

## BOOKS &amp; THE ARTS

Why *Brown* Still Matters

DAVID J. GARROW

**SIMPLE JUSTICE: The History of *Brown v. Board of Education* and Black America's Struggle for Equality.**By Richard Kluger.  
Knopf. 865 pp. \$45.**MAKING CIVIL RIGHTS LAW: Thurgood Marshall and the Supreme Court, 1936-1961.**By Mark Tushnet.  
Oxford. 399 pp. Paper \$30.

Fifty years ago, African-Americans and fellow progressives hailed *Brown v. Board of Education* as a conclusive turning point in the struggle for racial equality. NAACP chief counsel Thurgood Marshall predicted the end of all school segregation within five years, and the NAACP adopted the slogan "free by '63." White supremacists unsurprisingly denounced the decision, but prominent academics and jurists also criticized *Brown* for rejecting history, endorsing social psychology and espousing judicial supremacy.

Fifty years after *Brown*, the battle lines are reversed. Prominent African-American figures now criticize *Brown* as a "failure," and liberal legal scholars claim the ruling contributed little or nothing to the black freedom struggle of the 1950s and '60s. Conservative commentators and judges, for their part, now avidly praise *Brown*, celebrating it as a landmark victory that paved the way to a "colorblind" America.

This paradoxical turnabout is not a singular phenomenon. Consider, for example, how each January the Martin Luther King Jr. federal holiday now elicits a largely hohum response from proponents of racial justice. In contrast, right-wing politicians like President George W. Bush consistently use the anniversary for wreath-laying photo-ops designed to advertise their anti-racist credentials.

*David J. Garrow is the author of Bearing the Cross (Morrow), a Pulitzer Prize-winning biography of Martin Luther King Jr., and Liberty and Sexuality (California), a history of America's reproductive rights struggle.*

Should conservatives be blamed for trying to appropriate the *Brown* decision and the King holiday as deceptive window-dressing for their own present-day political goals? Or should liberals instead ask whether onetime supporters of *Brown* and of King have so loosened their own embrace of two of the freedom struggle's greatest legacies as to make them easily available for uncontested capture by their opponents?

Failure to extol the democratic socialist King, who harshly decried America's military adventurism abroad, leaves him vulnerable to the sort of selective quotation ("not be judged by the color of their skin but by the content of their character") that allows conservatives to kidnap his birthday. Fortunately with King, there are excellent

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new books, such as Drew Hansen's *The Dream* and Stewart Burns's *To the Mountaintop*, as well as earlier biographies, that utterly rebut this historical hijacking.

*Brown* has not been as fortunate. Most of the long shelfload of books published on the occasion of the decision's fiftieth anniversary focus on the narrowest aspect of *Brown's* legacy—school desegregation—and overlook the broader and more far-reaching way in which *Brown* revolutionized the role of courts in American life. Some of these books offer fashionable dismissals of *Brown*, which, like the belittling of King by radicals, can have tangibly harmful consequences in the wider political culture. For if *Brown* was a "failure," then aggressive judicial protection of civil rights and liberties in other contexts is likewise more open to disparagement and attack.

The books that examine *Brown's* racial legacy range from *All Deliberate Speed*, a hybrid of historical criticism and memoir

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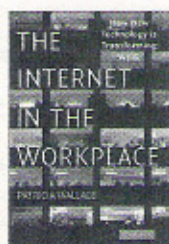
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by Harvard law professor Charles Ogletree, to Charles Clotfelter's *After Brown: The Rise and Retreat of School Desegregation*, a richly instructive "arithmetical history" of how educational integration waxed and then waned in the years after *Brown*. Supreme Court history aficionados will enjoy *With All Deliberate Speed* (edited by Norman Silber); while its subtitle, *The Life of Philip Elman: An Oral History Memoir*, may sound obscure, it provides a fascinating insider's look at the Supreme Court during the 1940s and '50s.

Derrick Bell's *Silent Covenants* is the most disconsolate new volume, revisiting criticisms of civil rights litigation that Bell—an NAACP Legal Defense Fund attorney in the 1960s, now a law professor at New York University—has been articulating for more than two decades. Bell believes that he and other lawyers failed to realize that "racism is permanent in this country," and that excessive faith in integrationist ideals has actually harmed black students' education. A far more optimistic prescription for America's racial future is offered by Sheryll Cashin, a Georgetown University law professor who clerked for Thurgood Marshall during his final year on the Supreme Court, in *The Failures of Integration: How Race and Class Are Undermining the American Dream*. Cashin's title captures the current media consensus that *Brown's* legacy for America's public schools has been one of failure rather than success. But unlike Bell, Cashin lays out an integrationist vision fully in keeping with Marshall's own 1954 confidence. She may be outnumbered by those who see *Brown* as a misguided venture that actually disserved African-Americans, but progressives should think twice before accepting such a negative conclusion about a decision so long and so popularly associated with judicial advancement of civil rights.

None of these new books offer a comprehensive history of *Brown* itself. For that, one must turn to Richard Kluger's *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*, first published in 1976, or to Mark Tushnet's very different but valuable *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961*, published in 1994. Kluger's exhaustively documented chronicle remains the richest book yet written about *Brown* and one of the finest works of history ever to appear. The Pulitzer Prize board's failure to honor it is, in retrospect, a glaring embarrassment (Kluger did re-

ceive a 1997 Pulitzer for *Ashes to Ashes*, a magisterial history of the public health battle over cigarettes). Publication of a new edition of *Simple Justice* this spring offers a renewed opportunity to absorb one of the essential stories of American history.

Kluger's beautifully written volume begins with a memorable account of *Brown's* origins in Clarendon County, South Carolina. *Brown*, the singular name for the Supreme Court ruling, actually encompassed four initially separate cases—from South Carolina, Virginia, Delaware and Kansas, the last of which furnished the "Brown" moniker. A fifth case, from the District of Columbia, *Bolling v. Sharpe*, was simultaneously decided in an individual opinion.

*Simple Justice* moves back and forth among the grassroots origins and lower-court litigation of all five cases. The South Carolina lawsuit is a riveting story because of the white repression and retaliation the African-American plaintiffs suffered. Kluger's elegant narration supplies copious detail about each case, but the most historically significant moment in the lower-court trials took place in *Brown* itself on June 25, 1951, during the testimony of Louisa Pinkham Holt, a psychology professor at the University of Kansas.

Addressing segregation's impact on black schoolchildren, Professor Holt testified that "the fact that it is enforced, that it is legal, I think, has more importance than the mere fact of segregation by itself does because this gives legal and official sanction to a policy which is inevitably interpreted both by white people and by Negroes as denoting the inferiority of the Negro." The resulting "sense of inferiority must always affect one's motivation for learning," she added, "since it affects the feeling one has of one's self as a person."

Five weeks later the court ruled against the black plaintiffs. But Judge Walter Huxman's opinion included a finding of fact that recapitulated Louisa Holt's testimony: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn." As *Brown* moved forward to the Supreme Court, Huxman's echoing of Holt would tellingly reverberate.

Kluger's powerfully rendered accounts of such preliminary events convey a sense

of high drama and uncertainty about the cases' eventual outcome. *Making Civil Rights Law* tells a different story. In Tushnet's view, only modest drama marked the Supreme Court's handling of *Brown*. When the High Court first heard the five cases in late 1952, the nine Justices already knew they were going to overrule *Plessy v. Ferguson*, the infamous 1896 "separate but equal" ruling that had enshrined racial segregation in American law. Kluger, in contrast, portrays the NAACP attorneys as advancing a precarious challenge to *Plessy* whose final resolution was unforeseeable.

The crucial turning point, in Kluger's view, occurred on September 8, 1953, when Chief Justice Fred Vinson died suddenly of a heart attack. Vinson's demise, Justice Felix Frankfurter told his close friend Philip Elman, represented "the first indication I have ever had that there is a God." Earl Warren, the Republican governor of California, was named as Vinson's successor, an appointment *Simple Justice* heralds as the "Arrival of the Superchief."

Judicial serendipity thus seems crucial to *Brown's* outcome. As the Court moves forward toward its May 17, 1954, decision of *Brown*, Kluger's focus on the nine Justices, and especially on Earl Warren, intensifies. *Simple Justice* presents *Brown* as the fortuitous achievement of the right man who was in the right place at the right time. Indeed, in Kluger's account, the Justices are the decisive actors, while in Tushnet's account the plaintiffs' attorneys, particularly Marshall, are crucial. As Tushnet puts it, "It was precisely the brilliance of Marshall's strategy that he forced the justices to a choice" concerning *Plessy*, "believing—correctly, as it turned out—that once he forced them to choose, they could make only one decision." The suggestion that there was "only one" possible outcome in *Brown* is utterly foreign to the historical tension that *Simple Justice* so persuasively portrays. For Kluger, not only was *Brown's* outcome in doubt until after Warren's arrival as Chief Justice but uncertainty continued right up to the very drafting of the decision, as Warren worked to persuade all of his colleagues to join in one unanimous opinion. For Tushnet, *Brown's* outcome was never in doubt; only the Justices' modest differences "over how to justify the result" they knew they were going to reach were really at issue.

In Tushnet's view, the crucial issue that preoccupied the Justices from late 1952 to



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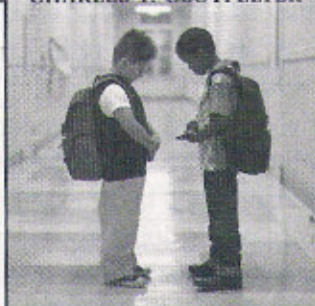
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1954 was not *Brown's* constitutional merits but how a decision overturning *Plessy* could avoid imminent enforcement of school desegregation in the South. That primary concern led the Justices to order yet another round of rearguments, rather than issue an immediate remedial mandate, when *Brown* "I" was handed down. Twelve months later, in *Brown* "II," the Justices sent all five cases back to the lower courts in a brief opinion that did not mention "segregation," "desegregation" or "integration." *Brown* II reiterated that "racial discrimination in public education is unconstitutional," but it instructed the lower courts only "to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."

"All deliberate speed" has become a deservedly notorious phrase, but criticism of that phrase diverts attention from the *Brown* Court's far more fundamental failure to articulate, or even think through, what the future of nondiscriminatory public education in previously segregated schools should entail. The Supreme Court's silence on that crucial point was a fatal error, for when the Clarendon County case returned to South Carolina, Circuit Judge John Parker shrewdly filled the gaping hole. Under *Brown*, Parker said, "a state may not deny to any person on account of race the right to attend any school that it maintains." However, so long as schools are "open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools." Pursuant to *Brown*, Parker explained, the Constitution "does not require integration. It merely forbids discrimination" and "forbids the use of governmental power to enforce segregation."

Tushnet notes that the lower federal courts "universally adopted" Parker's formulation, and his distinctions, in Kluger's words, "set a standard for evasiveness" for school districts across the South. Thanks to the Supreme Court's blindness, and Parker's assertiveness, "after *Brown*, the ultimate issue of principle was the meaning of *Brown* itself," as Tushnet aptly puts it. Whether or not the Constitution required "some substantial degree of integration" on the part of previously segregated school districts was a question that the *Brown* Court had failed to answer or even consider.

The *Brown* Court's fundamental failure to articulate an affirmative standard for public education's postsegregationist future was as momentous a judicial mistake as any that the post-New Deal Court has ever made. It opened the door to Judge

Parker's wily artifice, and the Court's post-1955 evasion of most, though not all, of the ensuing decade's most pressing desegregation cases allowed the Parker formulation to hold sway largely unchallenged for more than ten years.

Only in 1968, thirteen years after *Brown* II, did the Supreme Court finally return in a definitive fashion to the unanswered questions about Southern school desegregation it had forsaken in 1955. The Court's virtual abandonment of *Brown's* meaning during those intervening years allowed the white South to evade any implementation of meaningful change for well over a decade. Indeed, it was only after Circuit Judge John Minor Wisdom of Louisiana declared that Parker's formulation was "inconsistent" with *Brown* II's unspoken mandate that districts "provide an integrated school system" that the Supreme Court embraced Wisdom's response to the crucial question that *Brown* had failed to address clearly.

Over the past decade it has become fashionable in some academic circles to assert that *Brown v. Board of Education* was a decision of little moment, that the Southern black freedom struggle of the 1954-68 era would have developed in much the way that it did irrespective of whether *Brown* or any similar ruling was ever handed down by the Supreme Court. Michael Klarman, a law professor at the University of Virginia, first propounded that argument in 1994, and this year he elaborates at some length a slightly muted restatement of it in *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*.

Klarman is not alone in asserting that *Brown* mobilized white segregationists to oppose African-American efforts for equality with radically increased vigor. But many recountings of mid-1950s history wrongly see white "massive resistance" as a direct response to *Brown*. Instead, as the best civil rights histories richly detail—see, for example, J. Mills Thornton's *Dividing Lines*—*Brown* inspired African-American activists across the South to redouble their efforts. Only as black Southerners petitioned for school integration, boycotted segregated municipal buses and attempted to desegregate all-white public universities did hard-core segregationists rise up in hysterical fury.

Academic efforts to minimize *Brown's* importance to the Southern black freedom struggle are not new—Gerald Rosenberg's 1991 book *The Hollow Hope: Can Courts Bring About Social Change?* is a case in point—but such historical arguments in-

creasingly go hand in hand with political claims that progressive social-change movements should not look to constitutional lawsuits like *Brown* (or *Roe v. Wade*) to advance their agendas. For many Americans, *Brown* represents the social truth that courts can right fundamental wrongs just as much as it represents a landmark moment in the struggle for racial justice. Even as recently as 1987, when Judge Robert Bork's nomination to the Supreme Court was overwhelmingly rejected by the Senate, criticisms and dismissals of the Warren Court's legacy of constitutional change were voiced only by conservative Republicans, and *The New Republic*, not progressives.

The new left-liberal hostility toward judicial power was exemplified by Mark Tushnet's *Taking the Constitution Away From the Courts*, published in 1999. Tushnet advocated that rather than invest in constitutional litigation, progressives "ought to participate in creating constitutional law through our actions in politics." Tushnet's call unfortunately echoed the longtime editorial rhetoric of *The New Republic*, whose disdain for judicial protection of constitutional liberties culminated in the bizarre assertion that women's access to legal abortion was "a right that should be protected by politics," not the judiciary.

When prominent progressive scholars such as Tushnet join with *The New Republic* in calling for constitutional self-abnegation on the part of the federal judiciary, they embrace the legacies of Felix Frankfurter, Learned Hand and Robert Bork, not those of Earl Warren, William Brennan and Thurgood Marshall. To the extent that this position is animated by historically erroneous dismissals of *Brown*—and by similarly wrongheaded claims that the abortion rights movement would have fared better had the Supreme Court not handed down so strong a ruling as *Roe v. Wade* in 1973—forceful rebuttals of Klarman's historical distortions are imperative. As liberal law professor Erwin Chemerinsky has emphasized, "The erosion of faith in judicial review may cause courts to be less willing to enforce the Constitution."

The danger that an academic fad can have deleterious real-world consequences is starkly evident in Judge Richard Posner's off-the-bench observation in *The New Republic* that "the swelling chorus of 'judicial review' skeptics" has "undermined the complacent belief that judicial review is unequivocally a good thing." Perhaps



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progressives will be tempted to endorse Posner's conclusion, rather than Chemerinsky's warning, when they reflect upon the recent track record of the Rehnquist Court, but that temptation should be resisted and indeed rejected. Landmark decisions in the 1990s, such as *Planned Parenthood v. Casey*, *Romer v. Evans* and *US v. Virginia* (the VMI sex-discrimination case), all reflect how even a highly conservative Court sometimes can insure and advance individual rights. Indeed, anyone tempted to dismiss the political utility of progressive civil liberties litigation in today's federal courts should recall the Rehnquist Court's historic June 2003 vindication of gay Americans' basic personal liberties in its remarkable 6-to-3 ruling in *Lawrence v. Texas*.

*Brown's* legacy as our ultimate beacon of judicial protection of fundamental rights will resonate even more vibrantly this May 17. Last November the Massachusetts Supreme Judicial Court, building directly upon *Lawrence*, held in *Goodridge v. Department of Public Health* that the state Constitution does not allow for the insti-

tution of civil marriage to be discriminatorily restricted to opposite-sex couples. *Goodridge* is the climax of a state constitutional litigation strategy for gay marriage equality that reaches back to the early 1990s and bears more than a passing resemblance to the constitutional vision that animated Thurgood Marshall in the years before *Brown*.

When the Massachusetts court issued *Goodridge* on November 18, it delayed implementation of its order for 180 days. The past few months have witnessed sad, pathetic and ultimately unsuccessful efforts by Massachusetts Governor Mitt Romney to obstruct and postpone the court's ruling. The 180-day period expires on May 17, the day on which same-sex couples will first be eligible to obtain state marriage licenses. It is a fitting tribute to *Brown*, and to the courageous lawyers and Justices who demonstrated that constitutional litigation can indeed enhance human freedom, that *Brown's* fiftieth anniversary will be celebrated by the advent of another historic advance toward complete liberty and equality for all. ■

## No Success Like Failure

JON WIENER

**EUGENE MCCARTHY: The Rise and Fall of Postwar American Liberalism.**

By Dominic Sandbrook. Knopf. 397 pp. \$25.95.

Eugene McCarthy has always been a mysterious and frustrating figure. Nothing he did before 1968 hinted that he would become the liberals' antiwar leader and challenge an incumbent Democratic President; nothing he did after 1968 accomplished much of anything. Dominic Sandbrook skillfully conveys

the events and the experience as well as the arguments of that year. Although he is a Shropshire lad born in 1974, Sandbrook argues like my father, born in Duluth in 1921 and a good Minnesota Democrat: He insists we focus on how the story of 1968 ended. The split among Democrats led by McCarthy ended up with Nixon in the White House. Nixon kept the war going for another five years, during which 15,000 more Americans were killed, and—we might add—during which Americans killed something like a million more Vietnamese, Cambodians and Laotians.

If '68 ended badly, it began with "a triumph of heroic magnitude"—*Newsweek's*

description of McCarthy's showing in the New Hampshire primary that February. The senator from Minnesota had been the only one willing to challenge Lyndon Johnson, to make Vietnam the issue in the upcoming presidential election. Although McCarthy didn't win the popular vote—he got 42 percent in the Democratic primary—he did win twenty of the state's twenty-four convention delegates. Johnson saw the writing on the wall, and rather than lose to McCarthy a few weeks later in the Wisconsin primary, he announced he was withdrawing from his own re-election campaign. Nothing like it had ever happened before in American politics, and nothing has since.

There are some surprises, Sandbrook shows, in the story of McCarthy's 1968 triumph in New Hampshire: First, the vote for McCarthy was not primarily an antiwar

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