

Sunlight, Cloudy Days, and Shadows: Thinking about *Brown* and the Next Generation of Lawyers

Richard A. Matasar[†]

I am delighted that the Editors of the Washburn Law Journal invited me to comment on Professor Akhil Amar's splendid essay: *Becoming Lawyers in the Shadow of Brown*. The Essay is admirable, both in its narrative force and powerful message. It reflects the sophistication of its author, a noted constitutional theorist and prolific constitutional scholar. Commenting on the Essay is a terrific opportunity to jump into the middle of an evolving piece of work, take a few liberties with its text and make a couple of points of personal privilege.

But what makes it an enticing opportunity to make a few comments, also gives me pause. My little corner of constitutional study concerns structural matters,¹ not the great civil rights of our time. My theories narrowly explore the distribution of authority between governments,² not constitutional interpretation writ large or the meaning of constitutional rights. Resolving my polar reactions requires me to put on another hat—that of a legal educator. My perspective as a law school dean, not a constitutional scholar, informs my reactions to Professor Amar's Essay. It forces me to ask whether *Brown v. Board of Education's* future will be sunny or cloudy and whether its shadow will be short or long.

There is much to admire in Professor Amar's Essay. He reminds us that *Brown*, like all legal decisions, reflects the power of narrative—both the story of the case and its interpreters.³ He tours us through the competing views of the case offered by a wide variety of commentators, each of whom uses his or her own lens to construct meaning.⁴ I find especially persuasive the linkages he describes between commentators'

[†] President, Dean & Professor of Law, New York Law School. B.A. 1974, J.D. 1977, University of Pennsylvania.

1. See, e.g., ROBERT CLINTON, RICHARD N. CLINTON, RICHARD A. MATASAR, & MICHAEL G. COLLINS, *FEDERAL COURTS: THEORY AND PRACTICE* (1996).

2. See, e.g., Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399 (1983).

3. See Akhil Reed Amar, *Becoming Lawyers in the Shadow of Brown*, 40 WASHBURN L.J. 1 (2000).

4. See *id.* at 2-3.

general constitutional theories and their understanding of *Brown's* social impact. The Essay illustrates the richness of studying law by reading text, history and context together to derive meaning.

Professor Amar's own understanding of *Brown* is informed by his method—one of respect for constitutional language, in context. He shows us how close textual analysis of the Constitution yields broader social meaning when read in the context of the whole document and the historical era in which it was written. While on its face, *Brown* might be read as concerning a limited issue about equality in education, Professor Amar demonstrates that it also expresses deep thoughts about our underlying perceptions of constitutional structure, which at various points he describes as:

- prohibiting the creation of dual classes of citizenship (as demonstrated in the Constitution's Preamble and Republican Government Clauses);⁵
- eliminating distinctions based on the happenstance of birth (as demonstrated by the prohibitions of titles of nobility and bills of attainder);⁶
- assuring equality as defined by real social meanings, by looking at the actual purposes and effects of government actions,⁷ official and otherwise.

5. See *id.* at 3-4. Although recognizing the Constitution, drafted with preservation of slavery in mind, could not require equality in education, Professor Amar points to the Preamble of the Constitution and the Republican Form of Government Clause as the spiritual precursors of the Reconstruction Constitution and as potential sources for understanding *Brown*:

The purpose and effect and social meaning of racial segregation in America in 1954 is to create two hereditary classes of citizens—first class (white) citizens and second class (black) citizens. These two hereditary classes are a throwback to aristocracy and monarchy, assigning citizens unequal and intergenerationally entrenched places on the basis of birth status. This is a violation of the deep democratic structure of our Constitution, as exemplified by the Preamble and the Republican Government Clause.

Id. at 4. Of course, as Professor Amar later makes clear, arguments based on the Constitution before the Civil War amendments cannot alone support *Brown*. See *id.* at 6.

6. See *id.* at 4. As Professor Amar explains, together the Nobility and Bill of Attainder Clauses make plain that:

No government in America can, consistent with these clauses and the broader constitutional ethos they embody, name some Americans 'lords' and others 'commoners.' But if no government can name some (light-skinned Americans) 'lords' and other (dark-skinned Americans) 'commoners,' surely it cannot do the same thing through racially segregated schools whose purpose and effect and social meaning is to create a blood-based and hereditary overclass and underclass.

Id. See also *id.* at 5 ("If we take the non-attainder idea seriously, it bars . . . lawmakers from passing laws designed to humiliate or demean all persons descended from slaves, or all persons with black (corrupt) blood."). Of course, given the fact that the Framers' Constitution "made its peace with, and even propped up, a regime of chattel slavery," *id.* at 5, Professor Amar concludes: "we cannot simply read the Preamble or the Republican Government Clause or the nobility and attainder clauses at face value," *id.* at 6, because it is clear that the original constitutional conception was "rooted in hereditary and intergenerational inequality based on blood and birth status." *Id.* Rather, the search for a constitutional meaning of *Brown* needs support in "our Reconstructed Constitution," *id.*, which is "refounded on principles of free and equal citizenship." *Id.*

7. As Professor Amar so eloquently puts it:

By 1954 . . . it was clear that racially separate schools . . . were not equal in purpose or effect of social meaning. They were a way of keeping blacks down. Blacks knew it—as

- requiring us to mediate between text⁸ and context⁹.

Finally, Professor Amar cautions us to remember that the law business is more than technical activity. We must practice holism,¹⁰ retain humility,¹¹ and always search for humanity.¹²

Professor Amar's impressive account of *Brown* contemplates its continued vitality—a very long shadow, if you will. Nonetheless, his analysis of *Brown* makes me nervous. Its strong connection of underlying theory, context and the need to avoid a “two-class society” loses focus on the impact of the case on real people and the struggles of lawyers and citizens alike not to make constitutional law, but to achieve richer and better lives. If Professor Amar's narrative teaches anything, it is that formal equality is not commensurate with actual equality. I wonder if the Essay is complete. Does it address the most salient questions concerning *Brown's* future for the next generation of lawyers.

Professor Amar demonstrates that *Brown* rejects “separate but equal” because it was “a way of keeping blacks down.”¹³ In today's

any secret ballot vote among them would have revealed. And whites knew this too, in their hearts, though many denied it with their lips.

Id. at 7.

8. Professor Amar makes a text-based argument against the regime of separateness established following the Civil War:

Jim Crow in 1954 is not truly equal. American apartheid is an effort to create a kind of subordinated caste in violation of the vision of the Thirteenth Amendment; to perpetuate two classes of unequal citizenship in violation of the logic of the first sentence of the Fourteenth Amendment; to deprive blacks of genuinely equal laws in violation of the command of the next sentence of the Fourteenth Amendment (and of the companion Fifth Amendment); and to keep blacks and whites apart in ways that undercut the promise of the Fifteenth Amendment that Americans of different races must come together . . . to govern ourselves.

Id.

9. In assessing why separate, but equal, though logically possible, were not equal in *Brown*, Professor Amar demonstrates how context affects legal analysis:

Jim Crow had a different legal *form* than the 1860s Black Codes that the Fourteenth Amendment framers explicitly sought to outlaw. But it had the same purpose and effect and social meaning: keeping blacks down and depriving them of equal status. The 1860s Black Codes—which the Fourteenth Amendment framers clearly aimed to prohibit as a ‘paradigm case’ of impermissible legislation—were formally asymmetric: they imposed disabilities on blacks but not whites. Jim Crow was formally symmetric—blacks could not go to school X, but whites were likewise barred from attending school Y. But formal symmetry does not mean the law is automatically valid; it just means the law is not automatically invalid (as the Black Codes were). Thus, we must look to a Jim Crow law in its entirety, and ask whether it really is equal in purpose and effect and social meaning. It is possible to imagine some parallel universe where blacks as well as whites truly wanted separation, where no stigma attached to separation, where separation was not simply a way of keeping blacks down. But that was not the world of 1954, to any honest observer.

Id. at 8 (emphasis in original) (footnote omitted).

10. See *id.* at 10 (“[T]ry to see the big picture.” “Good constitutional interpretation is marked by a view of the whole as well the part; peripheral vision is important.”).

11. See *id.* at 10-11 (“Lawyers have done great good, but we have often been on the wrong side of history.” “A candid confession of error . . . is often better than a stubborn refusal to admit one's past mistakes.”).

12. See *id.* at 11 (“American apartheid was an oppressive, soul-deadening and degrading system of subordination.” “Are there similar injustices, inhumanities, and systems of subordination today that we are ignoring or even supporting?”).

13. *Id.* at 7.

world of racial pride, the rights of association and the creation of equal access to education and work, “separate but *really* equal” may not be “a way of keeping blacks down.” Separation might be desired by some. Integration might be less important than the chance to move ahead economically or socially. The stigma of separation might not so evidently be felt only by African-Americans. Perhaps the success of *Brown* is that the privilege of whiteness may have been reduced.

Despite these possibilities, however, I doubt that Professor Amar would believe his theory could be used to justify *de jure* school segregation. It seems equally likely that some types of distinction are unconstitutional without regard to their “purpose and effect and social meaning”¹⁴ merely because racial classification and separation invites future tinkering and discrimination. Professor Amar’s narrative might need some subplots to assure *Brown*’s shadow will stretch into the future.

Professor Amar’s analysis of *Brown* and the contemporary problems associated with affirmative action raise a similar red flag. He asserts that under *Brown* “certain forms of affirmative action, need not, perhaps, be seen as the legal and moral equivalent of Jim Crow.”¹⁵ He asks four questions, the answers to which would point to the legality of affirmative action: (1) does “educational” affirmative action¹⁶ “in effect make racial minorities a favored aristocracy?,”¹⁷ (2) “[i]s its purpose and effect and social meaning to demean or humiliate or attain whites?,”¹⁸ (3) “[i]s its ultimate aim a two class society of unequal castes?,”¹⁹ and (4) “[i]s it truly the legal and moral equivalent of the 1860s Black Codes?”²⁰

Both Professor Amar and I would answer these questions in the negative. Accordingly, it would seem to follow that affirmative action should be lawful. However, recent attacks on affirmative action suggest that the story is much more complicated.

First, some would argue that Professor Amar and I have the facts wrong. To them, the answers to the first two Amar Questions make affirmative action unconstitutional because: (1) racial minorities are now a favored aristocracy, with special privileges in admission to schools, their own support programs and an exalted status in job searches, promotion and recognition; and (2) today the purpose, effect, and social meaning of affirmative action is to demean whites (or

14. *Id.* at 4.

15. *Id.* at 8.

16. As defined by Justice Powell’s opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). See also Amar, *supra* note 3, at 8 (“Consider for example the kind of educational affirmative action Justice Powell was willing to endorse in *Bakke*.”).

17. Amar, *supra* note 3, at 8.

18. *Id.*

19. *Id.*

20. *Id.*

sometimes Asians) by favoring less qualified people (usually African-Americans, sometimes women or Hispanics) in admissions or employment processes.²¹ Angry white males are alive on many university campuses, decrying the advantages bestowed upon “less qualified” minority aristocrats, suggesting that whites are beleaguered, and arguing that whites soon will be outnumbered by “others,” who are assuming dominant positions.

Second, the strong American myth of meritocracy is affronted by affirmative action. The rhetoric decrying “reverse discrimination” reminds us of past battles to eliminate “quotas” that prevented access to higher education by some groups. Past generations fought to create “objective” measures for admission to school, hiring in the academy and entrance to professions. They zealously search for protection against subjective measures of “quality” that could be utilized by majorities to discriminate against minorities.²² The undercurrent of adherence to “objective” standards and meritocracy cannot be ignored. It calls for color blindness and racial neutrality, mistrusts classification by race and frankly is uninterested in the answers to questions about caste, attainders and black codes.

Whatever merit Professor Amar’s account has in explaining social context and meaning in 1954, it is no longer sufficient to deal with the race and education issues of 2000. To deal with current issues, we face a more difficult problem: we must explain why race consciousness, affirmative use of race and a broader understanding of merit is consistent with *Brown* and permits social experimentation that appears to confer advantages on those previously disadvantaged.

There is great irony that *Brown* itself contributes to the rift between the worlds of 1954 and 2000. As I described this dilemma a decade ago:

Brown was about lifting racial barriers based on race, equalizing opportunity, and expecting that true racial equality would certainly ensue. It was about assimilation of minorities into the dominant culture, but not about insuring acceptance or

21. Even if one concluded that the answers to Professor Amar’s questions were negative, it is unclear that this alone would make affirmative action lawful. As suggested above, there may be instances where adherence to formal racial neutrality follows from *Brown* because distinctions based on race create the risk of future inequality. Moreover, regardless of social impact, on the individual level those who lose an advantage (based on non-racial criteria) they otherwise would have had, may feel second-class if race becomes the salient feature in losing that advantage.

22. Similar arguments lead past generations of students to plead for anonymous grading to eliminate the possibility of bias by faculty who would give out grades on the basis of *who* a student is, rather than *how* he or she has performed. In recent years, many students have argued that anonymous grading hurts them because it objectifies a grade that is inherently subjective. They argue that if professors could take account of who they were, they would be benefited. Perhaps it is a tribute to the current generation of faculty members that the former climate of mistrust that characterized a past generation has been transformed into a sense that faculty now would do the right thing.

tolerance of the minority by the majority or about changing the majority through its absorption of minority values and norms. However, the last [45] years reveal a different world than the one envisioned by *Brown*. While state-sanctioned discrimination has decreased, racial animosity persists While legal barriers generally have fallen, and greater equality of opportunity has arisen, neither full equality nor acceptance of diversity has resulted.

Brown's commitment to mere equal opportunity is inconsistent with growing demands for equal results—increased numbers of minorities in education, as both students and teachers, greater success by those minorities, and respect for their contributions to the institution. Before the academy can grapple successfully with the important racial issues . . . it now confronts, it must recognize that the desire for equality of results compels us to reject . . . racial blindness . . . and limiting version[s] of meritocracy.²³

Brown presupposed that formal equal access to education would lead to equality.²⁴ It assumed that official neutrality to race and color blindness, would lead to a more just society. It turns out, however, that equal access alone has not led to equal outcomes for African-Americans and whites. Color blindness has had positive effects, but has not led to equal distribution of resources, prestige and power among races. Formally abolishing discrimination has not yielded an equal distribution of resources for individuals of different races. There is still a substantial differential in incomes and available work opportunities that correlates to race. One would hope, therefore, that our account of *Brown* might be enriched to accommodate race consciousness if we are concerned with outcomes.

My qualifications to venture opinions on these matters are slight; I am a constitutional theorist with modest attainments. I read a lot. I even think a lot (or at least I once did before becoming a dean). But over the last several years, my theoretician's love of abstractly

23. Richard A. Matasar, *Brown's Legacy in Legal Education*, 7 HARV. BLACKLETTER J. 127, 127-28 (1990) (footnote omitted).

24. First, *Brown* was the product of sixteen years of litigation that attacked the doctrine of separate but equal by arguing that separate was factually unequal. See *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938). These cases established the clear proposition that separate must be equal and when it is not, the state must admit to education without regard of race. Second, the cases clearly rest on providing equal opportunity, not equal outcomes. See *Gaines*, 305 U.S. at 349 ("The question here is [the state's] duty when it provides . . . training to furnish it to the residents of the State upon the basis of an equality of right."). Third, the cases do not care about the remnant of state-sponsored discrimination, that private individuals might continue to discriminate, because reactions should be based on the *merits* of individuals, not their race. See *McLaurin*, 339 U.S. at 641-42 ("The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on *his own merits*." (emphasis added)). Fourth, *Brown* hammers home that education "is a right which must be made available to all on equal terms," *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), and that it rests on ensuring "the opportunity of an education." *Id.*

contemplating legal matters has receded into a pragmatic haze. Today, I need to think practically. Administering a law school requires absorbing *Brown* in a practical way. Whatever I preach about the case, I would like to practice to make my school more diverse and humane. Moreover, I have come to think about *Brown's* shadow for real people—those who apply to our schools, those who we teach to become lawyers and those who do the teaching. For us, the question today is whether race may be used in a conscious way to produce an outcome that will advance the presence of minorities in our schools.

So, in my pragmatist's role, I will try to build on Professor Amar's analysis. As he argues, the Reconstructed Constitution surely was directed at obliterating legal burdens placed on African-Americans through positive law.²⁵ However, its child, *Brown*, surely also was about much more. It addressed the effects of more than 200 years of slavery, followed by another 100 years of subterfuge that preserved the vestiges of slavery. The struggles of the Civil War, the Reconstruction Congress and the battle taken up by *Brown* scores of decades later must be taken in context—at core they are concerned about the *status quo ante*, the position that might have been reached in the absence of mandated slavery, permissible segregation and a judicial regime that permitted inequality to flourish. In that context, formal equality is not enough; nor, is color blindness required. There is work to be done (and damage to be undone).

Professor Amar asks us to practice holism.²⁶ I agree. In looking at the last 350 years of racial practice in the colonies and the country they begat, racial equality is a new invention. Formal equal opportunities do not yet equal real equality. We must continue to ameliorate past effects not just of racial discrimination, but the generations of unequal resources produced by that discrimination. In *that* context it is clear that we are still evolving our understanding of the Constitution, race and equality.

Professor Amar also asks us to exercise humility.²⁷ I agree. Let's not create a narrow understanding of *Brown* that will mark it as the next incarnation of *Plessy v. Ferguson*.²⁸ Until we come closer to an ideal of equal *outcomes* as well as *opportunities*, we will not have succeeded in having a Reconstructed Constitution.

Professor Amar also reminds us to preserve our humanity.²⁹ I agree. Racial issues still divide us. We have reached no consensus on race in higher education. The choice to risk reduction of the presence

25. See Amar, *supra* note 3, at 6.

26. See *id.* at 10.

27. See *id.* at 10-11.

28. 163 U.S. 537 (1896).

29. See Amar, *supra* note 3, at 11.

of minority colleagues to fulfill the ideal of color blindness ignores the perceptions of many that race still matters, that the effect of discrimination still lingers and that treating affirmative action as reverse discrimination is a cover for recreating a hierarchy sent into retreat years ago. Yet, those of us who advocate affirmative action cannot maintain the conceit that comes without cost. When benefit is bestowed on one person, someone else is displaced.³⁰ Proponents of affirmative action should justify those costs on real people.

Becoming a lawyer in the shadow of *Brown* has meant different things for the last forty-five years of law school graduates. For students of my generation, *Brown* was a profound influence. We attended segregated schools one day, and found them integrated the next. We observed and participated in a changing of America that brought racial discrimination to the forefront in a fight for fairness. We saw voting patterns change, expansion of opportunities and studied with colleagues who a generation before would have been sent off in isolation. But the shadow of *Brown* is narrowing today. Many see its work as over—there are no legal barriers to integration of our schools. In 1990, I argued that more than ever “schools . . . can lead the march into a new multicultural and diverse era.”³¹ I suggested that if *Brown* teaches us anything at all, “it is that the search for an equal and just society is progressive.”³² It is this understanding of *Brown* that has animated Professor Amar’s Essay and my reactions to it. Let the sun shine brightly on *Brown* and may its shadow cover generations of lawyers to come.

30. Perhaps the gap between advocates of affirmative action and opponents of reverse discrimination is not as great as one might suppose. If one defines merit more broadly than traditionally done by schools, racial diversity can be maintained. This is the strategy used by states that open access based on grades or class ranks of students (without regard to standardized test scores). Given the racial segregation of housing in this country, top minority students still gain access to state schools. Similarly, systems that permit considering various forms of diversity—athletic skill, legacies of former students, those who might make a donation, musicians or even people of different races—find taking account of race an acceptable criterion to consider in distributing benefits. Nonetheless, under both of these systems, policy makers take account of race, albeit as part of a broader justification system for their decisions.

31. Matasar, *supra* note 23, at 137.

32. *Id.*