REFLECTIONS ON RACE, THE CONSTITUTION, AND GROWING UP IN THE SEGREGATED SOUTH*

WALTER DELLINGER

The following passages are excerpted from the manuscript entitled Balcony Reserved for White Spectators *that Walter Dellinger was writing at the time of his death in February 2022. These particular excerpts were chosen first and foremost because they demonstrate Dellinger's unwavering and lifelong commitment to the pursuit of racial justice. But they were also chosen because they illustrate the array of talents that Dellinger brought to his work—his encyclopedic knowledge of constitutional history, his powers of legal analysis and persuasion, his attunement to the latent meanings in popular culture, and last, but certainly not least, his spellbinding storytelling.*

Note: The excerpts have been lightly edited, reordered, and notated in order to fit into a law review format.

I. MAY 17, 1954[1]

On May 15, 1941, the day I was born in North Carolina, the New York Yankees lost to the Chicago White Sox.[2] Yankee outfielder Joe DiMaggio, who

1. This section contains material originally printed in *The Washington Post* and *Slate*, with some differences in editing. *See Walter Dellinger*, Opinion, *A Southern White Recalls a Moral Revolution*, WASH. POST (May 15, 1994, 1:00 AM), https://www.washingtonpost.com/archive/opinions/1994/05/15/a-southern-white-recalls-a-moral-revolution/23bad66d-e6c1-4ee0-a70f-3665a615e54e/ [https://perma.cc/4PKB-BTUU (dark archive)]; Walter Dellinger, *How Brown v. Board of Education Changed the South Forever*, SLATE (June 28, 2007, 9:32 AM), https://slate.com/news-and-politics/2007/06/how-brown-v-board-of-education-changed-the-south-forever.html [https://perma.cc/Z72E-LD67].

2. Nick Anapolis, *DiMaggio Singles To Start Hitting Streak*, NAT'L BASEBALL HALL FAME, https://baseballhall.org/discover/inside-pitch/dimaggio-begins-hitting-streak-with-single [https://perma.cc/X4UB-Y792].

had gone hitless the day before, had an uneventful single in the bottom of the first.[3] The next day, DiMaggio again got a hit, and yet again the day after that and the day after that deep into the summer of 1941, hitting in an extraordinary fifty-six consecutive games.[4]

The America into which I was born on that first day of "The Streak" was one in which no person of color was permitted to play any major league sport. More than a third of Americans supported the idea of legal restrictions on Jews, and gay Americans lived in constant fear of arrest and prosecution.

Feminism was a word we did not even know, but when I was eleven years old, I saw its roots as I watched my mother, suddenly a widow with barely a high school education, little money, and three children, struggle before finding a job as a salesclerk, one of the few occupations not closed to women.

On a journey that is not yet complete, America has made extraordinary progress on these issues. But it is not in every way a country more fair now than it was in my youth. I had opportunities (as a white kid) that are now not available to many low-income kids (white or Black) in this time of rising inequality and an increasingly depleted public sector. I played in the same public parks and attended the same public schools as the richest kids from the best-educated families. The downtown public librarian helped me learn about arcane subjects, and my tenth-grade teacher used her own money to buy me a two-year subscription to the London Economist.

By any measure, the lifespan of those of us born on the eve of the Second World War witnessed an astonishing transformation of America, a transformation whose origin story may well have begun on the third Monday in May of 1954.

* * *

I remember nothing of my 13th birthday, which was celebrated in some now unrecallable fashion on Saturday, May 15, 1954. But I will never forget what happened the following Monday. Still somewhat dazed from the death of my father the previous year, I was stumbling, unfocused, through the seventh grade at Myers Park Junior High in Charlotte. It was just past midday when a knock on the classroom door aroused me from my post-lunch slumber. The assistant principal, standing just outside the partially open door, carried on a whispered conversation with our fourth-period teacher.

At conversation's end, our teacher closed the door and turned (in my mind's eye, in slow motion) to face the class. Our distracted chatter dropped to

3. *Id.*
4. *Id.*

a hush as we noted his ashen face. I believe I can remember, more than half a century later, our teacher's exact words:

"*Children,*" he said slowly and deliberately, "*the Supreme Court has ruled. Next year you will go to school with colored children.*"

Our teacher's assumption about the effect of *Brown v. Board of Education*[5] on the racial composition of our public school turned out to be gravely mistaken. We did not "go to school with colored children" the next year as our teacher had naturally assumed. Or the year thereafter. In fact, I finished junior high and graduated from a still all-white high school in 1959 without ever having attended school with a Black child. By the time I finished four years at the state university, the public schools of North Carolina remained almost entirely segregated. It was not until the 1972 school year (I had by then been through law school, clerked for Justice Hugo Black, and become a law professor teaching *Brown*) that there was finally a meaningful end to the de jure segregation of the public schools of the rural and small-town South.[6]

It is true that *Brown* did not occur in isolation from the sweep of history. The NAACP Legal Defense Fund's decades-long strategy for eroding the legal doctrine of separate but equal was ever guided by Thurgood Marshall's extraordinary sense of timing.[7] The migration of African Americans to the cities of the North, the enormous impact of World War II in opening America to the world, and the articulation of an American antiracist ideology in the fight against Nazism all set the stage for what was to follow.

The breaking of the color line in baseball by Jackie Robinson[8] is a symbol of the amelioration of American racism that was occurring in the late 1940s—outside the South. Thus, one might argue, forces of history outside the Court created the conditions for dismantling segregation, and only acts by Congress and actions by the executive branch, spurred by the civil rights movement, actually accomplished any significant and identifiable results. In this version of history's tale, *Brown* is a bit player.

Perhaps because *Brown* played such a powerful role in shaping my life, I cannot avoid being awed by the decision still 65 years later. *Brown* was an act of extraordinary boldness, one with which the Supreme Court placed itself as an institution deeply at risk. For a decade, it appeared that the Court's most significant legal ruling would simply never be obeyed. Had the nation declined

5. 347 U.S. 483 (1954).

6. *See generally* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (holding that compliance with the court-ordered bussing plan to address inadequately desegregated schools in Mecklenburg County, North Carolina was both necessary and feasible).

7. *Our History*, NAACP, https://naacp.org/about/our-history [https://perma.cc/4SPR-WZ99].

8. Amanda Onion, Missy Sullivan, Matt Mullen & Christian Zapata, *Jackie Robinson Becomes First African American Player in Major League Baseball*, HISTORY (June 5, 2023), https://www.history.com/this-day-in-history/jackie-robinson-breaks-color-barrier [https://perma.cc/7KGW-FVNA].

to accede to the proposition of *Brown*, judicial review as we know it could have come to an end. I believe that Judge J. Harvie Wilkinson may have been right when he wrote that *Brown* "may be the most important political, social, and legal event in America's twentieth-century history."[9]

The excessive disparagement of *Brown*'s impact by academics is a mistake.[10] Properly understood, what *Brown* did was to put a powerful proposition to the American people: that racial segregation was immoral and unconstitutional. I have sometimes been asked whether, as a white child in the South of the late '40s and early '50s, I thought segregation was wrong. I don't believe that question would have made much sense to me growing up in the years before *Brown*. Segregation was a fact about my (white) universe; it seemed no more "right" or "wrong" than the placement of the planets in the solar system. It simply was. *Brown* inescapably altered that notion. At least for many young white Southerners, the Court's holding turned Jim Crow from a descriptive fact about the world into a powerful normative moral question.

The events of May 17, 1954, did not end a national debate but initiated one in earnest. From the day our teacher solemnly announced the Court's decision, my life through high school and college in the South was energized by an endless and fierce argument about whether the Supreme Court was right that segregation was wrong and what one should do about it. Throughout high school, we rode around packed in cars night after night, talking and arguing endlessly about race and football and girls and race—a subject forced upon us by *Brown*. For me, growing up in the South in the aftermath of *Brown* precluded denial about the role of race oppression: one either had to embrace and defend it or recoil from it and fight against it. I'm sure at least that there is some causal line from *Brown* to my sophomore decision to picket the "whites only" movie theater on Franklin Street in Chapel Hill.

In judging the significance of the Court's decision, it is critically important to recognize that the movement that brought an end to legally enforced racial subordination in the South was first and foremost an indigenous movement of Southern Black Americans led by Southern Black Americans. To those heroes of the civil rights movement goes the honor of having liberated the nation—and particularly the South—from the shame of legal apartheid.

But the *Brown* Court, by its declaration in 1954 that Jim Crow was unconstitutional, provided to those who were to demonstrate, march, and sometimes risk their lives the powerful moral support that the central covenant

9. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE* 6 (1979).

10. As will be discussed below, however, the *Brown* Court can be subject to criticism for its unwillingness to detail the system of racial oppression and subjugation that was the heart of Southern racial apartheid and for the consequences that have resulted from this failure. *See infra* Part IV.

of the American nation was on their side, and not on the side of those claiming to act on behalf of the state and local political majorities.

Brown was in a real sense a fulfillment of basic principles of American constitutionalism. Although the Constitution of 1787 committed in its core the deep original sin of complicity with human slavery—the "curse of heaven" as one delegate called it[11]—the document also created two principles that would one day help sustain the assault on a racist legal regime: nationalism and constitutionalism.

James Madison's vision was of an American republic extended across a continental nation. In such an extended and multifaceted republic, national norms would provide a check on the potential tyranny of local majorities. Thus, those who were oppressed by the laws of the Southern racial regime had available an appeal to the national commitment to the constitutional rule of law.

Brown's embodiment of that commitment, and its potential to embolden those who would challenge entrenched racial practice, was vividly demonstrated in the winter of 1955 in Montgomery, Alabama. Rosa Parks had been arrested for violating the legal code of segregation by refusing to give up her bus seat to a white man.[12] The historic Montgomery bus boycott began just days later with a stirring address by a 26-year-old minister, newly arrived in the city, who had but 20 minutes to prepare his remarks.[13]

What kind of argument does one make to show the wrongness of the rules cast into law by those with majority power and the rightness of the cause of those who are violating those laws? The best of the American constitutional tradition as it culminated in *Brown* provided the young Martin Luther King Jr. with a principled argument for defying local law not available in many of the world's political cultures. This is what he said to thousands packed in and outside of the Holt Street Baptist Church on that December night:

> If we are wrong, the Supreme Court of this nation is wrong.
>
> If we are wrong, the Constitution of the United States is wrong.
>
> If we are wrong, God Almighty is wrong.[14]

11. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 221 (Max Farrand ed., 1911) [hereinafter 2 Farrand].

12. *Rosa Parks*, NAACP, https://naacp.org/find-resources/history-explained/civil-rights-leaders/rosa-parks [https://perma.cc/8LJ3-KPR4].

13. MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 47 (Beacon Press 2010) (1958).

14. Martin Luther King, Jr., Address to First Montgomery Improvement Association (MIA) Mass Meeting at Holt Street Baptist Church (Dec. 5, 1955).

II. BALCONY RESERVED FOR WHITE SPECTATORS[15]

Brown was but one of a confluence of events that shaped my sense of race and justice. Radio was another. One of the few insights I had into the Black South came through the radio. WGIV was one of the stations then common in the South that played programming for Black audiences with Black disc jockeys. I found it, or it found me, with its music. WGIV was playing Bo Diddley and Chuck Berry when the mainstream "white stations" were playing Pat Boone. Radio, like the modern internet, could transcend boundaries. Those invisible radio airways were a means of circumventing the barriers of a walled-off segregated society. WGIV conveyed a small aspect of what we would have called "Colored Charlotte," into my house.

Through WGIV I learned something of the daily comings and goings of the Black community of Charlotte, the kind of knowledge that inevitably has a humanizing effect. Then, of course, there was the music. Rock and Roll, with its erotic power and joyous rhythms, was liberating and, at times, subversive.

Take, for example, Chuck Berry's 1956 "Brown Eyed Handsome Man," a song as subversive as they come. Composed and recorded at a time when even the Supreme Court would not touch the hot issue of state criminalization of interracial sex, forbidden in every Southern state, the song celebrates Black and Brown men's sexuality. It begins:

> Arrested on charges of unemployment
>
> He was sitting in the witness stand
>
> The Judge's wife called up the District Attorney
>
> She said "free that brown-eyed man
>
> If you want your job, you'd better free that brown-eyed man"[16]

The meaning of this song would not be lost on Berry's audience as he performed it before Black audiences in city armories throughout the South. Everyone in the South knew that "Vagrancy Laws" were used to force Black men to work for often oppressive plantation owners, a successor to the peonage laws, or risk being arrested for "vagrancy." (See *Bailey v. Alabama*.[17]) These laws

15. This section contains material originally printed in *The Washington Post* and *The William & Mary Law Review*, with some differences in editing. *See* Walter Dellinger, *Reading James Baldwin on a Segregated Southern Construction Site*, WASH. POST (Feb. 24, 2017, 7:17 AM), https://www.washingtonpost.com/posteverything/wp/2017/02/24/reading-james-baldwin-on-a-segregated-southern-construction-site/ [https://perma.cc/3NTS-Z62H (dark archive)]; Walter E. Dellinger III, *1787: The Constitution and "The Curse of Heaven*," 29 WM. & MARY L. REV. 145 (1987) [hereinafter Dellinger, *The Curse of Heaven*].

16. CHUCK BERRY, *Brown Eyed Handsome Man*, *on* AFTER SCHOOL SESSION (Chess Recs. 1956).

17. 219 U.S. 219 (1911); *see infra* notes 43–45 and accompanying text.

were always and only enforced against Black men. So, there was no doubting the race of the man who had been "arrested on charges of unemployment." And what about the woman who ordered the District Attorney to "free that [handsome] brown-eyed man." She was "the judge's wife" and she in the South of the '50s was exclusively a white woman. And not just any white woman, but that paragon of the Southern town: the *judge's* wife.

The song is way ahead of the Black Power movement in its celebration of the beauty and attractiveness of black and brown. The boldness of the tension between "the judge's wife" and the brown-eyed handsome man is stark. Berry wrote and recorded the song in a Chicago studio on April 16, 1956, a time when Chicago would still have been consumed with the funeral a few months earlier of Chicago's 14-year-old Emmett Till. While visiting his grandmother in Mississippi, Till had been lynched and mutilated for the offense of allegedly "flirting" with a white woman.[18] The photograph of his open casket was published in the *Chicago Defender* newspaper as well as *Jet* magazine. What guts it took for Berry to record that song and sing it in the South, knowing what could happen to a Black man who was even suspected of questioning the prohibition on interracial sex.

Did I or anyone else who listened repeatedly to that stirring song during my sophomore year in high school catch on some level the references to interracial sexual attraction? I can't say. But I do believe that rock & roll—Black rock & roll—had some effect. It was on WGIV that "Colored Dances" were advertised. All the great Rock & Roll artists had no better venue for most of the '50s when they went on the road than these Saturday night events at the local armories.

Every radio ad for a "Colored Dance" ended with this: "Balcony Reserved for White Spectators, one dollar." Only a handful of whites attended, sitting scattered about the largely empty balcony that ringed the dance floor on three sides. It was midnight before the stars—folks like Ray Charles and Laverne Baker—took the stage.

There was one strange and ultimately revealing aspect of that balcony that was reserved for white spectators: the repeated and strictly enforced admonition, *"There will be no dancing in the aisles by the white spectators."*

Since the balcony was largely empty, the music throbbing, and the sight of the attendees bobbing, weaving, and jumping on the packed armory floor compelling, it was impossible for me to refrain from dancing in the aisles of the balcony. Invariably, not long after I had begun dancing next to my seat, at least two (white, of course) police officers would be coming after me, wielding nightsticks and threatening immediate expulsion from the show or worse.

18. *See The Case of Emmett Louis Till*, EMMETT TILL PROJECT, https://www.emmetttillproject.com/home2 [https://perma.cc/436Y-QG4K].

It was decades later before I figured out why the prohibition on dancing by whites in the balcony was so important to the powers that be. It must be this: if the "colored" attendees dancing on the floor and the white attendees dancing in the balcony were dancing to the same music at the same time, that would mean we were engaged in a common, racially integrated activity. But as long as we whites were merely "spectators" witnessing a Black event, the code of Jim Crow was preserved.

Such was the complexity of the racial code of my youth.

In the summer of 1960, I worked on a construction crew at a segregated work site in Charlotte. White men were the carpenters; Black men were the laborers. (As a summer kid heading for college, I was the exception—a white laborer.) The laborers were paid $1 an hour, working 10 hours a day, six days a week.

By far the best carpenter on the site was a Black man named David. Under company rules, he could be classified only as a laborer. But when the project—an eight-story law building, which was very tall for that time in Charlotte—offered a difficult carpentry challenge, the on-site boss would ask David to take over. (Of course, even when doing skilled carpentry work, David was still paid only the laborer's dollar an hour.) While David worked his magic, someone had to be on the lookout, watching to see if anyone from the construction firm headquarters was driving up. If we sounded the alarm, David would quickly put down the carpentry tools and pick up a broom or shovel before being seen breaking the racial code.

We had an unpaid 30-minute lunchtime each day. We'd sit on boxes of construction material and eat sandwiches, the Black and white workers across from one another but having a single conversation. On a few occasions there was a spirited contest to see who could lift the most cement bags, with a white champion facing off against a Black champion. I sat apart from all this; I enjoyed listening to the banter, but I was always reading a book, under the guidance of a librarian at the local public library. Here, finally, I encountered Baldwin's *Notes of a Native Son*[19] and the essays that would become part of *Nobody Knows My Name*.[20]

Before reading Baldwin's essays and novels, I saw race as a series of discrete issues—schools, employment, and so forth. I knew, for example, how wrong it was to force the Black men into laboring roles. But Baldwin expressed the systemic aspect of racial subjugation in a way I had not yet seen. He observed that much of our nation's energy had been spent avoiding race, but an honest examination would show us how far we had fallen from the standard of

19. JAMES BALDWIN, NOTES OF A NATIVE SON (1955).

20. JAMES BALDWIN, NOBODY KNOWS MY NAME: MORE NOTES OF A NATIVE SON (1961).

human freedom we professed.[21] "The recovery of this standard demands of everyone who loves this country a hard look at himself, for the greatest achievements must begin somewhere, and they always begin with the person."[22] If we are incapable of such an examination, he concluded more than half a century ago, "we may yet become one of the most distinguished and monumental failures in the history of nations."[23]

III. SLAVERY AND THE CONSTITUTION[24]

On July 5, 1787, the Philadelphia Convention, having recessed for two days in honor of Independence Day, resumed its deliberations, then nearly at deadlock over the allocation of power between large states and small. As the Convention threatened to break apart, Gouverneur Morris of Pennsylvania gave voice to the hopes and fears of the delegates. "He came here," Madison recounts Morris as saying, "as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention."[25]

Of course, Morris and his colleagues could not in any meaningful sense "represent the whole human race." It is certainly possible, however, that the whole human race was to be affected by the Convention's proceedings.

To review the work of the Convention of 1787, as reflected in James Madison's extensive daily notes, beginning with the first day, May 25, and continuing day by day, draft by draft, through the Philadelphia summer until the Convention, its work completed, finally rose on September 17, to enter, as I did with my students, into another time and place, and to gain a sense—clouded, obscure, partial to be sure—of an extraordinary event in human history. One sees, in the records of this Grand Federal Convention, political debate of a quality that leaves one embarrassed by the comparative poverty of the public discourse of our own generation.

The Convention was the work of men who in their own time were seen as unusually gifted. The French *charge d'affaires* wrote to his government as the meeting convened: "If all the delegates named for this Convention at Philadelphia are present, we will never have seen, *even in Europe*, an assembly more respectable for the talents, knowledge, disinterestedness, and patriotism of those who compose it."[26]

21. *See id.* at 114–16.

22. *Id.* at 116.

23. *Id.*

24. This section contains material originally printed in the *William & Mary Law Review*, with some differences in editing. *See* Dellinger, *The Curse of Heaven*, *supra* note 15.

25. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 529 (Max Farrand ed., 1911).

26. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15 (Max Farrand ed., 1911).

But then there was the question of slavery. It cannot be forgotten that the Constitution was a document conceived in original sin, and that the success of the Constitutional Convention rested in part on one literally unspeakable compromise of principle. Both slavery and race have had an enormous impact on the development of the American Constitution, and we cannot fully understand our present constitutional conflicts over the permissible use of race and related issues unless we understand the role of race in our constitutional origins and throughout our constitutional history.

The issue of slavery did not simply slip past an inattentive Convention. Although for much of the Convention the delegates dared not speak slavery's name as they dealt with those who were euphemistically referred to as "three fifths of all other Persons," the division over slavery burst upon the Convention in late summer when Gouverneur Morris of Pennsylvania delivered a thunderous attack on the what he called "the curse of heaven."[27] The slave states wanted those held in slavery to be counted fully (that is, "five-fifths") when determining how many seats in the national House of Representatives would be accorded to each state. Morris argued that because those states had no intention of providing the vote or any other rights to slaves, slave states should not be given more representatives simply because their population included slaves. As Morris passionately argued:

> The admission of slaves into the [formula for allocating] Representation [in the House of Representatives] when fairly explained comes to this: that the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & dam[n]s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind, than the Citizen of Pa or N. Jersey who views with a laudable horror, so nefarious a practice.[28]

The critical moment came on August 29. The Southern states at the Convention wanted to guarantee their freedom to import into slavery even more men and women from the coast of Africa.[29] The New England states wanted Congress free to enact, by simple majority, "navigation" legislation to provide protection to the New England shipbuilding and shipping industries—protective legislation that would be costly to the exporting South.[30] Perhaps, it was suggested, if sent to a committee, these subjects—slavery and navigation—might form the basis of a bargain.[31] And so they did.[32] The two-thirds

27. 2 Farrand, *supra* note 11, at 221.
28. *Id.* at 222.
29. *Id.*
30. *Id.* at 449–50.
31. *Id.* at 453.
32. *Id.*

requirement for navigation legislation was dropped,[33] Congress was prohibited from interfering with the importation of slaves before the year 1808,[34] and the slave trade clause was subsequently entrenched from the amendment process for the next 20 years.[35]

Before the business was finally done, however, one last provision was added: Article IV, Section 2, Clause 3, or what has become more commonly known as the Fugitive Slave Clause.[36] The significance of this provision cannot be overstated. Because of the addition of the Fugitive Slave Clause, the adoption of the Constitution meant that, for the first time, there would be a national union in which free states were under a constitutional mandate to seize fugitive men and women and return them to slavery.

Moreover, with the new Constitution, there would now be a national government empowered for the first time to suppress insurrections, and therefore capable of putting down slave revolts. In his August 8 "curse of heaven" speech, Gouverneur Morris asked rhetorically, "And What is the proposed compensation to the Northern States for a sacrifice of every principle of right, of every impulse of humanity. They are to bind themselves to march their militia for the defense of the S. States; for their defence agst those very slaves of whom they complain."[37] The year 1787 thus marks the first occasion of formal, constitutionally mandated national complicity in the maintenance of the institution of slavery.

What, in the end, then may be said about the Constitution and the cause of human freedom? Perhaps it is that, although unintentional, the adoption of a national Constitution, in fact, doomed the institution of slavery. A necessary precondition to the ending of slavery was the creation of a national government with sufficient power to conquer states in which slavery was entrenched—if ever the will to do so were to exist. And that national empowerment was the signal achievement of the Philadelphia Convention, even if, at that time, national power was seen more as a means of assisting the Southern states in putting down slave revolts rather than as a means of abolishing the institution.

From the vantage point of 1776, the Constitution that emerged from the 1787 convention was a truly extraordinary creation.[38] The coming together of the American colonies into a single nation was more difficult than we can now

33. *Id.*

34. *Id.* at 414–15.

35. *Id.* at 559.

36. U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

37. 2 Farrand, *supra* note 11, at 222.

38. Gordon Wood, *Democracy and the Constitution*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 1, 4 (Robert A. Goldwin & William A. Schambra eds., 1980).

easily imagine. None of the revolutionary leaders ever publicly contemplated erecting over all of America a truly national government with the power to operate directly on individuals.[39] Rather, they came as representatives of legislative assemblies nearly a century old that had been more trading rivals than partners and had fought the war as allies, not as a union.

Yet from this uneasy alliance of simple state governments, the framers forged a powerful new national government, continental in scope, with the authority not only to create its own armies, but to operate directly on individuals, to regulate commerce, and for the first time, to impose taxes directly on citizens. They created a Constitution that unmistakably made this powerful new national government supreme and said so in terms unmistakable and addressed directly to state court judges who would be on oath to support it: "This Constitution, and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[40]

Is it possible, then, that the Constitution, which at critical points not only acquiesced in but actively facilitated slavery through the Fugitive Slave Clause and intentionally gave slave states disproportionate structural power, contained in its larger philosophy of government the seeds of slavery's demise? After all, only an empowered national government could have undertaken the monumental project of ending the institution of slavery in the southern half of the country. Moreover, the creation of a government that rested on the fundamental premise of consent of the governed, and which had among its central values human dignity and individual liberty, made slavery a constitutionally variant institution even in 1787. The 1787 Constitution then, though unforeseen by the Framers, created a conception of republican government with which slavery was inherently incompatible.

It would be seven decades, however, before a failed politician from Illinois would exploit this fundamental dichotomy of a Constitution at war with itself and undertake a heroic effort to bring the nation closer to the founding ideals of the Declaration of Independence. And it was close to a hundred years after that before the Supreme Court exhibited the courage to take up that mantle.

IV. BROWN AND THE FAILURE OF CONSTITUTIONAL FORMALISM

The unanimous decision in *Brown v. Board of Education* is rightly celebrated as one of the Supreme Court's finest hours. By rejecting the logic of "separate but equal," the Court reshaped not only the fabric of American society but also the Court's view of its own role. In a society that relentlessly insisted

39. *Id.*

40. U.S. CONST. art. VI, cl. 2.

on denying the essential humanity of its Black citizens, the Supreme Court was the last, best, hope for vindication of minority rights.

What is perhaps most interesting about *Brown*, though, is what it declined to say. Why—in an opinion that should showcase the Court at its finest on the evils of government-sponsored racism—is there so little discussion of racism, or the government's role in sponsoring it? The Court declines to place school segregation in any particular context; if anything, school segregation is treated as an aberration, rather than as a central feature of a complex caste system of racial apartheid. *Brown* is reticent, in other words, to acknowledge that much of the edifice of modern society was (and still is) grounded in racism. And the Court's inability to recognize that fact ultimately renders *Brown* something of a disappointment.

This particular failing is, in my view, actually part of a much larger pattern in the Court's opinions. For the better part of two centuries, the Court has demonstrated unusual reluctance about acknowledging the true meaning of race in American society. This almost willful blindness to the political and social context of race has contributed to ongoing confusion about our thinking on the critical issues of race we face today. And the inadequacies in the Court's ensuing equality jurisprudence are, in my eyes, the wages of a constitutional tradition of reticence about race.

One way to prove the point is to ask the following question: What would you know about race in America if you relied solely on what is found in the 500-plus volumes of the United States Reports? There are hundreds of opinions of the Supreme Court in which race plays a role, either overtly or covertly, directly or indirectly. If you were an anthropologist or historian, and your only primary sources were the opinions of the Supreme Court, what kind of history of race would you—*could* you—write? I assert that, with a few exceptions—Justice Harlan's dissent in *Plessy v. Ferguson*,[41] Justice Brennan's dissent in *McCleskey v. Kemp*,[42] for example—the view you would have of race in America is both somewhat strange and largely sanitized.

To see what I mean, consider *Bailey v. Alabama*,[43] a case from 1910 that contains one of the strangest opening sentences of any opinion of the Supreme Court. Justice Hughes begins the opinion for the Court with this sentence: "We at once dismiss from consideration the fact that the plaintiff in error is a Black man . . . . No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho."[44] In dissent, Justice Holmes begins with the same theme. His opening:

41. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).
42. 481 U.S. 279, 320 (1987) (Brennan, J., dissenting).
43. 219 U.S. 219 (1911).
44. *Id.* at 231.

"We all agree that this case is to be considered and decided in the same way as if it arose in Idaho or New York . . . . [T]he fact that in Alabama [the challenged law] mainly concerns the Blacks does not matter."[45]

Bailey v. Alabama concerned Alabama's system of peonage and convict labor, created by an interlocking set of state statutes.[46] At the time, Alabama's criminal vagrancy law—following in "apostolic succession" from slavery and the Black Codes, as Charles Black once put it[47]—allowed the incarceration of anyone who did not enter into a labor contract at the beginning of the harvest season.[48] And labor contracts were specially enforced: no matter how abusive the employer's treatment, if you left or fled the appointment before the end of the year-long contract, you could be charged with criminal fraud. In particular, state law created a presumption that one who failed to complete a labor contract was presumed to have (criminally) fraudulent intent at the time the contract was made. And another provision of state law precluded the accused from testifying to his intentions at the time he entered the contract. Upon conviction, you were leased out to private parties as convict labor. So essentially, as *Bailey* saw it, this arrangement of statutes made quitting a job *prima facie* a crime.

The majority did the right thing and invalidated Bailey's criminal conviction.[49] But the Court's upfront dismissal of race and racial history meant that it had to make this a case about something other than race. That made it all but impossible to write a coherent opinion setting aside the state's choice about how to structure a provision of its substantive criminal law, something that would otherwise be presumptively constitutional. In dissent, Justice Holmes (who meant what he said about ignoring the relevance of race) noted that state law created only a rebuttable presumption—to convict, a jury must conclude that the presumption was not rebutted and that there was indeed fraudulent criminal intent at the time the contract was formed.[50] To find a constitutional problem, Justice Holmes concluded, one must first adopt a tacit assumption that the law would be administered unfairly in Alabama. And he was not willing to say that it would.[51]

The problem, of course, is that everyone knows it would. As the Court was aware, in 1910 there was a Jim Crow system of justice in the South. There were

45. *Id.* at 245–46 (Holmes, J., dissenting).

46. *Id.* at 246–47 (Holmes, J., dissenting); *see also* Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1163–64 (1984) (arguing that the Jim Crow labor regime was created by "enticement laws and contract-enforcement laws," "vagrancy laws," "emigrant-agent laws," and the "convict-lease system").

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

48. *See* Roback, *supra* note 46, at 1168 ("Vagrancy statutes essentially made it a crime to be unemployed or out of the labor force.").

49. *Bailey*, 219 U.S. at 245.

50. *Id.* at 248 (Holmes, J., dissenting).

51. *Id.*

no Black prosecutors, there were no Black bailiffs, there were no Black jurors, there were no Black judges. This was an entirely all-white system. And to dismiss that context, and to assume the fairness of it, is to sanitize the history of race. The Court's struggle with that obvious truth was evident from the opening sentence of its opinion. An anthropologist would surely know, after reading that awkward first sentence, that something was up, that some hugely important subterranean factor was being submerged. The Court doth protest too much.

A similar reluctance to confront the realities of racial oppression and subjugation also appears in *Brown*. The opinion itself is instructive. It is, at times, almost curiously formalist. The South's embrace of racial segregation is cast as an error of logic, not of ethics: Can the concept of "separation" be reconciled with the concept of "equality"? No, because the two concepts are "inherently" incompatible (a conclusion in other words, that can be reached without considering any facts on the ground). *Quod erat demonstrandum*.

The Court's retreat into formalism wasn't for want of a better argument. There was, of course, the route taken by Justice Harlan in his famed dissent in *Plessy v. Ferguson*. Segregation was unconstitutional, Justice Harlan argued, for the straightforward reason that it discriminated against Black citizens and privileged white citizens.[52] And the formalist response that segregation was nondiscriminatory—because it prescribed a rule that applied to white and Black citizens alike—was laughable, a "thin disguise."[53] "Every one knows" (the opinion's most powerful phrase) that the purpose of segregation was to exclude Black citizens from white spaces, not to exclude white citizens from Black spaces.[54]

But this kind of discussion—about dominance and subordination, about the complexity of a caste system—was assiduously avoided in *Brown*. That was no accident. Chief Justice Warren's own internal memoranda to the Court that accompanied his draft opinion in *Brown* said that it had been prepared "on the theory that the opinion should be short, readable by the lay public," and, crucially, "non-rhetorical, unemotional, and above all, non-accusatory."[55] This choice, to avoid accusing the South of racism, is understandable. After all, Chief Justice Warren's work in *Brown* was one of the heroic achievements of our last half century, and this choice reflects his extraordinary political sense about what was doable and what was not. But the choice of approach—that the opinion should not be accusatory—created a problem. After all, one can't explain, without doing at least some accusing, how the South's system of racial apartheid was the foundation for a complex caste system whose salient characteristics were

52. Plessy v. Ferguson, 163 U.S. 537, 556–57 (1896) (Harlan, J., dissenting).
53. *Id.* at 562.
54. *Id.* at 557.
55. Chief Justice Warren, Memorandum to Members of the Court (May 7, 1954).

domination by one race and subordination of the other. Accordingly, the Court landed on a much more formal rationale for the unconstitutionality of segregation—not that it subordinated Black citizens in reality, but because it was irreconcilable with equality in the abstract.

This choice has proven consequential. By assessing the legality of segregation stripped from its actual social and historical context, the Court's opinion flattened the legal landscape and offered a less-than-fully-adequate basis for considering later issues. As a result, in subsequent cases involving the use of race or gender in governmental decision-making such as in affirmative action, the Court has treated the issue as if it was the same thing the Court was examining in *Brown*.

The Court's first encounter with race-based affirmative action was *Regents of the University of California v. Bakke*,[56] which considered the constitutionality of racial quotas for admission to the medical school of the University of California at Davis.[57] A plurality of four liberal Justices argued that race classifications were not all equally invidious—that a commitment to color blindness should not become "myopia" in light of the "reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."[58] But the controlling opinion, authored by Justice Powell, read *Brown* differently. In his view, *Brown* condemned all racial classifications without relying on "political and social judgments" to distinguish some from others.[59]

Of course, there is warrant for healthy skepticism about the precise role that social facts should play in the constitutional analysis. But it would be a mistake to banish them completely. As Justice Marshall's *Bakke* opinion wearily notes, "the racism of our society has been so pervasive that [no Black citizen], regardless of wealth or position, has managed to escape its impact"[60]—at "every point from birth to death."[61] This puts the lie to a fundamental premise of the *Bakke* decision: that Allan Bakke was denied admission "solely because of his race."[62] That implies, of course, that if Bakke were Black, he would have been admitted. Perhaps—if Bakke had woken up the morning of his application and found himself transformed into a Black man. But if Bakke was *born* Black, the answer is not so clear. In 1940, Bakke would have been born into a family with far less income (40% less, on average), with a fourfold increase in the probability

56. 438 U.S. 265 (1978).
57. *Id.* at 267.
58. *Id.* at 327 (Brennan, J., concurring).
59. *Id.* at 299 (majority opinion).
60. *Id.* at 400 (Marshall, J., concurring).
61. *Id.* at 396.
62. *Id.* at 305 (majority opinion).

that he would grow up in poverty.[63] The schools reserved for Black students in the segregated Florida community of his childhood were markedly inferior to their white counterparts—suffering from deteriorating facilities, dated textbooks, and underfunded teachers and staff. If he had managed to overcome those handicaps and voiced an aspiration to be a doctor, he would have been told to pick a different career; at the time, Black students were barred from attending most of the nation's medical schools (including, of course, his state university's medical school). Small wonder, as Justice Marshall observes, that only 2% of the nation's doctors at the time were Black.[64]

If we consider these kinds of social facts, then it becomes impossible to justify treating race-based affirmative action as nothing more than a variation on Jim Crow-era segregation. The purpose and effect of segregation was to oppress Black citizens and exclude them from society's institutions. Affirmative action has precisely opposite purposes and effects—by furthering diversity and addressing particularized needs that involve race, it allows society's institutions to advance goals that everyone thinks are laudable. By considering race, a police department can reduce racial tensions by ensuring that a minority community isn't policed by an all-white force. A newspaper can ensure better coverage by taking into account race or ethnic background when assigning reporters to cover a metropolitan area. And a university can enhance the learning experience by securing a diverse student body with more perspectives and viewpoints. These uses of race look and feel profoundly different from Jim Crow-era segregation. The equation of the former with the latter amounts to the profoundest of category mistakes.[65]

Subsequent decisions of the Court have only further curtailed the permissible consideration of race in governmental decision-making. In 2003, the Court explicitly adverted to the need for a termination point: "We expect that 25 years from now, the use of racial preferences will no longer be necessary . . . ."[66] And when the Court next takes up affirmative action in the

63. *See id.* at 395 (Marshall, J., concurring) (stating "[t]he median income of the [Black] family is only 60% that of the median of a white family").

64. *Id.* at 396.

65. Which is not to say that just because issues of affirmative action are fundamentally different from segregation, they are easy. They are not. Any use of race is potentially problematic, and consideration of race should always be done with caution and thoughtfulness. One must be careful, for example, not to justify diversity on the ground of "essentialism"—in other words, on the (invidious) assumption that members of a particular race or ethnicity have a characteristic viewpoint. Diversity matters, of course, but for reasons that have nothing to do with essentialism: it is common sense that race and ethnicity inform a person's life experiences and perspectives and, thus, a more racially diverse population will likely be more diverse in perspectives as well. But the dangers of essentialism—of basing governmental decision-making on (what are almost certainly prejudiced) assumptions about the members of a given race or ethnicity—means, of course, that judges and lawmakers should be vigilant that the use of race doesn't shade into something more invidious.

66. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

current challenge to the admissions policies of Harvard and the University of North Carolina there is good chance that it will be abolished.[67]

This, too, is part of *Brown*'s legacy. The Court's reticence about race in *Brown* (although a necessary compromise, yes), required the Court to construct a rationale for the unconstitutionality of racial classification that did not turn on social realities about race. The post-*Brown* case law has largely adopted *Brown*'s formalist tendencies, and the ensuing jurisprudence of race has, without question, been impoverished by its inability to incorporate social realities into the analysis.[68]

V. EPILOGUE[69]

The day after the Supreme Court handed down its decisions in *Parents Involved v. Seattle School District No. 1*,[70] I woke up at 4:00 restless and appalled that Chief Justice John Roberts and his colleagues could really think that the efforts of the people in Jefferson County, Kentucky, and Seattle, Washington, to have white and Black students educated together is anything remotely like the system of racial apartheid, subjugation, and servitude practiced in the American South. His concluding sentence, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," equates two such fundamentally different practices that it left me stunned.[71]

Writing for *Slate*,[72] I tried to convey a sense of how profoundly misguided and ahistorical that conflation was by addressing the strongest argument for the position of the Court's majority. The most rhetorically powerful argument against the two school-district plans in those cases was the fact that they would require some parents to say to a child, "You can't go to that school because of your race," just as Black parents had to say to their children in the South before *Brown*.

67. This had not occurred at the time of Dellinger's writing, but the Court addressed affirmative action in *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, 600 U.S. 181 (2023). Walter's premonition proved true. *See id.* at 231.

68. That blindness disabled the Court, for example, from recognizing that application of the death penalty is infected with racial bias. The Court is "pretend[ing]," as Justice Brennan noted in his dissent in *McCleskey v. Kemp*, that we have "free[d] ourselves from the burden of [our] history." 481 U.S. 279, 344 (1987) (Brennan, J., dissenting). And that blindness disabled the Court from recognizing that suspicionless stops have long been a tool of racial oppression—"it is no secret," Justice Sotomayor notes in her dissent in *Utah v. Strieff*, "that people of color are disproportionate victims of this type of scrutiny." 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting).

69. This section contains material originally printed in *Slate*, with some differences in editing. *See* Walter Dellinger, *Everything Conservatives Should Abhor*, SLATE (June 29, 2007, 11:17 AM), https://slate.com/news-and-politics/2007/06/a-supreme-court-conversation-everything-conservatives-should-abhor.html [https://perma.cc/NA4T-U2A2] [hereinafter Dellinger, *Everything Conservatives Should Abhor*].

70. 551 U.S. 701 (2007).

71. *Id.* at 748.

72. Dellinger, *Everything Conservatives Should Abhor*, *supra* note 69.

Think first about being a Black parent explaining race to a child in North Carolina in 1963. That year, Governor Terry Sanford went on statewide television to urge an end to segregation in public accommodations and read a letter from a Black soldier stationed at Fort Bragg describing what it was like to drive his children from eastern North Carolina to visit their grandparents in Texas. It was a harrowing experience, he wrote.[73]

Planning that trip was like a military operation; every supply that might be needed had to be packed and stuffed in the car for a trip of more than 1,000 miles. When they were hungry, they could not buy food. When they were tired, they knew they would be turned away from the motel. They traveled in fear that a child would become sick on the trip. Day after day they would drive by tourist sites and amusement parks that they could not enter; gas stations at which the children were barred from the restroom. How do you explain to a child why she can't go to the swimming pool, play in the park, or go to the movie? At home or on the road, this was an experience a child of color had repeatedly every day. *Every day*. And the reason: the child was considered an inferior being whose very presence in a place would be repulsive to the community.

Is that what happens under the Louisville or Seattle plans? What some parents will sometimes have to say to their children under these plans is something like this: "You will be going to P.S. 111 instead of P.S. 109 this year, and here's why: Our community is trying to make sure that we get over the racial separation that has been such a troubled part of our history. So, we want to make sure we have a pretty good number of white and Black children in all of our schools. It's important, even though it sometimes means you don't get your first choice of a school assignment this year."

Why is it so critical that we "get beyond race" in every possible way? Get beyond despising or disliking people because of their race, yes. Get beyond oppressing people because of their race, yes. But avoiding any consideration of race as though it were toxic? I don't understand that.

The Court's decision is everything conservatives should abhor. It is a form of social engineering dictated from Washington. It ignores the principle of local control of schools. It sets aside the judgment of elected officials, even though nothing in the text of the Constitution requires that result, and the original understanding at the time of drafting of the 14th Amendment is solidly against it. It equates the well-intentioned and inclusive programs supported by both white and Black people in Louisville and Seattle with the whole grotesquerie of

73. *Id.*

racially oppressive practices which came down in apostolic succession from slavery and the Black Codes.[74]

The plurality opinion was elegantly reasoned and read as if it could have been written by a law review president. But it failed the very first lesson taught to preschoolers who watch *Sesame Street*: "Which of These Things Is Not Like the Others?"

When I bemoan the current state of America, my younger friends say to me, "But weren't things so much worse for justice in every way in the '50s and early '60s when you were our age." Yes, of course. Much worse for women, gay people, minorities. But one thing was different. In America in the King years, we believed unquestioningly in the idea of progress. We were convinced it was only a matter of time before America lived up to its most fundamental ideals. Seventy years after *Brown*, however, it is much harder to maintain that uplifting confidence.

74. *Id.* (quoting Charles L. Black, Jr., *The Lawfulness of Segregation Decisions*, 69 YALE L.J. 421, 424 (1960)).