

## Book Review\*

**Brown v. Board of Education: Caste, Culture, and the Constitution.** By Robert J. Cottrol, Raymond T. Diamond, and Leland B. Ware. Lawrence, Kan.: University Press of Kansas, 2003. 292pp. \$25 cloth, \$15.95 paper.

Reviewed by Brannon P. Denning\*\*

¶1 As we approach the fiftieth anniversary of *Brown v. Board of Education*,<sup>1</sup> law professors Robert Cottrol and Raymond Diamond, and Leland Ware, who teaches legal studies at the University of Delaware, have written an excellent account<sup>2</sup> of what is generally regarded as the most important Supreme Court decision of the twentieth century. Anyone who writes a new book on *Brown* must be prepared for the inevitable question, “why another?” The subject hardly lacks for impressive works. There is Richard Kluger’s magisterial work on the *Brown* litigation, *Simple Justice*.<sup>3</sup> Law professor and legal historian Mark Tushnet has written several volumes about the NAACP’s legal strategies and its chief legal strategist and litigator, Thurgood Marshall, later Justice of the United States Supreme Court.<sup>4</sup> Historian Thomas Patterson recently published a very good, concise account of *Brown* and its legacy.<sup>5</sup> We have even seen law professors try their hand at bettering the Supreme Court’s *Brown* opinion: Yale professor Jack Balkin edited a book of essays titled *What Brown v. Board of Education Should Have Said*,<sup>6</sup> and earlier the *Southern Illinois University Law Journal* assembled a group to answer the same question.<sup>7</sup>

¶2 The strengths of Cottrol, Diamond, and Ware’s book would have provided ample answer to anyone questioning the need for “another” book on *Brown* if all the rich volume had included was their careful description of the NAACP’s legal strategy, their well-done thumbnail sketches of the personalities involved, and

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\*\* Associate Professor of Law, Cumberland School of Law, Samford University, Birmingham, Alabama.

1. 347 U.S. 483 (1954).

2. ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003).

3. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1976).

4. MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961* (1994); MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991* (1997).

5. THOMAS T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

6. *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION* (Jack M. Balkin ed., 2001) [hereinafter *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID*].

7. Symposium, *Brown v. Board of Education*, 20 S. ILL. U. L.J. 3 (1995).

their discussion of *Brown*'s aftermath. But they have written more than that. Their book is nothing less than a panoramic survey of the problem of race relations in the United States from the antebellum period to the present, viewed through the prism of the law, and taking into account the symbiotic relationship between culture and law, each influencing and shaping the other. Not only is their book suitable for law students and undergraduates, I think it ought to be required reading for all high school students, given the importance of its topic, the book's accessibility, and the helpful explanations of unfamiliar legal concepts the authors provide throughout. The remainder of this review summarizes and highlights the authors' treatment of the prelude to and aftermath of *Brown*, as well as their treatment of the case itself.

### The Road to *Plessy*

¶3 Many accounts of *Brown* begin with mention of the 1896 case of *Plessy v. Ferguson*,<sup>8</sup> in which the Supreme Court gave its imprimatur to racial segregation. Cottrol, Diamond, and Ware, though, begin a half century earlier, in Boston, where slavery had been unconstitutional since the late eighteenth century, where there was an active (if small) free black population, and where black men had the ability to vote. Liberal beginnings on matters of race, however, had by the mid-nineteenth century given way to "a harsher, more strident antiblack sentiment. . . . Black voting rights were curtailed. . . . Blacks found themselves barred from all but the most undesirable jobs" and subject to segregation on public transportation and in places of public accommodation.<sup>9</sup> Many northern cities in the 1820s and 1830s began to see a surge in violence directed at blacks. But oppression engendered reaction: "By the 1840s, Boston's black community was developing a vigorous civil rights movement designed to combat the discrimination that had developed in the previous decades."<sup>10</sup> A particular target was Boston's segregated school system.

¶4 In 1848, that system was challenged by Benjamin Roberts, the father of a black girl rejected by an all-white school closer to their house than the one reserved for blacks. After his daughter was rejected by that school, Roberts enlisted the help of prominent abolitionist lawyer (and future U.S. Senator) Charles Sumner to press her case.<sup>11</sup> Citing the Massachusetts constitution's equality provision, which had been the basis for the earlier abolition of slavery, Sumner argued that segregation was "an inherent violation of the principle of equality before the law"<sup>12</sup>—precisely the argument used a century later to attack segregation in *Brown*.

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8. 163 U.S. 537 (1896).

9. COTTROL, DIAMOND & WARE, *supra* note 2, at 12–13.

10. *Id.* at 13.

11. *Id.* at 15.

12. *Id.* at 16.

¶5 But if Sumner anticipated the arguments used to great effect in *Brown*, Lemuel Shaw's opinion for the Massachusetts Supreme Judicial Court in *Roberts v. City of Boston*<sup>13</sup> anticipated the arguments later deployed in *Plessy*. Shaw rejected Sumner's arguments, making "a distinction between law and custom and express[ing] his view that strong prejudice was a deeply rooted part of the culture of the day that could not be eradicated by legal change."<sup>14</sup> (Segregated schools were, however, abolished in Massachusetts in 1855.<sup>15</sup>)

¶6 The antebellum North was reluctant to extend the full range of civil rights to blacks; the antebellum South would precipitate a war to preserve its "peculiar institution" of human chattel slavery. The legal system of the antebellum South internalized and regulated this institution, and the authors do a fine job briefly summarizing some of its bizarre features, like court decisions holding that an undisclosed propensity to run away could render a contract for sale of a slave null and void.<sup>16</sup> As the authors note, however, the "southern law of slavery could not simply exist and survive in a vacuum. . . . The slave South was in a union with free states in other regions."<sup>17</sup> Despite using threats of secession to obtain a harsh federal fugitive slave law in the 1850s,<sup>18</sup> and the U.S. Supreme Court's disastrous efforts to settle the issue of slavery by denying citizenship to African Americans in *Dred Scott v. Sanford*,<sup>19</sup> the South's system of chattel slavery and its attempts at independence were not crushed until Abraham Lincoln decided to fight for the preservation of the Union and, later, for the emancipation of enslaved blacks, which culminated in the Thirteenth Amendment.<sup>20</sup> Additional rights for blacks were secured, on paper at least, with the passage and ratification of the Fourteenth and Fifteenth Amendments, which guaranteed equality and voting rights.<sup>21</sup>

¶7 The Reconstruction Amendments provided a partial answer to the question posed by the end of slavery: "exactly what kind of freedom [would] the newly emancipated slaves enjoy?"<sup>22</sup> For their part, the former slave states of the South "quickly indicated that [they] intended to permit the freedmen only a very limited kind of freedom."<sup>23</sup> They proceeded to visit numerous legal disabilities on freed slaves through so-called "Black Codes" that sought to preserve the old slave system in all but name.<sup>24</sup> Despite congressional action designed to counter such subterfuges<sup>25</sup> and

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13. 59 Mass. (5 Cush.) 198 (1850).

14. COTTROL, DIAMOND & WARE, *supra* note 2, at 17.

15. *Id.* at 18.

16. *Id.* at 19.

17. *Id.* at 21.

18. *Id.* at 22.

19. 60 U.S. (19 How.) 393 (1857).

20. COTTROL, DIAMOND & WARE, *supra* note 2, at 22–23.

21. *Id.* at 23–25.

22. *Id.* at 23.

23. *Id.* at 23.

24. *Id.*

25. *Id.* at 24 (describing Congress's passage of civil rights acts to enforce amendments).

initial court decisions broadly enforcing the Reconstruction Amendments against effective, as well as facial discrimination,<sup>26</sup> courts soon began to retrench.

¶8 Court decisions restricted the power of Congress to reach private action undertaken to deprive African Americans of their rights, even where powerful evidence existed that cast doubt on the purely “private” nature of the violence.<sup>27</sup> What ability the federal government did possess to protect the newly freed slaves was eliminated in the wake of the 1876 election, which most historians conclude gave rise to an agreement by Democrats to permit the inauguration of Rutherford B. Hayes in exchange for an end to Reconstruction.<sup>28</sup> With the so-called “Compromise of 1877,” the triumph of white “Redeemers” was complete: there would be no further federal interference in southern civil rights matters for more than seventy-five years.<sup>29</sup>

¶9 Yet at the moment it seemed as if the hopes for equality had been all but extinguished, the authors note that “Blacks had . . . experienced a liberation. Men had voted and for a time had exercised real political power. Black mothers and fathers had sent their children and often themselves to school . . . .”<sup>30</sup> Just as the South attempted to resurrect and preserve a rigid system of racial separation, newly empowered African Americans were determined, where possible, to invoke the rights the Constitution guaranteed them and challenge this system in the courts. But again, courts—and the Supreme Court in particular—would let African Americans down.

¶10 Louisiana state law required separation of the races on railroad cars, though it also required those facilities to be of equal quality. Adolphus Plessy<sup>31</sup> was arrested for trying to ride in the first-class car reserved for white passengers. Plessy sued; his lawyer argued that the Thirteenth and Fourteenth Amendments prohibited this sort of state-sponsored stigmatization of African Americans.<sup>32</sup> Using reasoning that would have sounded familiar to Justice Shaw,<sup>33</sup> the Court gave constitutional sanction to the doctrine of “separate but equal,” and incredibly suggested that if there was any stigma attached to forced separation, it was entirely

26. *Id.* at 25–26 (discussing *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303 (1879) (prohibiting exclusion of blacks from serving on juries) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down ordinance barring maintenance of wooden laundries without a permit where demonstrated that ordinance was enforced only against Chinese-owned laundries, despite facial neutrality)).

27. *Id.* at 26–27 (discussing *The Civil Rights Cases*, 109 U.S. 3 (1883) and *United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1876)).

28. *See, e.g.*, C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1991).

29. COTTROL, DIAMOND, & WARE, *supra* note 2, at 28.

30. *Id.* at 28.

31. As the authors point out, even though Plessy was only one-eighth black, state law deemed him black. *Id.* at 29–30.

32. *Id.* at 31.

33. *See supra* ¶ 5.

a function of the psychological insecurity of African Americans.<sup>34</sup> This is the infamous passage about which the late Charles Black wrote that the only appropriate response was “to exercise one of the sovereign prerogatives of philosophers—that of laughter.”<sup>35</sup>

¶11 The authors summarize the bleak outlook following *Plessy*: “The Court had allowed states to treat Afro-Americans separately as long as they received equal treatment. In 1896 government separation of the races was certainly growing. Would the courts insure that the separate treatment was equal?” At the dawn of the twentieth century, African Americans surely had no reason to be optimistic that courts would.

### Litigating “Separate But Equal”: The Emergence of the NAACP

¶12 Under “Redeemer” governments, maintenance of white supremacy became the *raison d’être* of most southern politicians. The authors note that by 1900 segregation had become “a full-fledged effort to subjugate and stigmatize the South’s black population.”<sup>36</sup> African Americans disappeared from polling places and were subjected to horrific attacks by the South’s white population.<sup>37</sup> Little wonder, then, that “[h]istorians of the Afro-American experience have . . . termed the beginning of the twentieth century as the ‘nadir’ of American race relations, a time . . . when race relations and protection of the rights of African Americans hit rock bottom.”<sup>38</sup> The authors argue that this hostility was born of a nationwide “buyer’s remorse over the Fourteenth and Fifteenth Amendments,”<sup>39</sup> of an historical school that portrayed Reconstruction as an unmitigated disaster,<sup>40</sup> and the emergence of a racialized social Darwinism whose adherents “saw Afro-Americans . . . as an inferior people destined to naturally lose in the competition between the races.”<sup>41</sup>

¶13 And yet, “the Thirteenth, Fourteenth, and Fifteenth Amendments were still there, unerased despite the new atmosphere. . . . They had not been repealed.”<sup>42</sup> The courts, including the *Plessy* Court, “indicated that these amendments could not be completely emptied of all meaning.”<sup>43</sup> How could courts claim adherence

34. “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896). See COTTROL, DIAMOND & WARE, *supra* note 2, at 31–32.

35. Charles L. Black, Jr., *The Lawfulness of the Desegregation Decisions*, 69 YALE L.J. 421, 424 (1960).

36. COTTROL, DIAMOND & WARE, *supra* note 2, at 34.

37. *Id.* at 34–35.

38. *Id.* at 35.

39. *Id.*

40. See *id.* at 35–37.

41. *Id.* at 38.

42. *Id.* at 39.

43. *Id.*

to constitutional principle in the face of a culture in which virulent racial prejudice was at least tolerated, if not warmly embraced, by a majority of the population? The authors contend that while the Supreme Court during this period “gave little relief to victims of racial discrimination,” its decisions “probably preserved the possibilities for future challenges to racial discrimination.”<sup>44</sup> What little relief was afforded before World War I depended upon “well-argued, well-prepared cases”;<sup>45</sup> these lessons were not lost on the newly formed NAACP, which began to work vigorously to secure what short-term victories were possible, while laying the groundwork for more ambitious future challenges.<sup>46</sup>

¶14 After initial successes ensuring that blacks received fair trials in criminal cases,<sup>47</sup> the NAACP used donated money to hire its first staff attorney, Nathan Margold, who devised a legal strategy to challenge segregated education in the South.<sup>48</sup> Margold concluded that a frontal assault on *Plessy*'s separate but equal rule would be futile, but that a strategy designed to force actual *equality* of separate facilities held promise.<sup>49</sup> The onset of the Depression and the subsequent financial difficulties of the NAACP meant that Margold's strategy could not be implemented during the 1930s.<sup>50</sup> When Margold left the NAACP to be the Interior Department's head lawyer, he was succeeded at the NAACP by Charles Hamilton Houston, the legendary dean of Howard University's law school and the mentor of a generation of the NAACP's brightest lawyers, including Thurgood Marshall.<sup>51</sup> Houston adopted Margold's strategy, but with an important change: challenges to segregated schools would begin with state professional schools.<sup>52</sup> Professional school challenges attracted Houston because they were easier to win,<sup>53</sup> and “they carried less emotional baggage” than integrating public schools, which would inevitably lead to charges that integration “would lead to the dreaded scourge of race mixing.”<sup>54</sup>

¶15 From the late 1930s until the eve of the *Brown* litigation, the NAACP racked up an impressive series of wins in the courts, which are nicely summarized by the authors.<sup>55</sup> The NAACP secured the desegregation of law schools and other graduate programs in Maryland, Missouri, Oklahoma, and Texas. Along the way

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44. *Id.* at 40.

45. *Id.* at 51.

46. *Id.* at 53.

47. *Id.* at 52–53.

48. *Id.* at 53–54.

49. *Id.* at 54.

50. *Id.* at 55.

51. *Id.*

52. *Id.* at 58–59.

53. “Here the NAACP was not faced with the tedious prospect of trying to compare the buildings in colored schools with those in the white, or trying to argue that a school with courses that stressed practical education, home economics, or shop was inferior to a school whose curriculum included Latin or French. Instead, with professional schools, the NAACP was dealing with total exclusion . . .” *Id.*

54. *Id.* at 59.

55. *See id.* at 59–76, 102–14.

the NAACP successfully employed legal theories in the Supreme Court that would be important in *Brown*. The most important of these, the authors argue, was to persuade the Court that when considering equality of institutions, one should focus on intangible qualities of reputation as well as physical qualities like buildings and volumes in libraries;<sup>56</sup> and that when a school admitted students of both races, it could not then conduct internal segregation, lest students be unable to profit from interaction with other students.<sup>57</sup> By pressing such arguments, the authors contend, “the NAACP was making the argument . . . that the formula in *Plessy* was constitutionally malformed [because separate was inherently unequal] and that the 1896 case should be overruled.”<sup>58</sup>

¶16 Buoyed by its victories, NAACP lawyers and a number of chapter presidents met with Thurgood Marshall (who had taken over the legal campaign after Charles Hamilton Houston’s death). This 1950 conference “mandated a frontal assault on *Plessy*” by challenging segregation beyond the graduate and professional school level.<sup>59</sup> This was risky and thus controversial within the NAACP. Some wished to consolidate the gains won by Marshall and his team by continuing to press states to equalize separate facilities if segregation was to be maintained.<sup>60</sup> There was some evidence this was occurring.<sup>61</sup>

¶17 But Marshall and the NAACP lawyers did not regard the choice as one between litigating under *Plessy* and challenging *Plessy*. They “could . . . offer the courts the alternative argument that even if the courts did not agree that segregation was inherently unconstitutional, it was nonetheless unconstitutional in actual practice. If a case that made a frontal assault on *Plessy* lost, it would be a blow to morale, but the NAACP could resume its current campaign to litigate equal protection” building on the victories already won.<sup>62</sup> Still, by deciding to confront separate but equal head on, Marshall and the NAACP litigation campaign had reached a turning point. The failure of a challenge to *Plessy* directly could harm the commitment to securing equality in fact as well, if states felt “separate but equal” was not vulnerable as a constitutional principle. The strategy harbored enormous risks; no one understood that better than Marshall as the NAACP’s lawyers began the laborious process of finding litigants for the six cases that eventually became known collectively as *Brown v. Board of Education*.

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56. *Id.* at 110–11, 112–13.

57. *Id.* at 110.

58. *Id.* at 111, 113.

59. *Id.* at 117.

60. *Id.*

61. *Id.* (“Because equality was being taken more seriously, states were being prodded toward making some progress in the equalization of schools, libraries, and recreational and other facilities. There were those who were pleased with the new progress and reluctant to give up what had been a successful campaign.”).

62. *Id.* at 117–18.

¶18 The authors make clear, however, that the string of NAACP victories was not simply a function of superior lawyering. The arguments Houston and Marshall were making were not too different from those Charles Sumner made a century before. What changed, the authors argue, was culture.<sup>63</sup> National attitudes toward race had shifted—not dramatically perhaps, but perceptibly—to a point where judges were receptive to the NAACP’s arguments in a way that they had not been in Sumner’s time. The stress the authors lay on the symbiotic relationship between law and culture is one of this volume’s real strengths.

¶19 First, African Americans themselves began to force reconsideration of the commonly held belief that blacks were inherently inferior. “Among the more significant and less recognized of these was the small group of African American scholars who . . . began to challenge the received presumptions of Negro inferiority that dominated much of the American academy and American letters.”<sup>64</sup> Despite the rigid segregation that accompanied military service in World Wars I and II, African Americans rendered distinguished service in uniform and, during service abroad, were exposed “to a very different way of life.”<sup>65</sup> Wars also brought heretofore unknown economic opportunities as African Americans moved in record numbers (during the so-called “Great Migration”) to “Northern cities [that] provided Negroes with better educational opportunities, better incomes, and the right to vote.”<sup>66</sup>

¶20 Second, social science, which had previously been thought to “scientifically prove” the inferiority of nonwhites, changed. “In the 1920s and 1930s, the scientific community began to move away from racism rooted in theories of biological determinism.”<sup>67</sup> While popular culture lagged behind academic research, the authors point to sympathetic portrayals of blacks in movies and in literature, especially after World War II, as evidence that a similar shift was occurring there as well.<sup>68</sup>

¶21 Third, African Americans, once enfranchised, began to benefit from positive attention from the federal government for the first time since Reconstruction. Though Franklin Roosevelt went to great lengths to placate southern segregationists, “the enfranchised northern Negro population was a constituency to be courted, and Roosevelt’s administration did so.”<sup>69</sup> Later, Harry Truman would desegregate the armed forces and run on a party platform that included a civil rights plank strong enough to alienate southern “Dixiecrats” who ran Strom Thurmond as their nominee for president in the 1948 primary.<sup>70</sup>

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63. *See id.* at 77–100.

64. *Id.* at 83.

65. *Id.* at 85, 91–95.

66. *Id.* at 86.

67. *Id.* at 87.

68. *Id.* at 89–91, 95–98.

69. *Id.* at 88. More important, perhaps, was the symbolic role played by Eleanor Roosevelt’s strong, public stands against racial discrimination. *Id.*

70. *Id.* at 98–99.

¶22 Finally, the waging of World War II against enemies with explicit racist ideologies, and the exposure of the horrendous crimes committed in their name, gave Americans a first-hand look at the possible consequences of prejudice and discrimination. Further, the post-war role that the United States adopted—“not merely a free nation but the guardian of freedom against totalitarian forces throughout the world”<sup>71</sup>—was hardly compatible (as the Soviets often gleefully pointed out to developing countries) with the legal and extra-legal white supremacist regimes that reigned in the South.<sup>72</sup>

¶23 Still, even if “[t]he America of the late 1940s and early 1950s was different from the America of 1909,” African Americans had a long road ahead.<sup>73</sup> Not only were “[r]acism, discrimination, and Jim Crow . . . still very much alive,” it appeared that they were not going to be easily displaced by a few favorable Supreme Court opinions.<sup>74</sup> As Marshall looked toward the upcoming challenge to segregated public schools, he was no doubt mindful of the lengths to which states (and unsympathetic federal judges) had gone to frustrate, delay, and subvert efforts of African Americans to receive an equal professional or graduate education.<sup>75</sup> Whatever the Supreme Court said (and the outcome there was in considerable doubt), the NAACP would have to depend on those same state officials and that same group of federal judges to give effect to the Court’s orders. This prospect could hardly have been heartening to the NAACP lawyers.

### *Brown*

¶24 There are two *Brown v. Board of Education* cases. The first (*Brown I*) established the right of schoolchildren to attend schools with whites and held that *de jure* segregation was a violation of the Equal Protection Clause of the Fourteenth Amendment. The second case (*Brown II*) addressed the remedy, holding that school desegregation must begin “with all deliberate speed.” The authors provide a fine summary of the efforts to secure plaintiffs to challenge segregated public schools and the litigation itself.<sup>76</sup> They also provide a brisk narrative of the birth of *Brown I*: the initial argument;<sup>77</sup> the death of Fred Vinson and his replacement as Chief Justice by Earl Warren;<sup>78</sup> Felix Frankfurter’s efforts to secure unanimity by scheduling reargument;<sup>79</sup> the efforts of the NAACP to find support for its case in

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71. *Id.* at 100.

72. See generally MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61 (1988).

73. COTTROL, DIAMOND & WARE, *supra* note 2, at 99.

74. *Id.*

75. See, e.g., *id.* at 69–71.

76. *Id.* at 119–39.

77. *Id.* at 140–42.

78. *Id.* at 143–44, 159–60.

79. *Id.* at 162–64.

the history of the Fourteenth Amendment's framing,<sup>80</sup> and the parallel efforts of Frankfurter clerk (and future Yale professor) Alex Bickel to do the same;<sup>81</sup> the courtroom dual between Thurgood Marshall and John W. Davis on reargument;<sup>82</sup> Warren's efforts to persuade Stanley Reed not to dissent;<sup>83</sup> and the issuance of the opinion, in which the Court declared that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. . . ."<sup>84</sup>

¶25 The authors largely follow what Mark Tushnet has called "the standard version" of *Brown*, which features Felix Frankfurter in the role of *de facto* Court leader, maneuvering his colleagues toward a unanimous decision with no separate opinions.<sup>85</sup> Tushnet has argued that the standard account "overstates the amount of division within the Court at the same time that it neglects the important role [Justice Robert] Jackson played in structuring the way in which Frankfurter thought about the problems of segregation and remedy."<sup>86</sup> While conceding that Frankfurter "[m]ight . . . have magnified his role somewhat," the authors assert that "[p]robably more than any other member of the Court, Frankfurter was responsible for the ultimate unanimous decision in the case."<sup>87</sup> Even so, the authors do not overstate the divisions on the Court, writing that by February–March 1954, "it was clear that the decision would be in favor of ending school segregation."<sup>88</sup> Moreover, they do give some attention to Jackson's role in shaping the ultimate opinion, noting his argument for reading the "Fourteenth Amendment as a document of a general nature and one with commands that could change with changing times."<sup>89</sup>

¶26 More attention is given to the disputed role played by Philip Elman, a former Frankfurter clerk who served with the Justice Department when *Brown* was before the Court.<sup>90</sup> In an interview published in 1987, Elman claimed credit for persuading the Court to bifurcate the questions of right and remedy, thus providing the solution that permitted the Court to render a unanimous decision.<sup>91</sup> While the authors caution against accepting Elman's characterization of his role at face

80. *Id.* at 144–45. In setting the case for reargument, three of the Court's five questions it wished the parties to brief concerned the intentions of the Fourteenth Amendment's framers regarding segregated schools. *Id.* at 143.

81. *Id.* at 160–61, 167–68. A revised version of Bickel's memo to Frankfurter on this question was later published in the *Harvard Law Review*. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

82. COTTROL, DIAMOND & WARE, *supra* note 2, at 145–48.

83. *Id.* at 175–76.

84. *Id.* at 177–82.

85. Mark Tushnet with Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1869 (1991) (summarizing the "standard version" of *Brown*).

86. *Id.* at 1930.

87. COTTROL, DIAMOND & WARE, *supra* note 2, at 162, 163.

88. *Id.* at 175.

89. *Id.*

90. *Id.* at 169–70.

91. Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation*, 100 HARV. L. REV. 817, 827–30 (1987).

value,<sup>92</sup> they concede that “[h]e is almost undoubtedly correct in stating that the separation of right from remedy helped pave the way for the ultimate unanimous decision.”<sup>93</sup> That decision, though, left unresolved the question of remedies, which the Court answered a year later, in 1955.

### ***Brown’s Legacy: Backlash (?) and Beyond***

¶27 In *Brown II*, the Court avoided the specter of massive upheaval in the South by requiring only that desegregation proceed with “all deliberate speed.”<sup>94</sup> For the next decade, desegregation was notable more for its deliberation than for its speed. The moderation with which *Brown* was initially received by southern politicians<sup>95</sup> quickly gave way to the “massive resistance” promised in the Southern Manifesto.<sup>96</sup> States frustrated litigants seeking the opportunity to attend desegregated schools at every turn, as did unsympathetic federal judges. Federal judges openly hostile to *Brown* (and given to racist outbursts in court) were being appointed to the bench as late as the Kennedy Administration.<sup>97</sup> Nonviolent protests by civil rights activists, meanwhile, began to meet with increasingly violent responses by both the Ku Klux Klan and local officials (whose membership sometimes overlapped), even as serious federal civil rights legislation was being considered.<sup>98</sup> As the 1960s drew to a close, younger African Americans began to reject the nonviolence of Martin Luther King Jr. and embrace more militant forms of activism. The authors write:

Despite the high level of protest activity, very little progress had been made toward school desegregation. In 1960, forty-six school desegregation cases were pending in southern states. Ten years after the *Brown* decision, only 1.2 percent of black students in the South attended schools with whites. In five states—Alabama, Mississippi, South Carolina, Florida, and Georgia—there were no black students attending white schools. . . .<sup>99</sup>

¶28 The Court’s attempts finally to end segregation, and even to require positive action to remedy racial imbalances and cure *de facto* segregation, met with

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92. COTTROL, DIAMOND & WARE, *supra* note 2, at 170 (“It would be fair to say that Elman had a highly egotistical personality, and it is difficult to know the extent to which he inflated his role in *Brown*.”).

93. *Id.* Incidentally, Elman’s oral history, in which he denigrated the contributions of the NAACP’s legal team, drew an outraged response from Harvard law professor Randall Kennedy. Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938, 1939 (1987) (accusing Elman of arguing, in effect, that the efforts of the NAACP did not matter “because God, Philip Elman, and Justice Frankfurter already had secured the NAACP’s victory”). For Elman’s reply, see Philip Elman, *Response*, 100 HARV. L. REV. 1949 (1987).

94. COTTROL, DIAMOND & WARE, *supra* note 2, at 184–85.

95. For a sample of the reactions, see Alexander M. Bickel, *Integration—The Seven Lean Years*, NEW REPUBLIC, Sept. 25, 1961, at 17.

96. *Id.* at 17.

97. COTTROL, DIAMOND & WARE, *supra* note 2, at 190–91.

98. *Id.* at 201–03.

99. *Id.* at 204.

mixed success.<sup>100</sup> While desegregation in the rural South proceeded,<sup>101</sup> urban desegregation efforts (particularly in the North, ironically) resulted in violent protests and a general “white flight” to outlying suburbs.<sup>102</sup> “As a result of persistent residential segregation and extreme isolation in many urban areas,” the authors note, “a phenomenon that social scientists describe as ‘hypersegregation,’ African American students in many inner-city school districts are more segregated today than their grandparents were in the pre-*Brown* era.”<sup>103</sup>

¶29 This lack of movement following *Brown* has given rise to a “backlash thesis” that *Brown* actually killed racial liberalism in the South by contributing to the ascendancy of politicians who found it expedient to champion segregation and white supremacy.<sup>104</sup> While this ended up aiding the civil rights movement, it did so indirectly by ensuring that civil rights protests would be met with violent resistance by southern officials, which, in turn, spurred previously apathetic Northerners to demand federal action, resulting in the Civil Rights Act of 1964 and the Voting Rights Act of 1965. *Brown* mattered, according to the backlash thesis, but in a rather perverse way.<sup>105</sup> Some, like Derrick Bell, take the backlash thesis further, arguing that *Brown* actually *undermined* African American progress toward racial equality.<sup>106</sup>

¶30 The authors engage the backlash thesis,<sup>107</sup> arguing to the contrary that African Americans have made real progress since the 1950s, but without making unrealistic claims that *Brown* was the sole catalyst for that progress. They mention the eradication of *de jure* discrimination, the presence of African Americans in the highest levels of corporate and political life in the United States, and the renunciation by white politicians like Senator Robert Byrd and George Wallace of their segregationist stances in order to court black voters, as examples of how far we have come.<sup>108</sup> More important, perhaps, “[t]he raw racism that prevailed in daily life, popular culture, and academic treatise at the beginning of the last century has

100. *Id.* at 204–05.

101. *Id.* at 205.

102. *Id.* at 206.

103. *Id.* at 207.

104. See generally Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

105. A related revisionist account of *Brown* uses the case, and the accompanying resistance to its full implementation, as an example of the limits of judicial power. See, e.g., GERALD ROSENBERG, *THE HOLLOW HOPE* (1991).

106. This is apparently the thesis of Professor Bell’s new book on the subject. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED PROMISE OF RACIAL REFORM* (forthcoming 2004). Bell was the lone dissenter in Jack Balkin’s collection of moot judicial opinions. Derrick A. Bell [Dissenting], in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID*, *supra* note 6, at 185.

107. Thomas Patterson’s volume on *Brown* finds little support for the backlash thesis. See PATTERSON, *supra* note 5, at 113–17.

108. COTTROL, DIAMOND & WARE, *supra* note 2, at 235–36.

become an embarrassing relic, defended by only a marginalized few today in public life.”<sup>109</sup>

¶31 While not denying that “[r]acism still exists” and that *de facto* segregation—especially in public schools—remains a serious problem in America,<sup>110</sup> the authors end on a hopeful note. “*Brown’s* importance,” they write, “lay in its setting the nation’s law on the path of rejecting the kind of racial exclusion that had made African Americans a people apart since before the nation’s founding.”<sup>111</sup> Of course, it took courageous people to bring and argue the case, and to execute the decision, but *Brown*, the authors argue “doubtless helped accelerate the rejection of racism as an American cultural norm.”<sup>112</sup> When “combined with later reinforcing decisions and civil rights legislation, it gave a significant boost to those larger forces in the society and the culture that were saying that discrimination was wrong and indeed un-American.”<sup>113</sup>

¶32 At the same time, they suggest that *Brown*

provides an important lesson in the law’s limitations. . . . [T]he law has found the system of structural inequality a more vexing problem. The often profound socioeconomic inequalities between blacks and whites can be traced to slavery, segregation, and long-term patterns of exclusion. . . . Yet it is not clear the extent to which the law will or can provide remedies in the future for the legacy of exclusion in the past.<sup>114</sup>

What is clear, they conclude, is that without *Brown*, remedying the problems that remain would be much more difficult.

### ***Brown* and American Constitutional Law**

¶33 It would be hard to argue with the proposition that *Brown* occupies a central place in American constitutional law.<sup>115</sup> The authors’ book, for all its admirable focus on culture and society, is also a work of legal and constitutional history, and it provides some illuminating observations on *Brown’s* place in American legal history by tracing the case’s journey from “target to icon.”<sup>116</sup>

¶34 First, they note that while *Brown* renewed academic concern about the “countermajoritarian difficulty”<sup>117</sup> inherent in judicial review that is still of central

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109. *Id.* at 236.

110. *Id.* at 237–39.

111. *Id.* at 241.

112. *Id.* at 242.

113. *Id.*

114. *Id.* at 242–43.

115. Some, however, might argue that its centrality is out of proportion to its actual importance. *See supra* ¶ 29.

116. COTTROL, DIAMOND & WARE, *supra* note 2, at 208.

117. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962).

concern to American constitutional law today,<sup>118</sup> the legitimacy of *Brown* is no longer open to serious debate. Among academics, even the most ardent originalist has to account for *Brown*.<sup>119</sup> The doubts expressed about the decision by Learned Hand,<sup>120</sup> and even Herbert Wechsler's public hand-wringing about the Court's decision,<sup>121</sup> would today be regarded as "out of the mainstream," as evidenced by Robert Bork's embrace of the decision during his 1987 confirmation hearings.<sup>122</sup>

¶35 Second, the authors note that *Brown* was part of the nascent attempts to enforce the Bill of Rights against states through the Fourteenth Amendment, and to give substantive content to its guarantees of equal protection and due process, which had been largely fallow since the Court abandoned them as a source for "economic substantive due process" in the late 1930s.<sup>123</sup> In fact, many applauded vigorous judicial action in the face of legislative intransigence and executive branch indifference, and hoped that the judicially enforced guarantees of equality in the Fourteenth Amendment could provide a remedy for a variety of social ills unmet by popularly elected branches of government.

¶36 To these, one might add another: *Brown*'s role in establishing the judiciary as *the* interpreter of the Constitution. When Arkansas Governor Orval Faubus attempted to defy a federal court order to desegregate schools in Little Rock, the Supreme Court, in *Cooper v. Aaron*, responded that "the federal judiciary is supreme in its exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."<sup>124</sup> If anything, the notion of judicial supremacy—that is, the identification of the Constitution with the Supreme Court's interpretation of it—has become ascendant in the years since *Brown*, and its success as an idea probably owes something to the widespread belief that courts are better guarantors of the Constitution and of individual rights than either the legislative or executive branches, a belief currently questioned by some progressives.<sup>125</sup>

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118. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Five: The Birth of an Academic Obsession*, 112 YALE L.J. 153, 185–92 (2002) (discussing the role of *Brown* in reviving concern over the countermajoritarian aspects of judicial review).

119. For an impressive originalist defense of *Brown*, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

120. See generally LEARNED HAND, *THE BILL OF RIGHTS* (1958).

121. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–35 (1959).

122. COTTROL, DIAMOND & WARE, *supra* note 2, at 208–09.

123. *Id.* at 218–23.

124. 358 U.S. 1, 18 (1958).

125. See, e.g., LOUIS FISHER, *RELIGIOUS LIBERTY IN AMERICA: POLITICAL SAFEGUARDS* (2002); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry Kramer, *The Supreme Court, 2000 Term—Foreword: "We the Court,"* 115 HARV. L. REV. 4 (2001).

### Conclusion

¶37 Cottrol, Diamond, and Ware have written a wonderful, accessible, nuanced account of *Brown*. There are only three quibbles that I have. First, it seems that more attention might have been given to the international reaction to segregation and the effect that might have had, during the Cold War, on the executive branch's decision to take an active role in the litigation.<sup>126</sup> Second, given the rise of revisionist thinking on *Brown*, some of it by African Americans, which claims *Brown* retarded racial equality in this country, the authors' implicit belief that *Brown* did have significance might have been more explicitly contrasted and defended against the claims of the revisionists. Finally, the authors might have more directly addressed the continued controversy over affirmative action, and whether *Brown*'s dismantling of racial caste supports arguments against race-based remedies for the legacies of slavery and Jim Crow.

¶38 But these are very minor; none takes away from the authors' impressive achievement. Their book deserves a wide audience and would be useful in a wide variety of classroom settings. It contains enough explanatory asides to be understandable by younger readers and nonlawyers, while its rich consideration of the cultural context in which the legal struggle for equality proceeded would hold an expert's attention. Like all of the books in the University Press of Kansas's Landmark Law Cases and American Society series, there are no distracting citations; in their place is a rich bibliographical essay, as well as a list of cases cited in the work. There is also a chronology covering the years 1850–1968, which all readers should find useful.

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126. See *supra* note 72 and accompanying text.