DID BROWN MATTER?

On the fiftieth anniversary of the fabled desegregation case, not everyone is celebrating.

BY CASS R. SUNSTEIN

Brown radicalized Southern politics, spurring the rise of hard-line white supremacists.

On May 17, 1954, the Supreme Court announced its decision in the case of Brown v. Board of Education. "Separate educational facilities are inherently unequal," the Court ruled unanimously, declaring that they violated the equal-protection clause of the Fourteenth Amendment. It thus overturned the doctrine of "separate but equal," which had been the law of the land since 1896, when Plessy v. Ferguson was decided. The Brown ruling—the culmination of a decades-long effort by the N.A.A.C.P.—has today acquired an aura of inevitability. But it didn't seem inevitable at the time. And the fact that it was unanimous was little short of miraculous.

When the school-segregation cases first came before the Court, in 1952, the justices, all Roosevelt and Truman appointees, were split over the constitutional questions. Only four of them (William O. Douglas, Hugo L. Black, Harold H. Burton, and Sherman Minton) were solidly in favor of overturning Plessy. Though there is no official record of the Court's internal deliberations, scholars of the decision—notably Michael J. Klarman, a professor of law and history at the University of Virginia—have been able to reconstruct what went on through the justices' conference notes and draft opinions. Chief Justice Fred M. Vinson, a Truman appointee from Kentucky, argued that Plessy should be permitted to stand. "Congress has not declared there should be no segregation," Vinson observed, and surely, he went on, the Court must be responsive to "the long-continued interpretation of Congress ever since the Amendments." Justice Stanley F. Reed, also a Kentuckian, was even more skeptical of overturning segregation. "Negroes have not thoroughly assimilated," he said; segregation was "for the benefit of both" blacks and whites, and "states should be left to work out the problem for themselves." The notes for Justice Tom C. Clark, a Texan, indicate greater uncertainty, but he was clearly willing to entertain the position that "we had led the states on to think segregation is OK and we should let them work it out."

Justices Felix Frankfurter and Robert H. Jackson, though staunchly opposed to segregation, were troubled by the legal propriety of overturning a well-established precedent. "However passionately any of us may hold egalitarian views," Frankfurter, an apostle of judicial restraint, wrote in a memorandum, "he travels outside his judicious authority if for this private reason alone he declares unconstitutional the policy of segregation." During the justices' deliberations, Frankfurter pronounced that, considered solely on the basis of history and precedent, "Plessy is right." Jackson, for his part, composed a draft opinion reflecting his ambivalence. He acknowledged that the Court's decision "would be simple if our personal opinion that school segregation is morally, economically and politically indefensible made it legally so." But, he asked, "how is it that the Constitution this morning forbids what for three-quarters of a century it has tolerated or approved?" Both Frankfurter and Jackson had been deeply affected by the New Deal era, during which a right-wing Supreme Court had struck down progressive legislation approved by their beloved Franklin Delano Roosevelt, including regulations establishing minimum wages. Frankfurter and Jackson believed in democracy and abhorred judicial activism. They also worried that the judiciary would be unable to enforce a ban on segregation, and that an unenforceable decree would undermine the legitimacy of the federal courts. And so the justices were at odds. In an unusual step, the Court postponed its decision, and asked both sides to reargue the case.

In September of 1953, just before Brown was to be reargued, Vinson died

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of a heart attack, and everything changed. "This is the first indication that I have ever had that there is a God," Frankfurter told a former law clerk. President Eisenhower replaced Vinson with Earl Warren, then the governor of California, who had extraordinary political skills and personal warmth, along with a deep commitment to social justice. Through a combination of determination, compromise, charm, and intense work with the other justices (including visits to the hospital bed of an ailing Robert Jackson), Warren engineered something that might have seemed impossible the year before: a unanimous opinion overruling Plessy. Thurgood Marshall, a principal architect of the litigation strategy that led to Brown, recalled, "I was so happy I was numb." He predicted that school segregation would be entirely stamped out within five years.

That's how Brown looked fifty years ago. Not everyone thinks that it has aged well. Many progressives now argue that its importance has been greatly overstated—that social forces and political pressures, far more than federal judges, were responsible for the demise of segregation. Certainly, Brown has disappointed those who hoped that it would give black Americans equal educational opportunities. Some scholars on the left even question whether Brown was rightly decided. The experience of the past half century suggests that the Court cannot produce social reform on its own, and that judges are unlikely to challenge an established social consensus. But experience has also underlined Brown's enduring importance. To understand all this, we need to step back a bit.

A quiz: In 1960, on the sixth anniversary of the Brown decision, how many of the 1.4 million African-American children in the Deep South states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina attended racially mixed schools? Answer: Zero. Even in 1964, a decade after Brown, more than ninety-eight per cent of African-American children in the South attended segregated schools. As Klarman shows in his magnificent "From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality" (Oxford; $35), the Court, on its own, brought about little desegregation, above all because it lacked the power to overcome local resistance.

Not that it made any unambiguous effort to do so. In the 1954 decision, the Court declined to specify the appropriate remedy for school segregation, asking instead for further arguments about it. The following year, in an opinion known as Brown v. Board of Education II, the Court declared that the transition to integration must occur "with all deliberate speed." Perhaps fearing that an order for immediate desegregation would result in school closings and violence, the justices held that lower-court judges could certainly consider administrative problems; delays would be acceptable. As Marshall later told the legal historian Dennis Hutchinson, "In 1954, I was delirious. What a victory! I thought I was the smartest lawyer in the entire world. In 1955, I was shattered. They gave us *nothing* and then told *us* to work for it. I thought I was the dumbest Negro in the United States." As a Supreme Court justice, Marshall—for whom I clerked in 1980—liked to say, "I've finally figured out what 'all deliberate speed' means. It means '*slow*.' "

Real desegregation began only when the democratic process demanded it—through the 1964 Civil Rights Act and aggressive enforcement by the Department of Justice, which threatened to deny federal funds to segregated school systems. But Klarman doesn't claim that Brown was irrelevant to the desegregation struggle. In his view, the decision catalyzed the passage of civil-rights legislation by, in effect, heightening the contradictions: inspiring Southern blacks to challenge segregation—and Southern whites to defend it—more aggressively than they otherwise would have. Before Brown, he shows, Southern politics was dominated by moderate Democrats, who generally downplayed racial conflicts. The Brown ruling radicalized Southern politics practically overnight, and in a way that has had lasting consequences for American politics.

A case in point is Orval E. Faubus, who became a national figure in 1957, when, as the governor of Arkansas, he used the state's National Guard to defy the courts and stop African-American children from attending high school in Little Rock. But Klarman reminds us

that, three years earlier, he had been elected on a liberal, race-neutral platform of spending more money on education and old-age pensions. (His father, a socialist organizer, gave him the middle name Eugene, in honor of Debs.) In the early days of his term, he appointed blacks to the Democratic Central Committee for the first time, and desegregated public transportation. Only after public indignation over Brown swept through his state, and his chief political opponent accused him of being insufficiently zealous in resisting the decision, did he reposition himself as a racial hard-liner.

Or consider "Big Jim" Folsom, once a popular governor of Alabama. Folsom was a racial moderate who refused to join other Southern governors in a statement condemning Brown, and went so far as to invite Adam Clayton Powell to the governor's mansion. Folsom was defeated in the 1958 election by an extreme segregationist. During the Brown deliberations, Justice Black reportedly predicted that overturning Plessy would mean the end of mid-century Southern liberalism, and his prediction was largely borne out.

Klarman's story doesn't stop there, however. Because "the post-Brown racial fanaticism of southern politics produced a situation that was ripe for violence," he writes, Northerners soon found themselves outraged by televised scenes of police brutality against peaceful black demonstrators. The civil-rights legislation of the sixties, including the very laws that led to the enforcement of Brown, arose from a sort of backlash to the backlash. Given these complicated causal chains, how important to our civil-rights history, in the end, was Chief Justice Vinson's fatal heart attack? Not very, in Klarman's accounting: "Deep background forces"—notably, the experience of the Second World War and the encounter with Nazi racial ideology—"ensured that the United States would experience a racial reform movement regardless of what the Supreme Court did or did not do."

Klarman is far from alone in demoting the Court's historic role in the civil-rights movement. In "All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education" (Norton; $25.95), Charles J. Ogletree, Jr., a law professor at Harvard, contends that Brown did nothing "to address the social inequality that predominantly harms African-Americans." Ogletree still regards Thurgood Marshall as a genuine hero. But he believes that, under the spell of both Marshall and the Brown ruling, civil-rights advocates may have placed too much emphasis on the courts, which are often unresponsive or ineffective. If you want to improve educational opportunities for poor blacks, he suggests, you might do better to put your energies into, say, charter schools and after-school programs. (He tells us about some promising examples.) In Ogletree's view, Brown's unfulfilled promise reflects not so much the Court's limited authority as the nation's limited commitment to racial justice. He points to a series of Supreme Court decisions, starting in the late nineteen-seventies, that sharply confined the scope of affirmative-action programs and that amounted to a "process of undoing Brown."

This argument can be pressed even further, as Derrick Bell shows in "Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform" (Oxford; $25). In his view, Brown has been not merely a disappointment but a grotesque failure. Bell connects that failure to a more general claim about "interest convergence." America makes progress toward racial equality, he thinks, only when such progress is in the interest of whites. For him, Brown is a clear illustration: the Court knew that invalidating segregation would help the nation in its competition with Communist nations and undermine subversive elements at home.

The argument (which Mary L. Dudziak's 2000 book "Cold War Civil Rights" explored at length) isn't as implausible as it might at first seem. The Department of Justice, in its brief before the Court, quoted Secretary of State Dean Acheson, who maintained that racial discrimination gave unfriendly governments "the most effective kind of ammunition for their propaganda warfare," and remained "a source of constant embarrassment to this government in the day-to-day conduct of its foreign relations." (More recent support for Bell's claim about "interest convergence": when, just a year ago, the Supreme Court stopped

short of invalidating all affirmative-action plans, it referred to briefs it had received from businesses and former military leaders arguing that affirmative action was necessary for both corporate success and national defense.) "Interest convergence" motivated only the abolition of de-jure segregation; the nation, in Bell's view, had no larger appetite for racial justice.

Like Ogletree, Bell points out that, even without compulsory segregation, millions of African-American children continue to attend all-black schools, and often receive a second-rate education, or worse. In the nation's urban centers, millions of African-Americans are jobless, badly educated, and without marketable skills, and are thus propelled into crime, domestic violence, and, ultimately, despair. And he suggests that Brown shares some of the blame: "The statement that separate facilities were inherently unequal served to legitimate current arrangements. Thereafter, those blacks who remained poor and disempowered were viewed as having failed to take advantage of their definitionally equal status." Brown, then, may have been something worse than useless: an alibi for inaction.

If Brown was destined to fail, as Bell believes, what would he have had the Supreme Court do in 1954? Surprisingly, he argues that the Court should have reaffirmed Plessy and permitted segregation to continue—but should have insisted that separate must be genuinely equal. Recognizing that "predictable outraged resistance could undermine and eventually negate even the most committed judicial enforcement efforts," the Court should have required full enforcement of Plessy with a decree that would have equalized educational opportunity immediately, with federal district judges monitoring the process to insure compliance.

It's a bold and sobering counterproposal. But it would have done nothing about the injury produced by segregation, and it would have put federal courts in an impossible position. How could judges decide, in particular cases, whether segregated schools really were equal? To produce genuine equality, would they have had to ask local school boards to raise taxes, or to take funds from white schools for the benefit of black schools? The challenge of monitoring "separate but equal" would have been at least as formidable as the challenge of desegregation.

Brown has attracted scrutiny from another set of legal scholars, who are concerned with the proper role of judicial authority. What is at issue, for them, isn't the wisdom of the decision itself but what the decision later helped to establish and fortify—the widespread belief that the Supreme Court has been a major and indispensable force for expanding our liberties. In the 1975 foreword to the classic history of Brown, "Simple Justice" (which has now been issued in a revised edition by Knopf; $45), Richard Kluger declares, "The nine Justices, as has often been said, constitute the least democratic branch of the national government. Yet this, most likely, was one reason why the Court felt free to act: it is not compelled to nourish the collective biases of the electorate; it may act to curb those unsavory attitudes by the direct expedient of declaring them to be intolerable among a civilized people." For liberal critics of federal judicial power, such talk represents a perilous delusion. They argue that the meaning of the Constitution should not be in the hands of unelected judges; if people have been persuaded otherwise, it's in part because the cult of Brown v. Board of Education has conferred excessive prestige on an institution whose tendencies are better symbolized by Bush v. Gore.

Fifty years later, Brown does seem increasingly anomalous. Before the Warren Court, the justices were almost never a force for social reform, and they have rarely assumed that role in the past two decades. Most of the time, the judiciary has been an obstacle to racial equality. Before the Civil War, the Supreme Court, in the Dred Scott case, interpreted the Constitution so as to entrench slavery. After the Civil War, the Court sharply limited Congress's power to protect the newly freed slaves. During the first half of the twentieth century, the Court did little to promote racial justice (and for much of that time, as Frankfurter and Jackson were painfully aware, it was hostile to legislative attempts to reduce economic inequality); in the last quarter of the century, the Court's most important racial-discrimination decisions struck down affirmative-action programs.

But if the Supreme Court justices aren't the ultimate authority on what the Con-

stitution means, who is? In "The People Themselves" (Oxford; $29.95), Larry D. Kramer, a New York University law professor, makes a subtle and striking argument for popular control over constitutional meaning. Central to his account is a distinction between "popular constitutionalism" and "judicial supremacy": he thinks that the framers of the Constitution favored the former, but that, in recent decades, we have lost sight of their design, ceding constitutional supremacy to the judiciary. Roosevelt's contention that the Constitution should be seen as "a layman's instrument of government" and not "a lawyer's contract" perfectly captured the founders' spirit, Kramer believes. "The Supreme Court is not the highest authority in the land on constitutional law," he writes. "We are."

In a system of popular constitutionalism, the President, Congress, and the Supreme Court are bound by the founding document; they swear an oath to uphold it, and they must obey it as they understand it. For this reason, courts have the authority to strike down legislation that they deem to be unconstitutional. But judicial decisions on constitutional meaning are not to be treated as uniquely authoritative. If the Supreme Court rules that school segregation is unlawful or that affirmative-action programs are unacceptable, the public and its elected representatives are entitled to insist that the Constitution has been misread and to seek change. To the extent that Brown's harshest critics operated within the law, they were within their rights to object that the Court mangled the Constitution, and to use political channels to attempt to limit or even to overrule Brown. They need not have treated Brown as if it had been carved in stone.

Historically, there has rarely been a chasm between popular will and judicial rulings. A century ago, Finley Peter Dunne's fictional wiseacre Mr. Dooley remarked that "no matter whether th' constitution follows th' flag or not, th' supreme court follows th' iliction returns." The Court doesn't really do that, but its members live in society, and they are inevitably affected by the beliefs of society and its elected representatives. When, recently, the Court invalidated Texas's ban on same-sex sodomy, it relied on the fact that this ban was inconsistent with prevailing national values; most Americans just do not support criminal prosecutions for consensual sexual relations among adults. Brown can be understood in similar terms: by 1954, segregated schools were perceived as an outrage by at least half of the nation's citizens. In fact, American Presidents—Roosevelt, Truman, and, to some extent, even Eisenhower—supported a strong judicial role in the protection of civil rights. Courts do not rule in a vacuum, and when they appear most aggressive they are likely to be responding to evolving social values.

In "Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown" (Chicago; $20), the political scientist Kevin J. McMahon elaborates this point. He thinks that we have exaggerated the roles of Thurgood Marshall and Earl Warren and undervalued the role of Franklin Delano Roosevelt. In McMahon's account, interpretation of the Constitution fundamentally depends on Presidential decisions. Presidents have a more or less explicit "constitutional vision," and Brown, he believes, was a direct product of Roosevelt's. Constrained by the need to maintain Southern support for the New Deal, Roosevelt did proceed cautiously on issues of racial equality. But, in reshaping the federal bench, he destroyed the long-standing alliance between the Supreme Court and the South. Starting in the late thirties, his Justice Department took many steps to protect African-Americans, initiating litigation against police brutality, lynching, the poll tax, and the "white primary." And Roosevelt's judges, McMahon demonstrates, were quite willing to use the Court's authority to protect the rights of the disadvantaged.

The "presidency-focussed approach," as McMahon calls it, has its limits. (Consider Earl Warren, whose appointment to the Court Eisenhower called "the biggest damn fool mistake I ever made.") But it certainly accords with the radical shift from the liberal Warren Court to the conservative Rehnquist Court—a shift engineered, above all, by Presidents Ronald Reagan and George H. W. Bush, who appointed five of the nine justices currently serving. In this light, what Ogletree and Bell deplore as the failed promise of Brown would seem to be a result of Presidential decisions. Because the rulings of the Supreme Court are influenced by the occupants of the White House, and in that sense by popular will, popular constitutionalism is alive and well—and is largely responsible for Brown's limited effects.

And yet to declare, with Bell and Ogletree, that Brown has been "undone" presupposes a particular account of what Brown is taken to "do." Perhaps Brown means that governments must be color-blind—that they may never take race into account in their decisions. If so, Supreme Court decisions that strike down affirmative-action programs are continuing in Brown's path. Both Bell and Ogletree argue forcefully that Brown should be understood to require not color blindness but an end to white supremacy and the subordination of African-Americans. Thurgood Marshall himself emphasized the problem of subordination, or lower-caste status, in his arguments in Brown. I agree that this is the preferable interpretation of the equal-protection clause, and, if it's right, affirmative-action programs are fully consistent with Brown. But how should we choose between the color-blindness principle and the anti-subordination principle? The Rehnquist Court has mostly opted for color blindness, and Brown itself does not expressly prohibit that choice.

Was Brown, then, a failure? Suppose that this is the real meaning of the Court's decision: states may not, by law, separate citizens from one another by race, simply because forcible separation imposes a kind of stigma, or second-class citizenship, that offends the most minimal understanding of human equality. It is one thing to attend all-black schools. It is quite another to live under a legal system that announces, on a daily basis, that some children are not fit to be educated with others. Brown ruled that, under the Constitution, states may not humiliate a class of people in that way. It may have taken a while, but this ruling, at least, has stuck. And on the occasion of its fiftieth anniversary it justifies a celebration.

But it does not justify triumphalism. Brown v. Board, despite the unanimity of the decision, was the product of a divided Supreme Court and a divided nation. Its current meaning is up to us, not to previous generations or even to the Court that decided it. Cautious as that Court's justices were, Klarman notes a significant generational fact: nearly all of its clerks were in favor of overturning Plessy. The one evident exception was a clerk in Jackson's chambers, a Stanford-trained lawyer who had grown up in Milwaukee. His name was William H. Rehnquist. ♦