COMMENTARY

DISENCHANTMENT WITH THE "EGALITARIAN REVOLUTION"*

KENNETH S. TOLLETT**

I. INTRODUCTION

Professor Kurland's remarks take me back to May 17, 1954, when I was in a class of Professor William Winslow Crosskey. I will always remember when the *Brown*[1] decision came down. The class was very eager to get his reaction to the decision. We asked him his opinion of it. He said it was wrong, dead wrong! I had and have the highest respect for Professor Crosskey.[2] I have always had difficulty with the challenge he threw out at that time. He asked what was really theoretically wrong with separate-but-equal. I have never really been able to fully answer that question. I suppose on an abstract conceptual level, or on a highly analytical level, one could logically defend the separate-but-equal doctrine, but the problem with it was that there was never

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* Professor Kurland coined the phrase "egalitarian revolution" to characterize one of the dominant movements in the United States Supreme Court between 1954 and 1964. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government"*, 78 HARV. L. REV. 143 (1964).

** Kenneth S. Tollett, Distinguished Professor of Higher Education and Director, Howard University Institute for Study of Educational Policy. A.B., 1952, J.D., 1955, M.A., 1958, University of Chicago.

1. Brown v. Board of Educ., 347 U.S. 483 (1954).

2. After over thirteen years of research Professor Crosskey published two monumental volumes on the Constitution entitled 1 & 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953). These volumes, together with extended lectures on the historical and contextual background of the Constitutional Convention and the adoption of the United States Constitution, the Bill of Rights, and the Reconstruction Amendments, were the major substance of his two four-hour-per-quarter courses. The volumes have been both severely criticized and woefully neglected or disregarded; the former because of his untraditional criticism of Jefferson, Madison, and Justice Frankfurter; the latter because of his unconventional interpretation and painstaking research into the documentary and detailed background of the Constitution. I was most impressed with his ruthless integrity of intellect and Olympian powers of legal analysis and organization displayed in his writings and lectures.

I was so impressed with Professor Crosskey that I wrote my Master's dissertation on his books. K. Tollett, William Winslow Crosskey and the Constitution (M.A. dissertation, Univ. of Chicago, 1958).

any sincere intention to enforce it practically.[3] I think that may be the root of the problem in the analysis of the *Brown* decision that Professor Kurland laid out before us today. On a high level of abstraction and logic, if the injunction of the Constitution is to provide for all persons equally and if citizens in fact experience equality, what's wrong with separation? I suppose Professor Kurland's point about the first amendment's protection of freedom of association may be the best way to attack separation as prohibited conduct. When I went through the experience with Professor Crosskey and when I heard the discussion this morning, what came to mind is the problem in law of the different levels on which one has to operate in trying to address or deal with this problem.

One can deal with the problem philosophically and probably irresponsibly. Chastened by experience one can deal with it practically. To deal with the problem practically one usually will not have as much fun. Practically, one has to think about the consequences of what one says or does. Philosophically, I am an analytical positivist,[4] but you would never know it. I write articles as if I am a sociological jurisprude when it comes to law,[5] because I am biased or not disinterested.[6] I am committed to pursuing the interests of blacks and you will soon see how that is the case. Because of the peculiarities of the black experience in this country, a Black can indulge in the luxury of being very philosophical about desegregation, but only with great peril. In this arena, I think a Black has to be extremely practical.

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3. *See* Cumming v. Richmond, 175 U.S. 528 (1899).

4. Tollett, *Verbalism, Law and Reality*, 37 U. DET. L.J. 226 (1959); Tollett, *The Legalization of Social Ordering* in VALIDATION OF NEW FORMS OF SOCIAL ORGANIZATION (G. Dorsey & S. Shuman ed. 1968).

5. *E.g.*, Tollett, *Political Questions and the Law*, 42 U. DET. L.J. 439 (1965); Tollett, *The Viability and Reliability of the U.S. Supreme Court as An Institution for Social Change and Progress Beneficial to Blacks* (pt. 1), 2 BLACK L.J. 197 (1972), (pt. 2), 3 BLACK L.J. 5 (1973).

6. History is largely a melancholy catalogue of almost endless strife, exploitation, and oppression prompted by zealots of various ideological persuasions seeking to impose their perfect perception of good and evil upon others. All ideologies should be approached with skepticism so that one never gets the over-weaning conviction that anything and everything are justified in order to realize one's particular ideological outlook. I believe the greatest moderating influence for the control of ideological excesses is frank and open admission of ideological biases and predispositions. This is a minimum requirement for intellectual honesty and integrity—intrinsic values of the intellectual enterprise of an institution of higher education. The ultimate intellectual values are the passion and the desire for explanation which come reliably only from the pursuit of truth and knowledge.

Tollett, *Community and Higher Education*, 104 DAEDALUS 278, 284 (1975).

II. THE LAW'S DELAY, THE INDIFFERENCE OF OFFICE

Now, for my major observations on the problem of desegregation and the *Brown* decision, I would like to begin with this paradoxical proposition: For reasons of culture, social relations, and economics, *Brown* could have been more easily enforced at the time it was decided than it could be today. And in that respect, I suppose, I agree with Professor Kurland that instead of the "all deliberate speed" proposition, the Court should have required desegregation immediately.[7] Today, because of uneven development and certain economic gaps that expand and narrow between blacks and whites in the North and the South, it seems that the spirit of *Brown* is more difficult to enforce than in 1955. It is my feeling that because of the delay, evolution of the *Brown* principles into *Green*,[8] *Swann*,[9] *Keyes*,[10] and *Milliken*[11] had to come to counter past evasion. Although those latter decisions do seem to suggest an overreaching—maybe even an imperial—judiciary, those expansive remedies are necessary because of the failure to properly enforce *Brown* when it was first enunciated.

Most blacks were in the South in 1954. If you could have gotten beyond the race question, almost any index by which you measure the patterns of behavior of a people—social, cultural, attitudinal, lifestyle—southern blacks and southern whites were close. One of the reasons Jimmy Carter did so well in the black community in the South and the North is the certain social-cultural affinity that existed between the born-again populist and blacks throughout this country. But the chance to enforce effectively the decision at the time it was first rendered is now lost. That brings me to the next stage of my analysis.

III. "THE ONE PERVADING PURPOSE" REDUX

What is the proper interpretation of the equal protection clause? How should it be applied in integration? How should it be applied in affirmative action? I'd like to advance a view that contemporary cir-

7. For a discussion of the "all deliberate speed" formula as an example of conceptual institutional racism, see Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach*, 24 U.C.L.A. L. REV. 581 (1977). *See also* Tollett, *Justice is the Reversal of Discrimination*, in ADVANCING EQUALITY OF OPPORTUNITY: A MATTER OF JUSTICE 27 (C. Smith ed. 1978).

8. Green v. County School Bd., 391 U.S. 430 (1968).

9. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

10. Keyes v. School Dist., 413 U.S. 189 (1973).

11. Milliken v. Bradley, 418 U.S. 717 (1974).

cumstances compel and that also would have been acceptable in 1954 or 1955—a race-conscious interpretation of the Reconstruction Amendments. Whether it would have been proper then, or not, I think it is proper today because the country has failed to do justice to the blacks at different stages of history and thus the original pervading purpose of the Reconstruction Amendments still obtains. We should regard the Reconstruction Amendments as race-conscious. Justice Miller, I think, first suggested a race-conscious interpretation of the equal protection clause in the *Slaughter-House Cases*:[12]

> We doubt very much whether any action of a State not directed by way of discrimination against negroes as a class, or on account of their race, will ever be held to come within the purview of this provision [Equal Protection Clause]. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.[13]

Justice Miller, after enumerating the "onerous disabilities and burdens imposed upon the colored race," the curtailment of their rights "to such an extent that their freedom was of little value," which the thirteenth, fourteenth, and fifteenth amendments sought to correct, had earlier stated:

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment, in terms mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.[14]

That summarizes the essence of the Reconstruction Amendments.

I have been trying to advance the view for some years that if one starts with those statements of Justice Miller in the *Slaughter-House Cases* and approaches the Constitution in the way Justice Marshall did

12. 83 U.S. (16 Wall) 36 (1873).
13. *Id.* at 81.
14. *Id.* at 71-72.

in *McCulloch v. Maryland*[15] and Justices Douglas and Goldberg did in *Griswold v. Connecticut*,[16] we then can easily infer a pro-Black meaning and interpretation of the Constitution. I call this a "structural" approach to the Constitution.[17] What do I mean by this? If one looks at the mischief addressed in the thirteenth, fourteenth, and fifteenth amendments, each dealt in some aspect with the oppression of blacks. Individually, none would necessarily or entirely be pro-black, but because these amendments all focused on blacks, they collectively import more than any one of them individually entails. Just as Chief Justice Marshall extracted the power to create a corporation and a bank[18] not from any specific provision of article one, section eight, but from a series of provisions construed together, we can infer a pro-black meaning from the collection of amendments addressing problems faced by blacks. Structural analysis is analogous to the legislative principle of interpretation *in pari materia*. *Griswold v. Connecticut* found the right of privacy through the same approach. No specific provision in the Bill of Rights grants the right of privacy, but a series of provisions that touch, concern, or intersect interests cognate to privacy enabled the Court to infer that right. The same thing can be done with the Reconstruction Amendments.

IV. The One Pervading Purpose Deferred and Denied

Of course, we have the unfortunate situation that what Congress initially sought to enforce the Supreme Court itself began to undo by the most ingenious and disingenuous constructions of the Reconstruction Amendments and Civil Rights Acts. Immediately after the Civil War, many southern states enacted Black Codes to reenslave the slaves. In 1886 Congress passed the Civil Rights Act to stop the efforts of these states to reenslave the Freedman, and adopted the fourteenth amendment to ensure the constitutionality and enforcement of the Civil Rights Act of 1866. The Supreme Court has had a very sorry history in enforcing the rights of blacks.[19] Although today we seem to look too

15. 17 U.S. (4 Wheat.) 316 (1819).

16. 381 U.S. 479 (1965).

17. *See* Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970). Professor Black gives an excellent analysis of a structural approach to the U.S. Constitution.

18. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

19. For a detailed chronicle of the Supreme Court's breach of trust to blacks, see L. MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO (1966).

frequently to the Court to enforce these enactments, it may, by virtue of a justified guilt feeling, somewhat imperially be trying to make amends for its obvious past betrayal of blacks.

Even before the *Slaughter-House* decision emasculated the privileges-and-immunities clause of the fourteenth amendment, the Court in 1871 reached a remarkable conclusion in interpreting the 1866 Civil Rights Act. The 1866 Civil Rights Act provided that if a Black could not enforce or was denied certain rights secured by the Act in state courts, the case could be removed to a district or circuit court of the United States. In the *Blyew* case,[20] a four-member black family, consisting of a husband and wife, a seventeen-year-old son, and a ninety-year-old blind mother of the wife, were brutally mutilated and slaughtered by two white men in Kentucky. Because Kentucky had a law that prohibited blacks from testifying against whites in that State's courts, the case was removed to a federal circuit court where black witnesses could testify to the murder. The Supreme Court reversed the misdemeanor conviction on the ground that the 1866 statute contemplated removal in cases "affecting persons" who were alive rather than to mere witnesses. The Court reasoned that if one of the victims had lived, it would have been permissible to remove the case for an assault and battery prosecution, but because all the victims had died, the case could not be removed to prosecute for murder. In brief, blacks could secure their rights for assaults by whites, but not for murder.[21]

I allude to that early decision because it put the Court's action today in the proper historical context. We could talk about a half dozen other decisions[22] up to *Plessy v. Ferguson*[23] that indicate the miserable record of the Court and the miserable treatment that blacks received from it. Only three years after *Plessy*, a transportation case, enunciated the separate-but-equal doctrine, it was applied to education—a situation that

20. Blyew v. United States, 80 U.S. (13 Wall) 581 (1872).

21. Mr. Justice Bradley, who Mr. Justice Swain joined in a dissent, remarked upon this absurdity:

> In a large and just sense, can a prosecution for his [a Black person's] murder affect him any less than a prosecution for an assault upon him? . . . At all events, it cannot be denied that the entire class of persons under disability is affected by prosecutions for wrongs done to one of their number, in which they are not permitted to testify . . .

80 U.S. at 600.

22. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882); United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Reese, 92 U.S. 214 (1875).

23. 163 U.S. 537 (1896).

shows again how blacks have had a hard time receiving justice in our society, and even from the Court. The case was *Cumming v. Richmond County School Board*,[24] in which a Georgia citizen brought a class action in an attempt to insure educational opportunities for blacks in senior high school. Richmond County, Georgia, did not have a senior high school for blacks; nevertheless, the Court held that the separate-but-equal doctrine should apply to education as well as to transportation. Moreover, just because Georgia had inadequate funds in the County to provide a separate high school education for blacks was no reason either to force blacks' attendance in the white high school or to close the white high school. So from the very beginning, the *Plessy* doctrine meant separate-but-unequal.

V. Between the Constitution and the Court Falls the Black Experience

Now the question is, how do we attain a racial reconciliation? I believe that many criticisms can be made in the abstract about several of the desegregation decisions after *Brown* and Professor Kurland has made them all. But the difficulty I have when I review these criticisms and even when I listen to Professor Kurland's remarks is that whatever has been done to try to move blacks ahead, it has been somehow ingeniously frustrated by the courts or the legislature in the name of state's rights, neutral principles, or, most recently, racial neutrality. The problem with *Brown* from the very start was that somehow, in some way, it was not as important to enforce the constitutional rights of blacks immediately, as it would have been to enforce the rights of others. That failure, I think, has brought on the great difficulties in this area. Now that I propose a pro-Black interpretation of the Reconstruction Amendments, I am told that it is divisive; that you should not say that those particular constitutional provisions are primarily for the benefit of blacks. You're going to lose friends; you're going to shatter the coalition. What coalition?

We are in a curious situation today. We have one of the most affluent states in the union enacting a Proposition 13, partially in reaction to inflation, but also in reaction to social services that benefit the poor, particularly blacks. We have the notion—I suppose it was revived at the University of Chicago—that government can accomplish more by

24. 175 U.S. 528 (1899).

doing less. Adam Smith's laissez-faireism condemns social and governmental intervention in the free market of life; this is not the time to decide to try to do so much. It's not just a question of an imperial judiciary, but also a question of an interventionist federal government, whether executive, legislative, or judicial. Neoconservative opposition to governmental interventionism, however, is based upon the conviction and perception that most social problems are intractable or inscrutable and subject to haphazard forces that frustrate reform efforts because of the unintended consequences of well-intentioned policies and programs. Neoconservative noninterventionism is a rejection of reason and the human capacity to effect constructive change.

Why is it that at every turn the blacks and other oppressed, similarly situated groups are met with ingenious and subtle arguments to thwart their efforts to be treated as human beings, to be treated with dignity and respect? I certainly agree with the end of Professor Kurland's remarks that there is some question of how far we have actually come in terms of racial reconciliation.

In closing, I think that the way you look at *Brown*, or *Green*, or *Swann*, or *Bakke*,[25] depends largely, I'm afraid, on the interests with which you are primarily concerned. This is not to say that everyone who disagrees with me is hostile to blacks or bigoted. It is to say that they identify with different interests and the interest of blacks is not very high on their agendas. I hope that twenty-five years from now we will not have another symposium like this one in which a lecture can be made like Professor Kurland's that shows in some respects how little progress has been made, given the opportunities and possibilities available to us when the *Brown* decision came down. Law is the refinement of a human aspiration to be civil, decent, and humane. Is it asking too much of the Court to require this of the law, especially in the case of blacks, to keep out of the "Shadow,"[26] to effect "the one pervading purpose" of the Reconstruction Amendments?

We like to think that the rule of law transcends the selfish pursuit of a particular interest, and for that reason we all have to be committed to a rule of law. Yet realistically, I have the gnawing feeling that there are forces out there and people out there attempting to block the progress and citizenship recognition of blacks at each turn. Whether it was the

25. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

26. *See* J. FLEMING, LENGTHENING SHADOW OF SLAVERY: A HISTORICAL JUSTIFICATION FOR AFFIRMATIVE ACTION FOR BLACKS IN U.S. HIGHER EDUCATION (1976).

enforcement of the Public Accommodations Act of 1875,[27] or the provision of a high school for blacks in a Georgia town in 1899,[28] or the opportunity for blacks to go to medical school in 1978,[29] prolific pundits and profound professors found reasons to advance arguments that blocked or retarded black progress.

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27. The Civil Rights Cases, 109 U.S. 3 (1883).
28. Cumming v. Richmond, 175 U.S. 528 (1899).
29. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).