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Lecture

Mayteenth*

Jim Chen†

"[I]n this our noble land, memory is all: touchstone, threat and guiding star. Where we shall go is where we have been; where we have been is where we shall go—but with a difference. For as we

* This lecture draws upon three presentations made in commemoration of the semicentennial of Brown v. Board of Education, 347 U.S 483 (1954). The first, Taking Jim Crow out of the Constitution: How the Supreme Court Moved from Plessy to Brown, took place at Carleton College in Northfield, Minnesota, on April 20, 2004. The second presentation consisted of comments at the Minnesota Supreme Court's ceremony honoring Brown's fiftieth anniversary, conducted at the Minnesota State Law Library in Saint Paul on May 17, 2004. Finally, on July 22, 2004, I took part in another reenactment and discussion of Brown at a program called To Win Equality by Law: Brown v. Board of Education, sponsored by the Hennepin County Bar Association and the Minnesota Association of Black Lawyers. I thank Rabbi Joan S. Friedman, associate chaplain and coordinator of Carleton College's Program in Ethical Reflection, for the opportunity to speak in Northfield. Chief Justice Kathleen Blatz and Daniel Lunde, head of library development and special projects at the Minnesota State Law Library, conferred upon me the extraordinary honor of addressing my state's highest court at a ceremony marking the impact of twentieth-century America's most important judicial decision. Sonia Miller-Van Oort organized the July 22 event, which brought Brown to life for an audience drawn from the general public. These individuals deserve, and receive, my profound appreciation.

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As this lecture will make apparent, I divided my childhood between historically black schools in the city of Atlanta and historically white schools in DeKalb County, Georgia. Only later in life did I begin to appreciate more fully the hardships that segregation inflicted and the personal struggles that many of my teachers and classmates undertook in order to overcome the South's racist legacy. Though the gesture hardly seems commensurate, I dedicate this lecture to them.
proceed toward our destination, it is ever changed by the trans-
formations wrought by our democratic procedures and by the life-
affirming effects of our spirit. Here we move ever toward past-
future, by moonlight and by starlight, soaring by dead reckoning
along courses mapped by our visionary fathers!"1

I. THE BETTER MUSES OF OUR NATURE

Clio, muse of history, is a fickle mistress. Not long ago in the
collective memory of the American people, Brown v. Board of
Education2 enjoyed a status befitting “the single most honored opinion in the Supreme Court’s corpus.”3 At least while Brown
was young, before the stubborn task of implementation compro-
mised its promise, observers hailed the case as the herald “of ef-
fective enforcement of civil rights in American law.”4 If not “the
most important decision in the history of the Court,” Brown was
at a minimum “the watershed constitutional case of [the twenti-
eth] century.”5

Brown, alas, has reached middle age and, with it, the iden-
tity crisis that routinely accompanies lost youth.6 As of May 17,

1. RALPH ELLISON, JUNETEENTH: A NOVEL 16 (John F. Callahan ed.,
1999).
in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S
TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 3,
See generally RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V.
BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 709–10
(1975); JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS
MILESTONE AND ITS TROUBLED LEGACY 69 (2001) (“The decision cut through a
tissue of lies that white Southerners and others had woven to maintain the sub-
servient status of black people. It offered the possibility of long-awaited change
that other political institutions—the Congress, state legislatures—seemed
wholly incapable of producing.”); Dennis J. Hutchinson, Unanimity and Desegre-
gation: Decisionmaking in the Supreme Court, 1948–1958, 68 GEO. L.J. 1, 34–44
(1979); S. Sidney Ulmer, Earl Warren and the Brown Decision, 33 J. POL. 689,
689–90 (1971) (describing Brown as the decision that marked the Warren Court
as a “major force in the American constitutional system”).
5. SCHWARTZ, supra note 4, at 286; see also HUGH W. SPEER, THE CASE OF
THE CENTURY: A HISTORICAL AND SOCIAL PERSPECTIVE ON BROWN V. BOARD OF
EDUCATION OF TOPEKA WITH PRESENT AND FUTURE IMPLICATIONS 274 (1968).
6. Cf. MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT
COMMISSION 74 (1955) (“The life cycle of an independent commission can be di-
vided into four periods: gestation, youth, maturity, and old age.”); JOHN K.
GALBRAITH, THE GREAT CRASH, 1929, at 171 (1955) (“[R]egulatory bodies, like
the people who comprise them, have a marked life cycle. In youth they are vigor-
2004, Brown "passed [its] fiftieth birthday" and became "half as old as the century that had died" shortly before. Laws, like the men and women they govern, "do not often live as long as centuries." No man who argued or decided the case lives today, and many of the decision's intellectual heirs now make their living by systematically dismantling Brown’s image as "a beloved legal and political icon."

A prominent trio of books marking Brown’s fiftieth anniversary repudiates that decision’s integrationist ideal. Charles Ogletree echoes the sentiment of “[m]any communities at the center of the battle for integration”: “welcom[ing] something less than the full integration demanded by the civil rights lawyers” who won Brown and tried to have it fulfilled. Sheryll Cashin similarly describes the “emerging ‘post-civil rights’ attitude among black folks” as one of “ambivalent integration[],” typified by a desire “not [to be] overwhelmed by white people” and to have “plenty of your own kind around to make you feel comfortable.” Derrick Bell overtly argues that America would have been better off if Brown had affirmed Plessy v. Ferguson while ordering the “strict enforcement” of Plessy’s infamous “separate but equal” standard.

Views such as these, which once “might have been more easily attributed to an avowed racist,” now characterize many an academic’s definition of Brown’s legacy.

This mournful view of Brown pays homage not to Clio, but
rather to Melpomene, the somber muse of tragedy. In a grand reversal of living history, the deep resentment with which Southern whites once regarded Brown is now the emotional domain of many leading civil rights scholars. Although “[n]o federal judicial nominee and no mainstream national politician today would dare suggest that Brown was wrongly decided,”15 even in a South that has not yet fully discharged “the awful responsibility of Time,”16 the academy has all but abandoned Brown. The Supreme Court’s landmark desegregation decision offers at best “equality by proclamation”;17 at worst, it is “a mirage,”18 a “splendid bauble” of vacuous legalism intended to appease and deceive the masses.19 At fifty years of age, Brown seems doomed to “swell the rout / of [cases] that wore their honours out, / Runners whom renown outran / And the name died before the [law].”20 Ars longa, lex brevis: In a mobile country whose highest court rarely needs “[t]wenty-five years . . . to complete a constitutional hiccup,”21 each succeeding generation freely rejects those “ideas and aspirations” not fit to “survive more ages than one.”22

The embittered view of Brown finds its voice in an idiom familiar in the states of the old Confederacy: “The harvest is past, the summer is ended, and we are not saved.”23 Brown’s stalwart defenders may likewise respond in the oral tradition of Southern Christianity, black or white: a prophet “is not without honour, save in his own country, and in his own house.”24 Somewhere between jeremiad and gospel lies the mission of the legal scholar who earnestly seeks to discover Brown’s place in America’s continuing exodus from the bondage of racism: “And thou shalt teach them ordinances and laws, and shalt shew them the way wherein

17. BELL, supra note 13, at 136 (citing Louis Michael Seidman, Brown and Miranda, 80 CAL. L. REV. 673, 717 (1992)).
18. BELL, supra note 13, at 136.
20. A.E. HOUSMAN, To an Athlete Dying Young, in COLLECTED POEMS AND SELECTED PROSE 41 (Christopher Ricks ed., 1988).
they must walk, and the work that they must do.”

In the face of criticism designed to demote Brown from hero to villain, or at least to condemn the decision’s false promise, perhaps we should simply speak of the case as it is: “Nothing extenuate, / Nor set down aught in malice.” Once we know that a story is “true,” “the question of whether it is sad or happy has no meaning whatever.” In response to “prophets, old or young,” who “[b]awl out their strange despair,” we should heed the advice of an epic poet who explored another prominent Brown in the history of American race relations:

If you at last must have a word to say, 
Say neither, in their way, 
“It is a deadly magic and accursed,” 
Nor “It is blest,” but only “It is here.”

An honest assessment of Brown therefore “teach[es] us to number our days, that we may apply our hearts unto wisdom.”

The collective memory of the United States traverses centuries, but very few exact dates loom large across that span. Asked to name several exact dates of note in the nation’s history, the average American might start and stop with July 4, 1776. Perhaps the most memorable dates of the past century are those marking tragic events: December 7, 1941; November 22, 1963; September 11, 2001. Moments of national triumph, oddly enough, are rarely remembered as exact dates. The three “victory” dates associated with the twentieth century’s World Wars—November 11, 1918; May 8, 1945; and August 14, 1945—shine dimly, if at all, in America’s collective memory. D-Day (June 6, 1944) eclipses all three of these dates, and Armistice Day probably outranks both V-E Day and V-J Day if only because it became the basis for a widely observed holiday, Veterans’ Day.

By this admittedly imperfect standard of social significance, Supreme Court decisions rate fairly low. In the Court’s entire history, perhaps only two decisions figure so prominently in public memory that their exact dates are readily recalled by even a small fraction of lawyers. Brown qualifies as one of those two decisions. Among dates in Supreme Court history, only January 22,

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29. Psalms 90:12; cf. 1 Chronicles 29:15 (“[O]ur days on the earth are as a shadow, and there is none abiding.”).
1973,30 rivals May 17, 1954, in fame. To put the matter in perspective, July 24, 1974, and December 12, 2000, languish in obscurity, even those two dates mark the only occasions on which the Supreme Court has practically—if not formally—installed a new President.31 Brown's distinction should not be overstated; May 17, 1954, arguably does not even rank as the most important date in the annals of civil rights law. On July 2, 1964, exactly 101 years to the day after the 20th Maine Infantry repelled the 15th Alabama Infantry from Gettysburg's Little Round Top, President Lyndon Johnson signed the Civil Rights Act of 1964.32

The semicentennial of Brown v. Board of Education is an apt occasion on which to ponder whether Brown is worth remembering every year and, if so, to what end. In symbolic terms, the date that most resembles May 17, 1954, in American history at large, is June 19, 1865. On that day, a Union regiment led by Major General Gordon Granger landed at Galveston, Texas. The Granger regiment not only reported the two-month-old news that the Civil War had ended with Robert E. Lee's surrender at Appomattox Courthouse on April 9, 1865, but also enforced (nearly two and a half years after the fact) the Emancipation Proclamation of January 1, 1863. "Juneteenth" is now observed officially in Texas as "the anniversary of the event of emancipation from slavery that occurred in Texas on June 19, 1865."33 "Remember this day, in which ye came out from Egypt, out of the house of bondage . . . ."34 Once an obscure celebration known only to black Texans, Juneteenth has gained broader geographic and demographic popularity as a commemoration of liberty, equality, and civil rights.35 Juneteenth is, as it were, Martin Luther King, Jr.'s birthday without the tragedy.36

As an epochal event, Juneteenth managed rather remarkably to arrive both too late and too early. The two-month delay in reporting the news of the Confederacy's defeat and the two-year delay in the enforcement of the Emancipation Proclamation

30. Which of course was the day on which Roe v. Wade, 410 U.S. 113 (1973), was decided.
33. TEX. GOV'T CODE § 448.001 (Vernon 1998).
34. Exodus 13:3.
36. See id.
would prove to be trivial in comparison with the glacial pace of legal reform after the Civil War. The nominal end of slavery fore-shadowed the bitter disappointment of Reconstruction and the strange career of Jim Crow. A full lifetime after the end of Reconstruction, William Faulkner described all too perfectly the grip of slavery's dead hand: "The past is never dead. It's not even past." Most of the slaves emancipated in 1865 never enjoyed some of the simplest and most essential civil rights. Meaningful protection of the right to vote without regard to race or color, to name merely one example, would wait more than a century. Exactly 100 years and 48 days elapsed between Juneteenth and the passage of the Voting Rights Act of 1965.

To celebrate Juneteenth, in other words, is to acknowledge unfinished business. Neither Union victory in the Civil War nor Reconstruction came close to discharging America's debt to its black citizens. Indeed, Reconstruction effectively enabled the South to win the Civil War. Yet Juneteenth remains worth remembering and celebrating. Rail as we might (and should) against the persistence of racism in America, the preservation of the Union and the abolition of slavery define much of what is good and heroic in American history. To borrow a key word from the civil rights jurisprudence of Chief Justice Earl Warren, a negotiated peace with the Confederacy would have been "unthink-

38. WILLIAM FAULKNER, Requiem for a Nun, in NOVELS 1942-1954, at 471, 535 (Joseph Blotner & Noel Polk eds., 1994). In a very personal sense, the memory of the Civil War still lives. After the death of Alberta Martin on May 31, 2004, was reported as the death of the last widow of a Civil War veteran, see ALBERTA MARTIN, 97, CONFEDERATE WIDOW, DIES, N.Y. TIMES, June 1, 2004, at A17, at least one other living wife of a Civil War veteran was identified. James Barron, The "Last Civil War Widow" Has a Successor, It Would Seem, N.Y. TIMES, June 16, 2004, at C15 (identifying Maudie Celia Hopkins, 89, of Lexa, Arkansas, who married an octogenarian Confederate veteran in 1934, and speculating whether other Civil War widows may still be alive). The passing of this human milestone, anticipated at least since the publication of ALLAN GURGANUS, OLDEST LIVING CONFEDERATE WIDOW TELLS ALL (1989), may well wait until the sesquicentennial of the end of the Civil War.
able.” At a certain level of abstraction, quibbling over the precise terms of either victory seems downright ungrateful.

Juneteenth acknowledges a fundamental truth: no matter how long it is delayed, and no matter how imperfectly it is implemented, emancipation beats the pants off enslavement. What separates Juneteenth from other commemorations of wartime victory is its sense of irony and its humility. Because of these traits, and not in spite of them, Juneteenth’s celebrants understand the crucial point. However awkwardly accomplished, the outlawing of slavery is a monumental achievement worth commemorating as long as the Republic endures.

Like emancipation in Texas, school desegregation came late and accomplished far less than its beneficiaries might have hoped and certainly deserved. And as with the Civil War, Brown merits respect if only because the contrary outcome would have been so abominable. For all its flaws, the judicial sequence beginning with Brown is vastly preferable to its obvious alternative: a perpetuation of racial segregation by law under the odious “separate but equal” doctrine of Plessy v. Ferguson. Derrick Bell might well have gotten his wish, albeit in hideously incomplete fashion: the Supreme Court came very close to affirming Plessy before Chief Justice Fred Vinson died on September 8, 1953, a happenstance that Felix Frankfurter treated as evidence of divine intervention. In this light, it seems as discourteous to condemn Brown as it is to lament Union victory in the Civil War. The day on which the Supreme Court of the United States finally abandoned Plessy and repudiated public school segregation as a practice repugnant to the Constitution therefore deserves to be memorialized in a fashion befitting the jubilee known as Juneteenth. Indeed, May 17, 1954, deserves a name of comparable mirth. Euterpe, muse of music and lyric poetry and mother of joy and pleasure, demands no less. “Mayteenth” will do.

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41. Cf. Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”).


43. See Kluger, supra note 4, at 656.

44. See Ed Cray, Chief Justice: A Biography of Earl Warren 278 (1997) (quoting two former law clerks’ recollection of Justice Frankfurter’s utterance upon hearing of Chief Justice Vinson’s death: “This is the first indication that I have ever had that there is a God.”).
II. *BROWN* AS TOUCHSTONE, THREAT, AND GUIDING STAR

At nearly every level of abstraction, from the grand to the particular, from the global to the personal, the civil rights struggle that reached its climax in *Brown* is analogous to the American Civil War. Despite its drama and symbolism, Lee’s surrender at Appomattox Courthouse followed inevitably from the battles that had preceded it. Gettysburg was the true proximate cause of the Confederacy’s military defeat; Ulysses Grant could afford to lose tactical encounters in the Wilderness, at Spotsylvania Courthouse, and at Cold Harbor as long as he held firm in his siege of Petersburg.45 Indeed, given the Union’s overwhelming material advantages, the real wonder is how the Confederacy managed to survive as long as it did.46

In the legal war on Jim Crow, the Supreme Court delivered a series of decisions regarding law school and graduate school segregation that all but suffocated *Plessy*. From *Missouri ex rel. Gaines v. Canada*47 in 1938 to *Sipuel v. Board of Regents*48 in 1948 and the 1950 pair of *Sweatt v. Painter*49 and *McLaurin v. Oklahoma State Regents*,50 the Court systematically invalidated segregation in public universities. The “separate but equal” formula utterly failed to equalize differences in “qualities which are incapable of objective measurement but which make for greatness” in any educational institution, such as the “reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.”51

Michael J. Klarman’s chronicle of the Supreme Court’s civil rights jurisprudence, *From Jim Crow to Civil Rights*, agrees that de jure segregation by the 1950s was doomed to die.52 Professor Klarman, however, gives little or no credit to *Brown* and its May

47. 305 U.S. 337 (1938).
"[D]eep background forces," he argues, "ensured that the United States would experience a racial reform movement regardless of what the Supreme Court did or did not do." One of those forces, rarely acknowledged today, was the Cold War. Black soldiers, having laid their lives on the line against the Axis powers, were as determined to fight Jim Crow as the white establishment was to combat the communist bloc. Racial segregation proved a major embarrassment in the United States’ drive to undermine the Soviet Union’s international influence. Outright repudiation of segregation was necessary but not sufficient to secure moral high ground in the Cold War. A persistent “gap between promise and achievement” in America’s quest for civil rights would demoralize, even repulse potential allies abroad, “particularly in what would become known as the Third World.”

For their part, the defenders of Jim Crow also contested the international front. In 1952, Senator John Bricker proposed a constitutional amendment that would subject American legal obligations under international treaties to direct congressional oversight. The Bricker amendment constituted a transparent

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54. KLARMAN, supra note 52, at 468; see also Michael J. Klarm, The Puzzling Resistance to Political Process Theory, 77 VA. L. REV. 747, 813–14 (1991) ("A great deal of the school desegregation that ultimately flowed from Brown appears to have been more directly attributable to the intervention of a racially-enlightened national political process than to the Supreme Court . . . .").
55. See BELL, supra note 13, at 132.
56. CRAY, supra note 44, at 276.
57. Id.
59. The Bricker amendment was introduced as Senate Joint Resolution 130 in February 1952. S.J. Res. 130, 82d Cong. (1952); see also S.J. Res. 1, 83d Cong. (1953). One version of the proposed amendment read as follows:

Section 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

Sec. 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.

Sec. 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.

Sec. 4. The Congress shall have power to enforce this article by
attempt to insulate Jim Crow from international human rights treaties. Proponents of the Bricker amendment listed segregation among the "local customs and institutions" that were threatened by obligations under international treaties.\textsuperscript{60} Ironically, isolationism became the dominant strategy of the political heirs of the Confederate leaders who hoped that an embargo on cotton would suffocate European textile mills and thereby spur European intervention in favor of Southern secession.\textsuperscript{61} "[T]he South said plainly to all Europe: 'To get cotton you must swallow slavery.'"\textsuperscript{62} Europe refused, and the Confederacy's efforts to suppress its cotton exports eventually deprived the Southern war effort of a leading source of cash.\textsuperscript{63}

Whereas the economics of cotton and the politics of slavery put the warring United States on the margins of diplomatic affairs during the 1860s, \textit{Brown} and the legal war on Jim Crow projected the work of the Supreme Court onto a politically prominent international stage. Before \textit{Brown}, few if any Supreme Court decisions attracted attention abroad. The work of the Court today draws foreign commentary.\textsuperscript{64} \textit{Brown} alone did not spur this appropriate legislation.

\textsuperscript{60} LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 112 (2000).
\textsuperscript{61} See generally FRANK LAWRENCE OWSLEY, KING COTTON DIPLOMACY: FOREIGN RELATIONS OF THE CONFEDERATE STATES OF AMERICA (2d ed. 1959). The historic work that persuaded many Southerners of Europe's dependence on American cotton was DAVID CHRISTY, COTTON IS KING: OR SLAVERY IN THE LIGHT OF POLITICAL ECONOMY (1855).
\textsuperscript{62} 1 SHELBY FOOTE, THE CIVIL WAR: A NARRATIVE; FROM SUMTER TO PERRYVILLE 135 (1958).
\textsuperscript{63} See OWSLEY, supra note 61, at 263-64, 266 (reporting that the Confederacy exported roughly one million bales of cotton throughout the Civil War, about half of its wartime harvest); cf. STEPHEN R. WISE, LIFELINE OF THE CONFEDERACY: BLOCKADE RUNNING DURING THE CIVIL WAR app. at 229 (1988) (reporting that the South's cotton exports from September 1860 to August 1861 alone totaled approximately three million bales).
\textsuperscript{64} Although foreign courts do rely on the Supreme Court's constitutional decisions, see, e.g., National Coalition for Gay & Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517 (CC), 1998 SACLDR LEXIS 36, at *85-86, 145 n.133 (citing Bowers v. Hardwick, 478 U.S. 186 (1985) and Stanley v. Georgia, 394 U.S. 557 (1969) in an opinion invalidating South Africa's criminal sodomy laws), the Supreme Court's influence may be greater in nonconstitutional areas.
change, but it did project the Supreme Court into the interna-
tional debate over human rights in both camps of the Cold War. 
Professor Klarman's skepticism notwithstanding, Brown un-
doubtedly contributed to the consolidation of the United States'
"soft power" and to America's quest for high moral ground vis-à-
vis the Soviet bloc.

America became a fundamentally different country between 
1861 and 1954, and its place in the world order reflected those 
changes. Before Sumter, the United States occupied the fringes of 
world affairs. But for high tariff barriers, America would have 
imported most of its finished goods. The South in particular re-
lied on an economic strategy of exporting raw agricultural prod-
ucts to more developed markets. The region as a whole expe-
rienced the spiritual hazards of cotton cultivation, a way of life 
poisoned by "the doubleness that all jobs have by which one stays 
alive and in which one's life is made a cheated ruin." America at 
the time of its Civil War more closely resembled a nineteenth-
century equivalent of an oil-exporting Persian Gulf state than the 
superpower that ultimately prevailed in the seventy-five-year se-
quence, 1914–89, that future historians will undoubtedly treat as 
a single, continuous global conflict between totalitarianism and 
democracy. By the time Brown reached the Supreme Court, how-
ever, the United States had tipped the tide of battle in one world 
war and led the winning alliance in another. The country that 
one pointedly refused to join the League of Nations now led 
United Nations forces in Korea. The most shocking events of 
1857 and 1957, respectively, reflected the transformation. Ameri-
cans in 1857 debated the Dred Scott decision and the looming 
national divide over slavery. A century later, American politi-
cians and educators panicked at the news that the Soviet Union 
had launched a 183-pound orb named Sputnik into space. It is 
better to finish second in a space race than first in a game of na-

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tional Russian roulette.

Professor Klarman does stand on very firm ground in one respect: Supreme Court decisions tend to be accorded too much significance, both positive and negative, in legal commentary. Professionals who make a living by analyzing judicial decisions are bound to overestimate the Supreme Court's influence on public life. At best the Justices "try[] with [their] puny hand[s] first to urge on, and then to hold back, the tide of the vast popular current that [is] bearing [them] along with it." School desegregation and the judicial role in it did not precipitate, but rather followed, the social transformation of twentieth-century America. In roughly one decade, the mechanical cotton picker and the boll weevil accomplished a feat for which neither the Civil War nor Reconstruction could claim credit: rendering "obsolete the sharecropper system" that had supplanted the plantation system but retained its essentially feudal culture. Whereas the cotton gin had enabled the plantation system of slave labor to conquer the South, the mechanical cotton picker "made the maintenance of segregation no longer a matter of necessity for the economic establishment of the South." For its part, the boll weevil "was probably responsible for more changes in the number of farms, farm acreage, and farm population [during the 1920s] than all other causes put together." From World War I to roughly 1970, the resulting economic dislocation pushed six and a half million black Americans from South to North in "one of the largest and


69. LEO TOLSTOY, WAR AND PEACE 786 (Constance Garrett trans., The Modern Library 1931) (1869).


71. Id. at 6.

72. 4 BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, at 12 (1932); cf. Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 457 (Tex. 1997) (observing that the boll weevil still "presents a major economic threat to the Texas cotton industry" and "causes an estimated $20 million in crop loss in Texas every year").
most rapid mass internal movements of people in history."  \footnote{Lemann, supra note 70, at 6.}

\textit{Brown} and, for that matter, all other legal and political developments of the civil rights era took place against this dramatic social backdrop. With a foresight that can scarcely be credited to the Justices, demographers of the 1950s anticipated that the next generation of legal and political issues would grow from the country's adaptation to the rapidly accelerating migration "of Negroes from the South to the other parts of the country," especially into "very largely... urban areas." \footnote{Conrad Taeuber & Irene B. Taeuber, \textit{The Changing Population of the United States} 109–11 (1958); cf. Toni Morrison, \textit{Jazz} 33 (1992) ("[H]ow soon country people forget. When they fall in love with a city, it is for forever, and it is like forever. As though there never was a time when they didn't love it... There, in a city, they are not so much new as themselves: their stronger, riskier selves.").}

The Supreme Court barely noticed the prime mover of white migration during the Great Depression, as though the Justices were blind to the dust sweeping across the "red country... of Oklahoma." \footnote{John Steinbeck, \textit{The Grapes of Wrath} 1 (Viking Press 1967).}

As late as 1932, as the great agrarian migrations of the early twentieth century were well under way, the Court characterized cotton cultivation in Oklahoma as an industry "of such paramount importance... that the general welfare and prosperity of the state in a very large and real sense depend upon its maintenance." \footnote{New State Ice Co. v. Liebmann, 285 U.S. 262, 276 (1932).}

At most, by 1941, the Court would grudgingly acknowledge the Depression's "grave and perplexing social and economic dislocation[s]" and signal its "appreciation that the spectacle of large segments of our population constantly on the move has given rise to urgent demands upon the ingenuity of government." \footnote{Edwards v. California, 314 U.S. 160, 173 (1941).}

Aside from calibrating the proper amount of credit or blame to assign to the Supreme Court, it makes no difference whether \textit{Brown} was a byproduct of overwhelming social forces rather than a catalyst. By its own terms—that is, as a pivotal moment in judicial interpretation of the Constitution—\textit{Brown} does mark an epochal change in the Supreme Court's approach to equal protection. A mere twenty-seven years earlier, Justice Holmes had mocked equal protection as "the usual last resort of constitutional arguments." \footnote{Buck v. Bell, 274 U.S. 200, 208 (1927).} By the latter half of the twentieth century, equal protection would become "the first resort of constitutional argu-
Before Brown, the inspirational slogan in the Supreme Court building's west pediment, "Equal Justice Under Law," was little more than a decorative element suggested by architect Cass Gilbert. The phrase, after all, appears in none of the formal sources of American constitutional law—not the Constitution itself, nor The Federalist Papers, nor any Supreme Court opinion before 1948. When massive resistance to Brown challenged the Court's very legitimacy, however, Chief Justice Warren declared that the "Fourteenth Amendment embodied and emphasized th[e] ideal" of "equal justice under law." The old Chief Justice even opened his memoirs by invoking the "awesome sight" and "Grecian serenity" of the "most beautiful building in Washington, D.C.,” and the "inspiring" words "chiseled in white marble above the main entrance." Its architectural origins having been fully embraced by the Justices; the phrase "equal justice under law" now routinely adorns the legal work as well as the physical infrastructure of the Supreme Court. Betrayed after the Civil War and neglected for nearly a century beyond Reconstruction, the constitutional aspi-

81. The first instances of the phrase, "equal justice under law," in United States Reports are attributable to Justice Jackson. See Hirota v. MacArthur, 335 U.S. 876, 877 (1948) (per curiam) (separate statement of Jackson, J.); see also Dennis v. United States, 339 U.S. 162, 175 (1950) (Jackson, J., concurring). In 1956, Justice Black acknowledged that the challenge of "[p]roviding equal justice for poor and rich, weak and powerful alike is an age-old problem." Griffin v. Illinois, 351 U.S. 12, 16 (1956); see also id. at 16 n.10 ("Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbor." (quoting Leviticus 19:15)).
ration of equal protection of the laws has become the contemporary Supreme Court’s civil rights polestar, *L’Etoile du Nord* for America reborn.\(^{85}\)

The failure to deliver full civil rights is a recurring theme in American legal history. Although federal courts have fancied themselves the champions of “[g]roups which find themselves unable to achieve their objectives through the ballot,”\(^{86}\) the record of judicial failure runs deep. The Supreme Court’s first opportunity to interpret the Civil War amendments would curb those provisions’ reach for generations. In the *Slaughter-House Cases*,\(^{87}\) the Court did recognize that the Thirteenth, Fourteenth, and Fifteenth Amendments shared a common “pervading purpose”: “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”\(^{88}\) The Court nevertheless defended the presumed sovereignty of the states vis-à-vis the federal government. A contrary approach, even over civil rights, would allegedly “fetter and degrade the State governments by subjecting them to the control of Congress” and would “radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.”\(^{89}\)

In the immediate aftermath of the *Slaughter-House Cases*, the Supreme Court repeatedly curbed the reach of federal civil rights legislation. “The fourteenth amendment,” said the Court, “adds nothing to the rights of one citizen as against another.”\(^{90}\) The Court crippled federal responses to atrocities in the postwar


\(^{86}\) NAACP v. Button, 371 U.S. 415, 429 (1963) (noting that such groups “frequently turn to the courts”).

\(^{87}\) 83 U.S. (16 Wall.) 36 (1873).

\(^{88}\) Id. at 71; accord, e.g., Strauder v. West Virginia, 100 U.S. 303, 307 (1879); see also Ex parte Virginia, 100 U.S. 339, 344–35 (1879) (“One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States.”).

\(^{89}\) Slaughter-House Cases, 83 U.S. (16 Wall.) at 78.

\(^{90}\) United States v. Cruikshank, 92 U.S. 542, 554 (1875).
South, ranging from the impairment of voting rights\textsuperscript{91} to gruesome acts of racial violence.\textsuperscript{92} In 1883, the \textit{Civil Rights Cases}\textsuperscript{93} struck the hardest blow: the Court invalidated the public accommodation provisions of the Civil Rights Act of 1875. Insisting that the Fourteenth Amendment affected solely "State action of a particular character" without reaching "[i]ndividual invasion of individual rights,"\textsuperscript{94} the Court curbed Congress's power to punish "every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."\textsuperscript{95} The \textit{Civil Rights Cases} "firmly embedded" the principle that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."\textsuperscript{96}

\textit{Brown} and the judicial quest for integration ran ashore on the same regard for localism and state sovereignty. Having identified "education [as] perhaps the most important function of [contemporary] state and local governments,"\textsuperscript{97} \textit{Brown} then over-stated the difficulty of educational administration. The Court anticipated that "the wide applicability" of its decision and "the great variety of local conditions" would swamp "the formulation


\textsuperscript{92} See United States v. Harris, 106 U.S. 629, 630, 641 (1882) (lynch mob murder of prisoners under the custody of a deputy sheriff); \textit{Cruikshank}, 92 U.S. at 548–49 (massacre of freedmen and Republican partisans after a disputed election). Arising in the aftermath of "perhaps the bloodiest racial conflict in Louisiana history"—or, for that matter, in American history—\textit{Cruikshank} invalidated the convictions of three members of a "veritable army" of "old time Ku Klux Klan" who killed no fewer than "60 freedmen ... after they had surrendered" and left the victims' mutilated bodies "to rot in the parching sun." \textit{ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876}, at 175 (1985).

\textsuperscript{93} 109 U.S. 3 (1883).

\textsuperscript{94} \textit{Id.} at 11; \textit{cf. Harris}, 106 U.S. at 640 (invalidating a federal anticonspiracy statute that was "directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers").

\textsuperscript{95} \textit{The Civil Rights Cases}, 109 U.S. at 24–25.


of decrees" with "problems of considerable complexity." The 1955 case that would become known as *Brown II* adopted an infamous remedial formula: local school officials would be expected to proceed with "all deliberate speed" in working with supervising federal courts to overcome "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis." Integration never fully took root because the school officials addressed by *Brown II* intended no such thing. In many instances, even the federal district judges charged with implementing integration impeded the project. *Brown* did not demand that "the states must mix persons of different races in the schools," wrote a federal district court panel in South Carolina. "The Constitution... does not require integration.... It merely forbids the use of governmental power to enforce segregation." The judge who presided over a suit to desegregate the Dallas, Texas schools declined to "name any date or issue any order" on the grounds that "the white man has a right to maintain his racial integrity and it can't be done so easily in integrated schools." At the height of massive resistance, Prince Edward County, Virginia, one of the original parties to the *Brown* litigation, tried unsuccessfully to close its public schools in a desperate bid to avoid integration. A full decade after declaring that "constitutional rights... are not to be sacrificed or yielded to... violence and disorder," the Court finally invalidated the popular but illusory and utterly ineffective "freedom of choice" plans deployed throughout the South. Three years later and seventeen years after *Brown*, the Court finally endorsed aggressive remedies such as busing. At the same time, the Court fore-shadowed *Brown*’s eventual disappearance. Once a school system

98. Id. at 495.
100. Id. at 300–01.
102. Id.
“achieved full compliance with” \textit{Brown}, such a “unitary” system would face no further obligation to maintain racial balance “in a growing, mobile society” after the system had discharged “the affirmative duty to desegregate” and to eliminate “racial discrimination through official action.”\textsuperscript{108}

The allure of localism would eventually undermine \textit{Brown} as a guiding principle in public school administration. Confronted with “white flight”—the phenomenon anticipated by the Justices’ ominous observation that “the communities served by [unitary school] systems” would not necessarily “remain demographically stable”\textsuperscript{109}—the Court refused to sanction interdistrict remedies in the absence of a showing “that there has been a constitutional violation within one district that produces a significant segregative effect in another district,” a demonstration “that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.”\textsuperscript{110} The Supreme Court’s approach to education, even outside the context of desegregation, rests squarely on the premise that “[n]o area of social concern stands to profit more” from a commitment to local control “than does public education.”\textsuperscript{111} The Court remains beholden to claims that academic administration is at once complex and benign, as though this class of state actors and no other should be “presumed” to be acting in “good faith” absent some “showing to the contrary.”\textsuperscript{112} An observer given no other evidence besides the Supreme Court’s decisions would conclude that it was the American dream of racial integration, and not the deviant experiment called the Confederacy, that “Died of [the] Theory” of states’ rights.\textsuperscript{113}

One part of \textit{Brown}’s legacy emphatically is not theoretical.

\begin{quote}
\textsuperscript{108} \textit{Id.} at 31–32.
\textsuperscript{109} \textit{Id.} at 31.
\textsuperscript{111} San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973); accord Martinez v. Bynum, 461 U.S. 321, 329 (1983); see also Wright v. Council of Emporia, 407 U.S. 451, 469 (1972) (“Direct control over decisions vitally affecting the education of one’s children is a need that is strongly felt in our society . . . .”); \textit{id.} at 478 (Burger, C.J., dissenting) (“Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well.”).
\textsuperscript{113} 3 SHELBY FOOTE, \textsc{The Civil War: A Narrative: Red River to Appomattox} 766 (1974) (quoting Jefferson Davis) (emphasis removed). On whether an ideological dedication to states’ rights undermined the Southern war effort, see BERINGER ET AL., \textit{supra} note 45, at 203–35, 443–57.
\end{quote}
The living experience of the millions of students who have passed through America's public schools in the past fifty years includes astonishing stories of personal struggle and family sacrifice. The state motto of Kansas, where Brown began, expresses the perfect sentiment. *Ad astra per aspera*: through hardship to the stars.\(^{114}\)

In Topeka, Oliver Brown's family single handedly carried Brown's torch for forty years. Exactly a quarter century after the Supreme Court "conclude[d] that in the field of public education the doctrine of 'separate but equal' has no place,"\(^{115}\) the Brown family returned to court. In 1979, Linda Brown Smith, the schoolgirl on whose behalf Brown had been litigated, sued the Topeka school board for the benefit of her own children.\(^{116}\) For the next fourteen years, the case wended through the federal courts, twice reaching the Supreme Court.\(^{117}\) On July 25, 1994, almost exactly four decades after Brown, the federal district court for Kansas approved a desegregation plan submitted by Unified School District #501 of Topeka. The court's admonition that the parties should "negotiate and cooperate in bringing the case to an end" effectively closed one of the longest, hardest fought, and doctrinally richest clusters of legal proceedings in American history.\(^{118}\)

To add further nuance to the story, let us glance east at DeKalb County, Georgia, where the 1992 case of *Freeman v. Pitts*\(^{119}\) (along with *Board of Education v. Dowell*\(^{120}\) and the final phase of *Missouri v. Jenkins*\(^{121}\)) is widely considered to have ended the Brown cycle.\(^{122}\) On May 18, 1954, one day after the

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\(^{120}\) 498 U.S. 237 (1991). Ironically, the *Dowell* litigation's first visit to the Supreme Court generated a per curiam decision ordering the immediate implementation of a desegregation plan pending further appeals. The earlier *Dowell* decision observed that "[t]he burden on a school board is to desegregate an unconstitutional dual system at once." *Dowell v. Bd. of Educ.*, 396 U.S. 269, 270 (1969) (per curiam).


\(^{122}\) *See generally, c.g.*, *Peter Irons, Jim Crow's Children: The Broken*
Supreme Court decided Brown, DeKalb County broke ground on Hamilton High School, a segregated school intended to replace Avondale Colored Elementary and High School. Hamilton High would boast a library and a cafeteria. Mirabile dictu, Hamilton would even have indoor plumbing. Thanks to the county’s decision during the 1950s to install toilets in all new schools for blacks, many of DeKalb’s black students would flush a toilet for the first time in their lives. At Hamilton High’s groundbreaking ceremony, County Superintendent Jim Cherry dismissed Brown as “largely an abstraction” and predicted that Georgia schools would continue to segregate the races. Cherry was right: Hamilton High served as one of DeKalb County’s de jure schools for blacks for the next fifteen years. Caught in a vise between new litigation inspired by the Supreme Court’s invalidation of freedom-of-choice plans in the 1968 case of Green v. County School Board and federal officials’ threat to deny funding under the Elementary and Secondary Education Act of 1965, DeKalb County closed its black schools in 1969. Hamilton High’s students were dispersed into four historically white schools: Avondale, Clarkston, Druid Hills, and Shamrock. In a historical twist as tragic as it was “ironic,” “the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.”

Hamilton High was by no means unique. Black students in formerly segregated schools bore the brunt of sudden transfers into often hostile new schools that were integrated solely in the strictest legal sense. Jobs held by black teachers and staffers at formerly segregated schools did not reappear elsewhere within nominally unitary school systems. Hamilton’s heirs have also undergone transformations experienced by many other schools after

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123. The story of Hamilton High is told in Jim Auchmutey & Gracie Bonds Staples, Amid the Battle, a School Flourished, ATLANTA J.-CONST., May 16, 2004, at A1. Much of the information in this paragraph and the next is drawn from the Auchmutey and Staples article.


126. Clarkston High School is my alma mater; I spent eight years in DeKalb County schools. To my shame, Clarkston ranked among Hamilton’s successors as a “school[] . . . located in [a] communit[y] that had a reputation for being less than friendly to blacks.” Auchmutey & Staples, supra note 123.

Brown finally took effect. Avondale High School, one of Hamilton High's four successors, has almost fully resegregated; its white student population numbers fifty out of 1059.128 Fighting rampant resegregation is merely one of the overwhelming tasks that confront public school administrators today.129 I am told that Clarkston High School, another successor to Hamilton, now hosts the polyglot student population so typical of many urban and suburban public schools.130 Keeping the peace across historically antagonistic racial lines is merely one of many goals that test—and often elude—contemporary public school administrators.

DeKalb County's challenge today is no longer that of raising massive resistance to Brown or heeding with all deliberate speed the desegregation decrees that finally issued forth, but rather that of educating a multiracial, multilingual society whose complexity overwhelms the relatively simplistic world described in Brown and its companion cases. "[C]ommunity prejudices are not static, and from time to time" the federal courts must rise to the aid of new and "easily identifiable groups which . . . require[] the aid of the courts in securing equal treatment under the laws."131 Operating a public school today in DeKalb County—or, if Keyes v. School District No. 1132 means anything, in any district where schools were managed according to informal but invidious racial considerations—demands familiarity not only with Brown, but also with Gong Lum v. Rice,133 both major civil rights cases styled

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128. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., INFORMATION ON PUBLIC SCHOOLS AND SCHOOL DISTRICTS IN THE UNITED STATES, at http://nces.ed.gov/ccd/search.asp (on file with the Minnesota Law Review). As I understand it, other than refugees from Bosnia, as few as four white students attend Avondale High. See also E-mail from M.W. Worthington, Principal, Avondale High School to Minnesota Law Review (Sept. 2, 2004) (on file with the Minnesota Law Review) ("Our data reflects that other than refugees we have very few if any . . . non-African-American students.").

129. Avondale is by no means alone in its transformation from white by law to integrated to predominantly black. Brown High School in Atlanta—named for Joseph E. Brown, the virulently secessionist governor of Georgia during the Civil War—would have been my alma mater had my family stayed in the West End of Atlanta, the neighborhood where we settled as immigrants from Taiwan. Once reserved for whites, Brown High today "is still segregated": "Except for three Asian students, Brown . . . is all black." Martha M. Ezzard, Black, White & Brown: School Still Segregated Even Though Pendulum Has Swung Other Way, ATLANTA J.-CONST., July 4, 2004, at E1.

130. See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., supra note 128.


133. 275 U.S. 78 (1927).
Hernandez, and a language discrimination jurisprudence connecting the 1920s with the post-Brown civil rights era. Collectively, those cases stand for propositions that seem too obvious to state but in practice are ignored more often than they are observed. Race relations in America run beyond black and white. Multiculturalism must be gauged by the ear as well as the eye. And, most important of all, in matters of justice nothing comes quickly, easily, or free of cost.

Fairly assessing Brown's legacy demands close attention to "stubborn facts." This is no easy task, for the "starlit or... moonlit dome" of social meaning routinely "disdains / All that man is, / All mere complexities, / The fury and the mire of human veins." The half century since Brown has marked progress in

some domains and frustration in others. On one hand, black households earning at least $50,000 a year (in real dollars) have tripled since the end of the Great Migration, from 9.1% in 1967 to 27.8% in 2001. On the other hand, educational equity remains elusive. In a society that properly refuses "to assume that anything that is predominantly black must be inferior," the decisive criterion is not the racial profile of our public schools, but rather the academic performances of children of all racial and ethnic backgrounds.

By that gauge, the National Assessment of Educational Progress (NAEP) paints a grim picture. The typical black and Hispanic twelfth grader would finish behind three-quarters of white twelfth graders. In five of the seven subjects tested by the NAEP, a majority of black students perform in the "below basic" category. This rating, the NAEP's lowest, indicates that these students lack even a "partial" mastery of the "fundamental" knowledge and skills expected of twelfth graders. In math, so few black students fit the NAEP's "advanced" category that the test rounds the rate of black proficiency in this subject to zero. By contrast, 3% of white students and 7% of Asian students reached the advanced level of mathematical proficiency in 2000. These demoralizing statistics fuel resentful speculation that Brown has spurred no positive change, but rather has merely "reinforc[ed] the belief in a legal strategy for change of those already committed to it."

Yet the very terms of the debate over Brown's legacy illustrate how much progress has been accomplished in fifty years. Much of the remaining academic and political rancor concerns the peculiar practice of race-conscious university admissions,

142. See Maxeiner, supra note 141.
perhaps the least socially significant and most needlessly contentious civil rights debate of the last half century.\textsuperscript{144} Judge J. Harvie Wilkinson's proverbial path from \textit{Brown} to \textit{Bakke} spanned twenty-four years.\textsuperscript{145} After \textit{Regents of the University of California v. Bakke},\textsuperscript{146} it took the Supreme Court a quarter century to reexamine educational affirmative action. The full path from \textit{Brown to Grutter v. Bollinger}\textsuperscript{147} and \textit{Gratz v. Bollinger}\textsuperscript{148} coincides almost precisely with \textit{Brown}'s semicentennial. The Court's impassioned debate over these 2003 cases conceals a broad and important consensus: in an ideal society, universities would and should achieve educational diversity without reference to race. At heart the Justices disagree solely as to the exact moment when race-conscious admissions will wither away. Placing that moment in the year 2028,\textsuperscript{149} some indefinite point beyond that,\textsuperscript{150} or now\textsuperscript{151} is a legalistic luxury made possible by an earlier judicial generation's courageous determination to dismantle Jim Crow root and branch.

Eventually this country as a whole will adopt the creed that a prescient legal scholar proclaimed in \textit{Bakke}'s immediate wake (on the silver anniversary of \textit{Brown}): "[o]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race."\textsuperscript{152} Such disagreements as remain go

\begin{itemize}
\item \textsuperscript{145} See J. HARVIE WILKINSON III, \textit{FROM BROWN TO BAKKE} (1979).
\item \textsuperscript{146} 438 U.S. 265 (1978).
\item \textsuperscript{147} 539 U.S. 306 (2003).
\item \textsuperscript{148} 539 U.S. 244 (2003).
\item \textsuperscript{149} See \textit{Grutter}, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary . . . ").
\item \textsuperscript{150} See id. at 346 (Ginsburg, J., concurring) ("From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.").
\item \textsuperscript{151} See id. at 375 (Thomas, J., concurring in part and dissenting in part) ("While I agree that in 25 years the practices of the Law School will be illegal, they are [also] . . . illegal now.").
\item \textsuperscript{152} William Van Alstyne, \textit{Rites of Passage: Race, the Supreme Court, and the Constitution}, 46 U. CHI. L. REV. 775, 809 (1979).
\end{itemize}
strictly to timing. If *Brown* teaches anything, it is the value of patience. The state of race relations in America fifty years after *Brown* offers substantial hope that this country will have overcome race and racism before *Bakke* turns fifty. The dream of an America beyond race having taken firm root, there is no need to quibble over “the fine points of a principle that will, I am confident,” in time “command the support of a majority of [the] Court.”

In the meanwhile, Americans of good conscience do disagree on the precise means by which to bridge annoyingly persistent gaps in racial equality. Here lie the perils of placing too much faith in the courts, let alone a single judicial decision. As a recipe for navigating the treacherous waters of American race relations, as a step-by-step guide to social justice, *Brown* has failed. Or so its sharpest critics would have us believe. By that criterion, however, the Civil War was also an abject failure. Perhaps redemption lies in keeping things simple. Justice Potter Stewart understood that Chief Justice Earl Warren’s “great strength” lay in “his simple belief in the things [others]... laugh at—motherhood, marriage, family, flag, and the like.” Justice Stewart, after all, knew greatness (among other things) when he saw it. Like its author, *Brown* has overcome what it lacks in “genuine intellectual distinction” with “decency, stability, sincerity.”

Disappointed as we may be with the Civil War and, yes, with *Brown*, these historical milestones did manage to establish some simple, timeless truths—truths worth keeping as the legal building blocks of a pluralistic, democratic society.

Stripped to their essentials, the truths derived from the Civil War and the twentieth century’s civil rights movement are these: Juneteenth celebrates the Civil War’s goal, however imperfectly achieved, of emancipating the slaves and erasing the vestiges of the racist legal system designed to sustain slavery. With comparably mixed success, *Brown* ended one of the most odious practices that survived the Civil War and Reconstruction, racial segregation by law. Both campaigns delivered substantial if

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156. JOHN GUNTHER, INSIDE U.S.A. 20–21 (1974); see also id. at 18 (noting that Warren would “never set the world on fire or even make it smoke”).
inadequate gains, and both achieved enough to inspire further work toward societal justice. The ultimate prize, a society fully liberated from the shackles of race, lies in sight.

III. MAYTEENTH AND THE MYSTIC CHORDS OF MEMORY

The Union did win the Civil War after all, though it has taken the better part of a century and a half for “[t]he mystic chords of memory, stretching from every battle-field, and patriot grave, to every living heart and hearth-stone, all over this broad land,” to be “touched . . . by the better angels of our nature.” The Civil War fell far short of expiating America’s original sin. To this day the legacies of slavery overshadow and taint the illusory “Treasury of Virtue” derived from the Union’s victory, lest any American fallaciously “feels redeemed by history, automatically redeemed.” The jubilee called Juneteenth nevertheless celebrates the end of the Civil War, fully aware that victory then was anything but crisp and that even today, monumental work still lies ahead. The transformation of Juneteenth from a regional, almost exclusively black holiday to a nationwide celebration by and for all Americans universalizes the lessons of the Civil War. “[E]very man is, in the end, a sacrifice for every other man.” Or, to state the point even more lyrically: “The gentle serpent, green in the mulberry bush / Riots with his tongue through the hush-/ Sentinel of the grave who counts us all!”

Likewise, Brown did not end the struggle against institutionalized racism, but rather signaled the beginning of a new battle. Its enduring triumph lies in the American people’s belated but emphatic rejection of massive resistance. Race relations are imperfect, but better than ever before in American history. The United States of America in 2004 has achieved greater understanding across racial and cultural lines than any other polity anywhere, anytime. But the work of delivering complete justice across racial lines remains. Though Brown alone has not and will

157. ABRAHAM LINCOLN, First Inaugural Address: March 4, 1861, in ABRAHAM LINCOLN: His Speeches and Writings 579, 588 (Roy P. Basler ed., 1946).
160. ALLEN TATE, Ode to the Confederate Dead, in POEMS 19, 23 (1960).
not reach that future bliss,\textsuperscript{161} it has helped our eyes to see the
glory of its coming. In marching toward the promised land that
\textit{Brown} enabled us to glimpse, we must keep the faith. "Nothing is
irredeemable until it is past."\textsuperscript{162}

To celebrate Mayteenth—the May 17 anniversary of \textit{Brown}
v. \textit{Board of Education}—is to celebrate the civil rights advances of
America's Second Reconstruction. They were late in coming and
less than fully satisfactory, but victories already won are worth
celebrating in anticipation of others yet to come. As America's
greatest expatriate poet would remind the land of his birth:

\begin{quote}
A people without history
Is not redeemed from time, for history is a pattern
Of timeless moments.\textsuperscript{163}
\end{quote}

\begin{footnotesize}
\textsuperscript{161} Compare Deuteronomy 34:1–4 ("And the LORD shewed [Moses] all the
[promised] land . . . . And the LORD said unto him, This \textit{is} the land which I
swear . . . . saying, I will give it unto thy seed: I have caused thee to see \textit{it} with
thine eyes, but thou shalt not go over thither."), with Jeremiah 31:31–34:

\begin{quote}
Behold, the days come, saith the LORD, that I will make a new cove-
nant with the house of Israel, and with the house of Judah: Not ac-
cording to the covenant that I made with their fathers in the day \textit{that}
I took them by the hand to bring them out of the land of Egypt . . . . I
will put my law in their inward parts, and write it in their hearts; and
will be their God, and they shall be my people. . . . [F]or they shall all
know me, from the least of them unto the greatest of them . . . . for I
will forgive their iniquity, and I will remember their sin no more.
\end{quote}

\textit{Id.}

\textsuperscript{162} 2 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND
MODERN DEMOCRACY 997 (Pantheon Books 1972) (1944), quoted in Daniel A.
Farber, \textit{The Outmoded Debate over Affirmative Action}, 82 CAL. L. REV. 893, 934
(1994).

\textsuperscript{163} T.S. ELIOT, \textit{Little Gidding}, in \textit{FOUR QUARTETS} 29, 38 (Harcourt, Brace
& Co. 1943).
\end{footnotesize}