

PART III

LEGAL ISSUES

Calculated Confusion

Those who want to see judges who will apply the law instead of imposing their own policies face not only political obstruction to the appointment of such judges but also calculated confusion about the very words used in discussing what is at issue.

Judges who impose their own preferences, instead of following the law as it is written, have long been known as “judicial activists” while those who carry out the law, instead of rewriting it to suit themselves, have been said to be following the “original intent” of the law.

But now a massive effort to muddy the waters has been launched by those who want judges who will continue to impose the liberal agenda from the bench. Words like “activists” and “intent” are being twisted beyond recognition.

Senator Patrick Leahy has redefined “activist” judges to make the least activist Justices on the Supreme Court—Antonin Scalia and Clarence Thomas—suddenly activists by his new definition.

Senator Leahy has said: “The two most activist judges we have right now are Justice Thomas and Justice Scalia, who have struck down and thus written laws of their own in place of congressional laws more than anybody else on the current Supreme Court.”

One of the major functions of the Supreme Court for more than two centuries has been to strike down acts of Congress, the President, or the lower courts when any of these exceed the authority granted to them by the

Constitution. Calling this “judicial activism” is playing games with words and befogging the real issues.

When Justices Scalia and Thomas enforce the limits set by the Constitution, that is not writing “their own new laws,” no matter what Senator Leahy claims.

Those who are writing their own new laws are people like Justice John Paul Stevens, who arbitrarily expanded the Constitution’s authorization of government taking of private property for “public use” to allow the taking of private property for a “public purpose”—which can be anything under the sun.

It is one thing to allow the government to take land needed to build a military base or a dam and something very different to allow the government to bulldoze people’s homes to turn the land over to a private developer to build casinos or shopping malls.

Liberal law professors have joined in the redefining of words. One has given a numerical meaning to “judicial activism” by counting how many laws particular justices have declared unconstitutional. As Mark Twain said, there are three kinds of lies—lies, damned lies, and statistics.

Another law professor, Stanley Fish of Florida International University, likewise befogs the obvious with elegant nonsense.

Those who try to follow the “original intent” of the Constitution cannot do so, according to Professor Fish, because “the author’s intent” cannot be discerned, “so the intention behind a text can always be challenged by someone else who marshals different evidence for an alternative intention.”

Clever, but no cigar.

While the phrase “original intent” has been used as a loose label for the philosophy of judges who believe in

sticking to the law as it is written, judges with this philosophy have been very explicit, for more than a century, that they did not—repeat, not—mean getting inside the heads of those who wrote the Constitution.

Justice Oliver Wendell Holmes said it in plain English, that interpreting what was meant by someone who wrote a law was not trying to “get into his mind” because the issue was “not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used.”

Such contemporary followers of Holmes as Judge Robert Bork have said the same thing in different words. More important, nobody ever voted on what was in the back of someone else’s mind. They voted on the plain meaning of obvious words.

There is no confusion between the government’s taking land for its own use and seizing land to turn it over to somebody else. The only confusion is the calculated confusion of the partisans of judicial activists.

Judges and Judgment

Many years ago, someone did a study of the IQs of municipal transit drivers and their accident rates. Those with below-average IQs had higher rates of accidents, as you might expect. What was unexpected was the discovery that drivers with IQs above a certain level also had higher rates of accidents.

Apparently driving a bus or trolley was not enough to keep the minds of very bright people occupied. So their minds wandered and they had more than their share of accidents as a result.

Something similar may have contributed to disasters in our legal system, especially in appellate courts, where the issue is not simply whether someone was innocent or guilty, or who caused what damage, but how all this fits into the framework of Constitutional law.

The Constitution of the United States is not some esoteric document, written to be understood only by people with high IQs and postgraduate education. It is written in rather plain language.

There is even a sort of instructors' guide on what the Constitution means in *The Federalist Papers*—a collection of popular 18th century essays by those who helped write the Constitution, explaining why they did what they did.

Despite all this, appellate court decisions interpreting Constitutional law today are often a huge maze of tangled reasoning, obscure concepts and complex confusion. The motto over the entrance to the Supreme Court of the

United States says, “Equal Justice Under Law” but sometimes you might wish that it said: “Brevity is the soul of wit.”

It is not that the cases are so complicated in themselves but that high-IQ judges have turned simple realities into complex metaphysics. A few years ago, the Supreme Court voted 5 to 4 that carrying a gun near a school was not interstate commerce. To most people, the decision was obvious. So why 5 to 4?

You might think the decision should have been nine to nothing and it should not have taken more than one page to explain. Yet the good justices tied themselves into knots with lengthy explanations of their votes for and against.

The reason this decision was so complex and caused such consternation among some legal scholars was that previous generations of Supreme Court justices had turned the Constitution’s simple concept of interstate commerce into a complicated rationalization of Congress’ ever expanding exercises of power that it was never given when the Constitution was written.

Although the 10th Amendment says pretty plainly that the federal government can do only what it is specifically authorized to do, while the people can do whatever they are not specifically forbidden to do, this was not good enough for those who had visions of a more active government in Washington.

The terribly clever people who were put on the courts kept “interpreting” Congress’ power to regulate interstate commerce so broadly that anything they wanted to regulate was called “interstate commerce.” Thus the interstate commerce clause was used to virtually repeal the 10th Amendment.

Judges got so clever back in the 1940s that even a man who grew food for himself in his own backyard was said to

be affecting interstate commerce—and was therefore subject to the power of Congress.

After generations of this kind of runaway “interpretation” of the Constitution, it was a shock to some legal scholars when the Supreme Court decided—5 to 4—that Congress could not pass a federal law forbidding people from carrying guns near local schools.

Most states had such laws anyway, and all states had the authority to pass such laws if they wanted to, so this decision did not leave school children unprotected. It just put a stop to one of the thousands of extensions of federal power beyond what the Constitution authorized.

These over-extensions of federal power were not due simply to the ideological biases of judges, though that was undoubtedly a big factor. It also grew out of judges with more brainpower than was necessary to deal with 90 percent of the cases that came before them. High IQs and low self-discipline led to more wrecks in the law, just as among municipal transit drivers.

Justice for Little Angelo

Little Angelo finally got justice, though he died too young to even know what justice meant. Angelo Marinda lived only eight months and it took more than twice that long to convict his father of his murder.

Tragically, the policies and the mindset among the authorities responsible for the well-being of children—the practices and notions that put this baby at risk—are still in place and more such tragedies are just waiting to happen. Little Angelo came to the authorities' attention only 12 days after he was born, when he turned up at a hospital with broken bones.

How would a baby less than two weeks old have broken bones? And what do you do about it?

Many of us would say that you get that baby away from whoever broke his bones and never let them near him again. But that is not what the “experts” say. Experts always have “solutions.” How else are they going to be experts?

The fashionable solution is called “family reunification services.” The severity of little Angelo’s injuries would have made it legally possible to simply take him away and put him up for adoption by one of the many couples who are hoping to adopt a baby.

But no. Through the magic of “family reunification services” parents are supposed to be changed so that they will no longer be abusive.

A social worker told the court two years ago that the San Mateo County Children and Family Services Agency “will be

recommending reunification services, as the parents are receptive to receiving services.” The fact that little Angelo’s sister had already had to be removed from that same home did not seem to dampen this optimism.

At the heart of all this is the pretense to knowledge that we simply do not have and may never have. There are all sorts of lofty phrases about teaching “parenting skills” or “anger management” or other pious hopes. And children’s lives are being risked on such unsubstantiated notions.

Little Angelo himself apparently knew better. After months in a foster home, he was allowed back for a visit with his parents and “had a look of fear in his eyes” when he saw them.

But “expertise” brushes aside what non-experts believe—and little Angelo was not an expert, at least not in the eyes of the social workers who were in charge of his fate. The fact that he had returned from a previous visit with bruises did not make a dent on the experts.

Social workers thought it would be nice if little Angelo could have a two-day unsupervised visit with his parents at Christmas. It was a visit from which he would not return alive.

Now, more than 16 months after the baby’s death, Angelo’s father has been convicted of having literally shaken him to death.

Incidentally, there were experts who testified on the father’s behalf at the trial, one of whom gave testimony that contradicted what he himself had written in a book. This expert had never seen little Angelo, dead or alive.

The time is long overdue for us to stop pretending to know things that nobody knows—not even people with impressive letters in front of their names or behind their names. Whether these experts are simply cynical guns for

hire or really believe their own theories and rhetoric is beside the point. Unsubstantiated theories are no foundation for risking the lives of the helpless.

How anyone could break the bones of a newborn baby is something that people may speculate about. But to claim to know how to turn such parents into decent human beings is reckless. And to risk a baby's life on such speculation is criminal.

It is too bad that only one man will go to jail for this crime. There ought to be room in a cell somewhere for the social workers and their bosses who made this murder possible in the face of blatant evidence about the dangers that an infant could see, even if the responsible adults refused to see.

The pretense of knowledge allows judges, social workers, and others to "do something" by sending people to "training" in "parenting skills" and other psychobabble with no track record of success. And it allows children like little Angelo to be killed.

Property Rites

Two centuries ago, British Prime Minister William Pitt said that the poorest man in the country is so secure in his little cottage that the King of England and his men “dare not cross the threshold” without his permission. That is what property rights are all about—keeping the government off the backs of the people.

Beginning last September 19th, however, laws went into effect giving the British public the right to walk on certain privately owned land. These are large estates that critics on the left have called “private kingdoms,” which are to be private no more.

Envy and resentment of the rich have always been potent political weapons for those seeking the expansion of government power.

Often the power first applied to the rich gradually comes down the income scale to apply to people who are far from rich, just as the income tax has done. But it may be a while before ordinary Britons find that their own little cottage gardens can be trampled on by strangers.

In Norway and Sweden, people are not only allowed to walk on other people’s privately owned land but also to go riding and skiing there and to pick fruit. Europe has long been politically further to the left than the United States, so it provides a sneak preview of where our own liberals are headed.

In the more left-leaning parts of California, for example, public access to privately owned land is being pushed under

a variety of labels. A builder in San Mateo, California, wanted to wall off a small development for the elderly, in the interest of security, but was told by the Planning Commission that he must allow “street presence” rather than block out the public, if he expects to get their approval to build.

Some private homeowners on the Monterey peninsula have discovered that they are not quite as private as they would like to be because local authorities there have created an easement which allows the public to have access to a road across their property.

Officials who violate homeowners’ property rights may have some pretty words that are in vogue in their circles but they pay no price if strangers burglarize or vandalize homes to which they have been given free access, or even murder the homeowners.

Paying a price is what decision-making through a market is all about. But getting something for nothing is increasingly what politics is all about. Why anyone would expect better decisions to be made by third parties who pay no price for being wrong is one of the mysteries of our time.

All across this country, planning commissions, zoning boards, and environmental agencies take more and more decisions out of the hands of the people, who are told in increasing detail what they can and cannot do on their own property.

People who live where there are strong winds and tall trees with shallow roots on their property know that this a formula for falling trees to create costly damage or even death. But these homeowners have in some places found that they cannot cut down those trees because that would go against environmental fetishes.

Rivers and streams may need to be dredged, in order to

prevent flooding, but the danger of a flooded home or a drowned child is not a price that has to be paid by bureaucrats at an environmental agency that is preoccupied with keeping everything “natural.”

The Constitution of the United States protected property rights for the same reason that it protected other rights—a fear, based on the history of the human race, that those with power would abuse it if you let them. But liberal judges have increasingly “interpreted” the Constitution’s property rights out of existence when those rights have gotten in the way of government officials promoting liberal agendas.

Although much of this arbitrary power is wielded by unelected officials on zoning boards, planning commissions, and the like, the laws that create these boards and commissions are passed by elected officials whom we can vote out of office. But that requires that we stop letting ourselves be duped by pretty phrases like “open space” or “smart growth.” There will never be a lack of pretty phrases, if that is all it takes to get us to give up our rights and submit to those who can feel fulfilled in their own lives only when they are controlling our lives.

Property Rites: Part II

When I was house-hunting, one of the things that struck me about the house that I eventually settled on was the fact that there were no curtains or shades on the bathroom window in the back. The reason was that there was no one living on the steep hillside in back, which was covered with trees.

Since I don't own that hillside, someday someone may decide to build houses there, which means that the bathroom would then require curtains or shades and our back porch would no longer be as private. Fortunately for me, local restrictive laws currently prevent houses from being built on that hillside.

Also fortunately for me, my continued criticisms of such laws in this column have not made a dent in the local authorities. But suppose that someday either the courts will strike down land use restrictions or local officials will respect property rights.

Maybe I will be long gone by then and the new owner of this house will be angry at the diminished privacy—and consequently the diminished value of the house, caused by the building of houses on the hillside. Would that anger be justified?

The fundamental question is: What did the homeowner buy? And would the change in laws deprive him of what he paid for? Since the house and the wooded hillside are separate properties, the homeowner never paid for a hillside wooded in perpetuity.

If whoever owns the hillside finds that his property is worth more with houses on it, what right does the adjacent homeowner have to deprive the other owner of the benefits of building on that hillside or selling it to a builder?

True, my house was worth more because of the privacy provided by the wooded hillside. But there was no guarantee that the hill would remain wooded forever. Whoever buys the house buys its current privacy and the chance—not a certainty—that the hill will remain wooded.

If a homeowner wanted a guarantee that the hill would remain as is, he could have bought the hill. That way he would be paying for what he wanted, rather than expecting the government to deprive someone else for his benefit.

Many restrictive land use laws in effect turn a chance that someone paid for into a guarantee that they did not pay for, such as a guarantee that a given community would retain its existing character.

Existing homeowners get huge windfall gains, in the form of rising appreciation of their homes, when laws prevent farmers from selling their land for the purpose of building houses. It's supply and demand.

Without laws restricting land use, supply and demand would make much farm land more valuable for building homes that people want, rather than creating agricultural surpluses that people don't want, but are forced to pay for as taxpayers under our agricultural subsidy laws.

The rationale is the "preservation" of agricultural land. But nothing is easier than to dream up a rationale to put a fig leaf on naked self-interest. Far from being in danger of losing our food supply, for more than half a century we have had chronic agricultural surpluses.

Another rationale for laws restricting land use is that "open space" is a good thing, that it prevents "overcrowding"

for example. But preventing people from building homes in one place only makes the crowding greater in other places. This is just another fig leaf for the self-interest of those who want other people to be forced to live somewhere else.

Esthetics or other benefits of “open space,” can be a good thing. But how good? When you have to buy up the land in competition with others who want to use it for their purposes, that is when you have to put your money where your mouth is.

When the power of government is used to take the land off the market, instead of buying it, then the Constitutional right of “equal protection of the laws” is denied to others.

None of this is rocket science. But it does require taking a moment to think. Unfortunately, our schools are increasingly turning out people who can only “feel” and who are therefore easy prey for those who know how to use rhetoric to manipulate emotions.

Property Rites: Part III

You may own your own home and expect to live there the rest of your life. But keep your bags packed, because the Supreme Court of the United States has decreed that local politicians can take your property away and turn it over to someone else, just by using the magic words “public purpose.”

We’re not talking about the government taking your home in order to build a reservoir or a highway for the benefit of the public. The Constitution always allowed the government to take private property for “public use,” provided the property owner was paid “just compensation.”

What the latest Supreme Court decision does with verbal sleight-of-hand is change the Constitution’s requirement of “public use” to a more expansive power to confiscate private property for whatever is called “public purpose”—including turning that property over to some other private party.

In this case—*Kelo v. New London*—the private parties to whom the government would turn over confiscated properties include a hotel, restaurants, shops, and a pharmaceutical company.

These are not public uses, as the Constitution requires, but are said to serve “public purposes,” as courts have expanded the concept beyond the language of the 5th Amendment—reflecting those “evolving” circumstances so dear to judges who rewrite the Constitution to suit their own tastes.

No sane person has ever denied that circumstances

change or that laws need to change to meet new circumstances. But that is wholly different from saying that judges are the ones to decide which laws need changing and in what way at what time.

What are legislatures for except to legislate? What is the separation of powers for except to keep legislative, executive, and judicial powers separate?

When the 5 to 4 Supreme Court majority “rejected any literal requirement that condemned property be put into use for the general public” because of the “evolving needs of society,” it violated the Constitutional separation of powers on which the American system of government is based.

When the Supreme Court majority referred to its “deference to legislative judgments” about the taking of property, it was as disingenuous as it was inconsistent. If Constitutional rights of individuals are to be waved aside because of “deference” to another branch of government, then the citizens may as well not have Constitutional rights.

What are these rights supposed to protect the citizens from, if not the government?

This very Court showed no such deference to a state’s law permitting the execution of murderers who were not yet 18. Such selective “deference” amounts to judicial policy-making rather than the carrying out of the law.

Surely the justices must know that politicians whose whole careers have been built on their ability to spin words can always come up with some words that will claim that there is what they can call a “public purpose” in what they are doing.

How many private homeowners can afford to litigate such claims all the way up and down the judicial food chain? Apartment dwellers who are thrown out on the street by the

bulldozers are even less able to defend themselves with litigation.

The best that can be said for the Supreme Court majority's opinion is that it follows—and extends—certain judicial precedents. But, as Justice Clarence Thomas said in dissent, these “misguided lines of precedent” need to be reconsidered, so as to “return to the original meaning of the Public Use Clause” in the Constitution.

Justice Sandra Day O'Connor's dissent points out that the five Justices in the majority—Ginsburg, Breyer, Souter, Stevens, and Kennedy—“wash out any distinction between private and public use of property.” As a result, she adds: “The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”

In other words, politicians can replace your home with whatever they expect will pay more taxes than you do—and call their money grab a “public purpose.”

Foreign Law Is Not Law

One of the ironies of our time is that economists have been discovering the importance of law, as such—as distinguished from the specific merits of particular laws—while judges seem increasingly to be losing sight of the rule of law.

“I can hardly imagine any laws so bad, to which I would not rather be subject than to the caprice of a man,” John Stuart Mill said more than a century and a half ago.

Modern economists usually have in mind the economic advantages to a society of having a framework of known, enduring, and dependable rules—the rule of law—within which economic activities can be planned and long-term commitments and investments can be made. But Mill saw the benefits of living under known rules to extend far beyond economic benefits.

Mill spoke of the danger of having to lead “a life of anxiety lest by some of my acts I should unwittingly infringe against a will which had never been made known to me.” Some of today’s vague and ambiguous anti-trust, anti-discrimination, and environmental laws strike like lightning out of the blue to hit people who had no idea that they were doing something wrong.

The Constitution of the United States expressly forbade retroactive laws—“ex post facto” laws, it called them—but judicial decisions creating new rights, duties, and nuances out of thin air are for all practical purposes ex post facto law.

“Evolving standards” are also ex post facto law, for who can know in advance how someone else’s standards are going to evolve, much less which evolving standards will get a majority of the votes in the Supreme Court?

The recent practice of using foreign laws as bases for judicial decisions about American laws likewise turns law into the caprices that John Stuart Mill feared more than he feared bad laws.

There is no such thing as generic foreign law. There are the specific laws of France and the very different specific laws of Saudi Arabia and of hundreds of other countries around the world. It is a matter of individual prejudice or caprice which of these laws any given judge chooses to cite.

Justice Anthony Kennedy, for example, referred to foreign laws as a reason for declaring an American state’s law unconstitutional because it permitted the execution of murderers who were not yet 18 years old, which some foreign governments do not. In other words, laws enacted by the elected representatives of an American state can be wiped out if people in Spain or New Zealand think otherwise.

Not only does this prevent the millions of people who want to be law-abiding citizens from knowing which laws to abide by, it deprives American voters of the right of self-government through elected representatives that is at the heart of American society.

If our votes decide only which candidates get which offices, but not what laws and policies those elected representatives can enact for us to live under, our elections will become more and more like placebos, with the real power being exercised from the judicial bench by people we never voted for.

Liberal judicial activists have been citing laws from

countries more to the political left than the United States is, but there is no reason why other judges at other times could not cite very different laws to justify or rationalize decisions that could not be justified or rationalized on the basis of the Constitution of the United States that all judges have sworn to uphold.

In one of Justice Clarence Thomas' opinions, he noted in passing that the distinguished British 18th century legal scholar William Blackstone had said that people condemned to death should be executed within 48 hours. Surely this is not an idea that liberal judicial activists would want to import and Justice Thomas did not rely on it.

But there is no reason in principle why this or any other ideas from abroad should be any less eligible to be imported than the ideas from foreign countries which have been cherry-picked from an almost endless assortment of possibilities.

The question is not even whether particular foreign laws should become American law. It is not possible for them to become American law, in the sense of rules known in advance, unless they are openly enacted into law by elected officials, rather than imposed by judicial fiat after the fact.

Medical Lawsuits

When a friend told me recently that he was going to undergo a painful medical procedure to see if he has cancer, it reminded me of a time years ago when I faced a similar prospect. The testing procedure in my case would have been both painful and with some risk of infection.

Fortunately, it was a two-part procedure. The first part was uncomfortable but not painful or with any great risk of infection. After a young doctor had put me through that part, an older specialist took over and examined the results—and he decided not to proceed with the second part of the test.

When my wife asked me if that meant that I did not have cancer, my answer was, “No.”

“What it means,” I said, “was that the doctor weighed the alternatives and decided that, since the chance that I had cancer was sufficiently small, and the danger of infection from the test itself was sufficiently large, the best choice was not to go any further.”

My wife seemed not completely put at ease by that, so I added: “Like anybody else, this doctor can be wrong. But, if it turns out that I do have cancer and die, I don’t want anybody to sue that man. Nobody is infallible and no patient has a right to infallibility.”

Since this was many years ago, apparently the doctor’s choice was the right one. But how many doctors feel free to make such choices in today’s legal climate, where frivolous

lawsuits and junk science can lead to multimillion-dollar awards or settlements?

After so many megabucks awards grew out of claims that babies born with cerebral palsy could have been spared if only the doctor had delivered them by Caesarean section, C-section births rose sharply. But it did not reduce cerebral palsy.

While the C-section births may not protect babies from cerebral palsy, they protect doctors from being ruined financially by glib lawyers and gullible juries. Those lawyers who claim that their big-bucks awards don't add much to the cost of medical care are counting only the sums of money they collect.

But needless operations and needless tests are not free, either financially or otherwise.

Today, I cannot help wondering whether my friend is going to be put through a painful procedure for his sake or because the doctor dares not fail to do this test, for fear of a lawsuit somewhere down the road. This is one of the hidden costs of frivolous lawsuits and runaway damage awards, quite aside from the sums of money pocketed by lawyers.

When I was growing up, it would never have occurred to me that Dr. Chaney, our family physician, was doing anything other than giving it his best shot for the sake of our health.

It probably never occurred to Dr. Chaney that we might sue him. For one thing, he knew we didn't have enough money to hire a lawyer, so that was out of the question in the first place.

Trust between doctor and patient is not a small thing. Sometimes it can be the difference between life and death. Our laws recognize the enormous importance of that

relationship by exempting doctors from having to testify to what a patient has told them, even if it is a murder case.

To go to these lengths to protect the doctor-patient relationship—and then blithely throw it away with easy access to frivolous lawsuits makes no sense. Neither does creating a massive medical bureaucracy to pay for treatments and medication, where that means that patients can go only to those doctors preselected for them by some insurance company or the government.

One of my favorite doctors retired early and spent some time explaining to me why he was doing so. The growing red tape was bad enough but the deterioration of the doctor-patient relationship soured him even more.

Earlier in his career, patients came to him because someone had recommended him and they came with a wholly different attitude from that of someone who had been assigned to him by an insurance company. He now found much more of a distrustful, if not adversarial, attitude that didn't do him any good or the patient any good.

That may be the biggest cost of our current bureaucratic and legal environment.

Fixing the Jury System

Now that the case against Tyco executives has ended in a mistrial, there is much outcry against the juror whose holdout will cause a \$12 million trial to have to be done all over again from scratch. Whether that juror was principled or just pig-headed, this trial reveals something more fundamentally wrong with our jury system—and with the media.

It was not some trashy supermarket scandal sheet, but the *Wall Street Journal* and the *New York Post*, that published the juror's name. The Associated Press published her photograph. It was not this juror's holdout itself which ultimately led to a mistrial but a report of her receiving a phone call and a letter that were seen as putting pressure on her.

The jury was described as being minutes away from reaching a verdict when the judge called a mistrial. But the judge was right. There was no way of knowing whether the holdout juror was now agreeing with the other 11 because of an outside threat.

The media who are condemning this woman ought to be condemning themselves for their own irresponsibility, which is not only costing taxpayers millions of dollars but can corrupt the whole system of justice. The *New York Times* pioneered such irresponsibility years ago, when it published the name of the foreman of the jury that acquitted the policemen who beat Rodney King.

Newspapers have every right to complain about any jury

verdict they don't like. But that is wholly different from putting jurors in personal jeopardy when they don't vote the way the media wants them to vote. Do we want future jurors to decide cases on the basis of facts or on the basis of fear?

In the Diallo police shooting case four years ago, a witness whose testimony tended to support the defense was forced by the prosecutor to reveal in open court not only his name and address, but also the very apartment in which he and his family lived.

In an atmosphere where mobs were being whipped up outside the courthouse by demagogues, this was a shot across the bow of any other potential witness who might testify in ways that the prosecutor did not like.

Do you wonder why witnesses do not come forward? When they do come forward, are they supposed to testify to what they actually saw or to what they think will keep them out of trouble?

If we are serious about wanting justice in our courts, then we need to start getting serious about preventing witnesses and jurors from being intimidated. We might start by getting all cameras out of the courtroom.

There is no reason why the identity of the jurors has to be known by the media. The whole jury could be put behind one-way glass, so that they can see the proceedings but cannot be seen. It can be made a felony to publish their names.

The requirement for unanimous jury verdicts is long overdue for reconsideration. One pig-headed juror can cause not only a costly mistrial but also verdicts that do not reflect the seriousness of the crime.

People who commit murder should be convicted of murder, not manslaughter because one juror is too squeamish to risk the death penalty. There are too many

people around who think they have “a right to my own opinion,” as they put it, which translates as: “My mind is made up, so don’t confuse me with the facts.”

The time is also long overdue to reconsider the current practice of having jurors selected with vetoes by the lawyers in the case. When prospective jurors are given 30-page questionnaires made up by lawyers, asking intrusive questions about their personal lives and beliefs, the situation has gotten completely out of hand.

Courts do not exist for the sake of lawyers but for the sake of the public. Allowing lawyers to fish around in hopes of finding one mush head who can save their client makes no sense.

Anonymous jurors, selected by lottery, and not restricted to unanimous verdicts, should be good enough for anyone in an inherently imperfect world. In such a system, cranks and ideologues would not have nearly the leverage that they do now.

There could also be professional jurors, trained in the law, for cases involving complex legal issues. That would cost more—or rather, the cost would be visible in money, rather than hidden in the corruption of the legal system, the way it is now.

Half a Century after *Brown*

May 17, 1954 saw one of the most momentous decisions in the history of the Supreme Court of the United States. Some observers who were there said that one of the black-robed justices sat on the great bench with tears in his eyes.

The case was of course *Brown v. Board of Education*, and the decision declared that racially segregated schools were unconstitutional. In rapid succession, all kinds of other racial segregation, which were common across most of the South and even in some border states, were likewise declared unconstitutional.

This was a reversal of the old 1896 Supreme Court decision in *Plessy v. Ferguson* that racially “separate but equal” facilities were constitutional—and an end to the pretense that the segregated facilities for blacks were in fact equal.

As a young government clerk going to a black college at night—Howard University in Washington—I first heard of the decision when our professor entered the classroom in an obvious state of agitation and announced that something momentous had happened that day, and that we would discuss that, instead of the planned lesson.

As various people around the room expressed themselves, it was clear that we were all in favor of the decision. In fact, many of my classmates seemed to have the most Utopian expectations that this was going to lead to some magic solution to problems of race and poverty. When my turn came, I said:

“It’s been more than fifty years since *Plessy v. Ferguson*—

and we still don't have 'separate but equal.' What makes you think this is going to go any faster?"

This discordant note was brushed aside in the general celebration. My classmates seemed to think that racial integration was going to do it all. They were not alone.

Looking back after half a century, what has *Brown v. Board of Education* accomplished and what has it failed to accomplish? What has it made worse?

After a very long struggle, the courts finally put an end to official racial segregation in states where it had been a barrier and a degradation to blacks. This included the District of Columbia, whose schools were racially segregated.

The anticipated economic benefits, however, lagged far behind. Blacks were already rising out of poverty at a rapid rate that was not accelerated by the civil rights laws and court decisions of the 1950s and 1960s, though of course the progress continued. Yet half a century of political spin has convinced much of the media and the public that black progress began with the civil rights revolution.

It did not. The first two decades after 1940 saw a more rapid rise of blacks out of poverty and into higher paying jobs than the decades following the Civil Rights Act of 1964 or the affirmative action policies that began in the 1970s. Check out the facts.

The key fallacy underlying the civil rights vision was that all black economic lags were due to racial discrimination. That assumption has survived to this day, in the courts, in the media, in academia, and above all in politics.

No amount of factual evidence can make a dent in that assumption. This means that a now largely futile crusade against discrimination distracts attention from the urgent need to upgrade educational standards and job skills among blacks.

Where has *Brown v. Board of Education* been positively harmful?

The flimsy and cavalier reasoning used by the Supreme Court, which based its decision on grounds that would hardly sustain a conviction for jay-walking, set a pattern of judicial activism that has put American law in disarray on all sorts of issues that extend far beyond racial cases. The pretense that the Court was interpreting the Constitution of the United States added insult to injury.

The Court got away with this, despite some calls for impeachment, because it was outlawing a set of racial practices that the country as a whole found abhorrent. If the justices took a few liberties with the law and the facts, who cared?

After half a century of unbridled judicial activism on many fronts, we now know that victims of frivolous lawsuits and violent crime cared, among others. And restoring law to our courts may take another 50 years—if it can be done at all.

Half a Century after *Brown*: Part II

The landmark case of *Brown v. Board of Education* was immediately about schools, even though it quickly became a precedent for outlawing racial segregation in other government-controlled institutions and programs.

What was the basis for that landmark decision and what have been the actual effects of *Brown v. Board of Education* on the education of black students?

The key sentence in the *Brown* decision was: “Separate educational facilities are inherently unequal.” It was not just that the previous “separate but equal” doctrine was not being followed in practice. Rather, the Supreme Court argued that there was no way to make separate schools equal. All-black schools were inherently inferior.

It so happened that, within walking distance of the Supreme Court where this sweeping pronouncement was made, there was an all-black high school that had produced quality education for more than 80 years. Back in 1899 this school outscored two out of three white academic high schools in Washington on standardized tests.

Today, in the 21st century, it would be considered Utopian even to hope for such a result. Moreover, this was not an isolated fluke. This same school had an average IQ of 111 in 1939—fifteen years before the Supreme Court declared such things impossible.

Most schools for blacks were in fact inferior, mainly because most were in the South, where the educational standards for blacks and whites alike tended to be lower.

Racial discrimination, as distinguished from segregation alone, tended to make black schools the worst of all.

This was not due to their being all black, however. Back in the early 1940s, the black schools in Harlem had test scores very similar to those in white working class neighborhoods on New York's lower east side. Sometimes the Harlem schools' scores were a little higher than those of schools on the lower east side, and sometimes they were a little lower, but these scores were always comparable.

In short, it was not segregation, as such, that made schools inferior. If this seems like hair-splitting, consider the consequences of the Supreme Court's reasoning.

Once you say that racial separation makes the education itself inferior, you are launched on a course that leads straight to court-ordered busing of school children hither and yon to mix and match them racially, in hopes of educational improvement.

The polarization and bitterness of this crusade has lasted for decades—and has left black children still far behind educationally. Many are now much further below national norms than black students were in Harlem more than half a century ago.

Medical authorities have long recognized that a quack remedy that is harmless in itself can nevertheless be fatal in its effects, if it keeps sick people from getting the treatment that can cure them. Racial mixing and matching has been the great quack remedy for the educational lags of black school children that has substituted for higher standards and harder work.

Brown v. Board of Education did not prescribe compulsory busing for racial balance. But the logic of its argument led inexorably to that conclusion, whether that was the original intent or not.

More broadly, both the explicit language and the implicit assumptions of the Supreme Court in *Brown* depicted the answer to problems of blacks in general as being essentially the changing of white people. This was yet another line of reasoning that led straight into a blind alley.

Today, there are all-black schools that succeed, all-black schools that fail, and racially mixed schools that do either. Neither race nor racial segregation can explain such things. But both can serve as distractions from the task of creating higher standards and harder work.

The judicial mythology of racial mixing has led to an absurd situation where a white student can get into a selective public high school in San Francisco with lower qualifications than a Chinese American student. This farcical consequence of judicial mythology about a need for racial mixing does nothing to improve education for blacks or anyone else.

Half a Century after *Brown*: Part III

Although *Brown v. Board of Education* dealt with race and with schools, its judicial philosophy spread rapidly to issues having nothing to do with race or schools. In the half century since *Brown*, judges at all levels have become unelected legislators imposing the vision of the political left across a wide spectrum.

For example, the anti-business vision of the left was apparent in another Supreme Court case with *Brown* in its title—*Brown Shoe Co. v. United States*. In this 1962 case, the same Chief Justice Earl Warren who delivered the landmark racial decision now ruled that a merger between the Brown Shoe Company and the Kinney retail shoe store chain had to be broken up.

Why? Because the Kinney chain, which sold about one percent of the shoes in the United States, could be “foreclosed” to other shoe manufacturers if it merged with Brown Shoe. According to Chief Justice Warren, such mergers, “if left unchecked, will be likely ‘substantially to lessen competition.’”

If ever there was a runaway extrapolation, this was it. If Brown and Kinney had been allowed to remain merged, together they would still have sold less than 6 percent of the shoes in the United States. But the Warren Court wanted to nip monopoly in the bud.

The same anti-business bias has over the years allowed frivolous lawsuits, based on junk science, to ruin or destroy companies and whole industries, costing vast numbers of

workers their jobs. All of this happened, not because the written laws compelled it, but because activist judges stretched and twisted the laws to fit their own biases and preconceptions.

Nowhere did this free-wheeling judicial activism do more damage to more people than in the Warren Court's remaking of the criminal law.

Under the much disdained "traditional" approach of criminal law, murders had been declining dramatically over the years. The murder rate in 1960 was just under half of what it had been in 1934.

All of that changed quickly and dramatically for the worse after the Warren Court began imposing its own notions about crime in the 1960s. The most famous of these changes was the "Miranda warning" that police have to give suspects, stating that they have a right to remain silent and to have an attorney supplied free.

For more than a century and a half, not one of the great Supreme Court Justices—not Holmes, not Brandeis, nor anybody else—had ever discovered any such requirement in the Constitution of the United States. Nor had Congress passed any law requiring any such thing.

It was just another part of the liberal vision imposed from the bench by an unelected judiciary. Moreover, *Miranda* was just one in a string of Supreme Court decisions that made it easier for criminals to escape punishment.

The theory was that a more "enlightened" understanding of crime would reduce the crime rate. Whatever the plausibility of this belief, the facts to the contrary were devastating.

The murder rate, which had been going down for decades, suddenly shot up. By 1974, the murder rate was twice as high as in 1961. The average person's chances of

becoming a victim of a violent crime tripled between 1960 and 1976.

Anyone can make a mistake but judicial mistakes are set in concrete. Moreover, the very possibility that they might be mistaken never seemed to occur to headstrong justices.

When a former police commissioner addressed a gathering of judges in 1965, warning of the consequences to expect from their rulings in criminal cases, Justices Warren and Brennan “roared with laughter,” according to the *New York Times*, when a law professor poured scorn and derision on the commissioner’s statements.

How many crime victims or their widows or orphans would have laughed is another question.

Brown v. Board of Education was not just about race or schools but was about a whole judicial mindset with ramifications across a whole spectrum of issues—and reverberations that are still with us in the 21st century. Its pluses and minuses have to be added up with that in mind.

Umpires, Judges, and Others

Major league umpires are complaining about an electronic device that is being used to check how accurately they are calling balls and strikes. They say that the device itself is too variable to be relied on.

Whatever the merits of each side in this issue, it all sounds much like judges complaining about restrictive sentencing guidelines and the “three strikes and you are out” laws which lock up repeat felons for life. From neither the umpires nor the judges is there the slightest acknowledgement that their own willful and arbitrary behavior is what brought on this reaction.

For years now, there have been complaints that every umpire seems to have his own personal strike zone, despite the rules of baseball which specify what is a strike and what is a ball. Some umpires have even complained when television cameras took overhead pictures showing that some pitches that were called strikes had in fact never passed over any part of the plate.

Some umpires called “high strikes,” some called “low strikes” and some were said to retaliate against pitchers or batters who complain by adjusting the size of the strike zone to their disadvantage.

All of history says that arbitrary power goes to people’s heads, whether they are umpires, judges, or Howell Raines of the *New York Times*. When judges get headstrong and disregard the rules, the consequences can be far more disastrous than they are in a baseball game or a newspaper.

Only after years—indeed, decades—of judges bending over backwards to let criminals off the hook have legislators begun passing laws to keep felons behind bars where they belong, instead of out on the street victimizing more people. These laws are not perfect, but those who whine about their imperfections pass over in utter silence the reckless judicial behavior that made such laws necessary.

It is much the same story in our public schools. Teachers' unions complain bitterly about outside testing of students, claiming that the tests are flawed, that "teaching to the test" distorts education and miscellaneous other whines and smoke screens.

The cold fact is that these tests came about only after decades of dumbing down of academic standards—which the education establishment ignored, denied or blamed on every conceivable thing other than themselves. Anything wrong with parents, students or society was taken as proof that there was nothing wrong with the schools.

All the complaints about the imperfections of the tests fail to acknowledge the irresponsible self-indulgences—including iron-clad tenure for incompetent teachers—that made tests necessary.

I don't know whether the new electronic camera for calling balls and strikes is better or worse than the umpires, or how much it will improve over time. But I do know that it was not just a bolt from the blue.

Neither were the restrictions put on judges who seemed hell-bent to let murderers roam the streets again. Nor were tests for schools where students are treated as a captive audience to be propagandized with political correctness or as guinea pigs to be experimented with to try out the latest fads.

We the public have been far too trusting and gullible

when it comes to putting arbitrary powers in the hands of people who are not accountable to anyone.

One group that has not yet been reined in are social workers, who have wreaked havoc in the lives of children, whether by ripping them out of their homes because of unsubstantiated accusations by anonymous informants or by putting them back into homes where they have already been abused—and where some have subsequently been killed.

Like teachers, social workers indulge themselves in all sorts of unsubstantiated notions which turn into dogmas when their establishment refuses to test those notions against evidence. Dogmas about teaching “parenting skills” or “anger management” can cost children their lives.

Accountability may be old-fashioned but it is still not obsolete. It is our only hope when there are headstrong people with power.

Big Business and Quotas

Anyone who thinks that business is gung ho for the free market has just not been paying attention to business. Adam Smith knew better, back in the 18th century.

Although he was the patron saint of capitalism, Smith was no fan of capitalists. Any policy advocated by businessmen, he said, “ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention.”

In our own time, as in Adam Smith’s time, businesses have not hesitated to advocate government interference with free markets. Tariffs on steel and other import restrictions are obvious examples. Many, if not most, anti-trust cases begin with some business complaining because a competitor is gaining market share by charging lower prices or offering an improved product.

While businesses will use the rhetoric of the free market when it suits their purpose, they will dump it in a minute when it does not. Against this background, it is not surprising that big business is filing briefs in favor of affirmative action in the University of Michigan case before the Supreme Court.

Big business has long been in favor of racial quotas. When an effort was begun back in the 1980s, within the Reagan administration, to get rid of affirmative action, the influence of corporate America helped squelch this effort.

Why does big business want racial quotas? Because it is in their own self-interest.

If a corporation does not have enough minority employees to satisfy government agencies, that can lead to racial discrimination lawsuits. But if they hire by quotas and quotas are outlawed, they can be sued by whites for reverse discrimination. Keeping affirmative action legal solves their problem.

But that is not how it was presented in the January 27, 2003 issue of *BusinessWeek*, where columnist Roger O. Crockett portrayed corporations as courageously “sticking out their necks” for the sake of that mystic thing called “diversity.”

Sticking their necks out? Just who is going to do what to them for supporting quotas? It is safer than playing checkers with your maiden aunt.

If there is anything more ridiculous than endlessly repeating the magic word “diversity,” it is trying to come up with plausible arguments in favor of the racial quotas that this euphemism really means.

According to *BusinessWeek*, corporate CEOs “believe that as minorities’ share of the U.S. population has mounted, diversity has become a critical workforce requirement.” They get this diversity by hiring graduates of “a campus where diversity thrives” because that is where “students develop an understanding of different cultures.” And that, in turn means that these graduates know how to “appeal to a variety of consumers” as well as how to get along with “colleagues and clientele from many ethnic backgrounds.”

How do companies in Japan manage to sell everything from cars to cameras, in countries around the world, without having that mystic “diversity”? How does a country with such a racially homogeneous population even manage to educate its young people if “diversity” is such an essential factor in education?

Yet big business CEOs “rightly worry,” according to *BusinessWeek*, that without racial quotas the result would be “a smaller supply of minority college grads, which would damage the economy and the society alike.”

Actually, the result of getting rid of racial quotas in college admissions is likely to be a *larger* supply of minority college graduates, because minority students will be attending colleges where they meet the same standards as others and are more likely to be able to do the work and graduate, instead of punching out as often as they do when they are admitted under lower standards.

The end of affirmative action in state colleges and universities in California and Texas has not led to declining enrollments of minorities, but to their redistribution among academic institutions. But facts carry no such weight as the “diversity” mantra.

The Grand Fraud

No issue has been more saturated with dishonesty than the issue of racial quotas and preferences. Many defenders of affirmative action are not even honest enough to admit that they are talking about quotas and preferences, even though everyone knows that that is what affirmative action amounts to in practice.

Despite all the gushing about the mystical benefits of “diversity” in higher education, a recent study by respected academic scholars found that “college diversity programs fail to raise standards” and that “a majority of faculty members and administrators recognize this when speaking anonymously.”

This study by Stanley Rothman, Seymour Martin Lipset, and Neil Nevitte found that “of those who think that preferences have some impact on academic standards those believing it negative exceed those believing it positive by 15 to 1.”

Poll after poll over the years has shown that most faculty members and most students are opposed to double standards in college admissions. Yet professors who will come out publicly and say what they say privately in these polls are as rare as hen’s teeth.

Such two-faced talk is pervasive in academia and elsewhere. A few years ago, in Berkeley, there was a big fight over whether a faculty vote on affirmative action would be by secret ballot or open vote. Both sides knew that the result

of a secret ballot would be the direct opposite of the result in a public vote at a faculty meeting.

When any policy can only be defended by lies and duplicity, there is something fundamentally wrong with that policy. Virtually every argument in favor of affirmative action is demonstrably false. It is the grand fraud of our time.

The need for “role models” of the same race or sex is a key dogma behind affirmative action in hiring black or female professors. But a recent study titled *Increasing Faculty Diversity* found “no empirical evidence to support the belief that same-sex, same-ethnicity role models are any more effective than white male role models.”

The related notion that a certain “critical mass” of black students is needed on a given campus, in order that these students can feel comfortable enough to do their best, has become dogma without a speck of evidence being offered or asked for. Such evidence as there is points in the opposite direction.

Without affirmative action, its advocates claim, few black students would be able to get into college. In reality, there are today more black students in the University of California system and in the University of Texas system than there were before these systems ended affirmative action.

These black students are simply distributed differently within both systems—no longer being mismatched with institutions whose standards they don’t meet. They now have a better chance of graduating.

What of the idea that affirmative action has helped blacks rise out of poverty and is needed to continue that rise? A far higher proportion of blacks in poverty rose out of poverty in the twenty years between 1940 and 1960—that is, before any major federal civil rights legislation—than in the more than 40 years since then. This trend continued in

the 1960s, at a slower pace. The decade of the 1970s—the first affirmative action decade—saw virtually no change in the poverty rate among blacks.

In other words, most blacks lifted themselves out of poverty but liberal politicians and black “leaders” have claimed credit. One side effect is that many whites wonder why blacks cannot lift themselves out of poverty like other groups, when that is in fact what most blacks have done.

Affirmative action is great for black millionaires but it has done little or nothing for most people in the ghetto. Most minority business owners who get preferences in government contracts have net worths of more than one million dollars.

One of the big barriers to any rational discussion of affirmative action is that many of those who are for or against it are for or against the theory or the rationales behind group preferences and quotas. As for facts, the defenders simply lie.

The Grand Fraud: Part II

Fraud is as pervasive in arguments for affirmative action for women as in arguments for affirmative action for blacks. In fact, a whole fraudulent history has been concocted to explain the changing economic position of women over the years.

In the feminist movement's version of history, women's changing economic position is explained by women's being repressed by men until they began to be rescued in the 1960s by the women's movement, anti-discrimination policies, and affirmative action.

Hard facts tell a very different story. Women had achieved a higher representation in higher education and in many professions in earlier decades of the twentieth century than they had when the feminist movement became prominent in the 1960s.

This earlier success can hardly be attributed to Gloria Steinem, Betty Friedan and the like. Nor should they be allowed to claim credit for the later resumption of that earlier trend, which had more to do with demographics than politics.

The percentage of master's degrees and doctoral degrees that went to women was never as great during any year of the 1950s or 1960s as that percentage was back in 1930. The percentage of women who were listed in "Who's Who in America" was twice as high in 1902 as in 1958.

Women were also better represented in higher education and in a number of professions in the 1920s or

1930s than they were in the 1950s or 1960s, though none of this fits the fashionable fairy tales of the feminists.

Women received 34 percent of the bachelor's degrees in 1920 but only 24 percent in 1950. In mathematics, women's share of doctorates declined from 15 percent to 5 percent over a span of decades, and in economics from 10 percent to 2 percent.

What was going on? After all, there was no feminist movement and no affirmative action in those earlier years when women were doing better.

What really happened was that, as the birth rate fell from the late nineteenth century into the 1930s, women rose in the professions and in the postgraduate education necessary for these professions. Then, as women began marrying younger and having more children during the years of the baby boom, their representation in both the professions and in the education that led to those professions fell.

There is nothing mysterious about the fact that motherhood is a time-consuming activity, leaving less time to pursue professional careers. It is just plain common sense—which is to say, it does not provide the moral melodrama needed by movements such as radical feminism.

In later years, as women again began to have fewer children, they rose again in higher education and in the professions, though it was often some years before they regained the position they had achieved decades earlier. But now their rise was accompanied by a drumbeat of feminist propaganda, loudly claiming credit.

Yet the role of motherhood in explaining male-female differences is far more readily demonstrated. Data from more than 30 years ago show that women who remained unmarried and worked continuously from high school into

their thirties earned higher incomes than men of the same description.

What about the rise of women's income relative to that of men after the 1960s? Surely that must have been due to the feminist movement or to affirmative action, no? No!

What the hard data show is that more women began working full time, both absolutely and relative to men. Obviously, full-time workers get paid more than part-time workers.

Among those women who worked full-time and year around, their income as a percentage of the income of men of the same description showed no real trend throughout the 1960s and 1970s, despite all the hoopla about the feminist movement and affirmative action.

The income of women who worked full-time and year around began an upward trend relative to the income of men in the 1980s—during the Reagan administration, which is not when most feminists would claim to have had their biggest impact.

How do the feminists explain away all this earlier history of women's progress? They don't. They ignore it. By the simple expedient of tracing women's progress only since the 1960s, the fraud is protected from contact with inconvenient facts.

The Grand Fraud: Part III

If you would like to be taller than you are, do you think that joining a basketball team would help? After all, statistics prove that members of basketball teams are taller than other people.

If this seems like a strange way to reason, it is the same kind of reasoning used by those who argue that minority students need affirmative action to get into top-rated colleges and universities, because graduates of those institutions have more upscale careers.

I am sure that my graduating class at Harvard has had a high income. After all, it contained a Rockefeller and the Aga Khan, so even if the rest of us became unemployed bums, the class would still have a high average income. Of course, that wouldn't do the rest of us any good.

As hand-wringing begins in many quarters over the prospect that affirmative action might end, and fewer black students get admitted to Ivy League schools and flagship state universities, it is well to keep in mind that statistics about how well the graduates of such institutions do in later life may have little or no relevance to those black students who are admitted under lower standards.

Most black students who enter college do not graduate—and that is especially so for those admitted with qualifications well below those of the other students at the same institution. So how well the graduates of this or that college or university do in later life has no relevance to

those who do not survive to make it up to the graduation platform.

These casualties of the double-standards admissions process do not even get the dignity of being recognized as the “collateral damage” of affirmative action. They would have been far better off succeeding on some campus where the admissions standards matched their academic background and capabilities.

For example, a study some years ago showed that the average black student at MIT scored in the top 10 percent in mathematics among students nationwide—but in the bottom 10 percent at MIT. One-fourth of those black students failed to graduate.

There is neither glory nor money to be had from flunking out of MIT. But you can have a fulfilling professional career after graduating from Texas Tech or Cal State Pomona.

The end of affirmative action in the state-supported universities of California and Texas was decried and denounced by those who said that it would mean the end of black students’ “access” to college, the “resegregation of higher education” and other irresponsible rhetorical flourishes.

In reality, the end of affirmative action in California and Texas state institutions meant that fewer black students would go to Berkeley or Austin, and more would go to other state colleges and universities in the same systems. There are now more black students in these systems than there were under affirmative action.

A liberal think tank in New York has joined the hand-wringing over the current University of Michigan affirmative action case, currently under consideration by the U. S. Supreme Court, by publishing statistics supposedly showing

how the percentage of minority students will decline in selective colleges. But being admitted to a selective college does not make anyone become a better student, any more than joining a basketball team makes anyone taller.

In reality, affirmative action increases the chance that a minority student will fail where the standards are higher, instead of succeeding where the standards are at a level that matches the student's academic capabilities.

Incidentally, when a minority student is admitted to a highly-rated college without meeting the standards, do you think that the white student who is displaced to make room is likely to be a Rockefeller or the Aga Khan? Or is the white student who is turned down more likely to be the son or daughter of some working-class family who is kept out so that the son or daughter of a black doctor can get in and make the statistics look good?

Both those who are kept out, despite meeting the qualifications standards, and those who are let in without meeting those standards, are likely to lose from affirmative action.

The Grand Fraud: Part IV

Someone once said of Lillian Hellman that every word she uttered was a lie, including “and” and “the.” Many defenders of affirmative action deserve a Lillian Hellman award.

Not only is much of what they say contradicted by readily available facts, much of what they say publicly contradicts what they themselves say privately. Often their very reasons for favoring affirmative action are false.

Supposedly, affirmative action in college admissions is to help black students. But why are so many big businesses filing briefs with the Supreme Court in support of affirmative action in academia? Is it because they are so gung ho for black students? Or does this have something to do with their own bottom line?

Big business has a lot to lose if the courts stop buying the “diversity” mantra that has now become the stock defense of group preferences and quotas. Take away the legal protection of affirmative action and businesses can be sued by blacks if they are “under-represented” and by whites if blacks get hired with lower qualifications to make the numbers look good.

It would be a lawyer’s heaven and a corporate CEO’s hell. Money that might otherwise go to the stockholders or into reinvestment in the business would instead end up in the pockets of trial lawyers. Trying to steer a course between statistical “under-representation” and “reverse discrimination” would be a task that would be as interminable as it is impossible.

At the heart of the problem is that the courts have allowed both private plaintiffs and government agencies to equate statistical disparity with discrimination. At the very least, the burden of proof shifts to the employer—and usually nobody can prove anything, so the employer loses.

Since it is virtually impossible to find two groups with the same qualifications in any industry or in any country, applying the same standards to all applicants for employment or promotion virtually guarantees a “disparate impact” on different groups—which in turn virtually guarantees charges of discrimination.

Even when the same employer hires people for different jobs—say, third basemen and centerfielders—there can be very different racial representation in those two jobs. Check out the races of third basemen and centerfielders in the major leagues. Is the employer a racist when he hires third basemen but not a racist when he hires centerfielders?

You may have seen hundreds of black football players score touchdowns but when did you last see a black player kick the point after? Do you believe that white clubowners are willing to hire black running backs and wide receivers, and to pay them millions of dollars each, but that those very same clubowners cannot abide the thought of a black man kicking a football through the uprights?

These are just some of the absurd conclusions you would have to reach if you took “disparate impact” statistics seriously. But disparate impact theory is like the emperor who has no clothes. Everybody knows he has no clothes. But they have to pretend that he does. Otherwise, the whole system is in jeopardy.

Take away disparate impact theory and you would have widespread unemployment in government agencies that enforce anti-discrimination laws. Trial lawyers might have so

much time on their hands that they would have to sue more doctors, in order to make ends meet.

Back during the Reagan administration, when there was some talk about a new presidential executive order, rescinding the executive orders of Presidents Lyndon Johnson and Richard Nixon, on which affirmative action is based, big business made their opposition known and the idea was quietly dropped.

This was not the Reagan administration's finest hour. Nor was it the Supreme Court's finest hour when the justices made their first big ruling on affirmative action, 25 years ago, and ended up with a cacophony of opinions, as they tried to square the circle and split the baby, so that quotas could continue—provided that you didn't call them quotas.

There has been a quarter of a century of national discord based on their indecision.

Saving Quotas

There was some talk recently about upcoming vacancies on the Supreme Court because some retirements were expected. However, the High Court's decision on affirmative action suggests that there are already vacancies, even though no one has resigned. We can only hope that, when President Bush gets a chance to nominate replacements, he does not fill an existing vacancy with another vacancy.

Justice Sandra Day O'Connor's majority decision upholding affirmative action in admissions to the University of Michigan Law School was her classic split-the-baby formula, washed down with rambling rhetoric, and making a mockery of the law. This decision provoked not only dissent from four other justices, but sarcasm and disgust—as it should have.

Justice O'Connor's argument is hard to summarize because it consists largely of repeating unsubstantiated claims about the “educational benefits that flow from a diverse student body” and the need for a “critical mass” of minority students for their own educational needs and those of other students. She uses the phrase “compelling interest” to get around the 14th Amendment's requirement of equal treatment, much as earlier generations of justices used the phrase “interstate commerce” to evade Constitutional limits on the powers of Congress.

This exercise in verbal dexterity included the pronouncement that “race-conscious admissions policies must be limited in time,” that “all government use of race

must have a logical end point.” But, having uttered these pieties, Justice O’Connor imposed no time limit nor defined any criterion for an end point. In other words, she talked the talk but she didn’t walk the walk.

Justice Antonin Scalia’s response was that the “mystical ‘critical mass’ justification” for racial preferences “challenges even the most gullible mind.” He pointed out how academics who talk about multiculturalism and diversity in the courts have “tribalism and racial segregation” on their own campuses, including “minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.”

Verbal pieties and cynical realities have thoroughly corrupted affirmative action from the beginning. A quarter of a century ago, the Bakke case brought a great outpouring of noble rhetoric from the Supreme Court but the bottom line was that you could continue to have racial quotas, so long as you didn’t call them racial quotas.

Today’s Supreme Court has not only reaffirmed that principle—or lack of principle—but also, by striking down a companion case involving undergraduate admissions, added that you can’t blatantly award points for race. That would be giving the game away so obviously that even the great unwashed masses would see what you are doing.

Racial preferences and quotas are favored by what Justice Clarence Thomas’ dissent called “the know-it-all elites.” It has become a badge of their identity and what its actual consequences are for others in the real world is of no real interest to them. Justice Thomas is unimpressed by the endlessly repeated mantra of “diversity,” which to him is just “a fashionable catch-phrase.”

Far from buying Justice O’Connor’s many reiterations of

claims for its educational benefits, Justice Thomas cited empirical studies indicating that the much vaunted diversity “actually impairs learning among black students.”

No one epitomizes the know-it-all elites more than the *New York Times*, whose front-page story by Linda Greenhouse refers to “the broad societal consensus in favor of affirmative action in higher education,” despite polls which have repeatedly shown the public’s grave misgivings about racial quotas and preferences.

Justice Thomas’ devastating dissent is deftly evaded by Ms. Greenhouse, who says that he “took as his text not the briefs but his own life story.”

If you want to find out whether you can rely on what the *New York Times* says, now that Jayson Blair is gone, read Justice Thomas’ dissent for yourself and see if you can find anything there that would lead you to believe that it was about his own life story.

The High Cost of Nuances

The Supreme Court's recent decision saying that the federal government can prosecute those using marijuana for medical purposes, even when state laws permit such use, has been seen by many as an issue of being for or against marijuana. But the real significance of this decision has little to do with marijuana and everything to do with the kind of government that we, our children, and our children's children are going to live under.

The 10th Amendment to the Constitution says that all powers not granted to the federal government belong to the states or to the people.

Those who wrote the Constitution clearly understood that power is dangerous and needs to be limited by being separated—separated not only into the three branches of the national government but also separated as between the whole national government, on the one hand, and the states and the people on the other.

Too many people today judge court decisions by whether the court is “for” or “against” this or that policy. It is not the court's job to be for or against any policy but to apply the law.

The question before the Supreme Court was not whether allowing the medicinal use of marijuana was a good policy or a bad policy. The legal question was whether Congress had the authority under the Constitution to regulate something that happened entirely within the boundaries of a given state.

For decades, judges have allowed the federal government to expand its powers by saying that it was authorized by the Constitution to regulate “interstate commerce.” But how can something that happens entirely within the borders of one state be called “interstate commerce”?

Back in 1942, the Supreme Court authorized the vastly expanded powers of the federal government under Franklin D. Roosevelt’s administration by declaring that a man who grew food for himself on his own land was somehow “affecting” prices of goods in interstate commerce and so the federal government had a right to regulate him.

Stretching and straining the law this way means that anything the federal government wants to do can be given the magic label “interstate commerce”—and the limits on federal power under the 10th Amendment vanish into thin air.

Judicial activists love to believe that they can apply the law in a “nuanced” way, allowing the federal government to regulate some activities that do not cross state lines but not others. The problem is that Justice Sandra Day O’Connor’s nuances are different from Justice Antonin Scalia’s nuances—not only in the medical marijuana case but in numerous other cases.

Courts that go in for nuanced applications of the law can produce a lot of 5 to 4 decisions, with different coalitions of justices voting for and against different parts of the same decision.

A much bigger and more fundamental problem is that millions of ordinary citizens, without legal training, have a hard time figuring out when they are or are not breaking the law. Nuanced courts, instead of drawing a line in the sand, spread a lot of fog across the landscape.

Justice Clarence Thomas cut through that fog in his

dissent when he said that the people involved in this case “use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana.”

Instead of going in for fashionable “nuance” talk, Justice Thomas drew a line in the sand: “If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.”

In short, the kinds of limitations on the power of the national government created by the Constitution are being nuanced out of existence by the courts.

Ironically, this decision was announced during the same week when Janice Rogers Brown was confirmed to the Circuit Court of Appeals. One of the complaints against her was that she had criticized the 1942 decision expanding the meaning of “interstate commerce.” In other words, her position on this was the same as that of Clarence Thomas—and both are anathema to liberals.

The Polio Fallacy

The disappearance of an American teenager in Aruba has been more than a tragedy for her and for her family. It is the latest of many tragedies to strike trusting people who have long been sheltered from dangers and who have acted as if there were no dangers.

Not only individuals but whole nations have lost their sense of danger after having been protected from those dangers.

After the devastating disease of polio was finally conquered by vaccines, back in the 1960s, the number of people afflicted declined almost to the vanishing point. Some people then began to see no need to take the vaccine, since apparently no one was getting polio any more, so who was there to catch it from?

The result was a needless resurgence of crippling and death from this terrible disease.

The kind of thinking involved in the polio fallacy has appeared in many other contexts. When some public disorder gets underway and a massive arrival of police on the scene brings everything under control immediately, many in the media and in politics deplore such “over-reaction” on the part of the police to a minor disturbance.

It never occurs to such people that it was precisely the arrival of huge numbers of cops on the scene that brought the disturbance to a screeching halt without having to use force.

During the Cold War, Communist expansionism around

the world somehow never struck Western Europe, which was protected by the American nuclear umbrella. Western Europeans often accused the United States of unnecessary militarism. American military power was like the polio vaccine that was considered unnecessary.

The latest version of the polio fallacy is the demonizing of the Patriot Act. Some people are yelling louder than ever that they have been silenced, that we have had our freedom destroyed, all as a result of the Patriot Act.

Let us go back to square one, to the terrorist attacks of 9/11, which were the reason for passage of the Patriot Act.

Do you remember how long every major public event—the World Series, Christmas celebrations, the Super Bowl—was a time of fear of a new terrorist attack? Do you remember all the advice to stock up on medicines or food, so that we could ride out any new terrorist onslaught?

Do you remember all the places that terrorists were expected to strike? The different colors of national alerts being announced regularly?

Now, after years have passed without any of these feared disasters actually happening, the eroding of a sense of danger has led many to repeat the polio fallacy and act as if the dangers from which we have been protected did not exist—and that the enhanced protection is therefore unnecessary.

The many crackdowns on domestic terrorists under the Patriot Act, as well as the ability to intercept and disrupt their communications under the powers of that Act, receive little or no credit for the fact that there has been no repetition of anything like 9/11.

The man principally responsible for law enforcement crackdowns on terrorists in the United States during this dangerous period—Attorney General John Ashcroft—not

only received no gratitude for our safety, the complacency to which that safety led allowed many to indulge themselves in the luxury of vilifying Ashcroft at every turn.

Like the police who arrive in large numbers to quell disturbances and are then accused of “over-reacting,” the Patriot Act has been depicted as an over-reaction to terrorist activity. Indeed, the very word “terrorist” has been banned in much of the politically correct media.

The Patriot Act is no closer to perfection than anything else human. It has costs, as every benefit has had costs, hard as it is for many among the intelligentsia to accept anything less than “win-win” situations.

“I have a real problem with fascism,” as one lady in a trendy California bookstore said fiercely, when discussing the Patriot Act.

She was aghast when I replied, “I hadn’t noticed any fascism.”

Have you?