for that role in recent decades lack substantial political experience, or even much professional experience as lawyers engaged in the resolution of disputes. Whereas the Warren Court was staffed with Justices of vast experience in public affairs, the present Court is sadly lacking in that qualification. This lack reinforces the Court's apparently growing inability to regard with proper respect the decisions either of other branches of government or of state and local governments. One may continue to scorn, as I do, the arguments we heard fifty years ago in favor of States' Rights as reasons to permit continued *de jure* segregation, and yet now regret that the Court has loosened the restraints on itself as a second-guesser of all manner of political decisions made at all levels of government.

This transformation of our government to place a life-tenured elite at its center, like the aforementioned transformation of public education, can hardly be said to be solely the result of *Brown*. Jeffersonians complained almost two centuries ago of the tendency of the Marshall Court to engage in freewheeling interpretation of constitutional texts.<sup>60</sup> It seems likely that the architecture of the Supreme Court's building erected under the leadership of Chief Justice Taft contributes to the Justices' inflated sense of themselves. As did the 1925 legislation conferring on the Court the power to control its own docket.<sup>61</sup> Still, it seems likely that the event we celebrate today, and especially its enforcement in Little Rock by the 101st Airborne Division, was an important step down this road.

Many and perhaps most lawyers exult in this enhancement of the role of the Court.<sup>62</sup> As lawyers, we tend to share its glories and bask in them, for it is a part of our profession. If the Court makes natural law, then we share in its semi-divine role.

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60. E.g. John Taylor, *Construction Construed and Constitutions Vindicated* (Shepard & Pollard 1820) (reprinted in 1970 by DaCapo Press).

61. 28 U.S.C. §1257(3) (1982).

62. E.g. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard U. Press 1999); Mark V. Tushnet, *The New Constitutional Order* (Princeton U. Press 2003).

Similar trends toward the self-empowerment of the judiciary by judges liberating themselves from the duty to heed pre-existing texts can be seen in many other nations: Canada,<sup>63</sup> Australia,<sup>64</sup> and India<sup>65</sup> are examples.

In support of this trend, Christopher Eisgruber assures us that life-tenured Justices have the capacity and the will to make moral judgments comporting with the will of the people.<sup>66</sup> There is no reason to doubt that Justices honestly strive to do that. I have worked with many judges over many years and will vouch for the integrity of every one of them that I have known. I will, however, not go so far as Chief Justice Taft, who affirmed that our judges “typify on earth what we shall meet hereafter in heaven under a just God.”<sup>67</sup> While they are admirable mortals, I doubt that they have the extraordinary wisdom to know our collective minds on deeply divisive issues.

And even if the Court is indeed Solomon, there is the consequence of the disempowerment of citizens. At the end of the road the Court has taken, it risks finding that the citizens’ sense of shared responsibility has been seriously reduced by its self-aggrandizement. That was a concern and a forecast expressed in 1848 by Frederick Grimké, an eminent judge of that time, and in 1893 expressed again in different form by James Bradley Thayer.<sup>68</sup> It was their belief, as it is mine, that the sense of shared responsibility is a critical source of the mutual trust that is indispensable to a stable democratic society. A people who look to nine elders to tell them what to think cannot be expected to maintain the interest in government required to assure its acceptance and stability over time.

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63. F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Broadview Press 2000).

64. Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge U. Press 2000). For a general account of the political role of Australian courts, see Enid Campbell & H.P. Lee, *The Australian Judiciary* (Cambridge U. Press 2002).

65. S.P. Sathe, *Judicial Activism in India* (Oxford U. Press 2002); U.C. Jain & Jeevan Nair, *Judiciary in India* (Pointer Publishers 2000).

66. Christopher L. Eisgruber, *Constitutional Self-Government* (Harvard U. Press 2001).

67. Judith Icke Anderson, *William Howard Taft: An Intimate History* 259 (W.W. Norton & Co. 1981).

68. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

For myself, I would be more comfortable about the future of American law if the Court were less arrogant. I would this year, fifty years after *Brown*, wish that the Justices might remember the defiant words attributed to President Jackson, and recall the days of Court-packing. Beneath the odious Southern Manifesto of 1956 was a lesson about the role and power of judges that the Court seems to have forgotten, of which it needs somehow to be reminded.

It bears notice on occasions such as this that hundreds of constitutions have been written for states and nations around the world,<sup>69</sup> many of them since 1954, and not one has created a high court responsible for its enforcement whose members are assigned their powers for life. This is striking given that many nations face problems resembling the one addressed in America in 1954. The idea of constitutional law enforced by professional judges is widely admired, but not the idea of natural law enforced by elders situated in a Grecian temple and accountable only to Zeus.

I thus return to the main point I wish to make. For the end of segregation by law, it is the American people who should be saluted above all others. Humanity is more humane because of what we Americans have done. And it is this shared achievement, not the mere utterance of our elders, that we should celebrate today.



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69. A recent compilation is *Constitutions of the Countries of the World* (Albert P. Blaustein & Gisbert H. Flantz eds., Oceana Publications 1990). Western Samoan judges serve for life, but their constitution is not difficult to amend.

