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## FOREWORD: DISABLING *BROWN*

Michael Ashley Stein\*

On May 17, 1954, the United States Supreme Court issued its decision in *Brown v. Board of Education*,<sup>1</sup> arguably the most famous American civil rights case of the twentieth century,<sup>2</sup> striking down segregation in public schools. Exactly fifty years later, the Court decided *Tennessee v. Lane*,<sup>3</sup> finding that disabled citizens may sue states under Title II of the Americans with Disabilities Act of 1990 (ADA) to enforce a right of access to court services.<sup>4</sup>

Though ostensibly a victory for people with disabilities,<sup>5</sup> the majority decision in *Lane* is the by-product of a fractured Court,<sup>6</sup> and is limited both in scope and applicability. Despite the ADA's prohibition against disabled persons being "excluded from participation in or be[ing] denied the benefits of the services, programs, or activities of a public entity,"<sup>7</sup> the Court confined its holding to an individual's right

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\* Professor, William & Mary School of Law; Visiting Professor, Harvard Law School. I thank Carlos Ball, Mary Anne Case, Angela Harris, Sonia Katyal, Jane Larson, and Michael Waterstone for their comments; Michael Lockaby for his research; IBRL Director Neal Devins for his support; IBRL Coordinator Melody Nichols for her kindness; and Mary Anne Case and Jane Larson for facilitating the in-person discussion that contributed to the symposium's success. Holland M. Tahvonon contributed valuable research and drafting assistance.

<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> *Brown* has been described as "the most famous decision in the history of the United States Supreme Court." Michael J. Klarman, *Brown at 50*, 90 VA. L. REV. 1613, 1613 (2004); see also Martha Minow, *Education for Co-Existence*, 44 ARIZ. L. REV. 1, 11 (2002) ("The condemnation of racially separate education as inherently unequal in *Brown v. Board of Education* stands as the most famous decision of the United States Supreme Court, as a decision that has inspired other constitutional democracies to build courts empowered to interpret principles of equality." (footnote omitted)).

<sup>3</sup> 541 U.S. 509 (2004).

<sup>4</sup> *Id.* at 533–34 ("[W]e conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress's § 5 authority to enforce the guarantees of the Fourteenth Amendment.").

<sup>5</sup> See, e.g., Harriet McBryde Johnson, *Stairway to Justice*, N.Y. TIMES, May 30, 2004, § 6 (Magazine), at 11 (calling *Lane* a "civil rights victory," but noting that "[p]eople with disabilities count it as a victory when rights simply aren't rolled back as far as they might have been.").

<sup>6</sup> The Court split 5–4 in favor of *Lane*. In addition to the majority opinion penned by Justice Stevens, there were two separate concurrences (Justices Souter and Ginsburg) and three separate dissents (Chief Justice Rehnquist and Justices Scalia and Thomas). *Lane*, 541 U.S. at 512.

<sup>7</sup> 42 U.S.C. § 12132 (2004).

of access to courts.<sup>8</sup> In so doing, it left open the question of whether people with disabilities can gain relief when denied access to other state facilities, programs, and services.<sup>9</sup> *Lane* is, therefore, of a piece consistent with the Court's positive ADA jurisprudence upholding claims within a narrow set of plaintiff-specific rights<sup>10</sup> — in this instance, the right of a paraplegic wheelchair-user to be able to physically enter a court of law to attend and answer criminal charges rather than drag himself up and down flights of stairs, as he had done for his first appearance.<sup>11</sup> From a disability

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<sup>8</sup> *Lane*, 541 U.S. at 533–34.

<sup>9</sup> In a recent decision, the Supreme Court applied its holding in *Lane* to the prison context, reversing the dismissal of a paraplegic prisoner's ADA claims on grounds of sovereign immunity. *United States v. Georgia*, 126 S. Ct. 877 (2006). The Court reaffirmed its conclusion that Title II abrogates sovereign immunity to the extent the state actors' conduct actually violates the Fourteenth Amendment, but remanded the case so the lower courts could determine (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

*Id.* at 882. In so doing, the Court side-stepped many key issues. Whether *Lane* will be applied in other contexts has not been answered. Our reading of *Lane* is that the Court would likely hold publicly accessible voting to be a state-provided service whose centrality rises to the level of protection. *See Lane*, 541 U.S. at 522–23 (noting that Title II seeks to protect “a variety of . . . constitutional guarantees”). However, given the silence of the opinion on point, the unresolved arguments over what kind of access is reasonable, and the changing roster of Justices, this result cannot be taken for granted. If, for example, the Court found that making polling places accessible to disabled citizens was sufficiently costly, it might find such expenses disproportionate (in light of proposed alternative facilities or means) to the right claimed. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (holding that § 5 legislation is only valid if the remedy is proportional to the alleged injury). For an assessment, see Michael E. Waterstone, *Lane, Fundamental Rights, and Voting*, 56 ALA. L. REV. 793 (2005).

<sup>10</sup> *See, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (concluding that a professional golfer with one wholly functional leg must be allowed to ride in a golf cart between holes). Thus, Dean Soifer's assertion that the Court selectively grants certiorari to outlier cases as a means of ridiculing the ADA while also narrowly upholding its tenets seems increasingly plausible. *See Aviam Soifer, Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1290 (2003) (noting that the Supreme Court's ADA decisions seem to suggest “a stealth strategy on the part of the swing voters on the Court” and explaining that “[t]he swing Justices will accept narrow instances of ADA coverage that are likely to grab public attention and are easily restricted to their unusual facts.”). At the same time, one must note the ruling in *Olmstead v. L.C.*, 527 U.S. 581 (1999), in which the Court held that people with mental disabilities must be allowed to live in circumstances invoking the least possibly restricted environments. *Id.* at 600–01.

<sup>11</sup> *Lane*, 541 U.S. at 513–14. The second plaintiff, a paraplegic wheelchair-using court reporter, *id.* at 514, effectively disappears from the decision, *see id.* at 523 (discussing criminal defendants' rights), much as the regrettably named smoke-sensitive prison guard in *Garrett*, *Milton Ash, see Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 362 (2001), receded from the Court's opinion. *Garrett*, 531 U.S. 356.

rights perspective, *Lane* is nevertheless preferable to the broad policy statements the Court issues when negatively interpreting the ADA's employment provisions.<sup>12</sup>

What, then, can be learned by examining the respective methodologies and contexts of *Brown* and *Lane*? On one level, an argument can be made that applying the methodology of *Brown* to *Lane* once more yields *Brown*. In other words, despite the Court reserving judgment until unanimity (and the moral salience it was thought to bear) could be attained,<sup>13</sup> the *Brown* decision itself was severely circumscribed in its reach.<sup>14</sup> Notably, and infamously, the second *Brown* opinion restrained the implementation of public school integration to a pace of "all deliberate speed."<sup>15</sup> More than fifty years later, public schools and public universities continue to struggle with de facto segregation.<sup>16</sup> *Lane*, too, is a minimalist opinion. Although the Justices ruled that court services are subject to Title II of the ADA, it did so in an insipid

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<sup>12</sup> See, e.g., *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002) (explaining that a disabled person whose disability threatens his health can be excluded from workplace opportunity); *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (finding that collective bargaining agreements, even those excluding disabled employees, are per se valid); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (determining that a person must be substantially limited from a range of jobs to be considered disabled, not just limited in the one for which she has applied); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (stating that employers may defer to federal regulations that negate employees' qualifications even when those regulations are functionally inaccurate and may be waived); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (concluding that ADA plaintiffs' disabilities must be measured in their mitigated states); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that, for an employee to be regarded as disabled under the ADA, an employer must have subjectively so considered the putative employee); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999) (deciding that persons who receive SSDI payments following a sworn statement that they are unable to work are under a burden of explaining why they nevertheless have been discriminated against under the ADA's employment provisions). See generally Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Anti-discrimination*, 153 U. PA. L. REV. 579 (2004) (describing how the Court views disability rights as being different from other civil rights, hence not worthy of equal legal protection).

<sup>13</sup> See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

<sup>14</sup> For discussions of *Brown*'s impact (or lack thereof), see, for example, the *Virginia Law Review*'s Special Issue on Twentieth Century Constitutional History, including David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151 (1994); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Gerald N. Rosenberg, *Brown Is Dead! Long Live Brown!: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161 (1994); and Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173 (1994).

<sup>15</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

<sup>16</sup> See, e.g., *United States v. Fordice*, 505 U.S. 717 (1992); see also *Fighting School Resegregation*, N.Y. TIMES, Jan. 27, 2003, at A24 (describing a study by the Harvard Civil Rights Project regarding segregation in public schools). Courts continue to consider whether elimination of de facto segregation constitutes a compelling government interest when reviewing school districts' policies. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1178 (9th Cir. 2005) (en banc); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 14–16 (1st Cir. 2005).

opinion. The five-person majority did not define what it meant by the term “court services.”<sup>17</sup> Additionally, in garnering a majority, Justice Souter’s reference to state and Supreme Court complicity in disability discrimination in the form of eugenics was relegated to a separate concurrence.<sup>18</sup> Moreover, four Justices strongly dissented from *Lane*.<sup>19</sup> The implications of *Lane* thus far are difficult to evaluate; accordingly, the argument can be made that *Lane* is a modern day avatar of *Brown*.<sup>20</sup>

Such a reading of *Lane*, however plausible, neglects the historical significance of these opinions. *Brown* was issued without the benefit of a civil rights statute<sup>21</sup> and against a dominant de jure system of segregation.<sup>22</sup> The Court’s defiance of the

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<sup>17</sup> For example, did the Court limit itself to access for the physically disabled to courtrooms (and if so, as defendants and/or as court reporters?), or does the ruling also extend to sign language interpretation, Braille transcription, and infra-red hearing loops for parties, witnesses, and attorneys? See *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (holding that “Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services,” but failing to identify the scope of such services).

<sup>18</sup> *Id.* at 534–35 (Souter, J., concurring).

I note that if the Court engaged in a more expansive enquiry . . . , the evidence to be considered would underscore the appropriateness of action under § 5 to address the situation of disabled individuals before the courts, for that evidence would show that the judiciary itself has endorsed the basis for some of the very discrimination subject to congressional remedy under § 5.

*Id.* at 534.

<sup>19</sup> *Id.* at 538 (Rehnquist, C.J., dissenting, joined by Justices Kennedy and Thomas); *id.* at 554 (Scalia, J., dissenting); *id.* at 565 (Thomas, J., dissenting).

<sup>20</sup> Overall, the appellate courts’ application of *Lane* has been somewhat of a mixed bag. Compare *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005) (permitting a law student with intractable migraines to sue a state-funded law school for monetary damages under Title II for failing to accommodate her disability), *Ass’n for Disabled Ams., Inc. v. Fla. Int’l Univ.*, 405 F.3d 954 (11th Cir. 2005) (upholding disabled students right to sue a public university under Title II where the school failed to provide aids and services), and *Badillo-Santiago v. Naveira-Merly*, 378 F.3d 1, 5–6 (1st Cir. 2004) (finding that the plaintiff’s claim based on the Commonwealth of Puerto Rico’s failure to accommodate his hearing impairment in court was cognizable), with *Douris v. Office of Pa. Attorney Gen.*, 2005 U.S. App. LEXIS 17269, at \*5 (3d Cir. Aug. 16, 2005) (holding that the Eleventh Amendment barred a wheelchair user’s right to the sue state where the claim involved lack of access to confiscated property auction, not court services), and *Bill M. v. Neb. Dep’t of Health & Human Servs. Fin. & Support*, 408 F.3d 1096, 1100 n.3 (8th Cir. 2005) (describing *Lane* as a “carefully cabined” opinion and declining to extend the holding to the plaintiff’s claim for denial of medical services).

<sup>21</sup> It preceded the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–2000h-6, by a decade.

<sup>22</sup> In 1954, seventeen states and the District of Columbia mandated segregation in public schools. Those states included Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. See Brian Willoughby, *Brown v. Board: The United States, Circa 1954*, Tolerance.org, <http://www.tolerance.org/teach/magazine/features.jsp?&is=34&ar=488> (last visited Jan. 29, 2006). Four other states — Arizona, Kansas, New Mexico, and Wyoming — permitted segregation, though they did not mandate it. See *id.*

hate-filled and historic edifice of racism, however mildly proffered, was courageous.<sup>23</sup> By contrast, the ADA was passed by a nearly unanimous Congress, and heralded as an “emancipation proclamation” for people with disabilities.<sup>24</sup> During hearings on the ADA, Congress was presented with a catalog of evidence on the historical exclusion of the disabled from American society.<sup>25</sup> As a result of those hearings, Congress was persuaded that the overall status of Americans with disabilities was a dismal one, concluding that they have historically been “relegated to a position of political powerlessness in our society,”<sup>26</sup> and “continually encounter various forms of discrimination.”<sup>27</sup> Ruling that persons with disabilities may assert a right to access court services — the provision of which is explicitly enumerated in the accompanying Code of Federal Regulations<sup>28</sup> — was hardly an act of bravery. In both *Brown* and *Lane*, the respective Courts did the least that they could to protect the civil rights of a marginalized group of individuals. The Court’s action in *Brown*, however, challenged centuries of deeply instantiated animus against African Americans without legislative support.<sup>29</sup> By contrast, the *Lane* decision declined full utilization of clear congressional backing for rectifying invidious, if “unintentional,” exclusion of disabled persons from the public sphere.<sup>30</sup> Consequently, however much more we might wish from *Brown*, that Court is worthy of praise; the scant holding of the *Lane* Court, while certainly preferable to a negative ruling, is far from satisfactory.

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<sup>23</sup> See, e.g., Anthony Lewis, *Why the Courts*, 22 CARDOZO L. REV. 133, 143 (2000) (describing the “boldness” of the *Brown* decision and using *Brown* as an example of the “radiating effects a judicial decision can have”); Ronald D. Rotunda, *The Confirmation of Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 577–78 (1988) (calling *Brown* “the Court’s courageous step in overturning over a half century of error”).

<sup>24</sup> Two legislators are credited with this description. See 136 CONG. REC. S9689 (daily ed. July 13, 1990) (statement of Senator Harkin); 135 CONG. REC. S10789 (daily ed. Sept. 7, 1989) (statement of Senator Kennedy). For a detailed account of the politics underlying the ADA’s passage, see JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 105–41 (1993).

<sup>25</sup> Congress summarized its conclusions as to this evidence in the ADA’s Findings section. 42 U.S.C. § 12101(a) (2000); see also U.S. COMM’N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 159 (1983) (“Historically, society has tended to isolate and segregate handicapped people. Despite some improvements, . . . discrimination against handicapped persons continues to be a serious and pervasive social problem.”).

<sup>26</sup> 42 U.S.C. § 12101(a)(7) (2000).

<sup>27</sup> *Id.* § 12101(a)(5).

<sup>28</sup> See 28 C.F.R. §§ 35.149–151 (2005).

<sup>29</sup> See, e.g., Albert M. Sacks, *The Supreme Court, 1953 Term: Foreword*, 68 HARV. L. REV. 96 (1954).

<sup>30</sup> Although some commentators have described the physical exclusion of disabled persons as “apartheid by design,” ROBERT IMRIE, PROPERTY DYNAMICS AND THE MULTIPLE DESIGN NEEDS OF DISABLED PEOPLE (1999), most concur with Harlan Hahn’s view that “discrimination on the basis of disability . . . usually is marked by subtle forms of inequality rather than by blatant prejudice or bigotry.” Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN’S STUD. 97, 108 (1994). Neither is conducive to equality.

Applying the methodology of *Brown* to *Lane* yields a decision more in line with pre-*Brown* decisions, ordering segregation to the extent that state facilities were not “equal.”<sup>31</sup>

Consider, however, the implications of applying *Lane*’s methodology to *Brown*. The majority decision, upholding the given civil right to the least extent possible, might turn out much the same. So, too, the concurring decision enumerating aspects of state- and Court-condoned racism.<sup>32</sup> The dissents, however, would disable *Brown* by balking at the notion that integrating the school system was an appropriate exercise of congressional power. Chief Justice Rehnquist, who as a law clerk urged Justice Jackson to uphold *Plessy*’s separate-but-equal doctrine in *Brown*,<sup>33</sup> would first point out the absence of empirical evidence demonstrating inferiority in segregated facilities. The seven sociological and psychological studies cited in *Brown*’s famous Footnote 11<sup>34</sup> would simply be insufficient to support the broad holding that separate is inherently unequal. Moreover, the Chief Justice would have required a more exacting inquiry to determine what constitutes “unequal.”<sup>35</sup> In *Lane*, Justice Rehnquist suggested that so long as a disabled person was not “actually denied . . . access,” the manner of access, however demeaning, is irrelevant for constitutional purposes.<sup>36</sup> Likewise,

<sup>31</sup> See, e.g., *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)) (granting a writ of mandamus and holding that the petitioner was entitled to receive professional education); *Gaines*, 305 U.S. 337 (ordering a white law school to admit black students where there was no separate, but equal facility within the state of Missouri); see also *Pearson v. Murray*, 182 A. 590 (Md. 1936) (ordering a state law school to admit black students because there was no separate school for African Americans).

<sup>32</sup> Imagine, if you will, Justice Souter proclaiming the Court’s complicity in condoning racism by denying rights of citizenship to former slaves, who were, as Justice Taney noted in his infamous *Dred Scott* opinion, considered as a subordinate and inferior class of beings at the time the Constitution was adopted. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1856).

<sup>33</sup> See William H. Rehnquist, *A Random Thought on the Segregation Cases*, reprinted in 117 Cong. Rec. 45,313, 45,440–41 (1971) (arguing that *Plessy* “was right and should be re-affirmed”). Rehnquist claimed that the memo was more reflective of Justice Jackson’s views than his own. *Id.* at 45,440.

<sup>34</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 n.11 (1954).

<sup>35</sup> Cf. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003) (holding that the Family and Medical Leave Act was a “congruent and proportional” response to gender discrimination by the states (quoting *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001))). In *Hibbs*, the Chief Justice (surprisingly) took a more liberal approach to the congressional findings underlying the FMLA.

<sup>36</sup> See *Tennessee v. Lane*, 541 U.S. 509, 546 (2004) (Rehnquist, C.J., dissenting). Even if the anecdotal evidence and conclusory statements relied on by the majority could be properly considered, the mere existence of an architecturally “inaccessible” courthouse — *i.e.*, one a disabled person cannot utilize without assistance — does not state a constitutional violation. A violation of due process occurs only when a person is *actually* denied the constitutional right to access a given judicial proceeding.  
*Id.* (second emphasis added).

in *Brown*, the Chief Justice might have required something more than psychological harm — perhaps a showing that the African American students were not given books or completely denied access to an educational facility — in other words, a deprivation which *actually* affected their ability to obtain an education. Justice Thomas, in his usually brief fashion, would join the Chief Justice's dissent. Justice Scalia, by contrast, would not only have rejected the majority's holding that "[s]eparate . . . [is] inherently unequal,"<sup>37</sup> but would likely have emphasized the need for a bright line test to determine what constituted "equal" educational facilities and the role of history in so defining the term.<sup>38</sup>

In *Lane*, the Court ultimately reached a conclusion that will likely inure to the benefit of people with disabilities. The holding, however, could and should have been more powerful. Considering *Lane* through the lens of *Brown* suggests that the methodological path was less than ideal. *Brown*'s lessons, however, extend not only to the disability context, but likewise to other civil rights movements. The authors in this symposium address the modern twists on civil rights law in the United States — discussing the lessons we can learn from *Brown* and other historical civil rights decisions.

Carlos A. Ball, in *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*,<sup>39</sup> points out similarities in the backlash to *Brown* and that which followed the Massachusetts Supreme Judicial Court's upholding of same-sex marriage in *Goodridge v. Department of Public Health*.<sup>40</sup> Despite the assertion of some gay and lesbian rights advocates that the latter has been harmful to their cause, a contention well-documented by sudden and fierce resistance to same-sex rights, Professor Ball argues that political and legal backlash is a foreseeable and expected result of controversial civil right decisions.<sup>41</sup> The rights of sexual minorities, he opines, however, are ultimately served by path-breaking judicial decisions that awaken social consciousness (even in negative form) to the homosexual community.<sup>42</sup> Nevertheless, he suggests there is a limit to the progress that can be made in the courtroom and, at some point in time, the emphasis must shift to the political arena. For gay and lesbian rights, he argues, that time has come.<sup>43</sup>

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<sup>37</sup> *Brown*, 347 U.S. at 495.

<sup>38</sup> See, e.g., *Lane*, 541 U.S. at 557–58 (Scalia, J., dissenting) (noting that “[t]he ‘congruence and proportionality’ standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress’s taskmaster.”).

<sup>39</sup> Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493 (2006).

<sup>40</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>41</sup> Ball, *supra* note 39, at 1494.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1536–37.



In *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*,<sup>44</sup> Sonia K. Katyal considers the import of the Supreme Court's decision in *Lawrence v. Texas*,<sup>45</sup> a decision which some scholars have suggested is reminiscent of *Brown*, in a global context. Professor Katyal identifies three dominant foreign perspectives of homosexuality: governments that view homosexuality as a uniquely Western experience that should be rejected; international sexual minority rights advocates embracing a univocal typology of gay, lesbian, and bisexual identity that elides their community's diversity; and social constructionists who believe that identity is best expressed within local contexts.<sup>46</sup> To date, many cases in the gay-rights context have depended upon the second view, which focuses on sexual orientation or gay identity as the paradigm for asserting rights-based claims. In *Lawrence*, by contrast, the Court focused on the individual's right to autonomy, privacy, and liberty in sexual decision-making, and thus, offered a "vision of sexual self-determination that is deeply bordered between public and private expressions of sexuality and desire."<sup>47</sup> Professor Katyal contends that this vision of sexual self-determination in *Lawrence*, though having its limits, nevertheless may translate more easily to cultures that reject Western notions of sexual orientation or identity.<sup>48</sup>

Angela Harris connects these two papers in her article, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*.<sup>49</sup> Though applauding Ball and Katyal's optimistic view of *Goodridge* and *Lawrence*, Professor Harris cautions that like the civil rights activists in *Brown*, by winning the legal battle, gay rights proponents may effectively lose the war.<sup>50</sup> The victory in *Brown*, she suggests, may be merely symbolic.<sup>51</sup> Although in theory *Brown* eradicated segregation, its holding served only to tame the radical vision of rights activists who ultimately faced a political economy that fueled racial and class segregation.<sup>52</sup> Likewise, she warns, the right to gay marriage and freedom of sexual activity may signal the end of a progressive revolution aimed at a transformation in social views of sexuality and family relations.<sup>53</sup> Given the law's commitment to structural liberalism, she, like Professor Ball, explains that the struggle for gay rights cannot end in the courtroom.<sup>54</sup>

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<sup>44</sup> Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429 (2006).

<sup>45</sup> 539 U.S. 558 (2003).

<sup>46</sup> Katyal, *supra* note 44, at 1433.

<sup>47</sup> *Id.* at 1436.

<sup>48</sup> *Id.*

<sup>49</sup> Angela Harris, *Out in the Suburbs: Sexuality, Politics, and Neoliberalism*, 14 WM. & MARY BILL RTS. J. 1539 (2006).

<sup>50</sup> *Id.* at 1540–41, 1543, 1568.

<sup>51</sup> *Id.* at 1547.

<sup>52</sup> *Id.* at 1546.

<sup>53</sup> *Id.* at 1543.

<sup>54</sup> *Id.* at 1582.