Shall We Overcome?†

By Louis H. Pollak*

Just over four years ago, in March of 1965, a young Boston minister was put to death in Alabama. His crime was to come to the town of Selma to help Martin Luther King show black people how to become registered voters. A fortnight later, Dr. King led the great march from Selma to Montgomery ("the cradle of the Confederacy"), to let the world know that there were whites in Alabama who would kill to stop black men and women from becoming voting Americans.

A week before the march, the President of the United States went to the Capitol to address a joint session of Congress. He asked the Congress to enact a new law to protect the right to vote. In the course of his address, President Johnson said this:

But even if we pass this bill, the battle will not be over. What happened in Selma is part of a far larger movement which reaches into every section and state of America. It is the effort of American Negroes to secure for themselves the full blessings of American life.

Their cause must be our cause too. Because it is not just Negroes, but really it is all of us, who must overcome the crippling legacy of bigotry and injustice.

And then the President said to the Congress, and to the nation — invoking the great song of the civil rights movement — "And we shall overcome."\(^1\)

I

Four weeks ago was the first anniversary of the killing of Martin Luther King. Five weeks from now is the first anniversary of the killing of Robert Francis Kennedy. King was a black man; Kennedy was a white man. Both believed — and dedicated their lives to the belief — that America could be one land for all people. Was the belief of our dead leaders a dream whose time has now ended? Are we to accept — and try to rationalize — what we are told is happening: that our land is rapidly becoming two Americas, black and white, separate and unequal?\(^2\)

Grave as this question is, it draws in its train a question graver still — the continued viability of our nearly two-centuries-old experiment in democracy.

II

It is these questions which I wish to raise with you this evening. They will be at the heart of my direct examination. To help lay the ground-

\(^{†}\) Address, Ninth Annual William H. Leary Lecture, University of Utah College of Law, May 1, 1969.

* Dean and Professor of Law, Yale Law School.

\(^{1}\) Public Papers of the Presidents, Lyndon B. Johnson 281–87 (1966) ("Special Message to the Congress: The American Promise").

\(^{2}\) I am, of course, paraphrasing the grim verdict of the Kerner Commission: "This is our basic conclusion: Our nation is rapidly moving toward two societies, one black, one white — separate and unequal." Report of the National Advisory Commission on Civil Disorders 1 (1968).
work for these central questions, I will now call certain preliminary wit-
nesses. I offer their testimony, subject to connecting up:

A

(1) He was nominated for the vacant Congressional seat in an off
year, halfway through the Presidential term. He was a loyal party man,
and if he had any reservations about the foreign war the Administration
was waging, he certainly did not disclose them during his campaign. But
in the time between his election and the opening of the new Congress, the
Congressman-elect became increasingly aware that some leading members
of his party had lost confidence in the war. For example, when he stopped
off in Kentucky en route to Washington, he heard a senior member of the
Senate characterize the war as “unnecessary and offensive aggression,” a
war in which it is the enemy “that is defending her firesides, her castles
and her altars, not we.” And, shortly after the new Congressman took his
seat, he felt impelled to explain to his colleagues that there had been a
change in his own thinking about the matter. “When the war began, it
was my opinion that all those who . . . could not conscientiously approve
the conduct of the President, in the beginning of it should, nevertheless,
as good citizens and patriots, remain silent on that point, at least until
the war should be ended.” But now he found himself aligned with those
of his party who had recently asserted that “the war . . . was unnecessarily
and unconstitutionally commenced by the President.” To the Congress-
man, to the Senator, to the others arrayed in opposition to the Adminis-
tration, the war seemed, among other things, to be sharpening those divi-
sions on the question of race which were threatening to tear the nation
apart.

The course of public debate so summarily outlined might have taken
place in 1966 and 1967, midway in President Lyndon B. Johnson’s elected
term. It did take place in 1846 and 1848; the war was the Mexican War;
the President was Polk; the Senator was Clay; the Congressman was
Lincoln. Clay and Lincoln and their fellow Whigs saw the war as a
vehicle for the acquisition of more territory, which meant more slave terri-
tory, and an increase in the strength and stridency of the spokesmen of
“the peculiar institution” — which, in turn, seemed to bring the day of
secession inexorably nearer.

As things fell out, the Whig fears were, in the short run, overdrawn;
within a month after Lincoln had joined the assault on Polk and his war
policy, a peace treaty had been signed and the Mexican War was at an
end. Some two years thereafter, under the leadership of Clay and Webster
(and a younger Senator, Stephen Douglas of Illinois), Congress fashioned
the Compromise of 1850. It appeared that the competing claims of the
slave and anti-slave forces had at last been brought into equilibrium.

(2) Who, in 1850, could have ventured a sound prophecy of what was
to follow? One of the great statesmen who was adept at prophecy, and
at pessimism, had died two years before. He was an aging Congressman
from Massachusetts — relentless foe of slavery, hostile to the war, fearful of disunion. In February of 1848, just as the war was ending, he rose in the House to speak; then collapsed and was taken away to die. He was reported to have said, "This is the last of earth, but I am content." 3

But the dying Congressman, John Quincy Adams, was not content. His diary discloses that he thought his life, and his country's life, were ending in failure:

If my intellectual powers had been such as have been sometimes committed by the Creator of man to single individuals of the species, my diary would have been, next to the Holy Scriptures, the most precious and valuable book ever written by human hands, and I should have been one of the greatest benefactors of my country and of mankind. I would, by the irresistible power of genius and the irrepressible energy of will and the favor of Almighty God, have banished war and slavery from the face of the earth forever. But the conceptive power of mind was not conferred upon me by my Maker, and I have not improved the scanty portion of His gifts as I might and ought to have done. ... May I never ... murmur at the dispensations of Providence.4

The Compromise of 1850 was, as befits a negotiated position, more limited in its purposes than those which Mr. Adams had pursued. The great Compromise sought not to banish but to contain slavery, and thereby avoid a particular war. For seven years it seemed to offer the nation respite. But, in 1857, Chief Justice Taney and his brethren of the majority decided Dred Scott,5 and used the decision as an occasion for announcing that Congress was without authority to restrict the spread of slavery in the territories. The astounding obiter dictum put at naught all that Clay and the others thought they had achieved, and within four years the Compromise was at an end.

(3) Whether Mr. Adams, had he lived to and beyond Appomattox, would have viewed the Civil War and its aftermath to be a triumph or a failure, we cannot know. We cannot even know Mr. Lincoln's verdict. He died with a hope, not with a judgment; for he did not know what was to follow Lee's surrender.

We look back with less wisdom and less virtue than Mr. Adams and Mr. Lincoln, but — knowing, as they did not, what followed the war — we are able to venture judgments about the degree to which the war and reconstruction served our nation's highest purposes. This shadowed ground — contended for by arms and then by ideology and stratagem — has been endlessly revisited by historians and myth-makers — most often by historians turned myth-makers. Very recently, the ground has been surveyed anew by one of the few American historians stalwart and perceptive and rigorous enough to separate fact from fantasy. He is C. Vann

---

3 This quotation, and the quotations from Clay and Lincoln, are to be found in chapters VI and VII of C. Sandburg, Abraham Lincoln: The Prairie Years (1926).


5 Dred Scott v. Sandford, 60 U.S. 393 (1856).
Woodward. In a lecture delivered less than a week ago, Professor Woodward rendered a judgment — a judgment which, I submit, will not be reversed on appeal or set aside on collateral attack:

[In 1865 the democratic colossus of the New World stood triumphant, flushed with the terrible victories at Gettysburg, Vicksburg, Cold Harbor and Appomattox. Its crusade for freedom had vindicated the blood shed by its sons, and in the full flush of power and victory and righteousness, its leaders solemnly pledged the Nation to fulfill its promises, not only of freedom but the full measure of democracy and racial equality. The powers of fulfillment, sealed by the sacrifices of a victorious war, were unlimited. And the federal government was no remote trans-Atlantic metropolitan parliament on the banks of the Thames or by the Seine. It sat on the Potomac, with Lee's Arlington Mansion in full view of the White House windows across the river, and its armies garrisoned the defeated states.

For all that, we know that although the North won its four-year war over a fully armed, mobilized, and determined South, when the issue was slavery, it very quickly lost its crusade against a disarmed, defeated, and impoverished South when the issue was equality. For on this issue the South was united as it had not been on slavery. And the North was even more divided on the issue of equality than it had been on slavery. In fact, when the chips were down, the overwhelming preponderant views of the North on that issue were in no important respect different from those of the South — and never had been.]

The fact that our victory at arms was followed, in only a dozen years, by abject surrender of our stated purposes, marks out the history of Reconstruction as, in Professor Woodward's view, quite unlike any of the other central themes in American History, "Reconstruction is unique ... as the one great experience of failure for Americans — Southerners excepted — in the national history. The rest of American history, with the exception of the current war, can be told broadly in terms of successes."

— The quotation is taken from the closing paragraphs of "The Comparative Approach to Reconstruction History," the closing lecture of the Storrs Lectures delivered by Professor Woodward at Yale Law School, April 23, 24, and 25, 1969. The general title of the three lectures is *Slavery to Freedom: An American Failure.*

These sentences are taken from the first of Professor Woodward's Storrs Lectures. The first lecture is entitled, "The Problem of Failure in American History." The entire paragraph from which these sentences are taken is worth repeating in full:

Reconstruction is unique for another reason as the one great experience of failure for Americans — Southerners excepted — in the national history. The rest of American history, with the exception of the current war, can be told broadly in terms of successes. Heretofore, Americans have won all their wars, or have been convinced that they did, and have encountered no frontiers or problems that did not yield eventually to persistent effort or a large amount of good luck. Many of the major historic episodes have had their full share of guilt and shame, of betrayal, treachery, injustice, rapine, mass outrage, and criminal blundering. But, by and large, they have turned out well from a national, or at least majority point of view. Americans dwell on the history of their legends, fondly and without undue remorse or guilt or self-reproach. The winning of the trans-Mississippi West, for example, is crowded with stupendous gluttony and criminal stupidity, with broken promises, and betrayed minorities. Yet we have managed to convert it into something called the Frontier Experience, which is said to have had all manner of therapeutic and improving effects on the national character.
I said, shortly after I began this evening's talk, that I wanted to explore some preliminary questions before turning to the matter centrally at issue. I have now laid the groundwork; it comes simply to this: I agree with Professor Woodward that we are, as a nation, novices at failure. I agree, too, that our betrayal of the promise of equality in the generation from the end of the Civil War to Plessy v. Ferguson was our Republic's gravest and most corrupting failure. And I agree that the war we are now engaged in is also a failure — not only militarily, but also, like the Mexican War, politically, in the sense that we should never have undertaken it.

And so I at last turn to the paramount questions: Are we even now fashioning a new American failure — a failure which dwarfs the Vietnam War — a failure which parallels, and indeed inexorably fulfills, the failure of Reconstruction? Would such a further failure end all hope for democracy in our beloved land?

Let me put the matter simply. In just over a fortnight, we will mark the fifteenth anniversary of Brown v. Board of Education. Is it a day for celebration? Or is it, like Appomattox, a day that speaks to us of a nation's promise unfulfilled?

When Chief Justice Warren, in his first term on the Court, handed down the unanimous decision in Brown, most blacks and a great many whites thought the nation at last had a second opportunity to redeem the promise of equality. To be sure, there were some whites, especially in the South, who saw no merit in the promise. And there were a few whites who valued the promise highly but were skeptical about the authority and capacity of the Court to prod us into habits of rectitude. One of the ablest of the skeptics put it this way, four years after Brown:

Who will be bold enough to say whether the judgment in the segregation cases will be judged fifty years from now to have advanced the cause of brotherhood or to have illustrated Bagehot's dictum that the "courage which strengthens an enemy, and which so loses, not only the present battle, but many other battles, is a heavy curse to men and nations."

I was one who did not share that skepticism. I thought it was precisely the Court's function to discover in the Constitution, and to give voice to, the better angels of our nature — and thus to reaffirm, in a manner binding on all of us, this most solemn of the nation's covenants. I still think that is the Court's proper, indeed its highest, function; and I still hold myself bound by that covenant. I ask you to consider with me this evening whether we, as a nation, are not in train of breaking that covenant for the second time.

8 163 U.S. 537 (1896).
To give my question meaning, I owe it to you to say, with more precision, what I have understood that covenant to be. A pair of illustrations will, I think, make plain my meaning.

My first illustration is taken from a public school classroom. This seems proper enough, because *Brown* was, after all, a case about public schools. But the classroom I have in mind was not in the South; it was in New Haven. It was in a nursery school, established in the early 1960's, for poor children, chiefly black. It was a prototype for what, a year or so thereafter, was to become a national program — "Head Start." According to the late Dr. Laurence Paquin, then New Haven's Superintendent of Schools, the great thing that happened in that New Haven classroom — a basement room in a settlement house — was that someone had thought to put two or three mirrors on the walls. The little children spent most of their time looking at themselves in the mirrors. They had never seen themselves before. (What better demonstration could there be of the truth of Justice Frankfurter's dictum, announced in the very different context of the released-time problem, that "the public school is at once the symbol of our democracy and the most pervasive instrument for achieving our common destiny" — a dictum that surely had its shaping influence on the fact that *Brown* was chosen as the vehicle for repudiating the separate-but-equal doctrine.)

I take my second illustration from the law. I am going to read you a brief excerpt from what transpired in an Alabama trial court, where a woman petitioning for habeas corpus was being cross-examined by the prosecuting attorney:

Q. What is your name, please?
A. Miss Mary Hamilton.

Q. Mary, I believe — you were arrested — who were you arrested by?
A. My name is Miss Hamilton. Please address me correctly.

Q. Who were you arrested by, Mary?
A. I will not answer a question —

BY ATTORNEY AMAKER: The witness's name is Miss Hamilton.

A. — your question until I am addressed correctly.

THE COURT: Answer the question.

THE WITNESS: I will not answer them unless I am addressed correctly.

THE COURT: You are in contempt of court —

ATTORNEY CONLEY: Your Honor — your honor —

THE COURT: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine.

---

The contempt citation, sustained on appeal to the Alabama Supreme Court, was reversed per curiam by the United States Supreme Court.\textsuperscript{12}

The Supreme Court, in reversing Mary Hamilton's contempt conviction, cited one case — the decision invalidating courtroom segregation\textsuperscript{13} — and wrote no opinion. But the Court was saying, I submit, exactly what Dr. Paquin saw mirrored in the basement schoolroom: America must make it possible for people to be treated — and hence, for better or for worse, to fulfill themselves — as individuals. It is in this sense that we have covenanted that all men are created equal.

National acquiescence in, and a fair measure of national support for, such a covenant were not hard to achieve so long as the covenant could be perceived in geographically limited terms. Northern whites had no great difficulty with the proposition that southern blacks should be equal to southern whites. For the first decade after Brown, northern whites could wax indignant about the slow pace of southern school desegregation; and they could be equally emphatic in their insistence on black access to southern polling places, southern lunch counters and southern jobs.

Northern whites had no great difficulty admiring Martin Luther King in Montgomery, Birmingham, and Selma. But King in Chicago was another matter. For the past five years the ever-intensifying question has been northern white readiness to understand that the covenant of equality is nationwide; that it applies on Chicago's South Side, and also in Cicero and Winnetka; in Harlem and also in Forest Hills and Bronxville; in Roxbury and in Brookline and in Newton; in Watts and in Pacific Palisades. Blacks have come to know that the degradation of Beaufort County and Plaquemines Parish and Sunflower County has its counterpart in northern slums — drug-ridden, rat-ridden, gun-ridden slums, fenced off from the white world by that Proposition Fourteen of the mind and heart to which the Supreme Court's writ does not yet run.\textsuperscript{14}

And blacks are aware that whites, ever more affluent, would rather spend twenty billion dollars and ten thousand lives (many of them black) each year in a mindless war in Asia than wage a purposeful war for schools and homes and jobs and decency at home (not only in showcase enclaves but throughout America).

In sum, blacks, seeking equality, see today a linear projection of the America of 1877 and 1896, as so chillingly perceived by Professor Woodward: "...when the chips were down, the overwhelmingly preponderant views of the North on that issue were in no important respect different from those of the South — and never had been."

Whether white obduracy is really as monolithic as it proved in the decades after the Civil War is open to question. There is good reason for supposing that in many quarters indifference plays as large a role as intransigence. But, from the black perspective, this is a distinction without

\textsuperscript{12} Hamilton v. Alabama, 376 U.S. 650 (1963).
\textsuperscript{13} Johnson v. Virginia, 373 U.S. 61 (1962).
\textsuperscript{14} See Reitman v. Mulkey, 387 U.S. 369 (1967).
a difference, for either form of inertia means that the covenant of equality is still dishonored.

III

Building on this perception of a covenant dishonored, some black rhetoricians — especially those who sound the louder now that the voice of Dr. King is stilled — are presenting a different due bill. They do not ask for equality in the terms in which I have hitherto defined it. They ask for “identity” in group terms — “blackness” as beauty, “blackness” as power. They ask — and sometimes “demand” — white guilt, white capital, and white “followership” in building a black homestead in racially compartmentalized condominium. They seek this new covenant in place of the covenant of equality thus far unfulfilled.

The fact that the new proposal not only rests on, but insists on the ennoblement of, the white-created racist myth of “blackness,” is not its central defect. Myths assiduously cultivated have been the yeast of political theories, some of them viable, since the beginning of human history. The central defect of the proposal is that, if pursued with rigor, it appears to call for abandonment of free individual self-fulfillment as the chief purpose of American political organization. It is, of course, true that much of American life (far too much in my own biased [i.e., incurably individualistic] view) is packaged in racial or religious or other group-conscious terms. This ought not, I submit, to lead us to accept, as definitional of our democratic ideal, that shares of status (or whatever other forms of fulfillment you choose) should be allocated in group terms. I am aware that many Catholics supported John F. Kennedy for the Presidency because he was a Catholic, and that many non-Catholics opposed him for the same reason. I voted for him (as I hoped a year ago to be able to vote for Robert F. Kennedy) because I thought him the fittest leader, and I would have changed my vote had I thought he was campaigning on a different principle.

In the third of his Storrs Lectures, Professor Woodward adverts to the white myth of “blackness” in a discussion of the corrosive effect of racial prejudice in the several American countries in which slavery was practiced:

I find very helpful a distinction that a Brazilian scholar, Oracy Nogueira, has drawn between two models of prejudice: “prejudice of mark” and “prejudice of origin.” The latter type, “prejudice of origin,” in its pure form is peculiar to the United States. It is directed at anyone, regardless of physical appearance or personal attribute, known to be in some degree of African origin. This peculiar white myth of what constitutes a “black” is so universal in the United States as to be accepted by so-called “black nationalists.” Elsewhere, and particularly in Latin America, prejudice varies according to “mark,” physical or otherwise, and discriminates fastidiously among all the infinite varieties that amalgamations between Africans and other races as well as personal attributes and attainments can produce. In that sense, “prejudice of mark” is more discriminating than “prejudice of origin,” though the pure black appears to suffer as much exclusion from the one as the other type.

To avoid any possible misunderstanding in an area where misunderstanding is so easy to come by, permit me to make it altogether clear that nothing I have said cuts against the importance of electing black candidates to public office. Particularly (though not exclusively) in the South there are large areas in which no white political leader now on the horizon could be expected to lift a finger to vindicate the interests...
I ask, then, that we reject the siren song of separatism. I say "siren song" deliberately; for in some of its aspects the separatist proposal caters to the worst of white fears and prejudices ("If you fine black people will just stay in the center city and be nice, we'll fumigate your ghetto and let you do your thing in your community schools"). But my case against separatism does not rest on a challenge to the bona fides of those who market the nostrum (many of whom I believe to be in entire good faith), or of those whites to whom it is most readily vendable (and here my calibration of good faith tails off very quickly). My case against separatism is, simply, that I deny its compatibility, on any comprehensive and long-term basis, with our enduring commitment to build a nation in which each American has an equal stake and is a joint tenant of the whole.27

IV

The critical question, of course, is whether the commitment I have called "enduring" subsists or not. That many, perhaps most, blacks have lost faith in the existence of such a commitment I fully understand. The evidence supports their lack of faith. But is it beyond our power, as a nation, to invest both words and deeds to redeem the pledge made by Lincoln and his generals and his privates, the pledge repeated by Thaddeus Stevens and Charles Sumner and General O. O. Howard, the pledge we were reminded of by the elder Justice Harlan, the pledge reiterated in our own time by the Chief Justice and his brethren? I hope not. And I think not. To accomplish what must be done requires commitment of a kind to which we are now unaccustomed, but which is surely not beyond our intelligence or our resources. As a beginning, we must rid ourselves of the incubus of Vietnam. This is necessary — just as it was necessary to bring Polk's war on Mexico to a speedy conclusion — in order to assemble the strength to build towards unity. But ending this war, like ending that one, is not a sufficient condition of success. Starting with a clear understanding of our objective — the resolute establishment of equality in every aspect of American life — we must turn to the task with no smaller investment than "our Lives, our Fortunes, and our sacred Honor."

If we fail in this task, we will have added perceptibly to the human harvest of injustice and dishonor. And we will have done more. I think we will have gone far to complete the demonstration that democracy cannot work. As I say this, I have very much in mind that doughty democrat, John Quincy Adams. As I pointed out earlier this evening, Mr. Adams, at his death in 1848, despaired for his beloved country. And in 1919, just fifty years ago, Brooks Adams sought to buttress his own charge of hundreds of thousands of black constituents traditionally unrepresented (and in many areas largely disenfranchised, until very recently). But where there are exceptions, they should not be ruled out of contention simply because they are white. Against undiluted racial manipulation of the political process, Smith v. Allwright, 321 U.S. 649 (1944), a decision I take to be of general application, stands permanent guard.

27 A proposition which in no way precludes the possibility that, in limited contexts and for the very short term, a number of forms of black cohesiveness may conduce to a far more positive sense of individual identity and therefore of individual worth.
that democracy had run its course by reference back to his grandfather's prescient despair:

At this particular juncture of human affairs the tendency is very strong throughout the world to deify the Democratic dogma, and to look to democracy to accomplish pretty promptly some approach to a millennium among men.

This form of belief was strong in my family a century ago, and found expression through my grandfather, John Quincy Adams, who made the realization thereof the work and ambition of his life and who, when he grew old, practically gave his life for the cause. As an apostle of this doctrine, I take it, he must always be one of the most commanding figures in our history, when he comes to be fully understood... He based his hopes of success, in his supreme effort, on the belief that God... favored him, and would aid him; but he died declaring that God had abandoned him... But so far as he had watched, during a lifetime, the progress of the Democrat toward perfection, he had little to say in the way of hope. And so he died. His life was a tragedy, ending in the Civil War, which he had long foreseen approaching, but which he had been unable to do anything to avert. Yet the greatest tragedy of all for us, and for all optimists who believe in the advent of perfection through the influence of Democracy, is the condition in which we have been left since the close of the war. I wish to point out that the Civil War was fought, presumably, to enforce the Democratic principle "of the natural equality of man, and the possession of certain rights of which we cannot be deprived by violence." But, viewed in this light, our country is as much in the midst of a social war now as she was when Lincoln died.¹⁸

When Lincoln died, he had not succumbed to the pessimism which apparently engulfed John Quincy Adams. In his Second Inaugural, he looked hopefully to the end of conflict and to a time when we could "bind up the nation's wounds." But he knew that the end of conflict and the beginning of genuine reconstruction were not certainties, and he did not shrink from painting the alternate scene:

Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of the blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said, that the judgments of the Lord are true and righteous altogether.

V

It seems that next month, a few weeks after the fifteenth anniversary of Brown, the Chief Justice will, on completion of his fifteenth term, vacate the center chair. I hope that in after years it will be said of our generation and of the generations which follow, that we had the wisdom and courage and stamina to redeem the promise that Earl Warren, good democrat that he is, made in our names.

¹⁸B. Adams, Introductory Note to H. Adams, The Degradation of the Democratic Dogma at v–viii (1920). To be sure, the "social war" which obsessed Brooks Adams was not Lincoln's social war, nor ours—nor even, I think, the one which chiefly concerned Brooks Adams' grandfather.
I have completed what I came to say. But perhaps you will permit me — an alien agnostic, a non-believing Jew turned Gentile by the local Mormon lexicon — to add words of benediction: As you know, there will be celebrated a few days hence, and not far from this city, the centennial of the spanning of the continent by rail. I take my text from the words inscribed on the golden spike in May of 1869:

May God continue the unity of our country as this railroad united the two great oceans of the world.