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**BROWN v. BOARD OF EDUCATION AND THE JURISPRUDENCE OF
LEGAL REALISM**

WILLIAM E. NELSON*

We are here today to commemorate the fiftieth anniversary of *Brown v. Board of Education*,¹ surely the most important case decided in the Twentieth Century by the Supreme Court of the United States. Over the past half-century, *Brown* has come to “[define] the central values of constitutional adjudication in the United States.”² It has even been called “the single most honored opinion in the Supreme Court’s [entire] corpus.”³

There are many reasons not merely to commemorate but even to celebrate *Brown*. The most salient is that the Court’s decision marked the beginning of the end of the heinous system of formal de jure segregation of blacks from whites that had prevailed throughout the South for some three quarters of a century.⁴ Segregation had grown up in the aftermath of Reconstruction as a means to keep the former slaves in a condition of subordination.⁵ Whatever doubts might have existed about its legality were erased when the Supreme Court declared in *Plessy v. Ferguson* that separate facilities for African-Americans were constitutional as long as they were physically equal to facilities for whites.⁶ In fact, they almost never were. Indeed, both before and after *Plessy*, segregation had the purpose and effect of “constantly pushing the Negro farther down.”⁷

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1. 347 U.S. 483 (1954).

2. Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1867 (1991).

3. Jack M. Balkin, *Introduction to WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 4* (Jack M. Balkin ed., 2001).

4. See *Brown*, 347 U.S. at 495.

5. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 22-29 (3d ed. 1974).

6. *Plessy v. Ferguson*, 163 U.S. 537, 548-52 (1896).

7. WOODWARD, *supra* note 5, at 108. See generally *id.* at 97-109.

Thirteen years later, with the founding of the National Association for the Advancement of Colored People (NAACP),⁸ blacks began their slow climb up the mountain of equality. Another generation passed before Charles Hamilton Houston reorganized the Howard Law School into a center for the training of civil rights lawyers.⁹ Within a few more years, the Supreme Court, in *Missouri ex rel. Gaines v. Canada*, held for the first time that a separate educational track for African Americans—in this instance, an out-of-state law school—violated the Equal Protection Clause.¹⁰ After several other decisions,¹¹ the five cases that ultimately were consolidated into *Brown v. Board of Education*¹² and *Bolling v. Sharpe*¹³ came before the Court. They were first argued in the October 1952 Term, put over for reargument to the next term, and finally decided on May 17, 1954.¹⁴ The opinion directing the dismantling of segregation in the South “with all deliberate speed” was not issued until yet another year had passed.¹⁵ Sixteen years later, the Court affirmed the use of busing to achieve integration,¹⁶ but then, in the 1974 case of *Milliken v. Bradley*, it slowed integration efforts by prohibiting busing across municipal and school district boundaries.¹⁷ The result of all these cases is that de jure segregation is unconstitutional and Southern schools are no longer totally segregated, as they were a half-century ago.¹⁸ But residential segregation and all its untoward consequences are worse than ever, particularly in Northern cities.¹⁹ Thus, while there is reason for celebration, the celebration should be somewhat restrained. *Brown* put an end to an era of wicked law, but it failed to end racism, as many of us in the trenches during the past five decades had hoped it would.

Brown v. Board of Education also “contributed,” to quote Mark Tushnet, “to the development of a pervasive ‘rights consciousness’ among the people of

8. See MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 1 (1987).

9. See *id.* at 30-31, 35-36.

10. *Missouri ex rel. Gaines v. Canada*, 306 U.S. 337, 352 (1938).

11. See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948).

12. See *Brown*, 347 U.S. at 486.

13. 347 U.S. 497 (1954).

14. See *Brown*, 347 U.S. at 488.

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

16. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

17. *Milliken v. Bradley*, 418 U.S. 717, 752-53 (1974).

18. For statistics on the first two decades of desegregation in public schools in the South, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 345-47 (1991).

19. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

the United States generally.”²⁰ *Brown* was the first case in which the Supreme Court struck down numerous laws of many states in order to protect individual civil, as distinguished from economic, rights. *Baker v. Carr*²¹ and the Warren Court’s criminal procedure revolution²² followed, and by the end of the 1960s people had begun to expect that the courts, rather than other institutions, would protect their constitutional rights. *Roe v. Wade*²³ and *Lawrence v. Texas*²⁴ are both an outgrowth and a confirmation of that expectation. More deeply, Americans of all groups, as a result of *Brown*, have grown to understand that they have rights and that those rights can be enforced through law. Most of us think that this “rights consciousness” is a cause for celebration.

Finally, *Brown v. Board of Education* marked the birth of the Supreme Court’s claim, first announced four years later in *Cooper v. Aaron*²⁵ and brought to fruition in recent decisions of the Rehnquist Court,²⁶ that the Court, in the words of my colleague Larry Kramer, should be the “sovereign” and not simply the “supreme” interpreter of the Constitution.²⁷ *Cooper*, which “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution,” told all state officials that they had no power to ignore or reject the Supreme Court’s holding in *Brown* and, indeed, that their oaths bound them to enforce it.²⁸ Some forty years later, *City of Boerne v. Flores* informed members of Congress that, despite Section Five of the Fourteenth Amendment, they too had no power to ignore or reject the Supreme Court’s interpretation of the Fourteenth Amendment and, indeed, that their oaths bound them to enforce it.²⁹ *Bush v. Gore*³⁰ fully displayed the Court’s belief in its primacy over the other branches of government, as have the federalism cases culminating in *United States v. Morrison*.³¹ Proponents of

20. Tushnet & Lezin, *supra* note 2, at 1867.

21. 369 U.S. 186 (1962).

22. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *Fay v. Noia*, 372 U.S. 391, 398-99 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963); *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

23. 410 U.S. 113 (1973).

24. 123 S.Ct. 2472 (2003).

25. 358 U.S. 1, 18 (1958).

26. See, e.g., Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 128-69 (2001).

27. *Id.* at 13. The words Kramer uses are “sovereignty” and “supremacy,” not “sovereign” and “supreme.” *Id.*

28. *Cooper*, 358 U.S. at 18.

29. *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997).

30. 531 U.S. 98, 111 (2000).

31. 529 U.S. 598, 616-17 n.7 (2000); see also *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48 (1999); *United States v. Lopez*, 514 U.S. 549, 566 (1995). But see *Nev. Dep’t of Human Res. v. Hibbs*, 123 S.Ct. 1972, 1981-82 (2003). For a general discussion of these cases, see Kramer, *supra* note 26, at 137-58

a robustly empowered Supreme Court—and there will be many among the readers of this Article—can find cause for celebration here as well, even if they do not agree with all of the substantive results the Court has reached.

These matters of celebration, however, are not my subject. Indeed, *Brown v. Board of Education* itself is not my subject. What I plan to address is a shift in emphasis in the jurisprudence of legal realism—a shift that is connected to *Brown* but obviously more complex than *Brown*.

Let me define my topic from the bottom up. Throughout the Twentieth Century, the legal academy has fixated on the death of formalism, the birth of legal realism, and the triumph of the latter over the former during the New Deal's constitutional revolution of 1937.³² I have no doubt that the change from formalism to realism occurred and that the change was important. The legal realists have dominated the jurisprudential landscape of America since the 1930s.

But it is a mistake to view realism as a phenomenon that thereafter did not change, as most scholars have done.³³ An important intellectual move on the part of those who see realism as such a phenomenon has been to distinguish it from a predecessor movement, known as sociological jurisprudence. Again, I do not doubt that sociological jurisprudence and realism can be understood as different phenomena,³⁴ although I agree with Morton Horwitz that the

and Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

32. See BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 175-76, 208-25 (1998); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 213-36 (1995); EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 74-94 (1973); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 13-32 (2000); G. EDWARD WHITE, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 279-82 (1973).

33. *The Transformation of American Law* is the only scholarship that analyzes in depth how legal realism did change over the course of the decades since 1930. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 169-268 (1992). As the pages that follow will show, I agree with Horwitz's analysis in one important respect. I agree that legal realists can be divided into two groups—first, those who “turn to social science research [as] a direct extension of pre-war Progressive sociological jurisprudence,” and second, those who “insist” that law should be grounded in “a better system of political values.” *Id.* at 209. But I disagree with him in two respects: (1) I do not think, as I understand Horwitz does, that both groups have been equally prominent in the realist movement at all times in its history. Instead, I will argue that those who focused on the relation between law and society were dominant until the 1950s, especially in the judiciary, while those concerned with political values became dominant thereafter, and (2) unlike Horwitz, I do not believe that the shift from the first to the second form of realism, which occurred in the 1950s, was entirely a change for the better.

34. For some of the outstanding work that so understands them, see N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997), LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 1-46 (1986) and G. Edward White, *From*

difference is more one of tone and style than of substance.³⁵ My main objection, however, to drawing a line in 1930 to mark the shift from sociological jurisprudence to realism is that such a line obscures another—and, I think, more important—jurisprudential change that occurred in connection with *Brown v. Board of Education*. This Article focuses on this later change.

I need to begin by defining a legal realist as anyone, including a practitioner of sociological jurisprudence,³⁶ who rejects formalism's faith that judges can derive results in hard cases deductively from nonpolitical, neutral, and objective sources of law such as cases and statutes. A realist believes that judges must bring something else to the table. But what else? Here I need to draw an overly sharp, analytical distinction. On the one hand, a judge might see herself as an agent of society who is under a duty to make law conform to the wishes of society. If such a judge thinks of society as a train, law will appear as the caboose at the end of the train, and the judge's job will be to keep the caboose on the same track as the train. On the other hand, a judge might see himself as society's commander. Looking upon society as a train, law will emerge as the engine, and the judge as the engineer who must determine the direction that the train ultimately will take.

Of course, law is both an engine and a caboose. Nevertheless, we sometimes tend to think of it more as one than the other. My hypothesis is that until *Brown*, legal thinkers tended to see law as a caboose and the judge as someone who tidied up and ensured that law was following in the direction society was leading. Since *Brown*, our emphasis has shifted, and we now tend to look upon law more as the engine that will dictate the course society will take.

Part I of this Article will concentrate on this shift in emphasis between the 1920s and the 1980s in judicial and academic views about law and the nature of the judicial process. Then, in Part II, I hope to show how the ideas of the

Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America, 58 VA. L. REV. 999 (1972).

35. See HORWITZ, *supra* note 33, at 169-70, 174, 176, 185. Horwitz takes note of the impertinence, irreverence, and iconoclasm of the realists while calling "[r]ealism . . . a continuation of the Progressive attack on the attempt of late-nineteenth-century Classical Legal Thought to . . . portray law as neutral, natural, and apolitical." *Id.* at 170.

36. I actually have no stake in the use of the term "legal realism." What I do care about is viewing all antiformalists from the 1920s forward as a single group, so that I can compare the antiformalism of the 1920s with that of a later era, especially the 1980s, in order to identify a change in antiformalism that prior scholars have overlooked. My project requires me to treat what has been called sociological jurisprudence as comparable to what has been called realism in order to focus on a change in emphasis not directly connected to what others have seen as the transformation of sociological jurisprudence into realism. A focus on the distinction between sociological jurisprudence and realism tends to obscure the later change on which I am focusing, whereas seeing the two movements as part of a larger antiformalist phenomenon makes the 1950s change about which I care emerge more clearly.

1920s persisted into the early 1950s, and how the Court's opinion in *Brown* could have been written consistently with those ideas. In Part III, we will see that Chief Justice Earl Warren did not so write the opinion, and we will examine how the academy, in response to what he did write, began to articulate new views about law and judging. My claim will be that the legal academy's reaction to *Brown* undermined a conception of realism inherited from the 1920s—a notion that judges should conform legal doctrine to emerging societal needs and values. In place of this old conception, a new pluralist vision emerged, in which judges are expected to infuse the law with their own personally held, but typically discordant, values of political morality.

Finally, Part IV will analyze why we should, on the one hand, regret and, on the other hand, applaud this transformation in the concept of realism. I will argue that the academy's reaction to *Brown* moved America away from a jurisprudence of inherently progressive courts, such as the Warren Court, toward a deeply fractured legal culture in which conservative courts, such as the Court that decided *Bush v. Gore*,³⁷ again have become possible. I view this change as cause for regret, though others will celebrate it. At the same time, the infusion of discordant moral values into the law can help discrete and insular minorities enter the mainstream of American political dialogue. For me, this development is cause for celebration, but those who celebrate *Bush v. Gore* will likely disagree.

I

The Twentieth Century began with what Morton Horwitz has labeled “[t]he Progressive attack on Classical Legal Thought.”³⁸ In broad outline, which is all that is required here, the Nineteenth Century's classical ideal envisioned a body of nonpolitical, neutral, and objective legal doctrine that could mediate between the state and society and among contending forces within society.³⁹ Beginning with Oliver Wendell Holmes in the last decade of the Nineteenth and the opening decade of the Twentieth Century, progressives challenged this orthodox view. They argued that law was political and subjective and that many legal decisionmakers were prejudiced in favor of corporate entrepreneurs.⁴⁰ By the 1920s, according to Horwitz, legal realism had been born.⁴¹

But realism has not remained as a constant. Important emphases changed in the aftermath of *Brown*. A comparison of two important books—the one

37. 531 U.S. 98 (2000).

38. HORWITZ, *supra* note 33, at 4.

39. *See id.* at 9-31.

40. *See id.* at 109-62.

41. *See id.* at 169-70.

published thirty-three years before *Brown*,⁴² and the other published thirty-two years after⁴³—will illustrate. Both books begin with the fundamental realist insight that preexisting formal legal materials, especially statutes and judicial precedents, often do not dictate results.⁴⁴ Both see law as a policy-oriented science. But they differ significantly in their understanding of the ultimate sources from which judges sculpt their policy judgments.

The first book is Benjamin N. Cardozo's, *The Nature of the Judicial Process*.⁴⁵ For Cardozo, the supreme source of law was "social welfare"⁴⁶ or the "welfare of society."⁴⁷ Later in his book, Cardozo called his approach "the method of sociology."⁴⁸ Conceding the vagueness of his terminology,⁴⁹ Cardozo suggested that the method of sociology called upon a judge "'to ascertain . . . what ordering of the social life of the community comports best with the aim of the law in question in the circumstances before him'"⁵⁰ or with "the *mores* of the community," with its "ethics or . . . social sense of justice, whether formulated in creed or system, or immanent in the common mind."⁵¹

Cardozo was clear that the "standard" for judges who used the method of sociology "must be an objective one."⁵² Judges were not "free to substitute their own ideas of reason and justice for those of the men and women whom they serve."⁵³ They were not "commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise."⁵⁴ When judges were "called upon to say how far existing rules [were] to be extended or restricted," their duty was to "let the welfare of society fix the path, its direction and its distance."⁵⁵ Cardozo understood, of course, that his demand for objectivity provided "no assurance that judges [would] interpret the *mores* of their day more wisely and truly than other men,"⁵⁶ it demanded only that the judge "shall search for social justice" along paths fixed by society, not by the policy preferences of the judge.⁵⁷

42. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

43. RONALD DWORKIN, *LAW'S EMPIRE* (1986).

44. See CARDOZO, *supra* note 42, at 14-23, 40-43; DWORKIN, *supra* note 43, at 24-26.

45. CARDOZO, *supra* note 42.

46. *Id.* at 71-72.

47. *Id.* at 66.

48. *Id.* at 98-102.

49. *Id.* at 71-73.

50. CARDOZO, *supra* note 42, at 90 (quoting LORENZ BRUTT, *DIE KUNST DER RECHTSANWENDUNG* 57 (1907)).

51. *Id.* at 72.

52. *Id.* at 89.

53. *Id.* at 88-89.

54. *Id.* at 66-67.

55. CARDOZO, *supra* note 42, at 67.

56. *Id.* at 135.

57. *Id.* at 137.

This is a lecture about constitutionalism, and some listeners might want me to say a word about how Cardozo's writing about common-law adjudication, expressed in *The Nature of the Judicial Process*, fit with his constitutional decision-making. I find the fit nearly perfect. In constitutional as well as common law cases, Cardozo ultimately gave effect to societal needs and values. For example, in *Panama Refining Co. v. Ryan*, Cardozo in dissent asserted that separation of powers was "not a doctrinaire concept," but had to be used with "elasticity of adjustment, in response to the practical necessities of government."⁵⁸ And, in *Palko v. Connecticut*, he focused on societal values—on "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁵⁹

The second book is by Ronald Dworkin, *Law's Empire*.⁶⁰ Dworkin agrees with Cardozo that judges must rely on something in addition to precedent, their conception of judicial role, and their sense of craft in reaching judgments. Dworkin also agrees that a judge's task is to interpret society's values,⁶¹ not to impose her own. But, unlike Cardozo, Dworkin recognizes that society's values sometimes will be ambivalent.⁶² When they are, the judge must point societal values in one direction rather than in another to make them "the best these can be."⁶³ And, in so directing them, the judge must have recourse to "political morality,"⁶⁴ not to the societal needs or preferences themselves.

Dworkin argues that right political morality is objectively true and thus transcends the mere policy preferences of judges. Much of his book consists of a brilliant analytical attack on what he calls both external and internal skepticism.⁶⁵ Dworkin's claim of objectivity is difficult to maintain, however, in a constitutional culture that venerates political and religious equality and pluralism. Jeremy Waldron explains the problem as well as anyone. "A confident theorist of justice," Waldron writes:

[Might] announce, . . . "[o]f course, there is disagreement about justice; but . . . the existence of disagreement is quite compatible with one of the contestant views being true and the others false." He can say that, but it is hardly sufficient, particularly if it is just a prelude to his saying, "And of course the

58. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935).

59. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). I am indebted to John C.P. Goldberg for these insights about Cardozo's constitutional cases. See John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324 (1990); see also John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419 (1999) (reviewing ANDREW L. KAUFMAN, *CARDOZO* (1998)).

60. DWORKIN, *supra* note 43.

61. See *id.* at 225, 255.

62. See *id.* at 255-56.

63. *Id.* at 255.

64. *Id.* at 249, 256. I am not alone in so reading Dworkin. See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* 203-04 (1999).

65. See DWORKIN, *supra* note 43, at 31-86.

true view of justice is *my* view” For if he is at all self-aware, he knows very well that he will be followed, one by one, by his ideological rivals, each making a similar announcement in similarly self-assured tones. . . . [E]ven among those who accept the proposition that some views about justice are true and others false, disagreement will persist as to which is which.⁶⁶

If Waldron is correct that America’s constitutional pluralism inevitably means that judges will ground judgments in claims of political morality that are at war with each other, then we need to understand Dworkin as describing a jurisprudence in which the differing, individual moral values of judges legitimately play a role in the process by which they arrive at their decisions. A judge cannot seriously expect to persuade another judge whose political morality differs from hers that she is right and he is wrong, although as political actors we might and, indeed, probably should oppose confirmation of a judicial nominee with whom we disagree.

This diversion brings me back to what I see as a key difference between Cardozo and Dworkin. Cardozo insisted that judges supplement the professional sources of law with an objectively verifiable analysis of societal needs and values. Dworkin, on the other hand, would ultimately have judges work from their disparate views of proper political morality. In Cardozo’s world, law is intrinsically progressive; because it is a derivative of social fact, it changes over time in whatever fashion society as a whole progresses over time. In Dworkin’s world, in contrast, there is room for judges whose political morality dictates that law should not change or that law should revert to some previous golden age. Unlinked from the direction of social change, the law can move in whatever direction those who happen to inhabit the bench succeed in moving it. Cardozo, in short, saw law as a caboose that should follow whatever course the societal train takes. Dworkin, in contrast, sees law as an engine of political morality that can keep the train steady or move it in whatever direction those at the throttle can command.

II

A.

The Supreme Court created by the New Deal after 1937, of which Cardozo himself was briefly a member, largely abided by Cardozo’s understanding of the nature of the judicial process and thus developed into a strong force for progressive change. The current Court, in contrast, consists not only of progressives, but also of conservatives who think that law should remain

66. WALDRON, *supra* note 64, at 3.

stable⁶⁷ and reactionaries who would revert to a past golden age.⁶⁸ What caused this shift of emphasis in our understanding of how the judiciary should go about doing its job?

I must concede that the shift is not as sharp as I have so far portrayed it to be. As early as the late 1930s, Judge Charles Clark urged that judicial decisions depended not on society's, but on the individual judge's "values and his notions of sound and desirable social policy."⁶⁹ Before coming to the bench, Jerome Frank likewise observed that "[t]he peculiar traits, disposition, biases and habits of the particular judge will . . . often determine what he decides to be the law."⁷⁰ Karl Llewellyn has often been associated with the Clark-Frank position as a result of his statement that someone seeking to know "the true measure of the law" must look, on a case-by-case basis, at "what, in particular, can or will anybody do about it, here and now."⁷¹

Nonetheless, as I have argued in my recent book on the legal history of Twentieth-Century New York, Cardozo's jurisprudential vision remained dominant into the 1950s.⁷² One key figure who at least started in agreement with Cardozo was his colleague, Justice Harlan Fiske Stone. At the same time that Cardozo was working on *The Nature of the Judicial Process*, Stone wrote that "[t]he entire history of our law has been one of change and adaptation to meet new conditions, social and economic, and to conform to a more enlightened ethical perception."⁷³ Three decades later, Henry M. Hart and

67. Justice O'Connor has publicly expressed this view. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (O'Connor, J., concurring); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 861-69 (1992).

68. Surely Justice Thomas fits this description, and perhaps Justice Scalia does as well. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (advocating a return to "original understanding"); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38-47 (Amy Gutman ed., 1997) (arguing for jurisprudence of "original meaning" rather than "living constitution"). In my view, Justices Scalia and Thomas yearn for the restoration of a hierarchical world in which hierarchy is grounded in merit, not racial, ethnic, or religious discrimination. In an effort at greater understanding of their vision, I hope in the future to write a sympathetic portrait of it, even though ultimately I reject it.

69. *Pease v. Sinclair Ref. Co.*, 104 F.2d 183, 185 (2d Cir. 1939).

70. JEROME FRANK, *LAW AND THE MODERN MIND* 111 (1930).

71. K.N. Llewellyn, *Holmes*, 35 COLUM. L. REV. 485, 488 (1935). Of course, Holmes himself had said the same thing. See O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897). See generally PURCELL, *supra* note 32, at 82.

72. See WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980*, at 142-47 (2001); accord HORWITZ, *supra* note 33, at 169-70, 189-92 (discussing Cardozo as one of a number of legal realists, and arguing that realism had more in common with, as opposed to differences from, the broader, progressive law reform efforts of the first third of the Twentieth Century).

73. Harlan F. Stone, *The Lawyer and His Neighbors*, 4 CORNELL L.Q. 175, 188 (1919).

Albert M. Sacks, whose *The Legal Process: Basic Problems in the Making and Application of Law*⁷⁴ typically reflected mid-Twentieth-Century jurisprudential values, cited the famous Warren and Brandeis article on *The Right to Privacy*⁷⁵ for the proposition that “the common law . . . grows to meet the demands of society.”⁷⁶ Likewise, their mentor, Justice Felix Frankfurter, rejected the view that a judge should bring his own political morality to bear on decision-making. According to Frankfurter, he was “not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.”⁷⁷

At least for a few years, Cardozo’s jurisprudential vision dominated the Court. Chief Justice Charles Evans Hughes, for one, followed the views of his junior colleague in *Home Building & Loan Ass’n v. Blaisdell*, when he rejected the claim that “the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed” upon it and instead construed it in accordance with “a growing recognition of public needs.”⁷⁸ Cardozo’s approach also commanded eight votes in the 1940 case of *Minersville School District v. Gobitis*, the first full-scale effort by the Supreme Court to address the contentious issue of whether Jehovah’s Witnesses should be compelled to salute the American flag.⁷⁹ In writing the opinion for the majority, Justice Frankfurter surely overstated the Cardozian argument, but that must not cause us to lose sight of the argument’s structure. It was an argument about societal needs. Following citations of precedent, Frankfurter said:

The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. . . . In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. . . . [T]he question remains whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion. We are dealing with an interest inferior to none in the

74. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

75. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

76. HART & SACKS, *supra* note 74, at 450 (quoting Warren & Brandeis, *supra* note 75, at 193).

77. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting).

78. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 443 (1934).

79. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 592-93 (1940).

hierarchy of legal values. National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills.⁸⁰

Another case from the same year combined both elements of Cardozo's approach. The case was *Chambers v. Florida*, where the Court, in an opinion by Justice Hugo Black, invalidated the state's use of a coerced confession to obtain a criminal conviction.⁸¹ The nation's need in 1940, as war against nazism and fascism was brewing, was to define itself as different from Germany, and courts understood that their job was to articulate the difference by portraying how America's developing values differed from those of Nazi Germany.⁸² In his opinion for the Court, Justice Hugo Black accordingly spoke of how "the exalted power of some governments to punish manufactured crime dictatorially [was] the handmaid of tyranny,"⁸³ and he promised that American courts would serve as "havens of refuge for those who might otherwise suffer because they [were] helpless, weak, outnumbered, or . . . non-conforming victims of prejudice and public excitement."⁸⁴ Echoes of *Chambers* were still being heard four years later in an internal memo that spoke of the efforts of the NAACP Legal Defense Fund "to have the principles of the 'Four Freedoms' made applicable" in cases pending before the Supreme Court.⁸⁵

A fourth case was *Korematsu v. United States*, where the Court upheld the validity of an order directing Americans of Japanese ancestry who lived in specified areas to report for transportation to internment camps.⁸⁶ Again, the case was about conforming the law to what the nation needed in wartime. The Court, in its opinion by Justice Black, said:

[That it could not] "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population . . . We

80. *Id.* at 594-95. Of course, *Gobitis* was overruled three years later in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). But the overruling of *Gobitis* does not detract from the fact that Frankfurter's opinion for the Court reflected Cardozo's approach to legal realism and that Cardozo's approach was an important one, if not the only available one, in the jurisprudence of the Supreme Court during the 1940s.

81. *Chambers v. Florida*, 309 U.S. 227, 240 (1940).

82. See NELSON, *supra* note 72, at 121-29; see also AZZA SALAMA LAYTON, INTERNATIONAL POLITICS AND CIVIL RIGHTS POLICIES IN THE UNITED STATES, 1941-1960, at 39-45 (2000).

83. *Chambers*, 309 U.S. at 241.

84. *Id.*

85. Memorandum, NAACP Legal Defense Fund (1944), *quoted in* CHARLES L. ZELDEN, A FREE AND OPEN BALLOT: SMITH V. ALLWRIGHT AND THE DEMISE OF THE TEXAS ALL WHITE PRIMARY 128 (forthcoming 2005).

86. *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.”

. . . .

In doing so, we are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. . . . Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.⁸⁷

Then there was *Dennis v. United States*, where the Court upheld the convictions of members of the Communist Party for conspiring to advocate the overthrow of the government.⁸⁸ The main issue in the case was whether the activities of party members constituted a clear and present danger, and that depended, in turn, on the meaning of the clear and present danger test.⁸⁹ Chief Justice Fred Vinson’s plurality opinion echoed the thoughts of Cardozo and the earlier opinions we have been examining, notably *Gobitis* and *Korematsu*. According to Vinson, no “shorthand phrase should be crystallized into a rigid rule to be applied inflexibly.”⁹⁰ The clear and present danger test, like separation of powers, was “not a doctrinaire concept,” but had to be used with “elasticity of adjustment, in response to the practical necessities of government.”⁹¹ “Nothing [was] more certain” for Vinson “than the principle that there are no absolutes. . . . To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.”⁹² Justice Frankfurter, in his concurring opinion, agreed:

Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests . . . than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.⁹³

87. *Id.* at 218-20 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)).

88. *Dennis v. United States*, 341 U.S. 494, 516-517 (1953).

89. *Id.* at 508.

90. *Id.*

91. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting).

92. *Dennis*, 341 U.S. at 508.

93. *Id.* at 524-25.

Cardozo's idea that law should respond to societal needs even appeared in one of the desegregation cases leading up to *Brown, McLaurin v. Oklahoma State Regents*.⁹⁴ There, the issue was whether an African-American could be kept separate from other students in a graduate program.⁹⁵ The Supreme Court's answer, in a unanimous opinion by Chief Justice Vinson, was that, as "[o]ur society grows increasingly complex, and our need for trained leaders increases correspondingly," a graduate program like the segregated Oklahoma one that "handicapped" a student "in his pursuit of effective graduate instruction" that would transform him into "a leader and trainer of others" would be unconstitutional.⁹⁶

The persistence through the 1940s of the idea that law should change in response to societal needs and values also emerges in the writings of those who criticized it, especially a group of Roman Catholic scholars who were advancing what they saw as the theological position of their church.⁹⁷ As these Catholic scholars argued, legal realists understood that judges decided cases "not by reference to precedent and principle, but by reference to present or becoming social customs, institutions, and patterns."⁹⁸ Law had only "one moral measure, Society's will."⁹⁹ According to the Catholics, "no moral oughts" bound the realists, which led to "a rather disagreeable (ugly) conclusion"—that "physical force or might makes right."¹⁰⁰ Not surprisingly, Catholic theorists objected to "a theory that discards moral powers and moral ought, that eliminates God and soul," and that "elevates a blind unfolding dominant social pattern force to the throne of omnipotence."¹⁰¹ These Roman Catholic scholars, however, did not hold professorships in the nation's most powerful, elite law schools, and accordingly the view that did dominate the elite schools—that law should change in response to dominant societal forces—persisted.

The notion that societal forces rather than political morality should dictate results also surfaced throughout the Supreme Court's internal discussions of *Brown*. In a memorandum that he drafted for his own private purposes, Justice Felix Frankfurter reiterated his view that:

[I]t is not our duty to express our personal attitudes toward these issues however deep our individual convictions may be. The opposite is true. It is

94. 339 U.S. 637 (1950).

95. *Id.* at 638.

96. *Id.* at 641.

97. Edward A. Purcell has done the best work on the critics, especially the Roman Catholic critics, of legal realism during the 1940s. See PURCELL, *supra* note 32, at 164-71.

98. Francis E. Lucey, S.J., *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493, 511 (1942).

99. Karl Kreilkamp, *Dean Pound and the End of Law*, 9 FORDHAM L. REV. 196, 231 (1940).

100. Lucey, *supra* note 98, at 512.

101. *Id.* at 513.

our duty not to express our merely personal views. However passionately any of us may hold egalitarian views, . . . he travels outside his judicial authority if for this private reason alone he declares unconstitutional the policy of segregation.¹⁰²

Justice Robert Jackson agreed that “we can not oversimplify this decision to be a mere expression of our personal opinion that school segregation is unwise or evil. We have not been chosen as legislators but as judges.”¹⁰³ Jackson’s law clerk from the term preceding the one in which *Brown* was decided, the future Chief Justice William H. Rehnquist, agreed that, “[i]f this Court, because its members individually are ‘liberals’ and dislike segregation, now chooses to strike it down, it differs from the *McReynolds* court only in the kinds of litigants it favors and the kinds of special claims it protects.”¹⁰⁴

Accordingly, the justices set out in their private thinking to identify the societal changes that made the abolition of segregation necessary and appropriate. Justice Frankfurter proclaimed the orthodoxy. In his memorandum, he declared that equal protection:

[I]s not a fixed formula defined with finality at a particular time. It does not reflect, as a congealed summary, the social arrangements and beliefs of a particular epoch. It is addressed to the changes wrought by time and not merely the changes that are the consequences of physical development. Law must respond to transformation of views as well as to that of outward circumstances. The effect of changes in men’s feelings for what is right and just is equally relevant in determining whether a discrimination denies the equal protection of the laws.¹⁰⁵

Justice Harold H. Burton articulated an equally orthodox, though vague position. He noted:

[He was] increasingly impressed with the idea that under the conditions of 50 or more years ago it probably could be said that a state’s treatment of negroes, within its borders, on the basis of “separate but equal” facilities might come within the constitutional guaranty of an “equal” protection of the laws, because

102. Memorandum from Justice Felix Frankfurter (1953), *quoted in* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 684 (1976).

103. Memorandum from Justice Robert Jackson (Feb. 15, 1954), *quoted in* KLUGER, *supra* note 102, at 689.

104. Memorandum from William H. Rehnquist (1952 Term), *quoted in* KLUGER, *supra* note 102, at 605.

105. Memorandum from Justice Felix Frankfurter (1953), *quoted in* KLUGER, *supra* note 102, at 685. Frankfurter made a similar statement during the initial oral argument of *Brown*. See ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952–1955*, at 32 (Leon Friedman ed., 1969). For other similar statements by Frankfurter and others, see Christopher W. Schmidt, *The Role of History in Brown v. Board of Education* 17-18 (Nov. 15, 2003) (unpublished paper presented at the Annual Meeting of the American Society for Legal History) (on file with author).

the lives of negroes and whites were then and there in fact *separately* cast and lived. Today, however, I doubt that it can be said in any state (and certainly not generally) that compulsory “separation” of the races, even with equal facilities, *can* amount to an “equal” protection of the laws in a society that is lived and shared so “*jointly*” by all races as ours is now.¹⁰⁶

At least in a political context, the new Chief Justice, Earl Warren, likewise would “not shrink from the known needs of social progress.”¹⁰⁷

But it was Justice Jackson, as much as anyone on the Court, who strove in a memorandum circulated only within his own chambers to identify what had changed in America so as to require that segregation now be outlawed. Jackson was clear that the framers of the Fourteenth Amendment had not intended to outlaw segregation and hence that *Plessy v. Ferguson*¹⁰⁸ was not necessarily wrongly decided.¹⁰⁹ But he also agreed with Cardozo that the generalities of the Constitution “have a content and a significance that vary from age to age”¹¹⁰ and thus knew that *Plessy* and the framers had not bound his Court. Still, if the Court were to overrule *Plessy*, “intellectual honesty”¹¹¹ demanded that it identify factors that could account for the change over time. What might those factors be?

One such factor was public opinion, which had undergone “profound change” as a result of the “awful consequences of racial prejudice revealed by . . . the Nazi regime.”¹¹² A second was education. In the late Nineteenth Century, education, at one time a privilege for the few, had become “a right and more than that a duty, to be performed not merely for one’s own advantage but for the security and stability of the nation.”¹¹³ Third, African-Americans themselves, according to Jackson, had changed. Unlike the late Nineteenth-Century freedmen, “who had had no chance ‘to show their capacity for education or assimilation,’”¹¹⁴ Jackson was convinced that by the mid-Twentieth Century, “assimilation [was] under way to a marked extent” and that “the mere fact that one [was] in some degree colored no longer create[d] a

106. Letter from Harold Burton, to Justice Felix Frankfurter (Sept. 25, 1952), *quoted in* KLUGER, *supra* note 102, at 610-11.

107. Newspaper Interview with Earl Warren (1952), *quoted in* KLUGER, *supra* note 102, at 665.

108. 163 U.S. 537 (1896).

109. *See* KLUGER, *supra* note 102, at 689.

110. Memorandum from Justice Robert Jackson (Feb. 15, 1954), *quoted in* KLUGER, *supra* note 102, at 689.

111. *Id.*

112. Memorandum from Justice Robert Jackson (Feb. 15, 1954), *quoted in* KLUGER, *supra* note 102, at 690 (alteration in original).

113. *Id.*

114. KLUGER, *supra* note 102, at 690 (quoting Memorandum from Justice Robert Jackson (Feb. 15, 1954)).

presumption that he [was] inferior, illiterate, retarded or indigent.”¹¹⁵ Jackson’s memorandum thus had some interesting and provocative ideas, but as Richard Kluger notes, it “left a good deal to be desired as a state paper.”¹¹⁶ It was far removed from becoming an opinion for the Court.

B.

At this point, I should restate one of my main themes—namely, that until the time *Brown v. Board of Education* was decided, mainstream American legal thinkers tended to reject the idea that courts should turn to the political morality of judges as a basis for deciding cases. Law, instead, usually was expected to change in response to societal needs and values.

Two outstanding books—one by Robert J. Cottrol, Raymond T. Diamond, and Leland B. Ware, *Brown v. Board of Education: Caste, Culture, and the Constitution*¹¹⁷ and the other by Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy*¹¹⁸—show that materials existed in the 1950s to decide *Brown* consistently with this dominant jurisprudence. Cottrol, Diamond, and Ware show how “the collective values, tastes, prejudices, [and] even the reflexes” of American society demanded that segregation be ended,¹¹⁹ while Dudziak examines how America’s goal of “promot[ing] democracy among peoples of color around the world was seriously hampered by continuing racial injustice at home.”¹²⁰

Cottrol, Diamond, and Ware begin by examining the work of early Twentieth-Century African-American scholars who, by rejecting then-dominant assumptions of white superiority, laid a foundation for subsequent racial progress.¹²¹ World War I was more important, as it showed some two hundred thousand African-Americans who served in the military as well as the many more who migrated to Northern cities that the South’s Jim Crow system was not the inevitable order of things.¹²² These developments began to bear fruit during the New Deal, when the administration courted the Northern black vote and the first lady, Eleanor Roosevelt, became a champion of the cause of civil rights.¹²³

115. Memorandum from Justice Robert Jackson (Feb. 15, 1954), *quoted in* KLUGER, *supra* note 102, at 690.

116. KLUGER, *supra* note 102, at 690.

117. ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003).

118. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

119. COTTROL, DIAMOND & WARE, *supra* note 117, at 78.

120. DUDZIAK, *supra* note 118, at 12.

121. COTTROL, DIAMOND & WARE, *supra* note 117, at 83-84.

122. *Id.* at 84-86.

123. *Id.* at 88.

World War II forced more rapid change. The manpower demands of the war brought more than one million African-Americans into the military, often in combat and sometimes leadership roles that would have been inconceivable only a few years earlier.¹²⁴ At the same time, industry's needs led to a great migration that ultimately transformed the nation's minority population "from one that was largely rural and southern to one that was increasingly urban and located in the more liberal North and West."¹²⁵ Cottrol, Diamond, and Ware note that:

[The war also forced Americans] to take a hard, awful look at where racism could lead. That look began when ordinary men, GIs in the European theater, stumbled across not only the unbelievable but the inconceivable: killing grounds with names like Dachau, Buchenwald, Mauthausen. These camps left an impression that would never be erased in the minds of the men who actually walked through them, including their commanding general, Dwight D. Eisenhower. The Nuremberg trials, as well as massive press coverage of Nazi atrocities, served to inform the wider American public of the horrors of the Third Reich's Final Solution. All of this would help make the kind of easy yet deep racial prejudice common earlier in the century far less respectable after the Second World War.¹²⁶

Popular culture changed as a result. Hollywood began to portray blacks as equal and heroic,¹²⁷ and Jackie Robinson's integration of major league baseball was "a turning point in the history of American race relations that should not be underestimated."¹²⁸ Robinson made a hero of color a routine icon in American life.

Slowly law and public policy began to change as well. President Franklin Roosevelt was forced to appoint the first African-American general and to sign a fair employment practices order barring discrimination in defense industries.¹²⁹ In 1948, his successor, Harry Truman, signed executive orders barring discrimination in the federal civil service and in the military.¹³⁰

Mary Dudziak picks up the story in detail where Cottrol, Diamond, and Ware leave off. She shows how the Cold War struggle against Soviet Russia was impeded by the continuation of racial injustice in America. One element in the Cold War was to win the benevolent neutrality, if not the allegiance, of what we now view as third world countries, most of whose people are dark-

124. *Id.* at 91-94.

125. *Id.* at 94.

126. COTTROL, DIAMOND & WARE, *supra* note 117, at 97. I have written at length about these developments. See NELSON, *supra* note 72, at 119-47.

127. See COTTROL, DIAMOND & WARE, *supra* note 117, at 95-98.

128. *Id.* at 97.

129. *Id.* at 91.

130. *Id.* at 99.

skinned.¹³¹ Dudziak shows how people from those nations were offended by reports of discrimination against African-Americans in the United States, and were angered when their own people arrived in Washington as government representatives, in college towns as students, or in other cities as businessmen and faced the same discrimination as dark Americans.¹³² She also shows how the Communist press and media exploited racial incidents for propaganda purposes.¹³³

The impact of racial injustice on American foreign policy greatly troubled State Department officials such as Chester Bowles, the ambassador to India. In a 1952 speech, Bowles observed:

A year, a month, or even a week in Asia is enough to convince any perceptive American that the colored peoples of Asia and Africa, who total two-thirds of the world's population, seldom think about the United States without considering the limitations under which our 13 million Negroes are living.¹³⁴

These third world people were “convinced that, solely because of their color, many Americans are denied a fair share in the life of the richest nation on earth, and in their ears this conviction gives our claim to world leadership a distinctly hollow ring.”¹³⁵ Confident that he had “not exaggerated” because it was “impossible to exaggerate,”¹³⁶ Bowles concluded: “How much does all our talk of democracy mean, if we do not practice it at home? . . . How can the colored peoples of Asia be sure we are sincere in our interest in them if we do not respect the equality of our colored people at home?”¹³⁷ As Dudziak shows, numerous Americans, both in government and outside of government, were conscious of and repeated Bowles's central points. A key person was Supreme Court Justice William O. Douglas, who, on a 1950 trip to India, was quickly asked why America tolerated the lynching of blacks.¹³⁸ When he published a book about the trip the next year, Douglas wrote of “color consciousness” as “an important consideration in the warmth of India's relations to the outside world” and of “the attitude of the United States toward its colored minorities [as] a powerful factor in our relations with India.”¹³⁹

More importantly, the Truman and Eisenhower Administrations brought these matters to the attention of the Supreme Court in *amicus curiae* briefs filed

131. See DUDZIAK, *supra* note 118, at 26-27, 45-46.

132. See *id.* at 29-42.

133. See *id.* at 11-83.

134. Address of Chester Bowles, Yale University (1952), *quoted in* DUDZIAK, *supra* note 118, at 77.

135. *Id.*

136. *Id.* at 78.

137. *Id.*

138. DUDZIAK, *supra* note 118, at 105.

139. WILLIAM O. DOUGLAS, *STRANGE LANDS AND FRIENDLY PEOPLE* 296 (1951), *quoted in* DUDZIAK, *supra* note 118, at 105.

on behalf of the United States in the *Brown* litigation. One of these briefs reminded the Court that “[i]t is in the context of the present world struggle between freedom and tyranny that the problem of race discrimination must be viewed.”¹⁴⁰ The brief then quoted Secretary of State Dean Acheson, who said:

During the past six years, the damage to our foreign relations . . . has become progressively greater. The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country. As might be expected, Soviet spokesmen regularly exploit this situation in propaganda against the United States, both within the United Nations and through radio broadcasts and the press, which reaches all corners of the world. Some of these attacks against us are based on falsehood or distortion; but the undeniable existence of racial discrimination gives unfriendly governments the most effective kind of ammunition for their propaganda warfare.¹⁴¹

The brief concluded by stating that “the existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.”¹⁴²

Thus the Court, as it was deciding *Brown*, had to appreciate that racial conditions had changed since the time of *Plessy v. Ferguson* and that the nation needed the Court to give constitutional sanction to the change. Just as the *Charlotte News* would tell the people of North Carolina after *Brown* had been decided, so too the Court itself in analyzing the case knew that it “somehow . . . must keep the sweep of human history in [its] perspective, must apply its intelligence coolly and dispassionately, and must find the resources for giving all . . . children equality of education.”¹⁴³ In short, the materials existed for deciding *Brown v. Board of Education* in the dominant realist mode of displaying how the Court was changing law in response to societal need. It would have been easy for the Court to explain why, to avoid a pending train wreck, the caboose had to remain attached to the train riding down the track of equality.

Indeed, in his column in the *New York Times* published the day after the *Brown* decision was handed down, James Reston tried to draft the opinion that the Court might have written. Entitled *A Sociological Decision*, Reston observed that the Court had “rejected history, philosophy and custom as the

140. Brief for the United States as Amicus Curiae, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), quoted in DUDZIAK, *supra* note 118, at 79.

141. *Id.*, quoted in DUDZIAK, *supra* note 118, at 100.

142. *Id.*

143. Editorial Statement of *Charlotte News* (quoted in BIRMINGHAM POST-HERALD, May 18, 1954, at 5), quoted in DUDZIAK, *supra* note 118, at 110.

major basis for its decision and accepted instead Justice Benjamin N. Cardozo's [sic] test of contemporary social justice."¹⁴⁴ In a document that "read more like an expert paper on sociology than a Supreme Court opinion,"¹⁴⁵ the decision, according to Reston:

[A]dded one more illustration to Justice Cardozo's [sic] power of prophecy:

"When the social needs demand one settlement rather than another," he said, "there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends.

"From history and philosophy and custom, we pass, therefore, to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology

"The final cause of law is the welfare of society"¹⁴⁶

But the *Brown* opinion did not say what Reston's column said, at least not as thoroughly and eloquently. It did not identify itself as part of a line of decisions growing out of Justice Cardozo's method of sociology. Nor did it emphasize the social facts, which Professors Cottrol, Diamond, Dudziak, and Ware have so eloquently elaborated, that demanded an end to formal, de jure segregation. Perhaps *Brown* would have been criticized as political rather than legal if it had done so; indeed, the leading scholar of the case understands Reston's column to have so criticized it.¹⁴⁷ But, in retrospect, it seems that the Court did not even try to avoid criticism by arguing that it had to do what it did. Why?

III

A.

We will never know for sure.¹⁴⁸ Aware of the importance and sensitivity of the case, the Justices were very secretive in their discussions about *Brown*. They did not resolve the case in the conference meeting after argument, but in subsequent, private, often one-on-one conversations.¹⁴⁹ Thus, even the sketchy conference notes kept by Justices Burton, Clark, Douglas, and Jackson do not tell the full story.

144. James Reston, *A Sociological Decision*, N.Y. TIMES, May 18, 1954, at 14.

145. *Id.*

146. *Id.* (alterations in original) (quoting Justice Cardozo).

147. See KLUGER, *supra* note 102, at 711.

148. Despite the title of his article, *What Really Happened in Brown v. Board of Education*, Mark Tushnet agrees. See Tushnet & Lezin, *supra* note 2, at 1868-69, 1884.

149. See KLUGER, *supra* note 102, at 683.

We can begin to discern the story-line only by looking at two important cases that occurred in the years leading up to *Brown*. When we do, we will have a better understanding of why the Court did not rest the *Brown* opinion on Cardozo's jurisprudential approach. We also will come to see something morally problematic about Cardozo's method of sociology.

The first case was *Korematsu*.¹⁵⁰ As I have already suggested, the six-man majority (Justices Black, Stone, Reed, Frankfurter, Douglas, and Rutledge) had grounded its decision on wartime military needs. But in this instance, pursuit of Cardozo's approach produced three vociferous dissents. I will make only the briefest mention of two of the dissents by Justices Owen Roberts¹⁵¹ and Frank Murphy,¹⁵² who labeled the internment policy racist, because neither justice would be a member of the *Brown* court. I will focus on the third dissent because I think it explains why its author, Justice Robert Jackson, reacted to *Brown* as he did. And, Jackson's reaction was profoundly important to the form the *Brown* opinion took.

In *Korematsu*, Jackson was prepared to accept the claim of military necessity. He wrote:

When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. . . .

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient.

. . . .

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transporting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an

150. *Korematsu v. United States*, 323 U.S. 214 (1944).

151. *Id.* at 225.

152. *Id.* at 233.

urgent need. Every repetition imbeds that principle more deeply in our own law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.” A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.¹⁵³

Jackson accordingly urged that the judiciary should not interfere with the military’s execution of its responsibilities for national defense by, for example, enjoining the internment program.¹⁵⁴ At the same time, he concluded that it was wrong to allow society’s military needs to alter constitutional law.¹⁵⁵ To preserve the integrity¹⁵⁶ of the legal caboose, he proposed that it be detached from the societal train. Buried in his proposal was an awareness that, while societal needs and values ultimately would dictate the course of politics, something else had to determine the direction of the law.

Within a few years, it was plain that Justice Jackson had been right. *Korematsu* was a grievous mistake. A year after the majority opinion came down, it was subjected to intense criticism. Four years later, Congress enacted the Japanese-American Evacuation Claims Act, which, in giving compensation for some of the losses internees had suffered, implicitly recognized the wrong that had been done.¹⁵⁷ By the end of his career, at least one of the Justices in the majority, William O. Douglas, had publicly admitted his error.¹⁵⁸

Earl Warren was another leader who quickly concluded that the internment of Japanese-Americans had been a mistake. Although he had played a more active role than anyone else in instituting the relocation program,¹⁵⁹ Warren felt that “everybody who had anything to do with the relocation of the Japanese, after it was all over, had something of a guilty consciousness about it.”¹⁶⁰ Warren, for one, “wanted to show that it wasn’t a racial thing” and to justify it as “a defense matter,”¹⁶¹ but he was less than fully successful. As a result, he stated in his memoirs that he “deeply regretted the removal order”

153. *Id.* at 244-46 (footnote omitted) (quoting CARDOZO, *supra* note 42, at 51).

154. *Id.* at 248.

155. *Korematsu*, 323 U.S. at 247.

156. Integrity, of course, is Ronald Dworkin’s term of art, but no other word so aptly describes the concept underlying Jackson’s *Korematsu* dissent. See DWORKIN, *supra* note 43, at 176-275.

157. See PETER IRONS, JUSTICE AT WAR 348 (1983).

158. *Id.* at 362.

159. See G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 74-75 (1982).

160. Interview with Earl Warren (1972), *quoted in* WHITE, *supra* note 159, at 76.

161. *Id.*

and his own part “advocating it. . . . It was wrong to react so impulsively without positive evidence of disloyalty.”¹⁶²

All this made legal arguments about advancing societal needs somewhat suspect, and when such arguments were offered in a major case that came to the Court just one year before *Brown*, they were rejected.¹⁶³ That case, *Youngstown Sheet & Tube Co. v. Sawyer*, arose in 1952 when the administration of President Harry Truman, in the midst of the Korean War, seized control of the nation’s steel mills in order to prevent a work stoppage that it claimed would impede war efforts.¹⁶⁴ It was the same argument of military necessity that had been made in *Korematsu* and, in a sense, in *Gobitis*. As Chief Justice Fred Vinson noted for himself and two other justices in dissent, “the central fact of this case” was “that the Nation’s entire basic steel production would have shut down completely if there had been no Government seizure” and that such “a work stoppage would immediately jeopardize and imperil our national defense.”¹⁶⁵ Vinson accordingly concluded that “if the President has any power under the Constitution to meet a critical situation . . . , there is no basis whatever for criticizing the exercise of such power in this case.”¹⁶⁶ Like Cardozo, Vinson wanted to interpret the Constitution not as a series of “doctrinaire concept[s],” but with “elasticity of adjustment, in response to the practical necessities of government.”¹⁶⁷

The majority of his colleagues, including four who would play key roles in *Brown*—Justices Black, Douglas, Frankfurter, and Jackson—disagreed. Justice Douglas, for one, had “no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power.”¹⁶⁸ Thus, in Douglas’s view, the Court could not decide the case in whatever fashion would “deal most expeditiously with the present crisis” and could not “rewrit[e]” the Constitution “to suit the political conveniences of the present emergency.”¹⁶⁹

Justice Jackson was equally concerned that the Constitution not be manipulated to promote a short-term national interest. It was vital, according to Jackson, not “to emphasize transient results . . . and lose sight of enduring

162. EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* (1977), quoted in WHITE, *supra* note 159, at 76 (alteration in original).

163. The arguments also failed to claim the support of a majority of the Court in another important mid-century case, *Dennis v. United States*, 341 U.S. 494 (1950), although they were prominent in the plurality opinion of Chief Justice Vinson. *See id.* at 495-517.

164. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-83 (1952).

165. *Id.* at 679 (internal quotations omitted).

166. *Id.* at 680.

167. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting).

168. *Youngstown*, 343 U.S. at 629 (Douglas, J., concurring).

169. *Id.* at 630, 632.

consequences upon the balanced power structure of our Republic.”¹⁷⁰ Accordingly he concluded that:

[N]o doctrine that the Court could promulgate [was] more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.¹⁷¹

A third justice, Felix Frankfurter, began his analysis by recognizing that, of course, the content of the Constitution was “not to be derived from an abstract analysis” or in “disregard [of] the gloss which life has written upon” it.¹⁷² But, in the end, quoting Justice Brandeis, he agreed with Justices Douglas and Jackson that the Constitution was adopted “not to promote efficiency but to preclude the exercise of arbitrary power.”¹⁷³ Justice Black, writing the opinion of the Court, similarly rejected the Administration’s claim that the meaning of the Constitution should be altered “to avert a national catastrophe which would inevitably result from a stoppage of steel production.”¹⁷⁴

B.

Youngstown Sheet & Tube was decided in June 1952. Thus, when the Court met in conference in December 1952, and then in December 1953, to discuss *Brown*, Cardozo’s concept of societal need as a basis for judicial decision-making was not in vogue among those in the room. Chief Justice Vinson, the man who had been most willing to follow that approach in *Youngstown*, was dead and had been replaced by Earl Warren.¹⁷⁵

The new Chief Justice led off the discussion by reporting his morally grounded conclusion:

[T]he principle of segregation and separate but equal rests upon the basic premise that the Negro race is inferior. . . .

I don’t see how we can . . . set one group apart from the rest and say that they are not entitled to *exactly the same* treatment as all others. To do so is contrary to Thirteenth, Fourteenth, and Fifteenth Amendments. Those amendments were intended to make those who were once slaves equal with all others.¹⁷⁶

170. *Id.* at 634 (Jackson, J., concurring).

171. *Id.* at 642.

172. *Id.* at 610 (Frankfurter, J., concurring).

173. *Youngstown*, 343 U.S. at 610, 613.

174. *Id.* at 582.

175. THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 653 (Del Dickson ed., 2001) (collection of historical documents) [hereinafter THE SUPREME COURT IN CONFERENCE].

176. *Id.* at 654.

The senior member of the Court, Hugo Black, who was absent from the 1953 conference, had expressed an identical view during the conference following the first argument of *Brown* in December 1952. He stated, "I am compelled to say for myself that I can't escape the view that the reason for segregation is the belief that Negroes are inferior. I do not need books to say that."¹⁷⁷ As he had known earlier, "segregation 'was Hitler's creed—he preached what the South believed.'"¹⁷⁸ Black, in the December 1952 discussion of *Brown*, then went on:

I am also compelled to say for myself that the Civil War Amendments have as their basic purpose the abolition of such castes. . . .

If I have to meet it, I can't go contrary to the truth that the purpose of these laws is to discriminate on account of color. The Civil War Amendments were intended to stop that.¹⁷⁹

Justice Douglas, another key figure, agreed with Warren and Black. For him, segregation was "a simple problem. Race and color cannot be a constitutional standard for segregating the schools."¹⁸⁰ Justice Harold Burton similarly agreed that "segregation violate[d] equal protection" and that it was "not reasonable to educate people separately for a joint life." Justice Burton was prepared to "go the full length to upset segregation."¹⁸¹ For Justice Sherman Minton, the "only justification for segregation [was] the inferiority of the Negro," and the "Fourteenth Amendment, which was intended to wipe out the badges of slavery and inferiority," required "*equal rights, not separate but equal*."¹⁸²

The moralistic approach of these five justices could have provided the Court with a legally sound basis for its decision. It would only have required the Court to find as a fact something that surely was true—that the purpose of segregation was to discriminate against African-Americans—and to reach an historical judgment that the Thirteenth and Fourteenth Amendments had been intended to bar such discrimination. But the theory raised a problem—namely, four of the justices were not prepared to accept it.

Chief Justice Warren's most critical goal in *Brown* was achieving "unanimity and uniformity, even if we have some differences."¹⁸³ Justice

177. *Id.* at 648.

178. Tushnet & Lezin, *supra* note 2, at 1888 (quoting conference Notes of Justice William Douglas).

179. THE SUPREME COURT IN CONFERENCE, *supra* note 175, at 648.

180. *Id.* at 658.

181. *Id.* at 653.

182. *Id.* at 660.

183. *Id.* at 654; *see also* KLUGER, *supra* note 102, at 683.

Frankfurter, always a key member of the Court, agreed with Warren's goal,¹⁸⁴ and it became the driving force in the drafting of the opinion.¹⁸⁵ The goal compelled Warren, as he wrote the opinion, to refrain from making statements that might antagonize other justices and lead them to dissent or to write separate concurrences. As Justice Douglas, a firm vote in support both of desegregation and of unanimity, suggested at the December 1953 conference following reargument, achieving unanimity required that the opinion should not "try to anticipate too much," but should say as little as possible.¹⁸⁶ Three other justices who strongly favored desegregation—Hugo Black, Harold Burton, and Sherman Minton—did not disagree.¹⁸⁷

But unanimity did not, in fact, exist. Justice Stanley Reed disagreed that segregation rested "on a theory of racial inferiority,"¹⁸⁸ and a long line of cases going back to *Fletcher v. Peck* cautioned against judicial inquiries into legislative motive or purpose.¹⁸⁹ Justice Frankfurter, moreover, questioned "[h]ow . . . Black kn[e]w what the framers of the Civil War Amendments meant."¹⁹⁰ Only six years earlier, Black had failed to persuade the majority on a parallel claim that the original intentions of the Fourteenth Amendment's

184. KLUGER, *supra* note 102, at 685. Indeed, Frankfurter might have been the originator of the goal. See COTTRILL, DIAMOND & WARE, *supra* note 117, at 162-63; Tushnet & Lezin, *supra* note 2, at 1872.

185. Tushnet & Lezin, *supra* note 2, at 1876 n.51, 1877-78.

186. THE SUPREME COURT IN CONFERENCE, *supra* note 175, at 658.

187. See *id.* at 655-56, 658-60.

188. *Id.* at 656.

189. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810). *Accord* *Arizona v. California*, 283 U.S. 423, 455 (1931); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-58 (1931); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 210 (1921); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 187 (1919); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919); *United States v. Doremus*, 249 U.S. 86, 93 (1919); *Wilson v. New*, 243 U.S. 332, 358-59 (1917); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357, 366 (1916); *Weber v. Freed*, 239 U.S. 325, 329-30 (1915); *McCray v. United States*, 195 U.S. 27, 53-59 (1904); *Atchison, Topeka & Santa Fe R.R. v. Matthews*, 174 U.S. 96, 102 (1899); *United States v. Des Moines Nav. & Ry. Co.*, 142 U.S. 510, 544-45 (1892). Several years after *Brown*, John Hart Ely wrote about the "Supreme Court's traditional confusion about the relevance of legislative and administrative motivation in determining the constitutionality of governmental action[.]" John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1207 (1970), which Paul Brest called "one of the most muddled areas of our constitutional jurisprudence." Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 99.

190. THE SUPREME COURT IN CONFERENCE, *supra* note 175, at 651. As a result of his concerns about the framers' intentions, Frankfurter directed his law clerk, Alex Bickel, to conduct a detailed inquiry. Bickel ultimately drafted a memorandum that showed the history of the Fourteenth Amendment to be ambiguous, see KLUGER, *supra* note 102, at 653-55, which he later published as Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

framers directed the application of the Bill of Rights to the states.¹⁹¹ In short, the theory that segregation rested on racial inferiority and that the Fourteenth Amendment therefore outlawed it seemed unlikely to produce a unanimous opinion.

Three justices presented Warren with particularly great problems in his search for unanimity. Robert Jackson's position, which was a reworking of Cardozo's sociological jurisprudence, was especially interesting and bears quotation at length. According to Jackson:

Cardozo said that much of constitutional interpretation is partly statutory construction and partly politics. This is a political question. To me personally, this is not a problem. But it is difficult to make this other than a political decision. . . . I don't know how to justify the abolition of segregation as a judicial act.

. . . .

The problem is to make a judicial basis for a congenial political conclusion. . . . As a political decision, I can go along with it—but with a protest that it is politics.¹⁹²

Thus, the suggestion was that Jackson would file a separate opinion if the Court's opinion rested on a strong legal argument or otherwise asserted too much.

Justice Tom Clark, like Jackson, was willing to join a judgment invalidating segregation. But on the issue of the form that the opinion should take, Clark took a position opposite Jackson's. In his view, the case could not be handled "by a brief policy statement. There [was] a danger of violence if this [was] not well handled."¹⁹³ The final justice, Stanley Reed, initially announced that he would dissent from any decision outlawing segregation.¹⁹⁴

Thus, there was no consensus, and the justices kept discussing the case informally for several months. Chief Justice Warren did not begin writing the Court's opinions in *Brown* and in the companion case of *Bolling v. Sharpe*¹⁹⁵ until April, but he worked quickly and circulated his opinions on May 7, with a memo indicating that they "were prepared on the theory that the opinions should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory."¹⁹⁶ Justices Black, Douglas, Burton, Clark, and Minton promptly joined the drafts. It was also clear that Justice Frankfurter

191. See *Adamson v. California*, 332 U.S. 46, 69 (1947) (Black, J., dissenting).

192. THE SUPREME COURT IN CONFERENCE, *supra* note 175, at 658.

193. *Id.* at 659.

194. *Id.* at 661.

195. 347 U.S. 497 (1954).

196. Memorandum from Chief Justice Earl Warren (May 7, 1954), *quoted in* KLUGER, *supra* note 102, at 696.

would join, although perhaps after requesting changes in phraseology.¹⁹⁷ That left Justice Jackson, who had been hospitalized with a heart attack, as the key vote.

Warren personally delivered his draft opinions to Jackson in the hospital.¹⁹⁸ When Warren left, Jackson read the opinion in *Brown* and, in the words of his law clerk, was “greatly relieved.”¹⁹⁹ When Jackson then asked his clerk for his view, the clerk responded that he “wished that it had more law in it but [he] didn’t find anything glaringly unacceptable in it.”²⁰⁰ The opinion’s strength was that it was “simple and unobtrusive” and reflected a “keen sense” of what could be said “without getting everybody’s back up.”²⁰¹ Jackson agreed to join the opinion in return for Warren’s adding a reference to the success of African-Americans in many fields of endeavor²⁰²—a societal fact important to a justice influenced by Cardozo and a fact about which, as we have seen, Jackson had been concerned in a memo he had drafted shortly after the *Brown* cases had been argued.

We might wonder why Jackson did not publish a concurring opinion or, at least, insist on more concessions as the price for joining the Chief Justice’s opinion. It appears that his heart attack slowed him down; moreover, as his somewhat disjointed memo shows, he had no vision of what the reasoning behind the *Brown* judgment ought to be. In any event, Warren’s opinion contained no strong assertions of law of the sort to which Jackson had indicated he would object, and hence there was little reason for him to object.

After visiting Jackson in the hospital on May 10, Justice Frankfurter also joined Warren’s opinion.²⁰³ It is significant that Frankfurter joined as late as he did, after all the other justices except Stanley Reed were on board. His delay gave him less bargaining power. Of all the justices, Frankfurter presumably was the one most likely to insist that the opinion contain legally rigorous, reasoned arguments in support of its result. But Frankfurter also cared about unanimity. To insist that the Chief Justice make significant changes in his opinion would risk that others might withdraw their support from any revised opinion. Frankfurter had little choice but to join.

With Frankfurter and Jackson aboard, only Stanley Reed was left. The Chief Justice paid him a visit, emphasized the need for unanimity, and asked Reed to reconsider.²⁰⁴ Reed did reconsider, and “[f]or the good of the country,

197. See KLUGER, *supra* note 102, at 696-97.

198. *Id.* at 697.

199. Interview with Barrett Prettyman, *quoted in* KLUGER, *supra* note 102, at 697.

200. *Id.*

201. *Id.*

202. See KLUGER, *supra* note 102, at 697.

203. *Id.*

204. *Id.* at 698.

he put aside his own basis for dissent.”²⁰⁵ Eight days after Warren had first circulated his draft, the Court gave it final approval, and two days later, Chief Justice Earl Warren announced it from the bench.²⁰⁶

Regrettably, Chief Justice Warren’s opinion in *Brown*, which took shape in response to the moral concerns of several of the justices and to the Court’s perception of the nation’s needs and changing values, was almost devoid of reasoning, either moral or sociological. After outlining the procedural posture of the case, the inconclusive history of the Fourteenth Amendment until its definitive interpretation in *Plessy v. Ferguson*, and the importance of education in Twentieth-Century American life, the Chief Justice finally came to the question presented: “Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities?”²⁰⁷ Relying on a trial court finding that “[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children” that “affects the[ir] motivation . . . to learn” and thereby tends to retard their “educational and mental development,” the Court concluded that segregation was designed to and did, in fact, “generate[] a feeling of inferiority . . . [on the part of African-American children] that may affect their hearts and minds in a way unlikely ever to be undone.”²⁰⁸ The words were rhetorically powerful, but the legal reasoning thin; nonetheless, *Plessy* was effectively overruled.

In particular, the novice Chief Justice, who had spent the last decade and more of his career in high political office, from which he almost certainly had not paid careful attention to legal realist arguments about whether law should respond to changing societal values and needs,²⁰⁹ failed to make such Cardozian arguments explicit in his opinion. He likewise failed to elaborate the moral argument that had driven him to his result—that the purpose of segregation was to keep African-Americans in a position of subordination and that subordination is unconstitutional. His colleagues, perhaps out of respect for their new Chief and perhaps out of fear of fracturing the unanimity of the Court, did little to press the arguments on him.

Chief Justice Warren also placed little weight on precedent. He did cite *Sweatt v. Painter*²¹⁰ and *McLaurin v. Oklahoma State Regents for Higher Education*,²¹¹ but his ability to rely on precedent was limited because the most important precedent, *Plessy v. Ferguson*,²¹² supported the opposite result and

205. Interview with George Mickum, quoted in KLUGER, *supra* note 102, at 698.

206. KLUGER, *supra* note 102, at 698.

207. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

208. *Id.* at 493-94 (internal quotation omitted).

209. Warren himself fully appreciated his limitations. See WHITE, *supra* note 159, at 159-60.

210. 339 U.S. 629 (1950).

211. 339 U.S. 637 (1950).

212. 163 U.S. 537 (1896).

thus had to be overruled, although he did not explicitly overrule it. Nor could he rely on the legislative history of the Civil War Amendments because, as Justice Frankfurter had insisted and the *Brown* opinion frankly admitted, the legislative history was inconclusive.²¹³ Finally, while Warren expressed the conclusions of various psychologists about the relationship between segregation and feelings of inferiority on the part of blacks,²¹⁴ he presented the conclusions as psychological fact rather than as legal principle. The end result was an opinion with little reasoning of any sort on which to rely.

C.

In view of its lack of reasoning, the Chief Justice's opinion in *Brown v. Board of Education* became an easy target for the likes of Senator James Eastland of Mississippi, who called it a "legislative decision by a political court,"²¹⁵ and Governor Herman Talmadge of Georgia, who accused the Court of "ignor[ing] all law and precedent and usurp[ing] from the Congress and the people the power to amend the Constitution, and from the Congress the authority to make the laws of the land."²¹⁶ Meanwhile ninety-six members of Congress were drafting the Southern Manifesto, which declared that the nine justices had undertaken "to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land."²¹⁷

These criticisms were not unique: "the Warren opinion in *Brown* precipitated a constitutional firestorm the likes of which the nation had not seen at least since the Taney opinion in *Dred Scott*."²¹⁸ Indeed, by the end of the decade, the attack on *Brown* had reached into the academy. During a two-year period, two cycles of the Holmes lectures delivered at Harvard Law School and a response by a then-young professor at Yale, Louis H. Pollak, who has honored us by participating in this symposium, brought the debate regarding *Brown*, and the failings of the Chief Justice's opinion, to the forefront of academic thought. Significantly, we can see in the second lecture and in Professor Pollak's response, the emergence of the approach to judicial decision-making that subsequently would be elaborated by Ronald Dworkin in *Law's Empire*.

The first of the two Holmes Lectures was given by Judge Learned Hand, who levied the typical accusation that the Court had "assume[d] the role of a

213. *Brown*, 347 U.S. at 489.

214. *See id.* at 494, 494 n.11.

215. Statement of Senator James Eastland (Miss.), *quoted in* KLUGER, *supra* note 102, at 710-11.

216. Statement of Governor Herman Talmadge (Ga.), *quoted in* KLUGER, *supra* note 102, at 710.

217. *Southern Manifesto* (March 12, 1956), *quoted in* COTTROL, DIAMOND & WARE, *supra* note 117, at 187-88.

218. COTTROL, DIAMOND & WARE, *supra* note 117, at 210.

third legislative chamber” by its decision in *Brown*.²¹⁹ In Hand’s view, the judicial power in constitutional cases extended no further than the enforcement of specific, unambiguous textual provisions of the Constitution itself.²²⁰ *Brown* clearly was not such a case. Thus, Hand concluded that the Warren Court had simply “‘overrule[d]’ the ‘legislative judgment’ of states by its own reappraisal of the relative values at stake”²²¹— that the Court had merely engaged in the same process of weighing values that had produced segregation in the first place.²²²

The second Holmes lecture was delivered by Professor Herbert Wechsler, who sought to respond to Hand. The “problem” for Wechsler was not in the result of *Brown*, but “strictly in the reasoning of the opinion.”²²³ Wechsler understood that “courts in constitutional determinations face issues that are inescapably ‘political’—political . . . in that they involve a choice among competing values or desires.”²²⁴ What Wechsler, echoing Justice Jackson, found crucial was “not the nature of the question but the nature of the answer that may validly be given by the courts.”²²⁵ Courts, he argued, had to support their “choice of values by the type of reasoned explanation . . . intrinsic to judicial action.”²²⁶ Courts, in other words, had to choose values on the basis of “neutral principles—by standards that transcend the case at hand.”²²⁷

219. LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 1958, at 55 (1958) [hereinafter THE BILL OF RIGHTS].

220. The statement in the text was Hand’s main claim in the THE BILL OF RIGHTS, *see id.* at 48, 66-67, and in his first draft of his lecture, Hand did not mention *Brown*. However, his then law clerk, Ronald Dworkin, who disagreed with Hand’s main claim, kept calling Hand’s attention to *Brown* as a case demonstrating the error of that main claim. Dworkin convinced Hand that *Brown* was too important to be ignored, and Hand also conceded that, if he had been on the Supreme Court, he might well have joined the majority in *Brown*. But Hand, who had come to maturity in the progressive era and had witnessed the New Deal’s battles against the Four Horsemen, did not abandon his limited view of the Supreme Court’s role. And with the integrity of Hercules (see DWORKIN, *supra* note 43, at 239) for whom Hand was the model, Hand concluded that his principled view about the Court’s role had to dictate what he would say in his lecture about *Brown*. Interview with Ronald M. Dworkin (Sept. 24, 2003). See also GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 664-72 (1994), which, in Dworkin’s view, complements his recollection of how Hand came to analyze *Brown* as he did. For the efforts of other law clerks to induce Hand, after he had delivered the THE BILL OF RIGHTS lecture, to recognize the error of his approach, see Scott I. Messenger, *Law Clerks and the Crafting of Judicial Reputation: A Cultural History of a Legal Institution*, at 33-36 (forthcoming 2004) (unpublished Ph.D. dissertation, New York University).

221. THE BILL OF RIGHTS, *supra* note 219, at 54.

222. *See id.* at 39.

223. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32 (1959).

224. *Id.* at 15.

225. *Id.*

226. *Id.* at 15-16.

227. *Id.* at 17.

When Wechsler examined Warren's opinion, he found the result supported only by lower-court fact findings and by a footnote reference to the work of sociologists.²²⁸ Perhaps, some neutral principle undergirded the opinion, but Wechsler could not find the principle because Warren had not expressed it. Thus, for Wechsler, *Brown v. Board of Education* reflected a political and not a legal judgment. But he opened up the possibility that *Brown* could be rendered legitimate if someone could provide a legal reason for its political result.²²⁹

Louis Pollak jumped into the opening by crafting a doctrinally solid alternative to Chief Justice Warren's opinion in his article, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*.²³⁰ Pollak made the point that others had made—that the policy underlying segregation laws was “the impermissible one of nourishing race prejudice.”²³¹ But in his alternative to the Chief Justice's opinion, Pollak also wrote:

“All others can see and understand this. How can we properly shut our minds to it?” We see little room for doubt that it is the function of Jim Crow laws to make identification as a Negro a matter of stigma. Such governmental denigration is a form of injury the Constitution recognizes and will protect against.²³²

Moreover, the opinion Pollak drafted for the *Brown* Court did not rest on this observation alone. It rested as well on a legal point that all “restrictions which curtail the civil rights of a single racial group are immediately suspect.”²³³ That suspicion could be overcome only by showing that the states had a legitimate and compelling policy reason for the restriction, and, in the case of segregation, no such reason existed. On the contrary, as Pollak had shown and everybody knew, the reason for segregation was not a legitimate one at all.

The opinion that then Professor, now Judge Pollak wrote for the Court was a powerful early statement of the two-tier equal protection analysis with which we have become so familiar. Segregation laws, as racial classifications, triggered strict scrutiny and put the burden of proof on the Southern states to

228. See Wechsler, *supra* note 223, at 32-33.

229. A decade later Wechsler concluded that *Brown* and subsequent cases had come to stand for the “principle . . . that any racial line, implying an invidious assessment, may no longer be prescribed by law or by official action.” On that basis, he found “[t]he decision . . . more acceptable.” Herbert Wechsler, *The Nationalization of Civil Liberties and Civil Rights*, 12 TEX. Q. 10, 23 (1969).

230. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

231. *Id.* at 26.

232. *Id.* at 28 (citations omitted) (quoting *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922) and citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951)).

233. *Id.* at 27 (quoting *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944)).

demonstrate the legitimacy of their laws. It was a burden the South obviously could not meet. Hence their laws were unconstitutional.

Pollak's article thus provided an easy and elegant solution to the problem of justifying the Court's opinion in *Brown v. Board of Education*. He might have ended the article with that solution. But he did not. He also tacked on a three-page conclusion, the thrust of which is central to the thesis of this Article.

The conclusion asked what Wechsler meant by "neutral principles."²³⁴ Did Wechsler require only that judges write opinions that were "disinterested, reasoned, and comprehensive of the full range of like constitutional issues" and that "plainly and fully articulate[d] the real bases of decision"?²³⁵ If so, the opinion Pollak drafted for *Brown* presumably would have satisfied Wechsler's criteria. Pollak suspected, however, that Wechsler meant more.²³⁶ He suspected Wechsler also meant that judges ought "not draw" on their "merely personal and private notions" but should "achieve . . . objectivity."²³⁷ If so, Pollak disagreed. In his view, "judicial neutrality" did "not preclude the disciplined exercise by a Supreme Court Justice of that Justice's individual and strongly held philosophy."²³⁸ Indeed, he appears to have understood that judges could not decide anything without recourse to their "individual . . . philosophy."²³⁹

With Judge Pollak's article, we enter the latter part of the Twentieth Century—the jurisprudential era dominated by Ronald Dworkin rather than Benjamin Cardozo. I lack the evidence to claim that Pollak's article caused others to change the way they thought about the role of judges in constitutional adjudication. But, at the very least, it reflected a new way that a young generation of academics, like Pollak's soon-to-be colleague Dworkin,²⁴⁰ were beginning to think.²⁴¹

234. *Id.* at 32.

235. Pollak, *supra* note 230, at 32.

236. *See id.* at 33.

237. *Id.* at 34 (quoting *Rochin v. Californai*, 342 U.S. 165 (1952) (Frankfurter, J.)).

238. *Id.* at 33.

239. *Id.*

240. Dworkin, who joined the faculty of Yale Law School in 1962, had already begun thinking about *Brown* when, as Learned Hand's law clerk, he had argued with Hand while the judge was writing his lecture, published as THE BILL OF RIGHTS, in which Hand questioned the Court's opinion in *Brown*. *See* THE BILL OF RIGHTS, *supra* note 219, at 54-55. Dworkin then had understood that any jurisprudential theory capable of attaining widespread assent had to be consistent with *Brown*, and thus, when he came to elaborate his own theory in *Law's Empire*, *Brown* became one of the four cases on which he focused his attention. *See* DWORKIN, *supra* note 43, at 15-30, 381-89.

241. Another academic who wrote in response to Hand and Wechsler, suggesting that a lawful basis for the *Brown* opinion did exist, was Charles Black. *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). Black observed what Hugo Black had stated in conference eight years earlier—that the Fourteenth Amendment provided

In what ways did this young generation reject Cardozo and develop a new jurisprudence? There were two. First, they rejected Cardozo's assumption that judges or even social scientists could objectively determine society's needs and values. Pluralism and relativism became dominant in American thought, as "[p]hilosophers made the idea of an objective social science increasingly untenable."²⁴² Thus, Robert A. Dahl's *A Preface to Democratic Theory*, published three years before Pollak's article, grounded democracy in pluralism,²⁴³ while three years after Pollak's article, Thomas S. Kuhn published *The Structure of Scientific Revolutions*, which maintained that, even in the physical sciences, the relativistic assumptions of researchers significantly impacted their results.²⁴⁴ For legal academics attuned to these developments in other disciplines, Cardozo's jurisprudence became implausible.

Second, the young academics placed their faith in individual moral judgment. The decade of the 1960s would be the era of youthful protest carried out not because society wanted it or had expressed any need for it, but because the protesters could not morally tolerate society's impositions on them. Many in the legal academy applauded, or at least tolerated, morally grounded protest;²⁴⁵ indeed, the problem that required explanation was not individual moral protest, but opposition to protest.²⁴⁶

By the 1960s, *Brown v. Board of Education* had become central in the thinking of these young academics. It had become the "big" case that could not be ignored; no theory of the judicial function was acceptable unless it explained why *Brown* had been rightly decided. *Brown* has remained a "big" case ever since and the progenitor of a vast scholarly literature.²⁴⁷

"that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states" and that "segregation is a massive intentional disadvantaging of the Negro race, as such, by state law." On this "awkwardly simple" "scheme of reasoning," *Brown's* judgment, in Professor Black's view, could be sustained. *Id.*

In stating the obvious in print for the first time—something that Earl Warren's desire to obtain the Court's unanimous support had precluded him from saying—Charles Black was seen in 1960 as having made an important contribution to the debate over the lawfulness of *Brown*. But we now know that Charles Black added nothing analytically that Hugo Black had not already contributed, and accordingly I have not discussed his article in the text.

242. PURCELL, *supra* note 32, at 267-68. See generally *id.* at 197-217, 235-66.

243. See ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956).

244. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

245. Laura Kalman provides an in-depth discussion of this in her forthcoming book documenting the important events that took place at the Yale Law School during the 1960s (Univ. of N.C. Press, forthcoming 2005) (title not yet available).

246. This was the problem that Robert M. Cover set out to address in his book, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

247. A comprehensive recent bibliography can be found in Balkin, *supra* note 3, at 237-42.

It is, of course, impossible to explore all of this literature within the scope of a single article, and it would serve no point to do so. The point I want to make can be seen simply by examining a recent book in which nine leading scholars of constitutional law offer suggestions for how the Court should have drafted the *Brown* opinion.²⁴⁸ I will put aside the draft proposed by Derrick Bell, to which I will return later, and concentrate for now on the other eight. These eight, in common, strive to present either traditional doctrinal analyses in support of *Brown* or philosophical justifications grounded in political morality. None of the eight make arguments grounded in Cardozo's method of sociology.²⁴⁹

Two of the proposed drafts—by John Hart Ely and Cass Sunstein—rely on the two-tier equal protection analysis first advanced by Judge Pollak in his 1959 response to Herbert Wechsler. Starting, as did Pollak, from *Korematsu v. United States*,²⁵⁰ they argue that segregation laws, as racial classifications, triggered strict scrutiny and put the burden of proof on the Southern states to demonstrate the legitimacy of their laws.²⁵¹ They conclude that the South's failure to meet that burden rendered its segregation laws unconstitutional.²⁵²

Michael McConnell tells a different legalist story—an originalist one. He asserts that Congress's passage of the Civil Rights Act of 1875, which outlawed segregation on common carriers and in public accommodations,²⁵³ demonstrates that when Congress proposed the Fourteenth Amendment in 1866 it understood the amendment to prohibit segregation.²⁵⁴ Although I find McConnell's originalist argument less than compelling,²⁵⁵ the important point

248. See Balkin, *supra* note 3.

249. Another collection of proposed alternative opinions to that of the Court in *Brown* appeared in a 1995 symposium volume on *Brown v. Board of Education*. See 20 S. ILL. U. L.J. 1 (1995). All of the proposed opinions in the symposium take the same approaches as the eight opinions in Balkin's book discussed in the text.

250. 323 U.S. 214, 216 (1944).

251. See John Hart Ely, in Balkin, *supra* note 3, at 135, 135-42; Cass R. Sunstein, in Balkin, *supra* note 3, at 174, 174-84.

252. See Ely, *supra* note 251, at 137-39; Sunstein, *supra* note 251, at 179-80.

253. Michael W. McConnell, in Balkin, *supra* note 3, at 158, 164.

254. See McConnell, *supra* note 253, at 158-73.

255. McConnell himself admits that the evidence from the 1866 debates on the Fourteenth Amendment is ambiguous and that "[i]t is impossible to tell, from this evidence, whether the language of the Fourteenth Amendment should be interpreted to require desegregation." See *id.* at 162. I have shown elsewhere that the framers did indeed have mixed views on the issue of segregation, but that their ambivalence was not, for them, a problem. See WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 133-36 (1988). The Fourteenth Amendment was not written as an explicit directive to the Supreme Court about the meaning and limits of the principle of equality, but as an authorization to future Congresses to make political judgments about the application of the equality principle. See *id.* at 54. Thus, the ambiguity in the Fourteenth Amendment only increased the freedom that the

for present purposes is that he, like everyone else who is striving to justify the outcome in *Brown*, finds it necessary to turn to some jurisprudential approach other than Cardozo's method of sociology.

Drew Days and Catharine MacKinnon agree with McConnell that the meaning of the Fourteenth Amendment must be found in its history, but they make only a very general claim about what that history shows. They claim that the Congress that proposed the Fourteenth Amendment intended to make African-Americans equal citizens of the United States and to prohibit racial discrimination against them.²⁵⁶ Days and MacKinnon then adopt the observation first made by Justice Black that the purpose and effect of segregation was to disadvantage African-Americans and to keep them at the bottom of a racist hierarchy.²⁵⁷

That leaves three other draft opinions—by Bruce Ackerman, Jack Balkin, and Frank Michelman.²⁵⁸ In essence, all three eschew analysis of specific doctrinal and factual issues and strive to elaborate the design of the “democratic republic contemplated by our Reconstruction Constitution,”²⁵⁹ if not by the Constitution of 1787 itself. What follows are Michelman's words, which easily could have been written by Ronald Dworkin, regarding the decision to outlaw racial segregation in all its forms throughout the United States. He explained:

[The decision] finally comes to rest on an attribution of national purpose and commitment for which no internal legal-textual or textual-historical demonstration can be found. Decision becomes a matter of attributing or not attributing to the Constitution, from its very beginnings, an overriding purpose and premise of excluding caste institutions from these shores, a premise that most Americans today doubtless would trace to the Declaration of Independence.²⁶⁰

So understood, *Brown* reaffirms a deep philosophical understanding of what America, as a nation, is about.

IV

At this point, it might be useful to summarize my historical tale. In 1921, Benjamin N. Cardozo published *The Nature of the Judicial Process*, in which he argued that judges, at bottom, should base their decisions on the needs and

Congressmen who adopted it gave to themselves in the future. What is unclear is whether the 39th Congress meant to give future justices of the Supreme Court comparable freedom.

256. See Drew S. Days, III, in Balkin, *supra* note 3, at 92, 92-99; Catharine A. MacKinnon, in Balkin, *supra* note 3, at 143, 154.

257. See Days, *supra* note 256, at 92-99; MacKinnon, *supra* note 256, at 148-51.

258. See Bruce Ackerman, in Balkin, *supra* note 3, at 100; Jack M. Balkin, in Balkin, *supra* note 3, at 77; Frank I. Michelman, in Balkin, *supra* note 3, at 124.

259. Ackerman, *supra* note 258, at 116.

260. Michelman, *supra* note 258, at 130.

values of society viewed as a whole.²⁶¹ Cardozo's approach remained dominant into the early 1950s, was known to the justices who decided *Brown v. Board of Education*, and contributed to the unanimous result to which they came. But Chief Justice Warren's opinion for the Court did not clearly and articulately express this method of sociology. And, when the Chief Justice's opinion was criticized, no one turned to that method to blunt the criticism. Scholars defended *Brown* on other grounds. The ultimate defense, grounded in what Cardozo called the method of philosophy,²⁶² reads the Constitution as a reflection of "an overriding purpose and premise of excluding caste institutions from these shores."²⁶³

A.

This history, I believe, contains two lessons. I already have hinted at the first. This lesson is that Cardozo's method of sociology—the method of conforming law to the needs and values of society—is intrinsically progressive, although never radical. In contrast, Dworkin's approach of permitting judges to rely on their understanding of sound political morality allows them to engage in radical as well as progressive change. It also legitimates judicial decisions that are conservative or even reactionary.

Cardozo's approach is progressive in the sense that it ensures that as society changes the law will change in tandem. If, as typically happens, people look back on the social change that has occurred as progress, they will also view the law that both contributed and responded to the change as progressive. This is a cheap argument, but it is not unimportant. I do not know, for example, whether societal changes during the course of the Twentieth Century that have disconnected sexual activity from reproduction ultimately represent progress or sin. But most people who look back on the Twentieth Century tend to think that life was better at the end than at the beginning of the century; they tend, that is, to think of the Twentieth Century as a time of progress. And legal decisions that promoted or ratified that progress, such as *Griswold v. Connecticut*,²⁶⁴ *Roe v. Wade*,²⁶⁵ and *Lawrence v. Texas*,²⁶⁶ similarly are viewed as progressive.

It is possible to reach a similar judgment about progress toward racial justice.²⁶⁷ No one can doubt that socio-political changes during the course of

261. See *supra* text accompanying notes 45-57.

262. See CARDOZO, *supra* note 42, at 30-50.

263. Michelman, *supra* note 258, at 130.

264. 381 U.S. 479 (1965).

265. 410 U.S. 113 (1973).

266. 123 S.Ct. 2472 (2003).

267. My own political morality informs me that nondiscrimination, integration, and equality are positive goods, but I also know that people from other times and other cultures would

the Twentieth Century made it essential for the United States to pursue a path of racial equality. At the outset of the century, the United States was under no military threat from foreign powers, because the British navy controlled the seas and Britain had no interest in invading.²⁶⁸ Moreover, America was economically self-sufficient.²⁶⁹ Today, on the other hand, we must import essential goods from overseas and can protect ourselves from foreign attack only by being the strongest military power in the world.²⁷⁰ Isolationism no longer is possible; we must be part of—indeed, we must be the leader of—a global community that consists overwhelmingly of people of color. Such leadership, in turn, requires fair and equal treatment of racial and ethnic minorities at home.

The amicus briefs of the United States in *Brown v. Board of Education* explicated this connection between American global responsibility and domestic racial justice.²⁷¹ Taken together, the amicus briefs showed that the national interest of the American people required racial justice and opportunity for people of color—that people of color in the United States had to lead good lives so that people of color elsewhere in the world could believe that America wanted them to lead good lives as well.²⁷² And the justices, most of whom still were familiar with Cardozo’s approach of conforming law to the nation’s needs and values, knew they had to decide *Brown* as they did.

The utility of Cardozo’s approach, even after decades of disuse, emerged last Term with special poignancy in the case of *Grutter v. Bollinger*.²⁷³ There, the amicus briefs of corporate leaders and retired military officers,²⁷⁴ along with the narrow 5-4 majority opinion by Justice O’Connor, explicated even more clearly than did *Brown* the connection between American global hegemony and domestic racial justice. Relying on the briefs, the majority opinion noted that “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed

disagree with me if they could be here to express their moral views. And, I doubt whether we could agree on any transcendent moral perspective that would resolve the dispute among us.

268. See PATRICK CALLAHAN, LOGICS OF AMERICAN FOREIGN POLICY: THEORIES OF AMERICA’S WORLD ROLE 55 (2004).

269. See *id.*

270. See Anne W. Branscomb, *A Special Symposium: The New Technology in the Communications Industry: Legal Problems in a Brave New World*, 36 VAND. L. REV. 985, 989 (1983); CALLAHAN, *supra* note 268, at 55.

271. Brief for the United States as Amicus Curiae at 3-8, 31-32, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 8).

272. See *id.*

273. 123 S.Ct. 2325 (2003).

274. See, e.g., Brief for Amici Curiae 65 Leading American Businesses, *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003) (Nos. 02-241, 02-516); Brief of General Motors Corp. as Amicus Curiae, *Grutter* (Nos. 02-241, 02-516); Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae, *Grutter* (Nos. 02-241, 02-516).

through exposure to widely diverse people, cultures, ideas, and viewpoints.”²⁷⁵ Even more significantly, Justice O’Connor observed that the military needed to “train and educate a highly qualified, racially diverse officer corps in a racially diverse setting” and that it could not do so “unless the service academies and the ROTC use[] limited race-conscious recruiting and admissions policies.”²⁷⁶

Taken together, the briefs and the O’Connor opinion suggest not only that Americans of color must lead good lives so that people of color elsewhere in the world can believe that America wants them to lead good lives as well, but two further points. First, white Americans need black Americans to tell the world about the good lives they lead and about America’s desire that people of color throughout the world should buy American products and thereby lead prosperous lives as well. Second, Americans of color need to be coopted to perform many of the lower-paying, less-desirable tasks, such as military service, that the maintenance of American global hegemony requires. Finally, the amicus briefs and the O’Connor opinion intimate that whites need to create an elite of color to persuade average Americans of color to assume these two tasks.

I must note, parenthetically, that I agree with Justice Ginsburg’s approach to affirmative action.²⁷⁷ I tend to regard it as an essential, though far from perfectly adequate, remedy for past and ongoing racial discrimination that has made it impossible for most Americans of color to compete on fair terms. I imagine it would have been catastrophic for *Grutter* to have outlawed the University of Michigan Law School’s admission system. Unfortunately, though, Justice O’Connor did not see the issue as I do, and O’Connor, not I, had the fifth vote. Moreover, what her opinion implies is true: whites do need blacks to perform the functions she suggests for them, and we probably need the “highly qualified, racially diverse”²⁷⁸ leaders that only affirmative action programs can produce to persuade the black underclass to do their necessary jobs. I cannot, in short, gainsay the power of Cardozo’s method of sociology to produce plausible, progressive, and maybe even right results.

It is equally significant that Cardozo’s jurisprudence will not be of help to a justice wishing to dissent from results like those reached in *Brown* and *Grutter*. A judge wishing to dissent, like either Stanley Reed in *Brown* or Clarence Thomas in *Grutter*, will need to do so for other reasons—essentially reasons of political morality.

275. *Grutter*, 123 S.Ct. at 2340.

276. *Id.* (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al., *supra* note 274, at 5, 29).

277. *See* *Gratz v. Bollinger*, 123 S.Ct. 2411, 2442 (2003) (Ginsburg, J., dissenting).

278. *Grutter*, 123 S.Ct. at 2340 (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., *supra* note 274, at 27).

Justice Reed had such a reason, wrongheaded as it might have been. As I understand Reed, he simply believed that African-Americans were inferior to European-Americans. “Of course,” Reed conceded, “there is no ‘inferior race,’” but he did believe there were “racial differences” and that blacks “may be handicapped.”²⁷⁹ “The race came out of slavery a short time ago,” Reed noted, and “have not thoroughly assimilated. . . . We must try our best to give Negroes benefits.”²⁸⁰ As I analyze the subtext of what I have just quoted, I cannot help but see Reed thinking of whites as benevolent parents of childlike blacks who need white help so that they might someday transcend racial differences and become the equals of whites. However, they were not yet equal, and while they were inferior it made sense to keep them separate. In short, I understand Justice Reed’s paternalism to reflect a deep belief in racial inequality—a belief grounded in a philosophical position.

In his dissent in *Grutter*, Justice Thomas likewise expressed a philosophical point of view, albeit a different one from Justice Reed’s. He quoted an especially eloquent statement of Frederick Douglass:

“[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested toward us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! . . . If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And, if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury.”²⁸¹

As I understand Justice Thomas’s morally driven position, he sees African-Americans as in all respects the equals of European-Americans, and believes that their equality would manifest itself if whites would only stop oppressing them, at times by trying to help them.

We know how Justice Thomas voted in *Grutter v. Bollinger*, and we know how Justice Reed would have voted if Chief Justice Warren had not persuaded him, for the good of the nation, to change his vote. Conservative and even reactionary positions such as theirs will be articulated from the bench routinely if the justices understand their job to be one of elaborating what they, as philosophers, attribute to the Constitution as its core purpose. For this reason, I am troubled by the shift in academic thinking away from Cardozo’s view that law should be attuned to society’s emerging needs and values. I am concerned

279. THE SUPREME COURT IN CONFERENCE, *supra* note 175, at 656.

280. *Id.* at 649.

281. *Grutter*, 123 S.Ct. at 2350 (quoting Frederick Douglass, What the Black Man Wants: An Address Delivered in Boston, Massachusetts (Jan. 26, 1865)).

that, as people with a moral perspective on the law that differs from mine increasingly set the Supreme Court's agenda, results favored by the dissenting justices in *Grutter* and the silent dissenter in *Brown* will become increasingly commonplace.

B.

Earlier, when I was discussing the recent book in which nine eminent constitutional law scholars proposed drafts of opinions that they think the Supreme Court should have announced in *Brown*, I noted that I was passing by the proposal of my colleague, Derrick Bell, and that I would return to it later. It is now time to return to an opinion that Bell labeled a dissent.

Bell does something that major constitutional theorists beginning with Charles Black and Lou Pollak have not done in their efforts to champion *Brown*'s result. He notes the role that Cardozo's method of sociology played in the Court's decision. In his words:

While it is nowhere mentioned in the majority's opinion, it is quite clear that a major motivation for the Court to outlaw racial segregation now when it declined to do so in the past is the major boost this decision will provide in our competition with communist governments abroad and our fight to uproot subversive elements at home.²⁸²

From this Bell drew that more fundamental conclusion that the rights of African-Americans "are recognized and protected for only so long as they advance the nation's interests."²⁸³

Bell's conclusion can appropriately be seen as an indictment of Cardozo's method of sociology, as well as Justice O'Connor's opinion in *Grutter v. Bollinger* and the underlying judgmental processes of the Court in *Brown v. Board of Education*. Put simply, Bell understands, as did Frederick Douglass and Justice Clarence Thomas, that white Americans have always used African-Americans to advance white interests, even when whites think they are acting benevolently. When judges ask what the nation (that is, the nation's vast white majority) needs and values, they never confer permanent rights on blacks, but merely confer temporarily privileges that endure only for so long as the nation needs them.²⁸⁴ *Grutter v. Bollinger*, for example, confers no right on any African-American student to attend the University of Michigan Law School; it merely allows the law school to admit blacks on different standards than whites as long as the good of the law school or the nation requires.

Professor Bell, along with Justice Thomas, finds this perverse. As proponents of equality, they believe that African-Americans, like all other Americans, should possess rights that will endure even after those rights no

282. Derrick A. Bell, in Balkin, *supra* note 3, at 185, 193.

283. *Id.*

284. *See id.*

longer suit the convenience of the majority.²⁸⁵ Bell and Thomas do not see whites, as a racial group, being used to promote the good of the nation. They believe, quite correctly, that using blacks, even benevolently, marks blacks as less than fully equal.²⁸⁶

Thinkers like Ronald Dworkin and Frank Michelman avoid this concern. Through philosophical analysis of the history of American constitutionalism, Dworkin derives an “individual right not to be the victim of official, state-imposed racial discrimination,”²⁸⁷ while Michelman, with a similar analysis, “attribut[es] . . . to the Constitution, from its very beginnings, an overriding purpose and premise of excluding caste institutions from these shores.”²⁸⁸ Both theories are racially neutral and should give neither Professor Bell, Justice Thomas, nor anyone who hopes for racial equality cause to criticize them. This neutrality justifies, and might even explain, why the Supreme Court and academic commentators, in *Brown* and its aftermath, shifted away from Cardozo’s method of sociology to an approach more like the method of philosophy.

C.

This approach brings us yet again to *Grutter v. Bollinger*. For Bell, Dworkin, Michelman, and Thomas, *Grutter* should represent a truly perverse decision. White Americans need African-Americans to fight their wars for them. They also need nonwhites to sell their products to people of color overseas so as to maintain their own high living standards at home. Continuing to so use African-Americans, in turn, necessitates the education and training of a black elite, which, finally, requires preferential admissions to the nation’s leading colleges and graduate schools.

One side of me rebels at hearing this reasoning. But the other side of me wonders whether any other reasoning could have produced the results in *Brown* and *Grutter*—results to which I am totally committed. Derrick Bell, Ronald Dworkin, Frank Michelman, and Clarence Thomas all stand committed to the principle of equality. But they have different conceptions of equality, and they will not resolve their differences by engaging each other in philosophic conversation. The conception of equality that will dominate the Court’s reasoning will be the one most acceptable to the vast majority of the American people, and the American people have never been able to concede real equality to the descendants of those brought here as slaves.

Maybe whites can be benevolent, however, to the African-Americans whom they need to protect their wealth and safety. And over time, perhaps,

285. *See id.* at 196.

286. *See id.*

287. DWORKIN, *supra* note 43, at 382.

288. Michelman, *supra* note 258, at 130.

white benevolence might so enrich and empower blacks, as it has so many other groups in the past, that they will be enabled to seize the equality that whites have refused freely to grant.

V

Some may find me unduly optimistic,²⁸⁹ but I do not mean to insist on my optimism. I have only one main conclusion—that since the time of *Brown*, both conservative and liberal jurists have tended to ground their decisions more on principles of political morality than on their perception of societal need. Because no one set of political principles ever has become permanently triumphant in pluralistic America, it follows that, if courts are charged with deciding cases on the basis of principle, they sometimes will reach liberal and other times conservative results.

Alternatively, judges might ground decisions not on abstract principle but on their understanding of society's needs, as Justice Cardozo and others did before *Brown* and as Justice O'Connor did in *Grutter v. Bollinger*. Of course, society sometimes can be divided into conflicting groups that do not agree on what is needed, and, even when there is general agreement, it might be difficult to determine what society's needs are. Hence judges can make mistakes. But often, as in *Grutter*, it is easy to know what is needed, and other times, when mistakes are made, as in *Bowers v. Hardwick*,²⁹⁰ it is possible to correct them.²⁹¹ In the end, legal change will follow in the wake of social change, and the law will appear progressive even when judges, perhaps benevolently, authorize use of the underprivileged to further the well-being of society as a whole.

I do not know whether, if I were a judge, I would base my decisions on my perception of society's needs and values or on my analysis of right political morality. Because I am not and never will be a judge, I have not had to face the question under the real-life conditions of having to give judgment. My job, as an academic scholar, is not to prescribe, but only to describe and analyze and thereby help my audience achieve new insight into matters of importance. I hope I have done that for you.

289. See, e.g., Mary L. Dudziak, *Brown and the Idea of Progress in American Legal History: A Comment on William Nelson*, 48 ST. LOUIS U. L.J. 851 (2004).

290. 478 U.S. 186 (1986).

291. See *Lawrence v. Texas*, 123 S.Ct. 2472 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).