

COMMENTARY

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My principal reaction to Professor Kurland's paper is that his analysis is too rigorous. I am not certain that I disagree with any of it, but I wonder why a decision like the *Brown*¹ case should be subjected to such vivisection, or to use his play on that, dissection. It was a decision whose time had not merely come, but was long past due. I, for one, am not troubled by the fact that the decision may not be internally consistent. It just had to be decided that way and Professor Kurland agrees that it was the correct decision. Also, the earlier papers presented in this series seem to agree that *Brown* was correctly decided.

In this connection, I want to make an observation that may or may not be original with me. I can assure you that I have not read it anywhere and it may not withstand a rigorous analysis. It seems to me that academicians and judges perform quite different roles that are complementary to one another and are significant in the development of the law. Judges principally concern themselves with deciding cases and controversies, but they always know that the academicians are looking over their shoulders to see whether their decisions are consistent with precedent and legal analysis. This symbiosis of academicians and judges permits our law to grow responsibly. The judges prevent its stagnation as they decide different cases and controversies according to their sense of justice. Nevertheless, they keep the growth of the law within bounds because they know that the academicians will be highly critical whenever there appears to be an abrupt or unprincipled departure from past precedent. Academic and judicial forces working together have significantly aided the development of the law in the United States, where our courts perform their function somewhat differently from the way courts do elsewhere and academicians are vigilant critics of the judicial product.

In considering school desegregation, the academicians look at *Brown* and observe that it did not overturn *Plessy*;² that it did not say that race

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

2. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

was an impermissible basis for classification, but seemed instead to rely on a new awareness—a new insight into the consequences of the application of the *Plessy* separate-but-equal doctrine within the public school area. The critics observe that in subsequent cases the Court acted as though it had indeed overturned *Plessy*. At least this is what I understood Professor Kurland to say this morning.

Perhaps the Court had to undercut *Plessy* in this manner. That it did and that the approach is vulnerable to Professor Kurland's analysis does not trouble me at all. We were a nation that had just come out of World War II and had assumed responsibility for world leadership. We were charter subscribers to the United Nations concept. We had this malignant practice within our body politic and we had to get rid of it the best way we could. The Court did what had to be done at that time.

Professor Kurland suggested to us that instead of the phrase "with all deliberate speed,"³ the Court might have looked to Shakespeare to find a better model. I think it could have stayed with Francis Thompson's poem, "The Hound of Heaven,"⁴ because as I remember it, the next line after "deliberate speed" is "majestic instancy." That certainly would have been a more appropriate remedy, but perhaps the nation was not ready for it.

Brown is now history and the emphasis has moved, as Professor Kurland pointed out, from desegregation to integration. I am convinced that our greatest difficulty with integration comes from the fact that we have concentrated our efforts on public schools. It is easier to desegregate public schools than it is to integrate them. One reason is that many neighborhood patterns developed in response to de jure segregation of schools, and where these patterns still exist, neighborhood attendance practices produce de facto segregation.

Nevertheless, the public school system continues to be central to integration efforts because we first achieved success in that area and the schools are convenient targets: persons must attend school and it is easy to count numbers and to make racial classifications. This reason is illustrated by one of the Marx Brothers' movies that I saw many years ago. One of the brothers was looking for something in the gutter. A police officer came along and asked, "What's the matter? Did you lose

3. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

4. F. THOMPSON, 1 *THE WORKS OF FRANCIS THOMPSON* 107 (W. Meynell ed. 1913).

something?" He said, "Yes." And he identified the object he had lost. The officer asked, "Where did you lose it?" And he replied, "Half way down the block." The officer asked, "Well, why are you looking here?" He said, "Because the light's much better."

I think that the pressure is kept on the schools because the light is a little better, as bad as it is. Let me give an illustration of this point. In Detroit, my legal residence, the school board is effectively controlled by a majority of black persons. The superintendent of schools and his principal assistants are blacks, but Detroit is under a court order to desegregate the system. One would think that these persons who have the political power to do as they see fit would hardly need the coercion of the courts to do so. Nevertheless, in *Milliken v. Bradley*⁵ the Court issued such an order, even though most of the defendants are persons who would be expected not to require the mandate of a court to bring about a desegregated system.

The problem in Detroit, of course, is, as Professor Kurland properly points out, that the record failed to show that the State of Michigan used school districts in the past for its own convenience. As recently as twenty-five years ago, Michigan had about five hundred school districts. It now has forty or fifty districts as a consequence of consolidating the vast numbers of districts that were too small to permit the furnishing of an effective education. The state consolidated and disestablished school districts as its educational wisdom indicated was appropriate. If the record had made this clear, it would have been easy for the Court to afford a statewide remedy instead of stopping at a school district line. Since the court did stop at the district line, however, Detroit goes through the charade of trying to integrate a school system where the public school population runs higher than seventy-five to eighty percent black.

Another troubled area is that implicated in the *Bakke*⁶ case—affirmative action. Critics of that decision say that it also does not mesh with prior law, but again it seems that the Court tried to decide a case the way it felt it had to for the good of the republic. Once again, the scrutiny and criticism of the academic community has focused on a judicial decision and it remains to be seen whether the progeny of *Bakke* will

5. 418 U.S. 717 (1974).

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

invite the same critical analysis that Professor Kurland has made of the sequela of *Brown*.

Finally, it seems that the nation has looked to its least powerful branch of government, the judiciary, to do its most difficult jobs. A moment's reflection teaches us that the courts cannot do these jobs alone. The task of eliminating two hundred years of racism cannot be accomplished without the support of the other two branches, which are more powerful, more flexible, and more capable of the fine-tuning necessary to take care of particular instances. I think that those of us who love our country, who respect our system of law, and who venerate our courts must keep the pressure on the other two branches to see that the courts are not required to do all the work by themselves.