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# Brown v. Board of Education and the Origins of the Activist Insecurity in Civil Rights Law

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The peculiar thing about *Brown v. Board of Education*[1] is that, when it was decided, liberal legal scholars trashed it. Indeed, the modern conservative movement has built its attack on civil rights initiatives and its critique of the judiciary[2] on the disparaging assessments of the opinion offered by Henry Hart,[3] Hebert Wechsler,[4] and Alexander Bickel.[5] This peculiar aspect of *Brown* has become the keystone supporting all arguments about what is excessive about the modern jurisprudence; federal courts are said to have a realist disposition producing an unbounded, relativistic, interdisciplinary judicial craft and characterized by an activist proclivity. These dual pillars of post-*Brown* judicial criticism have undercut the force and utility of *Brown*. They have also sapped progressive legal scholars' faith in the decision (and the law) as a tool for social reform.

This Article argues that such a loss of faith is unjustified. However, it exists because contemporary scholars, like *Brown's* contemporaneous critics, have not understood the opinion — they have not grasped the unique force of the opinion. Indeed, the main claim here is that the most important parts of the opinion are obscured as the *Brown* Court manifested an "Activist Insecurity" that has replicated itself on the judiciary ever since. One could say that the activist insecurity is the HIV of the judiciary, quietly reproducing itself within the body of law created by *Brown*, changing to hide from the jurisprudence's defenses, and spreading through *Brown's* prodigious intercourse with other areas of civil rights and constitutional law. Like HIV, the Activist Insecurity is a silent killer, emerging years later to sap the vitality

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

2. *See generally* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 132-43 (1993) (discussing Senate rejection of Robert Bork as Supreme Court nominee as rejection of neutral principles approach of conservatives).

3. *See* Henry M. Hart, Jr., *Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96-125 (1959).

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

5. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

of jurisprudential lines, eventually killing them. *Brown*, nearly fifty, is nearly dead.

On the most general level *Brown* created a tension in American jurisprudence. *Brown*, with other cases, unleashed the increasing constitutionalization of American law. This expansion occurred even as federal courts and legal commentators framed the central question of federal jurisprudence as concerning the need to limit the reach and scope of federal judicial power.[6] This problem seemed to have been averted by the *Brown* Court; the *Brown* opinion signaled a shift from an interpretation of the Fourteenth Amendment which vested courts with largely unbounded power to determine when fundamental rights were infringed, to a narrower approach that searched for textual support in the Constitution for rights. This change from a "substantive due process" vision of the Fourteenth Amendment to an individual rights-based model generated a formidable body of jurisprudential theorizing and a long period of Constitutional and statutory interpretation that fundamentally changed the language of law in the Untied States. In the United States, *Brown* ushers in rights-based legalism.[7]

As *Brown* approaches fifty years, this period has drawn to a close. In its wake lies a *Brown* decision drained of force, but which supports the foundation of the law designed to reign in its broader implications. Hidden by these developments is the legal and theoretical terrain on which the *Brown* Court operated. Rooted in a context now obscured, *Brown* seems misplaced; its implications seem excessive, even anachronistic; its rollback seems justified. This article shows why.

The past several decades have witnessed an explosion of jurisprudential theories in an increasingly diverse and vibrant legal academy.[8] The varied and often competing theories are characterized by their skeptical critiques of legal doctrine and institutions and draw from diverse academic disciplines.[9] Collectively they represent a post-modern period in jurisprudence. Each reacts to some perceived defect in doctrinal law, legal methodology, or the

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6. *See* John Valery White, *Vindicating Rights in a Federal System: Rediscovering 42 U.S.C. § 1985(3)'s Equality Right*, 69 TEMPLE L. REV. 145, 160-205 (1996) (discussing Court's balancing of federalism in interpretation of federal civil rights statutes).

7. This process dates back to at least *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938). *See, e.g.*, Cass R. Sunstein, *Lochner's Legacy*, 87 COL. L. REV. 873 (1987). Moreover, the process was arguably not complete until the mechanism for enforcing individual rights was put in place by a broad reading of 42 U.S.C. § 1983's "under color of state law" requirement, *Monroe v. Pape*, 365 U.S. 167, 187 (1961), and the specific individual basis for those rights were memorialized in *Roe v. Wade*, 410 U.S. 113 (1973). *See* White, *supra* note 6, at 205-16.

8. *See* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995); RAYMOND A. BELLIOTTI, JUSTIFYING LAW: THE DEBATE OVER FOUNDATIONS, GOALS, AND METHODS (1992).

9. *See* MINDA, *supra* note 8; BELLIOTTI, *supra* note 8.

profession.[10] In the area of public-law rights jurisprudence, many of the concerns that underlay these theories can be explained by a single defect in the federal judiciary's rights jurisprudence. Specifically, the *Activist Insecurity* has infected the civil rights jurisprudence developed by federal courts in response to Jim Crow and its continuing vestiges. The operation of the *Activist Insecurity* has compromised the coherence of that body of law, producing a fractured jurisprudence that is often self-evidently inefficient, irrational or apparently informed by biased or capricious limitations on recovery. Transparently thin rationalizations dress up decisions aimed at imposing coherence on this confusion, hiding the fact that many of the deep social problems at which the jurisprudence is presumably aimed go unaddressed. The consequence is the derogation of the rule of law, prompting the need for the creative and ambitious theories of law characteristic of today's jurisprudential commentary to justify the status quo or to point the direction for reform.

This Article is, in the end, a rereading of *Brown*. Because that rereading is premised on what preceded and followed *Brown*—*Brown*'s jurisprudential context—the first two parts of this Article are focused on *Brown*'s jurisprudential legacy and lineage. Part I assesses *Brown*'s force on jurisprudential thinking generally and explains why *Brown*'s key legacy should be understood as generating the Activist Insecurity. It is this insecurity that has the greatest effect on contemporary analyses of both *Brown* and civil rights law. Part II offers a definition of the Activist Insecurity. Part III provides the context in which the Activist Insecurity was born: concern with activities, *Brown* in the Realist transformation of American law coming into conflict with the stark reality of Jim Crow. On this basis, a rereading of *Brown* is offered in Part IV.

## I. *BROWN* AS HISTORICAL MARKER AND SCHOLARLY FETISH

*Brown* is many things, generating a multiplicity of meaning that confuses discussion of the case. In addition to marking the beginning of the end of Jim Crow and probably fueling the then-emerging Civil Rights movement, *Brown* marks a significant shift in American legal thinking.[11] This turn to "rights" as

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10. *See* MINDA, *supra* note 8; BELLIOTTI, *supra* note 8.

11. For example, Mark Tushnet argues that *Brown* marked a new independence for the Supreme Court, unleashed finally from the battle over the New Deal:

> In an important way the general acceptance of the New Deal program freed the Court from some constraints. In the presence of a real enemy, it had been important for the Court, seen as a political actor, to ensure that its actions were compatible with those of its allies in the New Deal coalition. With the enemy's disappearance, the Court could begin to act as an independent political force. Again *Brown* illustrates the Court's new position. The

the fundamental legal construct in American law was surely inspired by historical factors, as Bell's interest convergence theory[12] implies and as Henkin's connection of American and international rights movements demonstrates.[13] But the transformation of constitutional law into a rights-based jurisprudence has much to do with developments in American legal theory, specifically ascendent legal theories rooted in the legal realist movement.[14] *Brown* would give form and substance to realism, even as realism was being transformed and former realists became *Brown's* most effective critics.[15]

*Brown's* connection to realist developments is significant for a number of reasons. First, the importance of *Brown* as marker of a change in the judiciary's role is structured by the changes already taking place under the banner of realism. Second, the realist-based transformations of American law, of which *Brown* is a part, set the stage for the modern critique of *Brown*.[16] *Brown's* contemporary critics, following the realist injunction to look beyond formalism, criticize *Brown's* contemporary effects as manifesting a troublesome formalism.[17] Third, a realist frame is essential to truly understanding what *is* problematic about the *Brown* opinion. This section summarizes the first two of these observations and defines the problem reflected in the last, a discussion of which comprises the remainder of this article.

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> Democratic party coalition included southerners who tended to support . . . the social and economic agenda of the party, but who were adamantly opposed . . . to altering the southern system of race relations. Democratic party activists in the North, as well as liberal Republicans, believed that segregation had to go. . . . The Court's decision in *Brown* was, in the political sense, an act by one part of the governing coalition against another.

Mark Tushnet, *The Warren Court as History: An Interpretation, in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE (Mark Tushnet ed., 1993). *See also* John E. Canady, Jr., Comment, *Overcoming Original Sin: The Redemption of the Desegregated School System*, 27 HOU. L. REV. 557, 574-80 (conceiving of the history of desegregation law as shift from formal to substantive notions of equality and back). For Canady, *Brown* is a shift to a substantive notion of equality that is probably best understood as a rights-based notion as contrasted with a process-based notion which he calls formal. *Id.* at 580.

12. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

13. *See* LOUIS HENKIN, THE AGE OF RIGHTS (1990).

14. *See, e.g.*, MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, THE CRISIS OF LEGAL ORTHODOXY (1992); LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986); KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962).

15. *See* Hart, *supra* note 3; Wechsler, *supra* note 4; BICKEL, *supra* note 5.

16. *See* MINDA, *supra* note 8, at 24-43; HORWITZ, *supra*, note 14, at 247-68.

17. This criticism dates from the earliest days after *Brown*. Judge Learned Hand's inflammatory assault on *Brown* in his Holmes Lecture at Harvard in 1958, took issue with the opinion's effort to "distinguish" *Plessy* and argued that the decision had seemed to be the product of the old preference of personal rights over property rights. LEARNED HAND, THE BILL OF RIGHTS 54-55 (1958).

### A. Brown *as Marker of Jurisprudential Change*

*Brown* is in many ways the apex of a legal modernism that paralleled movements like structuralism in philosophy[18] and positivism in social science.[19] This description is perhaps strange, given the inherent tensions between structural analysis's relativism and scientific positivism's rationalism, but the developments of legal realist writing in the period prior to *Brown* reconciled them in a perhaps bizarre critique of legal formalism.[20] As reflected in *Brown*, realism focused on the structure of social systems and the law's reflections of that structure. This was manifest in realists' interests in looking behind rules to the policy effects and social origins of those rules.[21] This opening of the legitimate factors of analysis in legal theorizing necessitated a resort to and faith in science as a source of truth and answers.[22]

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18. *See, e.g.*, FRANCOISE DOSSE, THE HISTORY OF STRUCTURALISM: VOLUME I: THE RISING SUN, 1945-1966 (Deborah Glasson trans. 1997).

19. "The realist enthusiasm for adopting social science techniques in legal study led to a comparable interest in statistical methodology." EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 86 (1973). The positivism is that which characterizes American Social Science for most of the century. "Accepting a broadly naturalistic world views, [social scientists] held that the only real knowledge available about both man and society was empirical and experimental." *Id.* at 21. *See also id.* at 21-25.

20. Gary Minda describes the dual premises of the realist movement as distinctly antiformalist:

> The realist movement was . . . marked from the beginning by a deep skepticism about the possibility of decision making according to rule. Realist skepticism was based on two closely related ideas. The first idea was that "reality" is too complex and fluid to be capable of being governed by rules. The realists explained how the relationship between law and society is . . . like "two blades of a pair scissors." If we keep our eye only on the law blade, as legal formalists are prone to do, we will fail to see how society contributes to the cutting. The relationship between law and society . . . thus enabled the realists to argue in favor of "nontechnical" or "extra-legal" considerations in legal decision making.
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> The other basis for the legal realists' distrust of rules lies with their critique of the conceptualism and abstraction in Langdellian formalism.

MINDA, *supra* note 8, at 27-28 (quoting Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 443 (1934)). *See also* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

21. This vision is most closely associated with those realists Minda calls "radical realists." See MINDA, *supra* note 8, at 28-29: "[T]he radical realists wanted lawyers, judges, and practitioners to understand how legal logic maintained and justified legal and economic coercion thorough rationalizations that accepted the reality of inequality and raw social power." *Id.* at 29.

22. This resort to considerations exterior to the law was common to both Minda's "radical" and "progressive" strands. Radical realists required resort to politics and social science to explain the underlying basis for legal rules. *Id.* Progressive realists, "like the Langdellian theorists who argued that 'law is a science,' . . . advanced the similar idea that 'law is a social science.'" *Id.* at 31. "Modern social science became the new basis for controlling and limiting the open-ended type of policy narratives found in the law." *Id.* *See also* HORWITZ, *supra* note 14, at 208-12 (describing the dependence on social science of his two similar categories of realists, critical and constructive).

If the formalistic rules of the nineteenth century were not autonomous, inherent reflections of a moral and just order, answers to questions of right and justice surely required resort to other areas of learning. This, ironically, led legal theorists to increase reliance on positivistic findings of the natural and social sciences[23] even as positivistic visions of those fields were being challenged, in part by the structuralist social scientists and philosophers whose work underlay the realist developments.

The legal modernism that underlay *Brown* pursued a peculiar reconciliation of the new insights brought about by looking behind the law's claims to autonomy and the pursuit of an instrumental rationality capable of reimposing the order lost in the abandonment of the law-as-autonomous entity assumption:

> Legal modernism symbolizes the progressive union of scientific objectivity and instrumental rationality in the pursuit of the intellectual project of *twentieth-century Enlightenment*—the century-old quest for universal truth based on faith in "the omnipotence and liberating potential of reason and science . . . to penetrate to the essential truth of physical and social conditions, thus making them amenable to rational control."[24]

Thus the tools of science and rationality are to be employed to justify law where the claims of law's inherent justification have been removed. *Brown*, then, is informed by a quest for rational bases for decision to explain the lost faith in the inherent correctness of judicial decisions—to wit *Plessy*.

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23. According to Horwitz:

> Realists agreed that law needed to be brought back in touch with life, that legal categories needed to reflect better or express a more complex social reality. For some, the critique of autonomy [of law that was at the core of all Classical legal ideas] meant that legal questions needed to be more closely rooted in the traditional inquires of moral and political philosophy. . . . For many other Realists, however, the absence of legal autonomy meant that law became the dependent variable, society the independent variable. The task of bringing law back in touch with life meant that law needed to become a mirror of social relations. Since their goal was to develop a method that permitted the legal system to receive undistorted messages from reality, they turned to the social sciences to lean what reality was.
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> This Realist turn to social science research was a direct extension of pre-war Progressive sociological jurisprudence.

HORWITZ, *supra* note 14, at 209.

24. MINDA, *supra* note 8, at 5 (quoting Roy Boyne & Ali Ruttansi, *The Theory Oriented Politics of Postmodernism: By Way of an Introduction, in* POSTMODERNISM AND SOCIETY I, 3 (Roy Boyne & Ali Ruttansi eds., 1990).); *See also* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601 (1993).

These developments trapped modern legal theorists in a paradox. Their increasing faith in social scientific positivism was necessitated by an emerging structural analysis throughout academic inquiry. That structuralism had focused realists' gaze behind the law, on the institutions that created law and on the citizens whom the law had an effect. However, this very structuralism had also called into question the narrow empiricism of the positivist social science on which legal modernists were relying to save their analysis from incoherence. "Indeed, if Legal Realism was essentially correct, the real problem . . . became one of creating a certain and predictable legal regime after the demise of a nineteenth-century formalist view."[25]

This paradox was resolved, and an additional level of tension added, by the modern legal theorists' faith in rights, especially after World War II.[26] Rights, drawing on the natural rights-based notion that certain limits on government derived from that which all humans or citizens must have in a just order,[27] seemed the ready antidote for the extreme moral relativism of which realists among legal modernist were especially accused.[28] Though realists were likely never so relativistic, the horror of the holocaust made even slight charges of moral relativism a severe indictment matter.[29] Rights, when identified, represented the prerequisites for any legitimate legal order, and did not seem to rely on abstracted notions of human relations but on granting value to human agents themselves.

*Brown* stands, even today, as the manifestation of these developments. *Brown* exposed the complicity of law in the social system of Jim Crow. In

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25. HORWITZ, *supra* note 14, at 230. The paragraph continues, "In a post-formalist era, particular and concrete rules, sub-categorized to deal with a variety of highly differentiated economic and social problems, may have offered the best hope of legal predictability." *See* Duxbury, *supra* note 24.

26. This turn is likely not a specifically "realist" one, but rather a corollary to the enactment of the Administrative Procedure Act, 5 U.S.C. §§ 551, et. seq., which Horwitz views as a resurgence of "legalism" in the post-war period. *See* HORWITZ, *supra* note 14, at 230-46. By "legalism" Horwitz means a variety of renewed legal formalism promoted by Roscoe Pound and built on the "Rule of Law" writings of A. V. Dicey and Friedrich A. Hayek. *Id.* at 225-30; *see* A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1st ed. 1885); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72-73 (1944).

27. *See generally* HENKIN, *supra* note 13; *see also* JACK DONNELLY, UNIVERSAL RIGHTS IN THEORY AND PRACTICE (1989); IAN SHAPIRO, THE EVOLUTION OF RIGHTS IN LIBERAL THEORY (1986).

28. This charge is discussed by Horwitz in his description of Karl Llewellyn's "Retreat." HORWITZ, *supra* note 14, at 247-50. The retreat is Llewellyn's commentary in the foreword to the 1951 edition of his book, THE BRAMBLE BUSH (1930), that law is committed to the pursuit of justice. This retreat was inspired by criticism that suggested that realist positions might support totalitarianism: "Realism, Llewellyn observed, had been 'made the scape-goat for all the sins (real and supposed) of administrators and autocrats and the ungodly in general.'" *Id.* at 249 (quoting KARL N. LLEWELLYN, THE BRAMBLE BUSH 10 (1951 ed.).); *See also* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 3-4 (1960).

29. HORWITZ, *supra* note 14, at 250-52 ("much of post-war American thought was obsessed with identifying the 'lessons' to be learned from the spread of totalitarianism. One school of thought . . . sought to blame moral relativism for the spread of a 'might makes right' philosophy . . .").

doing so, it helped complete the de-legitimization of the supposed moral basis for racial separation—inherent differences in the human population.[30] Assuming all people were equal before the law, the decision revealed that *Plessy v. Ferguson*,[31] the 1896 decision upholding state-enforced segregation on commuter trains, was, in addition to being wrong, always an unstable platform on which was built a moral justification for the widespread and complex system of Jim Crow. Neither *Plessy* nor any other single decision was broad enough to bury a race (save perhaps *Dred Scott*),[32] yet the social, political and economic structure of the South was so built, relying on *Plessy* for justification.

By exposing *Plessy's* weakness and rejecting its moral implications, the *Brown* opinion exposed the immorality of the social, political, and economic structure of Jim Crow in the South and North alike. As significantly, *Brown* implied that the legal system reflected this immorality and needed to be changed. Thus not only could no law respecting the "separate but equal" regime of *Plessy* stand, but all laws reflecting separate and unequal *existence* were suspect, as they were born under *Plessy's* gaze.

*Brown* supports this exposing of Jim Crow by reference to the leading scientific findings of the time. In particular, *Brown* relies on studies destroying the natural science basis for Jim Crow, namely physical difference between the races.[33] *Brown* of course went further, arguing that separate but equal created actual harm; the opinion supports this conclusion by referencing the leading social science studies on this question. Most generally, the Court's reference to Gunner Myrdal's *American Dilemma* stands as a documentary reference to the deleterious effects of enforced segregation.[34] Finally the Court's citation of the Chin and Clark studies of black children's self image showed the individual harm wrought by a society consumed with race and race distinctions.[35]

Though *Brown* does not speak in terms of rights, as such, the case is fundamentally a rights decision. The Constitution allowed the plaintiffs in

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30. This process was already underway. As Stephen J. Gould's THE MISMEASURE OF MAN (1981) summarized, scientists were by mid-century rejecting biological differences. More significant, social scientists had by *Brown* come largely to reject biological distinctions as a basis for social inequality. Gunner Myrdal's AMERICAN DILEMMA (1949) manifests this in epic form. *See* STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY, 21-49 (1995).

31. 163 U.S. 537 (1896).

32. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

33. Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954).

34. *Id.*

35. *Id.* This focus had deliterous effect. As my colleague Kenneth Murchison reminded me, the Court's focus on segregated schools narrowed the focus of its inquiry from Jim Crow to the less certain question of education. This was consistent with the Court's allegiance to the standard judicial practice of narrowing the question it decides.

*Brown* to question the political decisions of their elected school boards in order to end the system of segregation. This was a sharp break with the Court's previous approach to Jim Crow's sundry manifestations. Prior to *Brown*, the Court had addressed Jim Crow mostly by questioning the legitimacy of Jim Crow governments directly.[36] Invoking and developing its substantive due process jurisprudence, the Court, in cases like those connected to the "Scottsboro Boys" trials,[37] declared trials and other official action wholly illegitimate. Offending governments had to be shown to have engaged in extreme behavior, behavior that "shocked the conscience." In effect, the Court had come into the business of declaring governments illegitimate. This approach was necessarily rarely used and limited only to the most egregious manifestations of Jim Crow in locales that were the most parochial and racist.[38]

*Brown's* turn was prosaic. The defendant school boards in *Brown* violated the Constitution and were required to bring their behavior in line with it. This rights-based assumption, though arguably treating constitutional questions as political issues and inserting the Supreme Court into the political process,[39] conceived of the dispute quite narrowly. It never insinuated that the state governments were wholly illegitimate. On the contrary, the *Brown* opinion treated the political bodies as legitimate entities, capable of and

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36. *See, e.g.*, Avery v. Georgia, 345 U.S. 559 (1953). Many of these decisions were decided after *Brown*. *See* Reece v. Georgia, 350 U.S. 85 (1955); Michel v. Louisiana, 350 U.S. 91 (1955); Williams v. Georgia, 349 U.S. 375 (1955). By the time of *Norris* the Court had identified a specific right to an integrated jury. *See* Carter v. Texas, 177 U.S. 442, 447 (1900). However, the *Norris* Court's method of determining whether that right was violated, turned heavily on the Court's own suspicion of the legitimacy of Alabama courts. Though the Court never says so, it viewed the Alabama decisions as farcical. Otherwise, the Court might have been bound to uphold the lower court reading of the facts, which held that although no black citizens had served on grand or petit juries in the two counties involved, there was no evidence that this was the product of discrimination. The prior decision in the case, Powell v. Alabama, 287 U.S. 45 (1932), is consistent with the due process approach. There the Court found a due process violation in the failure of the state to provide adequate counsel. The decision is, however, heavily hedged, recognizing the rights violation because of the circumstances, rather than as a particular right.

37. *See generally* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969); JAMES GOODMAN, STORIES OF SCOTTSBORO (1994).

38. Tellingly, the Court never saw or took advantage of the opportunity to declare lynching so uncivilized an act. Indeed, lynching is the subtext of the Scottsboro decisions; however, the practical limits on the Court's substantive due process approach clearly counseled against use of that tool in cases where the state's role was relatively indirect or otherwise muddled.

39. This is ordinarily a conservative charge. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing neutral principles should be taken to the extreme, excluding constitutional decision where text of constitution is not clear). However, Abram Chayes defends it as a means of empowering the judiciary. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (articulating role for judges in structural reform litigation as promoting public values).

expected to comply with the Constitution. *Brown* was thus an inherently realist decision, expanding the vision of the Court's role even as it inherently *increased* its deference to the other branches and the states. In fact, in this sense *Brown* could be said to be a "moderate" opinion.

### *B.* Brown *as Scholarly Fetish: Contemporary Critique of* Brown

In never questioning the legitimacy of southern governments the *Brown* opinion was a more moderate confrontation with American apartheid than the due process approach. This "moderate" aspect of *Brown* was not to be sufficient to soften its impact. The substance of the decision—Jim Crow—was too hot. Consequently, the "moderate" opinion in *Brown* generated at least a twenty year period of overt resistance to its holding,[40] increasing judicial involvement in the policy area it involved (elementary and secondary education), and eventually a backlash among large segments of the public.[41] *Brown* itself was not always the focus of this outrage, but it was never too far away.[42]

A generation of legal scholars emerged in the 1970's to forcefully criticize the "activism" of the Warren Court. Building on the contemporaneous criticisms of *Brown* and articulating the policy goals of its critics,

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40. *See* JAMES W. ELY, JR., THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE (1976); Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following* Brown v. Board of Education, 47 DUKE L. J. 399 (1997); *see also* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1969); ROBBINS L. GATES, THE MAKING OF MASSIVE RESISTANCE: VIRGINIA'S POLITICS OF PUBLIC SCHOOL DESEGREGATION, 1954-1956 (1962). Southern resistance eventually prompted the Court to abandon its deferential stance altogether. *See* Green v. County Sch. Bd., 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

41. This backlash is usually represented by the Boston School Riots. These were riots by white citizens of Boston in opposition to court ordered busing in an effort to desegregate the Boston area schools. *See* STEVEN J. L. TAYLOR, DESEGREGATION IN BOSTON AND BUFFALO: THE INFLUENCE OF LOCAL LEADERS 136-38 (1998).

42. As part of the backlash, a new round of criticism of *Brown* ensued. Focused on the *Brown*-inspired court orders, many renewed criticisms of *Brown* first seen just after the decision. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (arguing that *Brown* among other developments distorted Fourteenth Amendment law); LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976) (criticizing *Brown* and post-*Brown* desegregation law). Graglia continues the attack today. *See* Lino A. Graglia, *The Legacy of Justice Brennan: Constitutionalization of the Left-Liberal Political Agenda*, 77 WASH. U. L.Q. 183 (1999); Lino A. Graglia, *It's Not Constitutionalism, Its Judicial Activism*, 19 HARV. J. L. & POL. 293 (1996). Although his focus seems more on the post-*Brown* decisions on how desegregation should be implemented, Graglia, *Legacy*, *supra*, at 190-91 (arguing that Brennan distorted constitution in *Green* his opposition to desegregation of public schools is difficult to square with even a quite limited reading of *Brown*. Indeed, in *Disaster by Decree* Graglia views *Brown* as wrongly decided. GRAGLIA, DISASTER, *supra*, at 18-33.

these writers often aimed directly at the *Brown* decisions. In any case, *Brown* was an example of problematic judicial behavior and the catalyst for the Court's untoward decision making.

By the 1980's attacks on what *Brown* had wrought began to resonate, especially as they found voice in the Regan Administration's dual attack on affirmative action and court-ordered busing. Other analyses of *Brown* emerged in response; analyses that Minda calls Postmodern.[43] While these writers vigorously attacked *Brown's* critics and generally assumed *Brown* to be a sacrosanct decision, theirs was less than a vigorous defense of *Brown.* Usually, they conceded that something was wrong with the opinion. More generally, reacting to the modernist implications of *Brown* and relying on the post-structuralist thinking in other fields of study, legal theorists began to question the fundamental assumptions of *Brown* and the desegregation law it produced. In increasing number academic movements and counter-movements fought the original critics of *Brown*, each other, and, ultimately *Brown* itself.

On this contested and shifting terrain it was often difficult to know what any given author's position on *Brown* was. Generally, advocates of Critical Legal Studies (CLS) argued against *Brown's* critics that *Brown* was correct, while maintaining that the decision had generated too much faith in the legal process as a tool for social change.[44] Progressives like Alan Freeman acknowledged the centrality of *Brown,* but criticized the decision as not truly guaranteeing equal educational opportunity though an ambiguous opinion and a refusal to order remedies.[45] "These inadequacies squander the moment, requiring the Court," Freeman says, "to invent complicated and controversial tools to address inequality in the 1970's."[46] His strong criticism of the anti-*Brown* retrenchment of the 1980s is rooted in this mixed vision of *Brown.*[47] Some feminist writers have sought to invoke *Brown* in aid of equality for

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43. *See* MINDA, *supra* note 8, at 1-5.

44. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); Paul Oetken, Note, *Form and Substance in Critical Legal Studies*, 100 YALE L.J. 2209, 2222 (1991); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994); J. CRITICAL LEGAL STUDIES: SELECTED READINGS (James Boyle ed., 1992).

45. Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). *See also* Alan Freeman, *Antidiscrimination Law: The View From 1989, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 127-29 (D. Kairys ed., 2d ed. 1990) (hereinafter Freeman 1990).

46. Freeman 1990, *supra* note 45, at 130-33 (citing Griggs v. Duke Power, 401 U.S.424 (1971) (establishing disparate impact proof in title VII litigation); United Steelworkers v. Weber, 443 U.S. 193 (1979) (upholding voluntary affirmative action plan in title VII cases)).

47. Freeman 1990, *supra* note 45, at 138.

women, arguing against the original critics of the opinion.[48] In the meantime, other feminist writers have seen the rights-based approach of *Brown* as a trap, leading to the very false consciousness-related faith in the legal process that adherents of CLS had identified.[49] Yet others criticized the *Brown* approach directly, arguing that it contained an equality principle that would itself stifle the quest for gender equality.[50]

Drawing on feminist observations[51] and in opposition to both *Brown's* critics and CLS writers, Critical Race Theorists argued that legal institutions were necessary in the battle for equality and that *Brown* was an important development in that quest.[52] Similarly, the improper use of *Brown* has been seen as stymying the equality project.[53] Both errors, they argued, derived from the failure to look at equality and rights questions in context, particularly the failure to give voice to the people for whom *Brown's* rights were intended. In effect, they argued against the (formal) rights-based implications of *Brown*—especially, the decision's focus on universal application of legal norms without regard to context.[54]

All of these movements sought to expose and deconstruct *Brown*-based notions of equality in order to reveal the privilege-reinforcing aspects of those and related legal principles. Among the notions that received increasing

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48. This view is sometimes associated with so-called "conservative feminist," sometimes with "liberal feminist." For an example of this kind of classification, see Linda J. Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 TULSA L.J. 775, 780 (1990). Examples of liberal feminist articles include, Ann E. Freedman, *Sex Equality, Sex Differences and the Supreme Court*, 92 YALE L. J. 913 (1983); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

49. This view is associated with cultural feminism. *See, e.g.*, Lacey, *supra* note 48, at 780. However, the sense that equality is a trap and that the pursuit thrusts women into a "double bind" of having to prove that women's experiences are like or unlike male experiences (which implicitly are held out as the norm). Cultural feminism is famously associated with CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). *See also* DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION AND THE LAW 95 (1991) (taking this view of rights, without the cultural feminist tag); Susan Moller Okin, *Sexual Difference, Feminism, and the Law*, 16 LAW & SOC. INQUIRY 553, 554 (1991).

50. This view is associated with so-called "radical feminists." *See, e.g., Lacey, supra* note 48, at 780. Catharine A. McKinnon, *Difference and Dominance: On Sex Discrimination, in* FEMINIST LEGAL THEORY: FOUNDATIONS 276 (D. Kelly Weisberg ed., 1993).

51. Particularly the importance of experiential accounts in establishing an alternative means of evaluating reality and inspiring awareness. *See* Ann C. Scales, *Toward a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 56 (1988); *See also* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (examining emergence of feminist narrative scholarship).

52. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Tansformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

53. *Id.*

54. *See, e.g.*, Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990).

attention in this regard was the project of integration. All three movements cast some doubt on the propriety of integration as a principle that should guide equality law. The seemingly innocuous idea was seen as a primary tool of enforcing *inequality* rooted in race, class, gender, and other identity grounds. Generally, these movements favored a post-modernism which embraced multiple perspectives and multiple identities in a complicated, open society. The notion that people should be integrated into any single social entity, whether a melting pot or, more troubling a "white-male-hetero-centric" Americanism, came to be viewed as an anathema.

Consequently, the current take on *Brown* is skeptical of the decision, the principles it is said to have established, and its legacy on contemporary social policy. Steven Siegel argues in his 1991 article[55] that the "philosophical underpinnings" of *Brown* are based on a number of assumptions inappropriate to the issues facing black children in contemporary schools.[56] On this basis, he argues the decision is inconsistent with the goals and aspirations of some black supporters of change in education.[57] *Brown*, he argues, is due for a "reexamination of the limits and the continuing vitality of aspects of the nearly forty year old decision," in light of the multiethnic and multicultural nature of contemporary American society.[58] Daniel Gordon takes issue with *Brown's* narrow, rights-based conception under the equal protection clause.[59] Arguing for a broader, due process basis for the decision that self-consciously embraces *Lochner*,[60] he faults the Court for adopting a superficial, insubstantial, realist basis for its decision.[61] Roberta Steele embraces the Court's reference to realist bases for its decision to build an argument that African American Immersion schools of the type examined by Siegel are "not

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55. Steven Siegel, *Race, Education and the Equal Protection Clause in the 1990s: the Meaning of* Brown v. Board of Education *Reexamined in Light of Milwaukee's Schools of African-American Immersion*, 74 MARQ. L. REV. 501 (1991).

56. *Id.* at 503-07.

57. *Id.* at 501-02, 507-11. Siegel's examination concerns "African-American Immersion" schools proposed in the early 1990s. *See generally* Frederick Hord, *African Americans, Cultural Pluralism and the Politics of Culture*, 91 W. VA. L. REV. 1047 (1989) (arguing for the advantages of racial separation as means of empowering people of color). *But see* GARY BECKER, THE ECONOMICS OF DISCRIMINATION 31-32 (2d ed. 1971):

> Minority groups are often tempted to "retaliate" against discrimination from others by returning the discrimination. This is a mistake, since effective economic discrimination occurs against them, not because of the distribution of tastes but because of the distribution of resources. [Minorities are clearly] hurt even more by [their] own discrimination.

58. Siegel, *supra* note 55, at 511.

59. Daniel Gordon, *Happy Anniversary* Brown v. Board of Education: *In Need of a Remake After Forty Years*, 25 COLUM. HUM. RTS. L. REV. 107, 111-17 (1993).

60. *Id.* at 120-28 (citing Lochner v. New York, 198 U.S. 45 (1905) (invalidating New York maximum hours worked statute).).

61. *Id.* at 113-15.

antithetical to the decisions in *Brown I* or *II*, nor is it the first step on the slippery slope toward resegregation"[62] despite the explicit, single-race designation of the student bodies at the schools in question.

Thus, as *Brown's* Fiftieth Anniversary approaches, the decision is itself questioned, though usually not expressly. Old arguments about the decision's impropriety have been reborn, questioning the case's implications for constitutional structure. Its mission is viewed as a misguided failure and numerous proposals have emerged which overtly repudiate its principles. Indeed, most of *Brown's* critics are but short steps away from arguing that the decision should be abandoned.

The Activist Insecurity explains this dissatisfaction with *Brown. Brown* is troubling, its progeny unsatisfactory, and its current force limited. But this author argues for a renewed embrace of *Brown* rooted in understanding the basis for the opinion's defects. Rather than criticize *Brown's* excess formalism—surely an accurate description of *Brown's* contemporary force—the author argues for a better understanding of *Brown's* legitimate formalism and criticizes the *anti*-formalism that transformed *Brown* from a tool of social change to a weapon for enforcing inequality. The decision's *Activist Insecurity* is the source of its problems and the problems it has produced.

### C. *The Activist Insecurity as the Root of Contemporary Objections to* Brown *and its Progeny*

The proliferation of post-modern legal movements presume the legal modernism of Henkin's "age of rights,"[63] of which *Brown* is the signal case. The period since *Brown* is characterized by the ascendence of rights-based constitutionalism alongside the apparently inconsistent predominance of realist-based theories of judicial restraint. The apparent tension between these developments have spawned a voluminous amount of literature on the propriety of judicial restraint,[64] constitutional interpretation,[65] and governmental institutional structure.[66] In the academy, it has created an enhanced role for public law, most prominently represented in the transformation of

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62. Roberta L. Steele, Note, *All Things Not Being Equal: The Case For Race Separate Schools*, 43 CASE W. RES. L. REV. 591, 605 (1993).

63. The term is Louis Henkin's, used as the title to his book on international human rights law. HENKIN, *supra* note 13. It is derived from Thomas Paine's *The Rights of Man* (Collins ed., 1969). Henkin means to convey the sense that, since the Second World War, rights-based notions have come to frame thinking about international law. This has been the case in domestic law as well.

64. *See, e.g.*, SUPREME COURT ACTIVISM AND RESTRAINT (Stephen C. Halpern & Charles M. Lamb eds., 1982).

65. *See, e.g.*, ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992).

66. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

Constitutional Law[67] and the birth and development of Federal Courts (along with numerous rights-specific courses) as academic disciplines.

Post-modern jurisprudential movements critique and respond to the development of rights in the shadow of judicial restraint and to the disparate efforts in the academic literature to escape the tensions inherent to this juxtaposition.[68] Post-modern theories generally take exception with the formal underpinnings of rights-based legalism and the malleability of realist and traditional conceptions of law alike.[69] While versions of the traditional jurisprudence that predated realism are criticized as an obvious example of the vice of legal formalism, modern theories are regaled for duplicating that formalism. Legal realism, and especially the so-called legal process school that grew out of realism, is accused of perpetuating the excessive formalism of traditional theories through excessive focus on process and a disturbingly excessive pursuit of neutrality. Squarely in focus in these critiques are the leading commentators on *Brown*, each of whom earned their reputations arguing—in the footsteps of Justice Frankfurter—that courts' obedience to process and procedure could strike the balance between the protection of liberty and the preservation of democracy. So Hart, Wechsler, and Bickel are assailed for reproducing the errors of Beal and Austin. Contemporary writers are similarly assailed for building on the shaky foundation of their predecessors, duplicating and magnifying the formalism of traditionalists.[70]

Post-modern writers have generally sought to "deconstruct" traditional and modern jurisprudence, revealing the duplication of inequality-preserving societal biases in legal process, doctrine or personnel and exposing the ineffective or inefficiency-producing character of various judicial policies. Their critique of the legal academy takes issue with the formal limits on legal institutions that circumscribe the law as a tool for social change. A deep suspicion of legal formalism underlies their varied critical assessments of the

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67. Constitutional Law has emerged from an upperclass public law course covering what is now Constitutional Law, Administrative Law, Civil Rights, and Legislation, becoming a central part of the formative first year curriculum.

68. MINDA, *supra* note 8, at 79.

69. Certain postmodern scholars "developed and 'pushed to the limit' the strand of legal realist thought that pursued a deconstructive type of legal criticism." *Id.* at 110. But its root in realism did not prevent those postmodernists from attacking it as well. "Early [critical legal studies] was initially devoted to showing how traditional modes of legal analysis reflected the phemonological experience of living within a society that values autonomy, but yearns for community; glorifies reason, but longs for passion." The "*liberal legalism*" of post-realist scholars "denied the values of community and human connection by a universal perspective that emphasized the importance of only certain values." *Id.* at 113.

70. *See generally* James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 702-08 (1985) (criticizing Hart, Wechsler and Sacks along with Posner, Michelman, Ely and Choper).

law. What is peculiar, however, is that post-modern theorists also question the capacity of law and the judiciary as institutions for social change.

Skepticism over the capacity of law to effect social change is a peculiar position for postmodern legal commentators. Postmodern theorists have generally exerted substantial influence on changes in civil rights law and, with significant exceptions,[71] most share the goals of rights jurisprudence.[72] However, their skeptical view of the capacity of the judiciary to promote social change undercuts civil rights law. Indeed, the prominence that civil rights are today afforded and the efficacy of civil rights as safeguards, catalysts for social change, or prerequisites for a just society are both undercut by the cynical suggestion that law cannot accomplish much. Built into this argument is the subtle implication that achieving the goals of civil rights (equality, justice, etc.) is emphatically *not* a proper role for the judiciary.

However, if this skepticism is troublesome, it also finds support in the post-*Brown* Court's cynical view of rights jurisprudence and its often open hostility to uses of that jurisprudence to employ the courts in the business of social change, or to right social wrongs.[73] This *judicial* attitude arguably inspires the cynicism of post-modern theories. Indeed, the worst of the post-modern theories seeks to explain court behavior as rooted in bias (class, gender, racial), chronic derogation from principle, or simply sloppy jurisprudence. But imbedded class and gender presumptions, claims of "politically correct" agendas, even accusations of incompetence, hardly explain law, not in the sense that distinguishes the "rule of law" from a

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71. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST ANTIDISCRIMNATION LAWS (1992).

72. I take the goals, quite generally, to be the elimination of subordination and irrational practices and policies, most dramatically associated with Jim Crow's pervasive segregation. Obvious and deep disagreements exist among theorists on this point. The deepest division concerning the degree to which Jim Crow was a system of subordination or a complex of disaggregated, inefficient and irrelevant distinctions between equal citizens by their co-equals. Most progressives' concern with subordination and inequality is matched by neo-conservatives' emphasis on rationalizing public policy. Somewhere between the two are those concerned with manifestations of "hate," which appears sometimes as merely evidence of subordination and other times as an irrational behavior to be banished from social relations.

73. Of course, this agreement between the Court and its critics on the capacity of the judiciary to right social wrongs has a degree of irony to it. It is explained, I believe, by the deterioration of legal discourse into questions of individual motivation or bias. Critics view the court as disingenuous in its invocation of legal doctrine or cloudy eyed in its development of doctrine (its view impaired by its good or bad intentions). The judiciary has, similarly, increasingly tended to view plaintiffs' civil rights claims as illegitimate attempts to transform run of the mill disagreements with government or its officers into a "federal case." This attitude is pervasive in the courts standing decisions. *See* Allen v. Wright, 468 U.S. 737 (1984); Los Angeles v. Lyons, 461 U.S. 95 (1983). Also, the Court makes distinctions between constitutional violation and "mere tort" in civil rights cases. *See* Paul v. Davis, 424 U.S. 693 (1976). Finally, the Court's attitude to so-called "structural reform" litigation. *See* Missouri v. Jenkins, 515 U.S. 70 (1995); O'Shea v. Littleton, 414 U.S. 488 (1974).

Machiavellian politics of raw power.[74] Rather, these critiques are curious, emanating as they do from law professors who, however frustrated with the judicial hostility to social change, presumably understand and are invested in the promise of law as a check on the tyranny of governments, majorities, or invidious institutions and individuals. An explanation of the cynical loss of faith in legal institutions among people who have dedicated their lives to understanding law as an instrument of social change requires a theory of the judiciary's institutional behavior over the momentous post-*Brown* period.

*Brown* promises much and seems to deliver little. Although only the uninformed would doubt that tremendous changes followed *Brown*, it is fair to say that the nature of those changes have disappointed those legal commentators who saw in *Brown* the promise of a new order. These complaints are overblown. However, there is something to the uneasiness about *Brown*. Commentators' cynicism is wise; only their focus on the law generally proves too much. Rather the root of their concern is found in the federal courts' behavior during the period of change initiated by *Brown*. Indeed, the problem is rooted in *Brown* itself.

Courts have been charged with presiding over social change and have failed in the task because they have not wanted to undertake it. Perhaps recoiling from anticipated criticism, perhaps regarding the role as inappropriate to their station in some way, or perhaps just not understanding what they were doing, courts have corrupted civil rights law out of a fear of being regarded as *"Activist."* While courts are inherently limited as agents of social change,[75] courts have, since *Brown,* over limited themselves out of a fear of an activist charge—out of an *Activist Insecurity.* It is the operation of the Activist Insecurity which best explains the federal courts' behavior during the post-*Brown* period and which points the way to effective reform of civil rights law as well as the law of federal jurisdiction. This article focuses on the origins of this insecurity in *Brown.* But first, the next section defines and discusses the nature of the Activist Insecurity.

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74. An alternative explanation is that courts are poor institutions for social change because they necessarily hear decontextualized disputes. This is generally a conservative criticism of structural reform litigation. *See generally* Lloyd C. Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation*, 42 U. MIAMI L. REV. 401 (1987); Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725. This argument is fundamentally dependent on libertarian theories of government legitimacy and usually see courts as engaged in a power grab on behalf of special interests—that is, they see the courts as biased in the direction of promoting social change.

75. Courts, for example, are especially attuned to resolving individual disputes, and relatively less capable of addressing group problems. *See* Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). *Compare with* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 59-60 (1978) (questioning criticisms of broad court role in enforcing public values).

## II. THE ACTIVIST INSECURITY DEFINED

The *Activist Insecurity* is a judicial reticence to decide cases that are properly presented.[76] That is, in a justiciable case over which a court has jurisdiction and in a context where the nature of the dispute requires the court to decide, the court evidences a fear of deciding which in turn manifests itself in a consequential judicial response. The dispute might require decision because the question is so narrowly framed that the court must choose between the positions of the opposing parties rather than restructuring the issue so as to allow a compromise solution. The dispute might require a decision because a statute specifically requires an answer; or, the statute might have vested a benefit to one party that has been denied—any refusal to decide, denies the vested benefit. While the insecurity operates in less circumscribed cases, it is most apparent as a fear of deciding what, under the federal courts' traditions, must be decided.

The Activist Insecurity is a radical rejection of the implication of *Cohens v. Virginia*.[77] As early as 1821, the Supreme Court held in *Cohens v. Virginia* that refusal to exercise jurisdiction granted it by a constitutional act of Congress offended the Constitution as much as the exercise of power without properly vested jurisdiction.[78] This aspect of *Cohens* has long been discounted by the Court in exercise of "principled discretion."[79] It, nevertheless, represents the corollary to the Court's more famous contemporaneous decision

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76. "Properly presented" is here defined by five of Charles Lamb's six maxims of judicial restraint: (1) judges should be reluctant to exercise judicial review, (2) judges should avoid constitutional questions where possible, (3) judges should adhere to the record below, (4) judges should issue no advisory opinions, and (5) judges should not resolve "political questions." ACTIVISM AND RESTRAINT, *supra* note 64, at 7, 15-20. The sixth maxim, that judges should decide cases based on law rather than opinion, *id.* at 15, is the subject of this Article. Maxims 4 and 5 above imply additional restraints of proper jurisdiction and justicibility.

77. 19 U.S. (6 Wheat.) 264 (1821).

78. It is most true that this Court will not take jurisdiction if it should not:

> but it is equally true, that it must take jurisdiction, if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

*Id.* at 404. *See also* Willcox v. Consol. Gas Co., 212 U.S. 19 (1909).

79. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 578 (1985). The main body of law departing from *Cohens* includes the abstention doctrines. *See, e.g.*, R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941) (requiring abstention if question might turn on ambiguous state law). *Pullman* is interesting in this context, as the Court created the doctrine to avoid deciding an equal protection claim alleging racial discrimination against black Pullman porters. *Pullman* is superior to the activist insecurity in that it is (1) limited in scope and (2) designed to fulfill, rather than undercut the *Siler* doctrine. *See* Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909) (calling for court to defer deciding constitutional issues if less broad legal ground—like state law—available).

in *Marbury v. Madison*,[80] holding that the Court could not exercise jurisdiction not granted by the Constitution. It is also consistent with the Court's decision in *Martin v. Hunter's Lessee*[81] and in line with Justice Story's encompassing discussion there of the powers of the federal courts and Congress's constitutional obligations to create those courts and vest them with jurisdiction. Contrary to *Cohens*, the Activist Insecurity dictates that the Court should avoid deciding certain cases—those which involve social change—or at least search for substantial reasons to decide such a cases, beyond the grounds defining the issue.

The Activist Insecurity is also a pronounced repudiation of the so-called *Siler* doctrine. That doctrine, developed in *Siler v. Louisville & Nashville Railroad Co.*,[82] instructs courts to avoid deciding constitutional issues when the dispute in a case might be resolved by resort to resolution of factual disputes or the application of state or statutory law. *Siler's* contemporary force has been undercut by the Supreme Court's reading of sovereign immunity in *Pennhurst*[83] (a decision on a civil rights claim, perhaps best explained by the Activist Insecurity). However, *Siler* continues to exert some force, underlying no less substantial a doctrine than *Pullman* abstention.[84] Against *Siler,* courts infected with the Activist Insecurity often seek *more general* grounds for their decisions, constitutionalizing even more issues in a desperate attempt to fortify decision which effect even the most minor social change.

Most believe that *Brown* is an activist decision, with the Court reaching out to resolve the problems of Jim Crow.[85] Quite the contrary, the Court was

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80. 5 U.S. (1 Cranch) 137 (1803).

81. 14 U.S. (1 Wheat.) 304 (1816).

82. 213 U.S. 175 (1909). The decision is described by Professor Wright:

> A state order regulating rates was attacked as unauthorized by state law and as unconstitutional by federal law. The Supreme Court said: "'The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.'" In fact the state regulation was held invalid on state grounds, and the Court declared this preferable to an unnecessary determination of federal constitutional questions. This rule . . . is not . . . a rule of necessity. It is, however, a useful rule. It avoids decision of constitutional questions where possible, and it permits one lawsuit, rather than two, to resolve the entire controversy.

CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS, 103-04 (4th ed. 1983) (quoting *Siler*, 213 U.S. at 191).

83. Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89 (1984) (Eleventh Amendment decision barring federal courts from issuing injunctions against state officials on the basis of state law).

84. *See* R.R. Comm'n of Texas v. Pullman, 312 U.S. 496 (1941).

85. *See infra* text accompanying notes 126-38.

bound to decide *Brown* on traditional legal principles, but sought to disguise this necessity in a realist opinion.[86] The Activist Insecurity, then, is a phenomena that causes courts to resist deciding cases and, when forced to decision, sends them on an urgent quest for cover to disguise that they were mandated by traditional legal principles to decide the case. The cover an Activist Insecurity infected court seeks is ordinarily of two types. *Brown* represents the first; the insecure court refers to principles outside the law, such as the *Brown* Court did in its reference to social science. On the other hand, an insecure court might refer to higher, more general legal authority, freeing itself from the constraints of a narrowly framed issue. In either case, the court obscures the legal precepts that necessitated it to decide the case in the first place.

The Activist Insecurity is a one way rachet; it applies only in those cases where the social change implications of the case are apparent. This is not to say that the insecurity operates only against one or another political position. On the contrary, the Activist Insecurity could operate against any particular position, so long as that position is perceived as upsetting the social status quo. Thus the Insecurity explains the predominant contradiction of the Rehnquist Supreme Court: how a court consumed with talk of judicial restraint could, without embarrassment, embark on what through the 1990s and into the present has been a massive constitutionalization of civil rights law.[87]

The Activist Insecurity has produced a civil rights jurisprudence rife with powerful statements supported by weak or irrelevant justifications or limited by numerous conditions on the statements' reach or operation. In its fully formed stage, the Insecurity has blurred the boundaries of law, melding various doctrines into an ambiguous corpus of often competing principles

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86. *See infra* Part IV.

87. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993) (constitutionalizing voting rights issues under the Fourteenth Amendment while ignoring the mandates of the Fifteenth Amendment and the Voting Rights Act enforcing it); Miller v. Johnson, 515 U.S. 900 (1995) (reading Voting Rights Act as authorized by the Fourteenth rather than Fifteenth Amendment). This process probably begins somewhere around the 1977 and 1978 terms of the Supreme Court.

A succinct demonstration of process can be found in the Court's interpretation of 42 U.S.C. § 1985(3). *See* Griffin v. Breckenridge, 403 U.S. 88 (1971); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979); United Bd. of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993). *See also* White, *supra* note 6, at 153-60 (describing development of § 1985(3) jurisprudence). This author is currently drafting an examination of the activist insecurity in § 1985(3) jurisprudence.

The Court has surely constitutionalized civil rights law because doing so makes it the master of the field. This power play has not been explained, but it ultimately seems consistent with the Court's practice over at least the last thirty years. As will be apparent later, this is because the Court has always been reticent to decide cases and has long been constitutionalizing decisions when it felt uneasy about the social change implications of the federal statute or regulation with which it was confronted.

from which judges can draw to escape obligations to transform society by judicial decision. The cases in which this insecurity arise are difficult. Their difficulty would seem to necessitate a clear articulation of the grounds for their decision and a tendency to support those decisions on the most narrow, least consequential grounds. Rather the Activist Insecurity prompts a melding of justifications and doctrine into a broad general mass that is most akin to the equity of medieval England. The Activist Insecurity thus produces an ambiguous corpus of law moving inexorably toward the constitutionalization of all law.[88]

Judges who are infected with the Activist Insecurity are sometimes hostile to civil rights law. At least as often, however, they are supporters of civil rights law who anticipate that their decisions will be unpopular or controversial. Perhaps deciding acrimonious controversies renders judges fearful of public reaction or uncomfortable with their political role. Many judges are surely affirmatively hostile to civil rights claims in general or to certain species of such claims. However, it is unnecessary to resort to these explanations (nor to allegations of bias or incompetence) to recognize the harm done by the Activist Insecurity. Rather, this Article posits that the Activist Insecurity is widely shared, perhaps nearly universal in the federal courts. In any case, the institutional costs of the Activist Insecurity are substantial. It is no less than that lamented by some modern theorists: the demise of the rule of law.[89]

*Brown* represents the beginning of this insecurity-infused jurisprudence. Though realists had long destroyed the underpinnings of *Lochner*, setting up in *Erie*[90] and *Carolene Products*'[91] broad claims about the Court's inability to

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88. This march toward constitutionalization does not mean that every question will be governed by a constitutional rule of decision. Rather, many cases are decided by the Court excluding the federal government (or constitutional rule) from an area of law. On first blush this might not seem so extraordinary, for the Court must decide whether the Constitution governs a case. However, there is another option. Following *Siler*, the Court could avoid the bulk of these constitutional issues by deciding cases on narrower grounds. Rather, the Court's trend is to search out the ultimate constitutional issue and decide that issue, setting the relationship on the question presented.

89. *See* HORWITZ, *supra* note 14, at 225-30. The narrow meaning of rule of law usually associated with conservative critiques of postmodern legal theories is assumed here. The rule of law "means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge." HAYEK, *supra* note 26, at 72.

90. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). In an excellent book, Professor Edward A. Purcell, Jr., uses *Erie* to show how doctrinal law, even procedural law, is informed and transformed by social and historical events. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION, ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000).

91. United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

legitimately articulate constitutional rules of decision, the Court had not been forced to squarely confront the crisis of Jim Crow. Consequently, *Brown* is the first opportunity for the Court to seriously confront the implications of *Erie* and *Carolene Products*.[92] The Court apparently was uncomfortable with the bind created by the confluence of jurisprudential theories associated with *Erie* and the social facts of Jim Crow, retreating into insecurity.

*Brown* initiates successive periods of expansion and contraction, Revival and Limiting periods, in civil rights law.[93] During the Revival period the Supreme Court created an extensive civil rights jurisprudence by reviving Reconstruction Era statutes[94] and applying broad constitutional theories to support congressional enactments protecting civil rights.[95] During this period, the Court evidences a perhaps justifiable concern with resistance to its socially transformative decisions. This concern powers the *Activist Insecurity* and is evident in *Brown* itself.

With *Brown* the Court reluctantly adopts an approach to law which responds only when a response is unavoidable, but does respond. This judicially driven social transformation is, as *Brown* most clearly evidences, disguised behind references to various matters which are, ironically, designed to hide the very necessity of the decision. This insecurity-laced approach has produced decisions littered with various and sundry reasons for the results obtained, but in which the rule of decision is generally well hidden below the numerous layers of justification. *Brown* rejects formalism and, in its stead, manifests denial. Thus, though the Revival period brings on the revival of Reconstruction Era civil rights statutes and occasions the rapid development of substantive constitutional rights, these developments occur only according to fairly conservative requisites of necessity[96] whose persuasiveness and force

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92. "[O]n the eve of *Brown*, the possibility that a sanitized politics might be the only or the best hope for protecting minorities yet seemed reasonable," adding force to the balance of *Carolene Products*. Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1311 (1982).

93. This author defines these periods more precisely in White, *supra* note 6, at 147-50.

94. *See* Runyon v. McCrary, 427 U.S. 160, 172 (1976) (reviving 42 U.S.C. § 1981); Griffin v. Breckenridge, 403 U.S. 88 (1971) (reviving 42 U.S.C. § 1985(3)); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-39 (1968) (reviving 42 U.S.C. § 1982); Monroe v. Pape, 365 U.S. 167, 187 (1961) (reviving 42 U.S.C. § 1979).

95. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding the validity of 1964 Civil Rights Act under broad reading of commerce clause).

96. By the mid-1960s the Court was perhaps more eager to abandon its jurisdictional rules to reach civil rights cases. *See* Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869 (1994). *See also* Henry v. Mississippi, 379 U.S. 443 (1965). However, these decisions, exemplified by *Henry*, are better explained as the Court's defensive protection of its authority. In *Henry*, the state court could be viewed as manipulating the Court's adequate and independent state

are, furthermore, disavowed. Ironically it is this disavowal that gives *Brown* the appearance of departing from traditional jurisprudence and perpetuates the activist charge from which the opinion recoiled—and which haunts the Court's post-*Brown* jurisprudence.

The comprehensive rights jurisprudence produced during the Revival period was, by the mid-1970's, mature enough to provide protection from varying forms of discrimination, to regulate police powers of the local and federal governments, and to structure the massive entitlement programs that had been created over the years since the New Deal. However momentous these developments were, they were infused by the same activist insecurity that emerged in *Brown*. Even as the Court was vastly expanding the substantive rights applicable against state and federal governments, it was seeking authority for those rights in ever broader, increasingly superfluous rhetoric. This move was aimed at obscuring the necessity of the Court's decision on legal grounds and rooting the Court's actions in political and rhetorical bases that happened to be popular at the time of decision. The result is an increasingly politicized judicial process, for sure. But more importantly, the emergence of a general drift from specific to general decisional bases in the law itself.

The limiting period that coalesces mid-way through the Burger Court is fundamentally characterized by the maturation of the Activist Insecurity. In constitutional and statutory cases implicating social change, the Court, even when defending social change, resorts to the less precise, more general constitutional provisions to avoid the dictates of clear text and precedent, or invokes generalized principles said to underlie the Constitution to avoid the socially transformative implications of apparently clear statutory and constitutional text. This resort to the more general is coupled with a threshold tendency to invoke relatively clear language when it defeats efforts to use rights jurisprudence to effect social change.

These two types of Activist Insecurity are best illustrated by the fate of the Supreme Court's revival of 42 U.S.C. § 1985(3). In *Griffin v. Breckenridge*[97] the Court read the unique language of the statute to establish a cause of action for injuries caused by private conspiracies aimed at undercutting equal protection of the laws or equal privileges and immunities

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ground doctrine to foreclose Supreme Court review. While this manipulation might have been in response to gamesmanship on the part of the attorneys of the criminal defendant—a black civil rights activist fighting a frameup—the Supreme Court's need to protect its authority was not diminished.

In any case, this move, some ten years after *Brown* is *evidence* of the activist insecurity. In *Henry*, the Court's defense of its authority took the form of overreaching opinion, desperately seeking to ground the decision on broader, more general authority.

97. 403 U.S. 88 (1971).

under the laws.[98] *Griffin's* reading identified a right to substantial enjoyment of a system of laws.[99]

Just eight years later in *Great American Federal Savings & Loan Ass'n v. Novotny*[100] the Court narrowed its reading of § 1985(3), saying the statute "creates no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right . . . is breached by a conspiracy in the manner defined by the section."[101] The narrowing of the statute framed the question in that case as one of allocating civil rights claims between statutes. Particularly, the Court said that a § 1985(3) cause could not be used to enforce rights under Title VII of the 1964 Civil Rights Act.[102] Because the plaintiff had failed to satisfy prerequisites to the Title VII suit, the Court's narrowing and allocation moves freed it from the need to be "activist."

Four years later, the Court used the other technique to avoid "activism." In *Brotherhood of Carpenters and Joiners v. Scott*,[103] the Court used *Novotny*'s remedial construction to fully constitutionalize §1985(3). Although § 1985(3) contains no state action doctrine, the Court read its "remedial" nature to require state action where the underlying constitutional right required it—as all constitutional rights do.[104] Just twelve years after it was decided, *Griffin* had been rewritten by decisions claiming allegiance to its holdings. Section 1985(3) had been thus killed by a Court which insisted the statute remained viable. The Court was afraid to interject itself in socially consequential disputes despite the fact that those disputes were properly presented.

As illustrated by the demise of *Griffin*, the Activist Insecurity has both formalist and realist components, owing to its emergence in *Brown* at a time when the federal courts were changing from the former to the latter as a predominant style of jurisprudence. The formalist component operates to distinguish which law applies in a given case.[105] Courts thus avoid difficult issues by confining the dispute to a single, exclusive legal ground. But the formalist component is a one way rachet. That is, formal distinctions are not generally treated as independent and authoritative bases for deciding cases

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98. *See* White, *supra* note 6, at 181-88.
99. *Id.* at 186, 188-93.
100. 442 U.S. 366 (1979).
101. *Id.* at 376.
102. 42 U.S.C. § 2000, *et seq.* (2000).
103. 463 U.S. 825 (1983).
104. *Id.* at 832-33.
105. *See* Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV 395, 399 (1993) (describing courts' tendency to "intentionally separate doctrinal and institutional domains to promote specific interests and policies"). *See also* Graham v. Connor, 490 U.S. 386, 399 (1989) (requiring due process claims that might be conceived more narrowly to be decided under the bill of rights).

when those cases imply controversial outcomes. Otherwise easy cases—those controlled by text or precedent—are transformed into hard cases when judges fear the outcome will be controversial or when they merely disagree with the indicated outcome. The insecurity with being activist undercuts the formalist component. In such cases, the judge, by granting influence to considerations beyond the specific demands of the doctrine at hand, escapes the strictures of the law. Thus the formal component of the insecurity vigorously employs formal legal doctrine to confine jurisprudential development but does not otherwise give controlling weight to formal rules. Like *Brown*, where fear of popular white resistance pushed the Court to subsume the doctrinal mandate for its decision in a realist opinion, the Activist Insecurity compels that doctrinal matters be used only as a threshold exclusion device.

The more prominent component of the Activist Insecurity is its anti-formalist component. Cases are seen as governed by general principles of law, some found in the statute or constitutional provision directly in question, some found in transcendent principles of law located in other specific doctrinal lines or tacit in the legal order. The referent in this anti-formal component changes but the role is the same: to situate the specific, formally mandated outcomes in a broader universe of legal and policy principle that is viewed as necessarily governing the particular dispute. In *Brown* the referent was social science; today it is generally reference to related, but strictly inapplicable constitutional pronouncements like "Our Federalism" which have attained a sanctified status. Similarly, vaguely defined and often poorly supported doctrine is extended and grafted onto otherwise easy cases in order to modify the demands of the formal doctrine. These techniques and others produce a widespread derogation from law.

In light of the Activist Insecurity, civil rights plaintiffs are asked to make competing showings: first, that the precise text of the specific statute or constitutional provision governs their claim (that it is determinative and does not prohibit the plaintiff from prevailing) and, second, that the suit is not prohibited by more broad principles like "Our Federalism," or ostensible notions of legal common sense such as comity. Defendants, especially government defendants, face increasing ambiguity in this context; they thus develop an increasingly hostile disposition to these suits because of the difficulty they encounter defending them and the apparent injustices that seem to occur when they are held liable on vague, newly articulated grounds. The concerns of the parties create a political noise which exacerbates judicial insecurity, making courts *more* reticent to develop narrow case-law and *more* resistant to following the implications of binding text and precedent, creating further exceptions through the more rapid resort to the general sources of law. Civil rights advocates' characteristic response to this tendency has been to seek the enactment of interstitial legislation rectifying troublesome

decisions.[106] These revisions have prompted prospective defendants' to voice their concerns, arguably producing a balance on the particular points of contention that better resolves the dilemma the courts perceived. However, even the most satisfactory revision, one which satisfies the competing interests and sends a clear message to the courts, is defective. Such a patchwork approach does not appreciate the full implication of the *Activist Insecurity*. The patchwork response, like postmodern theories, is premised on the view that judges are biased against the legislation or otherwise recalcitrant rather than insecure.[107] The revision is meant, then, to scold the Court—which it may successfully do (although little can be done about the truly ill-motivated). Thus if a true disagreement exists between the courts and the legislature, interstitial revision can be of limited success. If the post-moderns are correct, this sort of interstitial legislation is pointless.[108] Moreover, if the insecurity herein described is pervasive, judges will be reluctant to read the revised provisions in any but their most narrow sense. Such legislation, it seems, only wastes valuable political will while judges continue to limit their role to preserving the status quo.

This Article's focus on the emergence of the Activist Insecurity in *Brown* necessitates a more extensive examination of the terms related to *Brown* and the Activist Insecurity specifically. The insecurity emerges from the peculiar demands placed on the Supreme Court by the then increasingly moribund system of Jim Crow and the limits on the Court's power imposed by its transition from a largely formalist Court to a realist one. The nub of this transformation is the concern with judicial restraint and activism. Consequently, the following pages are organized around these key notions. First focusing on the meaning of activism, the Article turns to the impact of the realist transformation of American jurisprudence, and then the crisis created by the continued existence of Jim Crow. These come together in *Brown* with monumental effect, requiring a re-reading of the opinion.

## III. SEEDS OF THE ACTIVIST INSECURITY IN THE REALIST TRANSFORMATION OF AMERICAN LAW

The Activist Insecurity, like the law it infects, grew out of the urgent need to rid the nation of the scourge of Jim Crow in the face of diminishing

106. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 107 (1991); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1987).

107. Jerome Culp makes this argument in his assessment of the failure of the 1991 Civil Rights Act to remedy the Supreme Court's hostility to certain Title VII cases. *See* Jerome M. Culp, Jr., *Small Numbers, Big Problems, Black Men and the Supreme Court: A Reform Program for Title VII After* Hicks, 23 CAP. U. L. REV. 241 (1994).

108. *See id.* at 254.

but substantial and impassioned resistance to that project. However, in addition to the resistance to the Court's intervention in the battle against Jim Crow, the period is significant because this resistance was internalized by the Court in the terms of then recently ascendent jurisprudential theories.[109] Consequently, in the cases leading to *Brown* and in *Brown* itself, the Court avoided intervention, ironically hid the necessity of that intervention when it did intervene, and sought to limit its role in future interventions. This is interesting for what it says about the judiciary's approach to segregation then as well as its approach to other civil rights questions after the drama produced by the crisis surrounding the dismantling of Jim Crow had passed.

While the times make the *Brown* decision peculiar, the virulent opposition to the Court's decision is so significant because *Brown's* critics echoed an increasingly skeptical view of legal formalism in courts and the legal academy which was coupled with an increasing faith in the abilities of social science to rationalize, and thereby perfect, human affairs. The confluence of these trends represented an inversion of general views of law and legal process and which tended to cast Jim Crow as an irrational social problem.[110] Though also a social problem, Jim Crow was for the Court fundamentally a legal problem: it was an urgent problem from a legal formalism perspective, and in significant ways ordinary as a social problem. That is, by the early 1950's when *Brown* was being litigated, the formal legal doctrine of separate-but-equal that underlay Jim Crow had become unintelligible. It had come to support a broader and more significant social practice than it had claimed to support; its insistence that the practices it sanctioned did not constitute subordination had been proven false, even on its own terms; and the social theory (of white supremacy) that buttressed the decision was being rapidly discarded. Moreover, though Jim Crow was unique—few social practices stain the American legacy as deeply as Jim Crow—the question presented the judiciary can be generalized, asking "when and how should a Court resolve disputes that are politically charged and morally significant?"

The challenges of Jim Crow ultimately proved no hindrance on the Court's exercise of its power. Slowly at first and more confidently later, the judiciary asserted its power, occasioning a rapid development of constitutional

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109. Courts, by their nature confront difficult and controversial issues. Indeed the American system is noted for the predominant role it occupies in the resolution of difficult political issues and a substantial portion of our public law is dedicated to outlining the contours and limits of those powers. Thus, the controversial nature of the Court's assault on Jim Crow, though dramatic and no doubt an interesting perspective, is not sufficient to explain the *Court's* tortured view of its own role. That view is rooted in the search for principles to determine how and when the courts' intervention in controversial issues is appropriate.

110. A version of this in the social sciences is summarized by STEINBERG, *supra* note 30.

rights and, of great significance here, the revival of Reconstruction Era civil rights statutes to aid in the cause.[111] The Court's revival behavior, influenced by *Brown* and the virulent criticism of that decision, came to be concerned with charges of judicial activism. Activism was, however, a concern of the Court prior to *Brown*.[112] The *Brown* Court was itself concerned with its limited role in a democratic republic and chastened by the competing demands of that role. Consequently, the Court that decided *Brown* and the Revival Courts that followed it, were characterized by near obsessive concern with tenants of judicial restraint.

The significance of the period is found in the Court's recognition of its important role in a constitutional democracy. The Court's failing during this period is its increasingly pervasive preoccupation with being perceived as "activist," a preoccupation that it would raise to troublesome levels in the most recent two decades. To understand *Brown*, then, this Section turns first to the main criticism of the *Brown* decision—its "activism"—and the context that made that charge resonate—the Court's realism.

### A. *Frankfurter's Shadow; or, the Brooding Omnipresence of Judicial Restraint and Activism Before and After* Brown

Although Justice Frankfurter joined the unanimous *Brown* opinion of Chief Justice Warren, his shadow seems never to have stopped haunting *Brown*. From the beginning, the Justice's acolytes in the academy attacked *Brown*.[113] At base their charge was that, though the result was correct, the Court should have "restrained" itself and left the controversial question of Jim Crow to the elected branches. *Brown* has always then been regarded as an "activist" opinion—an illegitimate act by a Court exercising power it should not have exercised. Frankfurter's signature on the opinion seems inadequate to salvage the opinion, even nearly fifty years later.

"Activism" has become the signal characterization of illegitimate judicial behavior. At least since the often vehement criticism of the Warren Court[114]

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111. *See generally* RANDALL KENNEDY, RACE, CRIME AND THE LAW, ch. 2 & 3 (1997) (describing how constitutional law was influenced by Court's effort to address Jim Crow); Cover, *supra* note 92 (describing crucial role of Jim Crow in Court's reconciliation of its limited role).

112. Classically, the concern dates to the controversial decision in *Lochner*. *See* Cover, *supra* note 92, at 1287-89; HORWITZ, *supra* note 14, at 33-36 *passim*.

113. J. LEARNED HAND, *supra* note 17; Hart, *supra* note 3; Wechsler, *supra* note 4; BICKEL, *supra* note 5. In the case of Henry Hart, this attack seems to have been the product of Frankfurter's pleading. PURCELL, *supra* note 90, at 255.

114. By the Warren Court, I mean the Court led by Chief Justice Earl Warren. This definition is insufficiently precise for some, who persuasively argue that the Warren Court really begins in the early 1960s and might be better designated as the Brennan Court. *See* Tushnet, *supra* note 11, at 2-12. For the purposes of this Article, however, the Court's quiet period from *Brown* to approximately 1962 is evidence

gave the term currency among political conservatives, the charge of activism has come to synthesize disparate charges against judicial action, especially the U.S. Supreme Court. The charge, of course, predates the Warren Court. Before mid-century, activism was most famously associated with the Court's invalidation of progressive social legislation in the 1920's and 1930's.[115] Activism is a chameleon-hued word, deriving its synthesizing power from its multifarious and ambiguous references. Nevertheless, the essence of the charge is a concern with the "least dangerous branch['s]" unelected judges exercising considerable power in a representative democracy.[116] Over the past forty years, this concern has been most closely associated with the Supreme Court's decisions providing protection for minorities or ensuring the civil liberties of criminal defendants and other maligned or controversial minorities.[117] Concerns with judicial activism have been closely associated with civil rights law.[118] The consequence has been that most of the major legal advances of the so-called civil rights movement (the period from the end

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of the very behavior under study. The Court refuses to act because it is infected by the fear of doing something "activist."

115. United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (labor relations); Nibbia v. New York, 291 U.S. 502 (1934) (price regulation); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (laws on minimum wages), *overruled by* W. Coast Hotel v. Parrish, 300 U.S. 379 (1937); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (consumer protection), were victims of activist protection of property and contract rights by the Supreme Court of Chief Justice Taft. *See* Lochner v. New York, 198 U.S. 45 (1905) (restricting state maximum hours law as unconstitutional), *overruled in part by* Day-Brite Lighting v. Mo., 342 U.S. 421 (1952) and Ferguson v. Skrupa, 372 U.S. 726 (1963).

116. *See* BICKEL, *supra* note 5.

117. These decisions were most prominently represented by the background concern with race matters. *See, e.g.*, Johnson v. Virginia, 373 U.S. 61 (1963) (invalidating state segregation of public facilities); Brown v. Bd. of Educ., 347 U.S. 483 (1954). *But see* Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring counsel to be appointed for indigent defendants); Sherbert v. Verner, 374 U.S. 398 (1963) (involving cases involving religious freedom); Baker v. Carr, 369 U.S. 186 (1962) (strengthening and extending political democracy); Mapp v. Ohio, 367 U.S. 643 (1961) (adopting exclusionary rule); Griffin v. Illinois, 351 U.S. 12 (1956) (invalidating fee for trial transcripts necessary for poor defendants to appeal criminal conviction).

118. For the purposes of this Article, "Civil Rights Law" refers primarily to that sub-set of civil rights litigation associated with the civil rights movement. Civil rights law, of course, also includes protection of civil liberties through the Constitution which, today, has no necessary or obvious connection to the civil rights movement's effort to produce racial justice. It was, however, the civil rights movement that initiated the reform of constitutional law that created civil rights law. Therefore the first part of this Article puts aside important questions of protection of criminal defendants' rights, protection of the right of association, and other important constitutional development during the Warren Court period. This narrowing of the inquiry is a writing device only; the Article focuses on race questions in this first part only because they most dramatically frame the development of the court's approach to civil rights law more generally defined. In Parts II and III this focus is abandoned for a concentration on the Court's treatment of the approach to civil rights law which its treatment of race and other questions framed.

of World War II to approximately 1972) have been automatically associated with presumably unjustified and exorbitant judicial activism. The period itself is widely regarded as precipitating the disruption of important government relations in order to solve a unique, and presumably finite, set of social problems. The implication is that decisions from the period are, if they were justified, unsuitable components of any lasting legal order.

The charge of activism has constituted an insidious, often pernicious, assault on the notion of human or civil rights through law. Indeed, while the allegation entails elements of reasonable criticisms of certain judicial behavior, the charge of activism has come to portray human and civil rights as largely antithetical to the very idea of rule of law. This implication should be transparently ridiculous; unfortunately, it is not. The following pages isolate the illegitimate elements of the charge of activism and distinguishes the remaining, compelling elements. Once the legitimate components of the charge are distinguished, it will be possible to reflect on the Court's decision in *Brown* and the charge that it was an "activist" decision.

### 1. *Brown* and The Anti-Realist Perception of the Warren Court

Just months after Chief Justice Warren's tenure began, the Supreme Court decided *Brown v. Board of Education*. In an unanimous decision, the Justices overruled the "separate-but-equal" regime of *Plessy v. Ferguson*[119] and issued a strong statement against segregation. As Professor Alexander Bickel noted, "The *Brown* case itself did not seem to represent a sharp break with the seven preceding Vinson [Court] years."[120] "Yet," Bickel insisted, "the appearance of continuity is superficial, and . . . limited to racial cases."[121] He explained:

> The judges were plainly conscious of entering upon a great and intricate new enterprise.
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> . . . .
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> *Brown v. [Bd.] of Education* was the beginning. Subsequently, the Court declared Bible reading and all other religious exercises in

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119. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

120. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 4 (1970). Professor Bickel noted that *Brown* could be seen as the extension of the Vinson Court's efforts to invalidate segregation in state institutions of higher education. *Id.* at 4-5, 183. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (the white primary); Barrows v. Jackson, 346 U.S. 249 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Okla. St. Regents, 339 U.S. 637 (1950); Shelley v. Kraemer 334 U.S. 1 (1948) (enforcement of racial covenants); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948); Missouri *ex rel.* Gains v. Canada, 305 U.S. 337 (1938).

121. *See* BICKEL, *supra* note 120, at 4.

> public schools unconstitutional; it ordered the reapportionment of the national House of Representatives, of both houses of state legislatures, and of local government bodies on a one-man, one-vote basis; it reformed numerous aspects of state and federal criminal procedure, significantly enhancing the rights of the accused, including juvenile offenders; it held that wiretapping and eavesdropping [were] subject to the Fourth Amendment's prohibition against unreasonable searches and seizures, and that evidence obtained in violation of that prohibition may not be admitted in state or federal trials; and it laid down a whole set of new rules governing the admissibility of confessions, and, in effect, the conduct of police throughout the country toward persons arrested on suspicion of crime.
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> The Court also . . . enlarged its own jurisdiction to hear cases challenging federal expenditures, expanded the concept of state action under the Fourteenth Amendment . . . , and introduced a striking degree of permissiveness into the regulation . . . of material alleged to be obscene. In addition, the Court limited the power of state and federal government to forbid the use of birth-control devices, to restrict travel, to expatriate naturalized or native-born citizens, to deny employment to persons whose associations are deemed subversive, and to apply the laws of libel.[122]

This formidable list of accomplishments earned the Chief Justice and his Associates repeated criticism. Clifford Lytle, describing the controversy surrounding many of the Warren Court's decisions as "fascinating," noted that "the reaction to [the Warren Court's] decisions, especially in conservative circles, has been rather startling. It has been characterized by anger, fear, and often frustration. More importantly, it has set in motion a continuing barrage of criticism directed at the Court and its personnel."[123] Many of the criticisms levied against the Warren Court are "conspicuous for vitriolic and irrational overtones,"[124] but one stood out and has survived today as perhaps the most substantial modern question over the role of the Court in a democratic society. That criticism, the charge that the Warren Court manifested an excessive degree of "judicial activism," has become a rallying cry for as varied groups as the remaining supporters of segregation to scholarly fraternal groups such as the Federalist Society. Charges of activism in the Warren Court are rooted in the *Brown* opinion and are, today, widely associated with the Court's civil rights jurisprudence. They are, therefore, an important concern here.

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122. *Id.* at 7-8 (footnotes omitted).
123. CLIFFORD M. LYTLE, THE WARREN COURT AND ITS CRITICS xi (1968).
124. *Id.* at 1.

Gerald Kurland has identified the root of criticism of the Warren Court in the Court's judicial activism:

> The Supreme Court headed by Earl Warren . . . was the most controversial and important Court since the Chief Justiceship of John Marshall . . . . Under Warren, the Supreme Court adopted a policy of judicial activism which stressed the responsibility of the Court to see that the Constitutional guarantees of the Bill of Rights were made binding upon both state and federal governments. At the same time, the Court gave a broad interpretation to the Constitution . . . and insisted upon striking down any state or federal legislation which might violate the absolute guarantees of the federal Constitution. In adopting this activist position the Supreme Court broke sharply with the judicial philosophy of the recent past and brought upon itself a storm of criticism and abuse . . . .[125]

Kurland captured the still widely held view of the Warren Court. Highlighting the rapid development of constitutional law during this period, Kurland's statement conveys the sense that the fact of this development constituted untoward judicial behavior, a policy no less, that both made the Court important and provoked the fierce criticism to which it was subject. Indeed, Kurland's reference to activism invokes the more lasting concern with activism as an improper approach to judging given to disrupting important structural relations. But the Kurland description, like the critique it describes, is troublesome because "activism" operates ambiguously, especially since its relation to the numerous political conflicts the Court confronted during this period[126] is not made clear.

Clifford Lytle's treatment of Warren Court criticisms identifies two hidden but important types of criticisms of the Warren Court and therefore, two definitions of judicial activism: result- and process-oriented criticisms.[127] Result-oriented criticism (or, for the purposes of this Article, substantive criticism) "generally takes the form of a dissent from a particular decision or group of decisions."[128] The concerns are fundamentally disagreements with the propriety of the court's identification of rights: does there exist a right to privacy which protects abortion, etc. While substantive debates are the hallmark of a vibrant political community, substantive disagreement with the

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125. GERALD KURLAND, THE SUPREME COURT UNDER WARREN 3 (D. Steve Rahmas ed., 1973).

126. *See* LYTLE, *supra* note 123, at 1-5. Kurland also overlooks the fact that many of the decisions criticized as activist were in deference to congressional legislation. *See, e.g.*, Griggs v. Duke Power, 401 U.S. 424 (1971); Jones v. Alfred H. Mayer, Co., 392 U.S. 409 (1968).

127. *See* LYTLE, *supra* note 123, at 4.

128. *Id.* at 1-5.

Warren Court was frequent, loud, and not always in good faith. In Lytle's words, "On numerous occasions [the substantive criticism would] be little more than an emotional or irrational outburst, distinguished by an additional factor such as exaggerating the result out of all proportion, or ignoring any analysis whatsoever of the disputed case."[129]

The second order of criticisms, the process-oriented criticism, concerns failures in judicial methodology and process.[130] While this criticism has ascended to the level of legitimate critique, most notably in the work of Alexander Bickel,[131] many of the process-oriented criticisms of the Warren Court were without support. In Lytle's view

> Criticism [of] the process oriented school usually manifests itself in one of two forms. The first is concerned with the judicial process per se. In essence it is a methodological disagreement with the methods and procedures used by the Supreme Court justices. These critics are not particularly [concerned with] the outcome of any one judicial decision; rather, they are concerned with *how* [the] decision came about.[132]

This is the most formidable criticism of the Warren Court and the type which continues to carry considerable appeal. However, the force of these arguments are limited. As Anthony Lewis says of Bickel in his foreword to Bickel's *The Supreme Court and the Idea of Progress*,

> Like other professional scrutineers of the Warren Court, [Bickel] found much wrong with particular opinions: bad history, sloppy analysis. But there have always been those faults, he said, and the modern Court is not going to be faulted by history on details if in fact it was "seized of a great vision," if it "glimpsed the future and gained it."[133]

In the end, the methodological process arguments remain tenable and important (a matter to which this Article returns, below). As Bickel's transformation on this point importantly illustrates, methodological critiques are not completely compelling unless related to persuasive substantive concerns such as the content of right or structure of constitutional government.

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129. *Id.* at 5.

130. *Id.*

131. *See* BICKEL, *supra* note 5; *cf.* BICKEL, THE IDEA OF PROGRESS, *supra* note 120.

132. LYTLE, *supra* note 123, at 5.

133. BICKEL, *supra* note 120, at ix. This is not to suggest that Bickel or Lewis believed that sloppiness was excusable, only less important than the Court's ultimate correctness. As Bickel himself put it "this sort of comparison between the Warren Court . . . really does not matter one way or the other, for intellectual incoherence is not excusable and is no more tolerable because it has occurred before." *Id.* at 47.

"The second type of criticism which falls within the process-oriented school involves attacks on the judicial process or the Court as an institution, but these are for the most part predicated on decisional differences. The motivation is result-oriented, but the criticism itself is process-oriented."[134] As such, process-oriented criticisms are seen as intimately tied to substantive critiques. To be valuable the truly process-oriented critique must be tied to an argument about the undesirable consequences mandated by the faulty process while other critiques cast in terms of process are properly seen as substantive, result-oriented criticisms.

Lytle's observations raise concerns with the currency of the "activist" critique of the Warren Court. Kurland's definition of "judicial activism" opposes it to "judicial restraint," as is the popular formulation.[135] But it is often far from clear what restraint suggests, apart from a court's reticence to exercise the otherwise perfected jurisdiction. Indeed, Kurland's indictment of the Warren Court for judicial activism begins on the popular ground of concerns over the "sociological" nature of the Court's *Brown* opinion. However, the charge that poor-decision writing makes for activism is an empty charge. Importantly, any "activism" in *Brown* concerned the Court's definition of substantive rights, rather than any reformulation of federal structure. While it may have been improper for the Court to draw on the works of Myrdal and Clark to justify its decision[136] (a criticism that is valid whatever outcome is believed justified), any activist charge against the *Brown* opinion can only be based on disagreement over the propriety of its decision to overrule *Plessy*[137]—that is, it must assert that (1) the fact of the decision, (2) the result of the decision, or (3) the rule announced was improper. If the doctrine of *Plessy* could not be sustained, some reformulation of that doctrine was necessary. Further, few argue that the result of *Brown* was wrong. Finally, though the opinion is widely criticized for invoking social science authority, the rule which the court announced in that section of the opinion is

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134. LYTLE, *supra* note 123, at 5-6.

135. *See* KURLAND, *supra* note 125, at 5.

136. The works of Myrdal and Clark along with others were cited in footnote 11 of the *Brown* opinion in order to backup the statement that "psychological knowledge . . . amply supported by modern authority" condemned separate but equal. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954); *see supra* text accompanying notes 34-37.

137. *See infra* text accompanying notes 201-03. While it may certainly be argued that the Court should have deferred to states or even Congress on this matter, the implication of this suggestion, that it was somehow possible for the Court to permit desegregation of society to proceed without commenting on the continuing validity of *Plessy*, an issue raised squarely by the *Brown* facts, is simply false. For the Court to ignore *Plessy* was to reaffirm its authorization of Jim Crow and strike a blow against the Civil Rights Movement. Any pretense that there was an escape route for the Court is to underestimate the work of the NAACP and its Legal Defense Fund at boxing the Court into a jurisprudential corner.

extremely, even excessively narrow, declaring only that "in the field of public education 'separate but equal' has no place."[138]

Moreover, even criticisms based on substantive activism, the suggestion that *Brown* should not have been decided, must yield to *Brown II*. That is, while any declaration of constitutional right will effect government powers thought to exist prior to the decision, such effects on the real governments of 1954 were doubtless a concern of the Court which it sought to accommodate through its "deliberate speed" directive. Certainly, it would have taken but one sentence for the Court to order immediate desegregation of the defendant school systems, and therefore all school systems.

In retrospect, activist charges have tended to constitute elaborate, apparently reasoned, methodological cover for substantive disagreements with court decisions. Kurland's discussion of the Warren Court's treatment of anti-communist legislation, such as *Cole v. Young*,[139] and *Pennsylvania v. Nelson*,[140] is illustrative, confirming the fundamentally substantive character of his activist definition.[141] He quotes as representative of opposition to the Court's decisions the comments of Senator William E. Jenner, alleging that the Court is "changing the meaning of the Constitution, in an apparent determination to make the law of the land what the Court thinks it should be."[142] He further locates the emergence of Justice Frankfurter's call for a "return" to judicial restraint as a response to this opposition. Troublesome, however, is the role the doctrine of judicial restraint is said to have. As Kurland concedes, judicial restraint "acknowledges the authority of the Court to strike down acts of Congress that are clearly in violation of Constitutional guarantees" but adds that courts cannot and must not "enact legislation."[143] Relying heavily on this sophomoric distinction between legislative and judicial action, Kurland seeks to transform disagreements with the Court's substantive view of the Constitution into an accusation that the Court has disrupted systems and forms of government power.[144] Kurland's judicial

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138. *Brown*, 347 U.S. at 495. Indeed, this narrow construction, and the near universal acceptance of *Brown's* result, has prompted significant disagreement over the decision's larger meaning as the central precedent in our nation's jurisprudence. *See* HORWITZ, *supra* note 14.

139. 351 U.S. 536 (1956).

140. 350 U.S. 497 (1958).

141. KURLAND, *supra* note 125, at 3.

142. *Id.* at 12.

143. *Id.* at 13.

144. *See id.* This construction is related to and reminiscent of libertarian constructions of the governments role in political theory. In response to Robert Nozick's claim that the "fundamental question" of political theory is whether there ought to be a state at all, Professor Ian Shapiro has remarked:

> So deeply embedded have negative libertarian conceptions of freedom become that the sheer absurdity of this view escapes many people. If someone said that the fundamental question of dental theory is whether people should have teeth at all, no one would take him seriously

restraint defines "good judging" as "not judging" and provides cover for any and all opponents to substantive positions without requiring opponents to recognize the existence of a substantive constitutional disagreement in which they are on the losing side. All result-oriented criticisms are transformed into process-oriented criticisms, obscuring the content and goal of the disagreement by implying an alternative allocation of governmental power that, theoretically, could have resolved the problem.

While Kurland's treatment of activism highlights the tendency of accusations of judicial activism to deteriorate into mere substantive disagreements with the Court's decisions, John Denton Carter's 1973 critique of the Warren Court illustrates the use of activist accusations to mask such disagreements.[145] In Carter's case, that disagreement reduces to polemic against desegregation and rights jurisprudence.[146] Carter's work is an important illustration because it highlights the particular combination of process-oriented and substantive critiques which defines the very existence of federal constitutional rights, applicable against states, as disruptive of federalism or, more precisely, "states' rights."

Like Kurland, Carter repeats the "activist" charge, implying a disruption of the basic structure of government.[147] Carter's book, a vile and pernicious volume which focused as much on impugning Chief Justice Warren's character as analyzing his Court, highlights the leap from substantive disagreement to claims of structural change. There are three important elements of the argument. First, improper behavior by the Court is merely asserted (or assumed). The Court's decisions are characterized as judicial bidding for a "liberal-left coalition" made of "verbalists of the academy, media, pulpit and bureaucrats; their allies of the left leaning special interest pressure groups . . . ; subservient politicians; and utopian activists generally."[148] Its conspiratorial tone aside, Carter's claim is immediately revealed to be premised on the view that the justices work not for themselves but for an "elite" which Carter contrasts with an undefined, presumably Jeffersonian polity.[149] However, as his rather comprehensive list suggests, unless this amorphous polity is defined as those who agree with him, it can

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> for a minute. Yet if the existence of politics and states are an inevitable part of social life . . . Nozick's question and many of the assumptions behind the negative libertarian conception of freedom are no less absurd.

IAN SHAPIRO, THE EVOLUTION OF RIGHTS IN LIBERAL THEORY 288-89 (1986).

145. *See* JOHN DENTON CARTER, THE WARREN COURT AND THE CONSTITUTION: A CRITICAL VIEW OF JUDICIAL ACTIVISM (1973).

146. *See id.*

147. *See id.*

148. *Id.* at ix-x.

149. *See id.*

include little more than the illiterate and politically apathetic. Indeed, that some or most Court decisions might conform with the desires of some members of Carter's wide-ranging list cannot possibly mean what Carter alleges, that such decisions are illegitimate. Again, the fact of judging is conceived of as illegitimate, something other than judging; *just* judging is defined as *not* judging.

Second, Carter's apparent disagreement with the substantive positions taken by the Warren Court is characterized as a "power transfer" from representative government, especially states, to an unelected Court.[150] This charge might be asserted on the basis of the Warren Court's taking the Constitution seriously but, in that case, proves internally inconsistent since the traditional notions of government structure which occupy such a prominent position in Carter's charge of activism are Constitutionally based. Indeed, since Carter apparently believes the Court should preference the outcomes he believes appropriate over the results its decisions have produced, his argument, again, is revealed to be little more than disagreement with the Court's outcomes.

In the end, Carter's problem with the Court is rooted in vehement opposition to its desegregation decisions, especially *Brown*.[151] In his Preface, Carter questioned Warren's view (expressed in a law school address) that the Supreme Court's essential function is "to act as a final arbiter of minority rights."[152] Carter goes on to object to the Court's "restricting the freedom of the states, local governments, and the people."[153] *Brown* is repeatedly reviled as the case in which "the Warren Court took the plunge directly into the political and legislative thicket to bring about what it considered to be desirable school and political reforms and thereby introduced into the judicial process a sense of abandon that the New Deal Court had only approached."[154]

While Carter's musings on the structure of government might appeal to some, it has little to do with the validity or propriety of judicial review. By ignoring the context of the decisions, especially the difficult but narrowly constructed legal questions in dispute in *Brown* and like cases, Carter turns the cases on their head. Rather than recognize the challenge the Court confronted

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150. *See* CARTER, *supra* note 144, at x.

151. *See id.* at 12. Carter's entire Chapter 2 is dedicated to "proving" that *Brown* was the product of an intentionally "falsified" historical record (of the Reconstruction). Indeed, criticism of *Brown* in which the decision is blamed for all manner of the nations problems constitutes the focus of Carter's book. As a black southerner I cannot resist reminding the reader that the confederacy did lose the civil war and a more righteous defeat there never was. However, the recent legitimization and ascendancy of arguments like Carter's raises the question of who, exactly will have the last laugh.

152. *Id.* at x.

153. *Id.* at xi.

154. *Id.* at 7.

in the form of Jim Crow and later "massive resistance" to desegregation and, then, locating extraordinary judicial supervision of local school districts as the product of that resistance, Carter puts it just the other way. He attributes to the Court a lust for management of picayune affairs of school administration. From this premise it is a short step, which Carter quickly takes, to locating in the Court the origin of all manner of social problems such as crime and pornography, even going so far as to ridiculously allege the Warren Court's responsibility for the "intensification of the racial war."[155]

Carter's book illustrates the problem of substantive critique parading as rational disagreement over legal process; Kurland's more reasoned treatment of Warren Court activism reveals an analytical lethargy that seems to derive its content only by tacit reference to unsustainable critiques such as Carter's. Carter and Kurland both accept a view of judicial action that seems to confuse judicial restraint with a rejection of judicial review. Both grant too much to the extremely loud opposition voiced against various Warren Court decisions. To the degree that both rely on the volume and vehemence of political opposition to Warren Court decisions to define key elements of their claim of untoward activism, they advance a theory of judicial activism that proves of little aid in analyzing court behavior. Lytle's suggestion that nearly all criticisms of the Warren Court can be dismissed as mere disagreement is confirmed in these flawed but apparently appealing views. Nevertheless, this broad, ambiguously defined activist charge has been influential; arguments in the style of Kurland and Carter's seems to have formed a backdrop against which court behavior is analyzed outside legal circles. While such arguments prove less than helpful for legal theorists and jurists, they have influenced popular views of the judiciary as an institution and through that popular impression affected both legislative and judicial perceptions of the proper role of the court. However, activist charges *have* developed into a rigorous academic critique of the judiciary; the nature and implications of that critique are set out below.

### 2. Activism and Substantive Constitutional Law

Activist charges such as Kurland and Carter's are flawed primarily because they fail to grant the difficulty of the doctrinal matters faced by the Warren Court. By discounting the subtle but substantial legal issues presented

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155. *Id.* at 10. While it is probably not worthy of further comment, the wide acceptance of irresponsible theories such as this require that the intensity of the "racial war" before *Brown* be noted. Suffice it to say that for black Americans the threat of lynching, the daily indignities of segregation, and, perhaps most importantly, the near absolute exclusion from political, commercial and social life were extraordinarily intense. Carter seeks to blame the inhabitants of a city under siege for "intensifying" the war by seeking an end to the siege. He transforms white inconvenience into something so dramatic as war.

the Warren Court, the cases are recast as little more than political controversies in the resolution of which the Court is seen as acting "politically." On these terms it is the strength of political opposition to the Court's decision that determines the decision's legitimacy. Indeed, as Lytle effectively explained, the origins of the vehement criticism of the Warren Court was a coalition of southern segregationist opposed to *Brown* and "residual conservative groups" which objected to the Court's invalidation of anti-communist legislation in the name of protecting individual rights.[156] Intermediary questions such as the sustainability of the *Plessy* doctrine of "separate but equal" are uninteresting details for those who advocated "massive resistance" to desegregation. When those questions are considered they are dismissed as cover for an unjustified result.

If the difficulties facing the Warren Court are admitted, the corrupting effect of mere disagreement can be controlled and an important element of the "activist" critique revealed. As Archibald Cox has noted, the notion of judicial activism is not new, even to this century.[157] However, in reaction to the activism of the Taft Court in the early century, "there developed the theory of judicial self-restraint with which the senior generation of lawyers [were] generally indoctrinated. The theory sprang from the soil of the old Jeffersonian philosophy but was more sophisticated because it allowed room for judicial review in a narrow class of cases."[158] This philosophy was not completely independent of political controversies, but operated to provide a means of analyzing judicial behavior apart from the specific content of such controversies. The doctrine is effectively captured by Cox who describes it as characterized by three demands:

> First, the courts should avoid constitutional issues whenever possible. . . . [159]

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156. LYTLE, *supra* note 123, at 6-9.

157. After noting the epic conflict between the Supreme Court of Chief Justice Marshall and President Jefferson, Cox recalls the activism of the Taft court which, unlike the Warren Court tended to overturn what was widely regarded as progressive legislation.

> Defining the Court's role in government . . . became a major issue early in the present century. Both the Supreme Court and inferior courts used the power to declare laws unconstitutional in order to invalidate much of the modern legislation that we now accept as a normal governmental function . . . . Most people thought such measures were required by our transformation into a modern industrial and predominately urban community. Most judges regarded them as dangerous innovations threatening the American way of life.

ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 3 (1968).

158. *Id.*

159. This reflects the *Siler* doctrine, developed in *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909).

> Second, the courts should not invalidate laws unless they were inconsistent with some specific constitutional prohibition.
>
> Third, wherever there was room for rational difference of opinion upon a question of fact or upon the relative importance of different facts or conflicting interests . . . the doctrines of federalism and separation of powers would require the Court to uphold the legislation.[160]

As Cox suggests, these restraints severely limited what the Warren Court could do in response to the significant demands placed on the Court by challenges to Jim Crow, increasingly suspect police and prison practices (highlighted in cases of lynching and charges of injustice perpetuated under Jim Crow) and the often irrational responses to the Red Scare.[161] For sure, the Court accepted these limitations as daunting largely because, in the decade and a half preceding *Brown*, the Justices were "deeply ambivalent in their characterization of the race conflict."[162] "If," as Professor Burt aptly notes, "the Roosevelt Justices had viewed race conflict in the same unambiguous format as the [turn of the century] *Lochner* Court had viewed economic conflict—as nothing more than subjugative warfare—they would have seen no justification for withholding swift, aggressive intervention on behalf of the vulnerable minority."[163] The Court's ambivalence operated in both directions; conceiving of their role as limited, the Justices came to *Brown* with conflicting impulses counseling for sympathy to the specific controversies and its (self-imposed) institutional limitations.

Racial matters were highly charged and, apart from the Court's internal disagreement, sure to ignite a maelstrom of disagreement. Controversy so assured, it is troubling to cast opposition to the Court's desegregation decisions as evidence of the impropriety of those decisions. Instead, charges

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160. *See* Cox, *supra* note 157, at 3-4. In Cox's view these principles translated into the related doctrines counseling:

> (1) that the courts should avoid substituting the judges' views of policy for those of the legislature under the guise of interpreting broad phrases like "due process" and "equal protection of the law"; (2) that the courts should presume the existence of facts which would justify the challenged action if they could rationally be supposed to exist; and (3) that the courts should uphold the acts of the legislature whenever a rational man might have reached the legislature's conclusion.

*Id.* at 9. Cox concluded that the Warren court's activism was characterized specifically by its refusal to "follow this course in dealing with personal rights ranging from speech and association to voting and birth control," necessitating a theory of judicial review. *Id.*

161. Robert Cover argued that dual aspects of black disenfranchisement and oppression made possible by that exclusion constructed an apartheid that could be *best* resolved by judicial intervention. *See* Cover, *supra* note 92, at 1313-14.

162. ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 271 (1992).

163. *Id.* at 272.

of activism, to be compelling, needed to establish that the failure of the Court to abide by important procedural and structural considerations forced it to issue an unnecessary and intrusive decision. Such activism might operate at any stage in the judicial process. The Court may have exceeded its jurisdictional grant, resolved a non-justiciable case, improperly crafted a rule of decision, unjustifiably ordered certain relief, or improperly enforced that relief.

While debates have long raged over the extent and nature of federal jurisdiction, the propriety of the Court's jurisdiction in any of the cases culminating with *Brown* has not seriously been challenged. Nor has any persuasive argument been advanced that, at least until well into the Warren Court era, threshold matters of justiciability were not strictly required of the aggrieved litigants.[164] Nor did the Court's vigorous enforcement of its decisions begin until much later.[165] The core concern, rather, has been with the Court's identification of rules of decision.[166] Controversies over judicial activism are at base controversies over constitutional interpretation, even if the Court did later expand its notions of justiciable disputes and become more aggressive in its enforcement of constitutional norms. Constitutional interpretation, if judicial review is accepted, always requires the imposition of judges' reason on the text of the Constitution to resolve cases. This sort of "activism" cannot be avoided, a point conceded even by the preeminent exponent of judicial restraint, Justice Felix Frankfurter:

> The words of the Constitution are so unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life . . . . [M]embers of the Court are frequently admonished by their associates not to read their economic and social views into the neutral language of the Constitution. But the process of

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164. The Court's key decisions expanding standing include decisions in 1961, 1962, 1965 and 1968. *See* Flast v. Cohen, 392 U.S. 83 (1968); Griswold v. Connecticut, 381 U.S. 479 (1965); Baker v. Carr, 369 U.S. 186 (1962); McGowan v. Maryland, 366 U.S. 420 (1961). *See generally* Glennon, *supra* note 96.

165. *See, e.g.*, Greene v. County Sch. Bd., 391 U.S. 430 (1968).

166. Certainly the identification of rules of decision effects jurisdictional and justiciability questions. In fact, notions like standing are fairly read as an alternative way of conceiving of rights questions. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (standing question is essentially one of what rights particular individuals have). In this sense the Supreme Court's decision in *Allen v. Wright*, 468 U.S. 737 (1984) (rejecting standing for black parents to challenge IRS failure to enforce regulations against discriminatory private secondary schools), constitutes as much a substantive restriction on the reach of *Brown* as it is a discussion of "case or controversy."

constitutional interpretation compels the translation of policy into judgement.[167]

The recognition that judicial review injects courts into policy-making has brought into question what limitations operate to restrain this exercise of judicial power.[168] From *Brown* to the present, constitutional law scholars have engaged themselves in formulating principled limitations on judicial review.[169]

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167. ALPHEUS THOMAS MASON, THE SUPREME COURT FROM TAFT TO WARREN 14-15 (1968) (quoting Felix Frankfurter).

168. The obvious focus of Cox's and others' efforts to discover justifying principles for judicial action (much less limits on activism) is the reassessment of judicial review. Though few question the necessity of judicial review, as such, assessments of the Warren Court's record evolved into evaluations of the Court's position in the governmental system and the propriety and proper exercise of judicial review. The result was a proliferation of theories aimed at explaining how and when judicial review was justified. These arguments have reinvigorated the anti-democratic arguments against the court. Professor Bickel, writing in the late 1950s, stated the problem, but appeared to apologize for reducing it to something as simple as the counter-majoritarian difficulty:

> I am aware that this timid assault on the complexities of the American democratic system has yet left us with a highly simplistic statement . . . . But nothing in the further complexities and perplexities of the system . . . can alter the essential reality that judicial review is a deviant institution in the American democracy.

BICKEL, *supra* note 5. By the late 1970s John Hart Ely could state the problem with vigor, quoting Bickel:

> [Non-interpretivist constitutional interpretation holds less appeal than interpretivist theories of constitutional interpretation because of the numerous problems it] encounters in trying to reconcile itself with the underlying democratic theory of our government . . . . Judges . . . are not elected or reelected. "[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system . . . ." [O]utside the area of constitutional adjudication, [courts] are either filling in gaps the legislature has left in the laws it has passed or, perhaps, taking charge of an entire area the Legislature has left to judicial development . . . . When a court invalidates an act of the political branches on constitutional grounds, however, it is overruling their judgment, and normally doing so in a way that is not subject to "correction" by the ordinary lawmaking process. Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.

JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4-5 (1980) (quoting BICKEL, *supra* note 5, at 19).

169. *See, e.g.*, Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415 (2000); Keith E. Whittington, *Hebert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509 (2000); John C. Yoo, *Judicial Review and Federalism*, 22 HARV. J.L. & PUB. POL'Y 197 (1998).

The core strength of the activist charge can be located in the federal judiciary's *recognition* of constitutional rights. Because of judicial review every act of recognition, in addition to invalidating a particular governmental act in question, places limits on the prerogatives of state government and the elected federal branches. Then tension is intractable; if judicial review is accepted on principle, all exercises of judicial review would seem to be justified and limitations on its exercise would appear to be

However, the lack of success at articulating a basis for the exercise of the judicial review has transformed the inquiry into primarily the search for rules of interpretation that would limit discretion in actually existing judicial review.[170] Thus the activist charge has developed into a substantial question of constitutional law relating to the nature of the Constitution, especially in the form of notions like originalism.[171]

Alongside these developments, civil rights law has continued to be widely regarded as a manifestation of judicial activism.[172] Often cast as a concern with the flood of civil rights actions,[173] critics of civil rights law insist that excessive judicial activism has distorted important government relations. The charge is advanced as frequently when addressing statutory as constitutional rights, notwithstanding the development of substantive constitutional activist charges away from its role in justifying judicial review toward a role in developing theories of interpreting constitutional text. But the Court's treatment of statutes is importantly distinguishable from its

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immediately arbitrary. In address of this tension two treatments have emerged: a process oriented and a substantive treatment. *See, e.g.*, Canady, *supra* note 11, at 574-90 (describing school desegregation cases in light of shift from "formalist" to "substantive" views and back).

The first, process oriented treatment, has developed primarily into the field of Federal Courts. It examines the conditions under which federal courts should take cognizance of cases. The necessary implication is that important limitations control when courts may decide cases implicating judicial review. Matters of justiciability, jurisdiction and remedial powers are debated as sources of power over cases. The second, substantive treatment, has developed into the debate over methods of constitutional interpretation in constitutional law. These treatments overlap substantially. They are distinguished by the degree of concern with the content of constitutional rights. The substantive treatment is manifest in a debate between those who believe the Court engages in "political" matters by improperly grafting judges personal judgments onto ambiguous constitutional provisions or an ambiguous conception of constitutionalism.

For civil rights matters, then, and especially the Court's treatment of those cases, two related concerns emerge: the basis for the Court's review of the matter and the substantive constitutional matters said to govern the case. If the fidelity of the Warren Court to restraint on these matters is to be shown, the origins of these core concerns of judicial restraint and the problems the Warren Court faced must be shown. The next section undertakes these tasks.

170. Original intent, interpretivism, non-interpretivist theories.

171. *See, e.g.*, Bork, *supra* note 39.

172. *See* BERGER, *supra* note 42; Graglia, *Activism, supra* note 42; Graglia, *Legacy, supra* note 42.

173. Before leaving the Court, Justice Blackmun complained that the flood of civil rights cases were damaging federal civil rights law as the Court strained to regulate civil rights litigation, especially under 42 U.S.C. § 1983. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will The Statute Remain Alive or Fade Away?* 60 N.Y.U. L. REV. 1 (1985). The Court has made an effort to restrain § 1983 litigation with an eye to limiting the "flood." *See* Daniels v. Williams, 474 U.S. 327 (1986); Parratt v. Taylor, 451 U.S. 527 (1981). *See also* Herbert A. Eastman, *Draining the Swamp: An Examination of Judicial and Congressional Policies Designed to Limit Prisoner Litigation,* 20 COLUM. HUM. RTS. L. REV. 61, 71-74 (1988).

interpretation of the Constitution.[174] Insofar as civil rights statutes purport to supply a rule of decision, they impliedly set the basis for jurisdiction, define a live controversy, and prescribe remedies. Charges of activism advanced against the Court's treatment of these statutes constitute an extension of substantive activist arguments that contend that the very recognition of rights (rules of decision) disrupts the content of the states' and peoples' reserved powers.[175] Courts' acceptance of these arguments in the form of the *Activist Insecurity* makes them reluctant to follow the apparent demands which doctrine places on them, providing a generalized derogation from extant law. The extension of even narrowly conceived activist charges to statutory rights is troubling in that it signals that activism is more an ideological claim than legal principle.

The origin of narrow activist charges makes this extension even more troubling. Indeed, the force of activist charges advanced in response to the Warren Court's *Brown* decision can be exploded. The circumstance of *Brown* and the jurisprudential history of its time offer a substantially different explanation of the case. The approach adopted there, rather than being activist is shown to be rather traditional and restrained. That approach is important, nevertheless, since it establishes the format by which the Activist Insecurity is manifest. *Brown* can be said to manifest a formalist insecurity that, because of the formalist legacy of now denounced activism in *Lochner* and other cases,[176] created an affinity between the *Brown* insecurity and activism. After the maelstrom of opposition to *Brown* and the Warren Court decisions more generally, this connection has blurred into an insecurity with the very exercise

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174. This distinction sometimes operates in unforseen ways. In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court refused to overrule its prior decision interpreting 42 U.S.C. § 1981, *Runyon v. McCrary*, 427 U.S. 160 (1976), on the grounds that the Court should give *more* stare decisis weight to a prior opinion interpreting a statue than one interpreting the Constitution.

175. This is the view now overt in the Supreme Court's revival of sovereign immunity. Envisioning Congress's exercise of power as a threat to state sovereignty, the Court has restricted Congress's ability to create causes of action against the state. *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996) (rejecting commerce clause as ground for Congressional abrogation of state sovereign immunity). *See also* the "Alden" trilogy: Alden v. Maine, 527 U.S. 706 (1999) (holding sovereign immunity bars non-consensual suits against states in own courts); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (rejecting implied waiver of sovereign immunity through participation in economic activity); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (restricting severely Congress's power to abrogate sovereign immunity under section 5 of the Fourteenth Amendment). Similarly, it has also restricted Congress's power under the commerce clause. *See* United States v. Morrison, 529 U.S. 598 (2000). At the root of both lines of decision is a reinterpretation of the enforcement powers given Congress by section 5. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (requiring strict connections between substantive provisions of the Fourteenth Amendment—section 2—and means of enforcement), especially as used in *Fla. Prepaid* and *Morrison.*

176. *See* HORWITZ, *supra* note 14, at 33-64.

of judicial power[177] that has deprived the past decades of civil rights law of any semblance of consistency.

### B. *Realism and the Production of the Revival Period*

*Brown* is a realist opinion; criticism of *Brown* is criticism of the implications of realism on Constitutional and civil rights law. Any assessment of *Brown* must, in addition to discussing activism, assess the realist revolution that produced *Brown*. This Article is, therefore, as much a reflection on a paradox of the legal realist revolution that transformed American Law in the middle decades of this century as it is an assessment of *Brown*.

Dispatching a version of legal formalism manifest as legal positivism,[178] the realist revolution necessitated a detailed and urgent justification for the exercise of federal judicial power. In consequence, the field of Federal Jurisdiction is born in the academy, a marked development by Justice Frankfurter's pioneering materials on federal procedure and jurisdiction.[179] The need for justification also changed court behavior, preoccupying the judiciary with justifying its power at the very time it was being confronted with weighty questions of the shape and nature of the post-war world. This is the paradox of realism: with realism several long-standing and emerging views of the federal courts' limited powers coalesced into a renewed notion of judicial restraint while those same courts were presented with urgent claims for relief from victims of the massively oppressive Jim Crow system that had overtaken the country. In a process culminating in *Brown*, carefully framed claims, advanced in cases deliberately selected for their appeal and

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177. It is important to remember that this is an insecurity. As such, the court is not actually limited in its exercise of judicial power. Rather, it may be *more* prone to exercise judicial power since the insecurity leads courts to disregard narrow rules of decision in favor of more ambiguous principles which allow escape from the necessity to decide or offer greater force in justification of the exercise of such power.

178. *See* HORWITZ, *supra* note 14, at 195-203.

179. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1928). The emergence of study of Federal Courts is manifest in Hart and Wechsler's casebook on Federal Courts, first published in 1953 and still used today. *See* HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed., Fallon, Meltzer & Shapiro ed., 1996). Also of significance were the photocopied course materials of Henry Hart and Albert Sacks. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Eskridge & Frickey eds., 1994).

Frankfurter is a controversial inclusion on a list of realists as he was left out of Karl Llewellyn's important list of realists. *See* Karl Llewellyn, *Some Realism about Realism—A Response to Dean Pound*, 44 HARV. REV. 1222, 1227 (1934). Horwitz thinks Llewellyn's definitions of realism were too restrictive, HORWITZ, *supra* note 14, at 169-92, especially as concerned Frankfurter. *See id.*, at 184-85. Generally, Horwitz notes, "defining legal realism with precision is not all that easy. . . . For [the] many purposes, it is best to see Legal Realism as simply a continuation of the reformist agenda of early-twentieth-century Progressivism," *id.*, at 169, of which Frankfurter was also a participant.

generalizing force had cornered the federal courts.[180] Using statutes still in force and building on or probing the weaknesses of constitutional precedent, the legal team of the NAACP (and later its spinoff the NAACP Legal Defense Fund) presented the Court with cases that seemed to require its response in cases it would rather have not decided. In resolution of this paradox the very judges who proclaimed allegiance to the notions of limited government and congressional control of jurisdiction were faced with rebuffing the apparent demands of the statutes they purported to interpret in order to defer to the very elected branches that had enacted the statutes. Where constitutional questions were presented, the power of the courts themselves were at question: should they decide the carefully framed questions and assert their power over states, or debase the substantive constitutional issues in deference to preserving a notion of federal balance and structure that itself seemed to bind them to the terms, intent, and interpretations of the provisions in question. In resolving the realist paradox, the federal judiciary created the Activist Insecurity.

### 1. Realism: The Age of *Erie*

Constraints on the Federal Court's power and controversies over the nature of the federal judiciary begin with the very drafting of the Constitution and have been a regular feature of this Nation's history. The modern conception of a limited judiciary, invoked by activist charges against the Warren Court, coalesced during an important period just prior to World War II during which existing conceptions of law and therefore constitutional government underwent significant changes. During this period, the ideas of so-called legal realist began to exert significant influence on judicial behavior, quickly constituting a change in the very conception of the judicial process.

For present purposes, the ascension of legal realism birthed two fundamental changes. First, the realist movement represented the culmination of a dramatically different conception of what judges do. Second, it destroyed the sanctity of rules in the judicial process.

#### (a) Conception of Judges

Replacing the Langdellian version of legal formalism that had initiated the modernization of law, but which continued to insist that judges "discovered" correct legal answers in an autonomous legal order through logic and reason, the realist (drawing much from Holmes's concern with mediating logic with experience to produce pragmatic "right" answers) cast judges as

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180. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994); JACK GREENBURG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994).

political actors whose decisions should be viewed as policy creations. Unlike subsequent jurisprudential movements which have had only limited influence on how judges conceive of their behavior, the realist movement witnessed the triumph of its views in the judiciary itself. Judges began to view themselves increasingly as political actors, precipitating a crisis of legitimacy which is discussed above as the counter-majoritarian difficulty. As political actors, judges needed to be concerned with the basis for their authority to resolve disputes. No longer was the craft of lawyering, the institutional necessity of creating rules of decision, justification enough since rules of decision were now viewed as simply policy created through judicial procedure. This concern over sources of rules of decision for federal courts, long understood to be courts of limited jurisdiction, can be summarized with the following propositions:

The Realist Legacy and Federal Courts[181]

1. Realists refute the notion that Judges discover law; Judges make law; Judging is a political act which is subject to Constitutional limitations defining the authority of different branches to make law.
2. Federal courts' power in particular is limited.
3. Federal courts should avoid "making law," except where authorized to do so. This may include interstitial lawmaking and constitutional interpretation, limited of course by the extent of theories of judicial review.
4. Federal courts should give meaning to constitutionally valid legislative pronouncements of Congress.

These changed conceptions of law are symbolized no better than by the Court's decision in *Erie Railroad Co. v. Tomkins*.[182] *Erie* concerned the

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181. These elements are, perhaps, better ascribed to the legal process movement which grew from progressive realism. *See infra* text accompanying notes 158-59. In either case, the realist recognition of the policy-creating role of judges compelled these conclusions. *See, e.g.*, Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 696 (1989) (reviewing PAUL BATOR, DANIEL MELTZER, PAUL MISHKIN, & DAVID SHAPIRO, HART AND WESCHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)).

182. 304 U.S. 64 (1938). *Erie* may be viewed as more appropriately ascribed to the "legal process school" which both the decision and realist legal scholarship birthed. *But see* PURCELL, *supra* note 19. For present purposes *Erie's* view of judges captures one of realism's distinctive contributions. As Amar notes:

> Precisely because the realists had shown that the common law of tort had to be made, not found, and because the Progressives and New Dealers had demonstrated that the particular choices made by federal judges in common law tort cases were politically controversial, the Court in *Erie* asked whether federal judges ought to be in the business of fashioning a general federal common law.

Amar, *supra* note 181, at 695.

source of rules of decision in cases before federal court on diversity jurisdiction.[183] *Erie* overruled *Swift v. Tyson,*[184] which had held that it was unnecessary for federal courts to consult the unwritten law of states in deciding diversity cases, that "they [were] free to exercise an independent judgment as to what the common law of the state is—or should be."[185] Initially the rule of *Swift* was limited to commercial law matters and, further, Section 34 of the Judiciary Act of September 24, 1789, compelled federal courts to apply "the laws of the several states." However, *Swift* had been extended beyond commercial law issues,[186] and Section 34 had been read to compel courts to follow only applicable state legislation, not common law decisions. Much of the Justice Brandeis's *Erie* decision focused on concerns over uniformity that had become the regular complaint of the *Swift* regime.[187]

However, *Erie* is important for its conception of judges and the federal judiciary as much as anything else. As Justice Brandeis's opinion states in its "Third" section

> The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular state but obligatory with it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":
>
> > [B]ut law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else . . . .

183. 304 U.S. 64 (1938).

184. 41 U.S. (16 Pet.) 1 (1842).

185. *Erie*, 304 U.S. at 71.

186. Baltimore & Ohio R.R. v. Baugh, 149 U.S. 368 (1893) (including questions of tort liability in general common law); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) (including rights deriving from deed to land in general common law).

187. See especially Justice Holmes's dissent in *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532-36 (1928).

> [T]he authority is the state, and if that be so, the voice adopted by the state as its own . . . should utter the last word.[188]

The succession of ideas is rapid and dangerously capable of obscuring both the validation of turn of the century formalism and the new realism. In the first quoted paragraph, Holmes asserts the ascendency of the kind of positivism that freed modern jurisprudence from the tethers of natural law.[189] However, Brandeis invokes Holmes's positivism only after referring to the changed impression of what judges do; because judges are regarded as making law, their authority to add to the corpus of positive law is dependent on the institution's specific grant of power.[190] If that authority is vested in states, as Holmes's statement and the beginning of Brandeis's "Third" section alleges, federal courts are not only creating policy but violating the Constitution.[191]

The realist implications of *Erie* are clear: Judges, who "make" law, must do so only when authorized. Modern activist charges are firmly rooted in this transformation. Prior to the realist transformation of the judge, assertions that courts should exercise judicial restraint were troubled by an apparently conflicting conception of "courts." While it is widely noted that the Constitution and the framers say little concerning the specific nature of federal courts, it is seldom noted that the framers had several centuries of the existence of courts in England to draw upon while no executive of the sort they hoped to create existed anywhere and the independent legislative bodies they envisioned bore scant resemblance to the monarchy-dominated parliament they drew upon.[192] Thus, while this fact can be invoked to support both expanded and limited views of federal courts' power, it remains that assertions that federal courts should exercise this or that amount of power or draw from this or that source for rules of decision always conflicted with

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188. *Erie*, 304 U.S. at 78. On Justice Holmes's place in the emergence of legal modernism, *see* MINDA, *supra* note 8, at ch. 1.

189. *Cf.* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COL. L. REV. 489 (1954) (meaning of *Erie* is that state judges make law which cannot be persuasively distinguished from state legislation).

190. As Henry Monaghan put it,

> [It should be made] clear to students at the outset that *Erie* is, fundamentally, a limitation on the federal court's power to displace state law absent some relevant constitutional or statutory mandate which neither the general language of article III nor the [diversity] jurisdictional statute provides.

Henry P. Monaghan, *The Federal Courts and the Federal System*, 87 HARV. L. REV. 889, 892 (1974) (book review). *See also* Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682, 1683-86 (1974).

191. *Id.*

192. One need not search far for an example, as this issue goes to the core of Chief Justice Marshall's definition of judicial review in *Marbury v. Madison.*, 5 U.S. (1 Cranch) 137 (1803).

unconnected (and likely less than dispositive) impressions of what courts were and what constituted their inherent function.[193] Realism, more than anything else, exerted its influence on the actual existing judiciary by providing, for the first time, an integrated definition of the nature and role of a judiciary in a constitutional government.[194] No longer is the notion of a judge's inherent role, derived from natural law-based visions of the common law, at odds with constitutional or otherwise defined limitations on the judicial function. Judges, again, make law and must do so only as authorized.

This reading of *Erie* explains a curious aspect of the activist charges levied against the Warren Court. At a time widely recognized to have ushered an increasingly powerful federal government, the Warren Supreme Court became the recipient of venomous criticism for not deferring to political branches, including not only the states but also the Congress. While there were criticisms of increasing federal power, there was no necessary connection between opposition to judicial activism and increased federal power.[195] Realism, represented by *Erie*, influenced subsequent treatment of judicial activity in precisely this narrow way because it placed significant importance on what were then still somewhat ambiguous tenants of constitutional allocations of power. Thus, while opponents of judicial activism criticized the Court's behavior in decisions like *Brown* as exceeding appropriate authority, these critics were not bound to rejecting federal cognizance of the underlying disputes. As a rhetorical tool, this proved invaluable to those who opposed certain judicial activity but nonetheless did not endorse the invalidated practice, such as segregation.

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193. Indeed, private law cases, like *Erie*, posed the most substantial challenge for purported limits on judicial power since such cases easily raised concrete disputes, the proper jurisdiction over implied a duty for courts, consistent with notions of what courts inherently do, to resolve them, even if required to create rules of decision or invoke equity considerations. Thus where the federal diversity statute created jurisdiction over *Erie* and like cases, pre-realist notions of judges implied an obligation to decide the case. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). This duty was importantly mitigated by the regime of artful pleading that tended to restrict courts' access to cases (or allow them to avoid deciding certain cases), but that regime proved even more susceptible to the realists' rule skepticism and was an early victim of realist reforms. *See* FED. R. CIV. P., 28 U.S.C. § 1652. In the absence of the restrictions of artful pleadings, the broad and ambiguous jurisdictional grant of the diversity statute all but mandated a reformed view of judges' function and role. Though not presented in those terms, Holmes's complaint over forum shopping in *Black & White Taxicab Co.*, 276 U.S. 518, 532, invoked approvingly in *Erie*, can be read to have manifested this demand.

194. Once *Erie* signaled the ascendency of a new conception of judges' behavior and function, all that remained to be explained, is the question that this realist transformation begged, is what role these limited courts played in a democracy? This question, as is now apparent, leads back to a discussion of the nature of the Constitution.

195. *Cf.* D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577 (1985).

*Erie* is powerful, precisely because it appears to be self-limiting; it restricts courts to the power they are assigned (by the Constitution or Congress) but does not in terms disable the institution or the federal government more generally. Under a long view, this construction is illusory (in a way similar to many activist arguments); it is less a concern over the power the Court properly exercises (as it claims to be) than a veiled claim that the Constitution creates few rights (or does not create the rights in question). Thus, activist charges against the Warren Court which appear limited to abuses of process are revealed as premised on the belief that the Constitution could not have included the right in question. On matters such as the appropriateness of *Brown's* invalidation of segregation, prominent liberal legal scholars may have been reluctant to articulate outright opposition to the Court's reading of the content of the Fourteenth Amendment. However, they apparently were less constrained in criticizing the opinion on procedural grounds. As the debate developed into the 1970's, process-based criticisms appropriately fell away, leaving versions of what Ely calls "interpretivist" theories of Constitutional law that identified activism not in abuses of process but in broad readings of the Constitutional text.

(b) Conception of Rules

The realist also initiated a reconfiguration of how judges were supposed to decide cases. In extension of Holmesian views about pragmatic decision making, realism prescribed a change in focus away from the sanctity of rules. In formalist conceptions, rules were said to produce answers through logical deduction. Realists advocated that judges focus on the underlying policies which rules were designed to advance. Gary Minda notes,

> The realist movement . . . provided legal scholars with new interpretive ideas for reconstructing modern jurisprudence along the lines of a contextual and purposive understanding of law. "It was by insisting that one always needed to look to purpose in order to interpret even the plain meaning of words that the realists unfroze rules, shattering their brittle form and dissolving them back to their constituent policy goals"[196]

196. MINDA, *supra* note 8, at 25 (quoting James Boyle, *The Politics of Reason: Critical Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 711 (1985)). Minda further notes that "conflicting impulses and alternative strands of oppositional thought developed from Holmes and the *sociological movement* in jurisprudence, associated with Pound and, later, Benjamin N. Cardozo" informed realist work. *Id.* at 26. Pound's sociological jurisprudence was especially influential in the realists transformation of the focus of judges attention. Pound "called for Judicial decision making in which judges would explicitly weigh social and economic consequences." *Id.*

This call to look beyond the terms of rules for their policy purpose derived from the realists' distrust of rule-bound legalism on the basis that "'reality' is too complex and fluid to be capable of being governed by rules" and that rules too often merely disguised political decisions.[197]

That Judges were to expressly invoke policy considerations, in realists' estimation, did not free them from the constraints deriving from the realization that they were political actors in a limited judicial branch. Indeed, realists' concern with rules' ability to hide "political" decisions gave greater reason for federal courts to abide by the limitations on their role because attempts to suggest that a decision was compelled by congressional provision would not be overlooked by the realist eye. Just as surely, reference to an undefined and constitutionally unacknowledged federal common law rule waxed of the application of raw power rather than reason. *Erie*'s command that federal judges in diversity cases seek rules of decision from states' law reconciled the two strands of the realism: federal judges were to be both respectful of their limited authority and expressly charged with effectuating the policies declared by state policymakers or other authoritative sources[198]

Still, these two strands of realism, both of which were widely influential, are not completely in accord with one another. The former strand might support textualist or interpretivist approaches to constitutional law decision making largely associated with the notions of judicial restraint while the latter is reasonably read to support non-interpretivists views such as fundamental rights readings of the Constitution. Indeed, just the opposite may be true as well. It is the potential for tension between these strains that produce the activist insecurity. However, for the most part, this tension was never realized in the judiciary of the realist period. Rather, realist claims were transformed, partially in reaction to the Warren Court's perceived activism, along the lines of a reconciliation of the competing strains of realism.

The notion of judicial restraint encapsulates the reconciliation of the strains of the realist ascendancy. The jurisprudential movement associated with Henry Hart and Albert Sacks[199] translated the long held notions of a limited judiciary into the new language of realism. The so-called legal process school:

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197. *Id.* at 27-28.

198. This, of course, led to the creation of various devices to ensure this concern. Such as *Pullman* Abstention. *See* Texas v. Pullman, 312 U.S. 496 (1941).

199. Just as realism's move from the academy to the courts was fueled by Frankfurter & Landis's materials on federal jurisdiction and administrative law, the legal process school's ideas were transmitted to the judiciary and practicing attorneys through Hart and Sacks's legal materials on the judicial process. *See* HART & SACKS, *supra* note 179.

> accepted the realists' claim that judges engage in policy-making when they decide legal cases, and they agreed that legal abstractions alone cannot explain what judges really do. They "emphatically accepted the social welfare implications of realist work in assuming the range of questions across the substantive field [of law] were rooted in issues of social policy." [But they] rejected the realists' skeptical conclusion that legal policy-making had to be subjective and unprincipled. They argued that public law disputes . . . could be rationally decided by "reasoned elaboration" of the institutional procedures for dispute settlement. . . . The rule skepticism of the radical strand of legal realist thought was rejected in favor of a new understanding of the institutions of the legal system.[200]

By diminishing the implications of rule skepticism in favor of institutional considerations, the legal process movement cleansed the realist legacy of its potential contradictions[201] in favor of a view of federal jurisdiction[202] equivalent on many fronts with a process-based version of judicial restraint. Federal judges were to be restrained not only by the institutional character of the judiciary in general, but also by the specific limitations on the competency of the federal judiciary to create policy.[203] It is little surprising then that Professors Wechsler and Bickel responded unfavorably to *Brown*, the signal case of what would be later regarded as the undeniable activism of the Warren

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200. MINDA, *supra* note 8, at 35-36 (quoting Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561, 593 (1988)).

201. Over time these modifications drew opposition from progressive legal realists. "Progressive realists rejected the idea of neutral principles and instead argued in favor of a 'result oriented, sociological jurisprudence.'" MINDA, *supra* note 8, at 39; *see, e.g.*, EUGENE V. ROSTOW, THE SOVEREIGN PEROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW (1962). However, by the early 1960s when these objections were voiced the legal process school had overwhelmed its progenitor.

202. Amar, *supra* note 181, at 691.

203. According to the legal realists, adjudication was not, and could never be, wholly mechanical and apolitical. Thus, judges unavoidably make law—at least interstitially. Largely in response to the success of the realists, the emerging legal process school began to reformulate the inquiry. . . .

> On a more political and less abstract level, legal realism fueled growing political opposition in the early twentieth century to federal court decisions interpreting the Constitution, statutes, and the common law in a fashion that generally favored business interests. . . . Once again, the legal process school can be seen as a response to the realists. By paying strict attention to second-order rules allocating power between federal courts and other institutions, the legal process theorists sought to specify with precision the boundaries and purposes of federal judicial power. Once these boundaries and purposes were specified, federal judicial decisionmaking could be both legitimated and restrained.

Akhil Reed Amar, *Hart and Wechsler's The Federal Courts and the Federal System*, 102 HARV. L. REV. 688, 694 (1989) (book review).

Court.[204] These unfavorable reviews initiated wide-ranging criticisms of the appropriateness, correctness, and approach of the *Brown* decision.

Wechsler criticized *Brown* for failing to articulate a neutral principle that would transcend the result of the particular case.[205] The lack of neutrality was found in Wechsler's identification of competing interests: freedom from segregation versus freedom of association (that is to discriminate).[206] Wechsler believed that the *Brown* opinion needed to be rewritten on a neutral ground, though he could not determine how.[207] In the end, he conceived of the Warren Court as acting as a raw power organ, no different from the *Plessy* Court before it.[208] Bickel's assessment was less direct. Rather he took up the challenge of Wechsler and sought to articulate a basis for neutral decisionmaking in the form of "passive virtues."[209] Bickel's passive virtues were necessitated by the "counter-majoritarian difficulty."[210] Thus Bickel read Wechsler's call for neutrality as a call for judicial restraint. Separately and together, Bickel and Wechsler cast a dark shadow over *Brown.*

From the grounds prepared by these criticisms, the emergent jurisprudence of civil rights and, to a lesser extent civil liberties, came to be viewed as opposed to the rule of law; a popular impression of civil rights law emerged that cast it as a dereliction of law (perhaps justified by extraordinary circumstances) rather than a fundamental extension of the rule of law to individuals and groups previously denied its benefits. The character of this critique of civil rights law, like the character of activism charges, is loose and often uncritical of hidden agendas parading as reasoned objections to the exercise of judicial power.[211] The criticisms of *Brown* and, later, civil rights statutes, are especially given to these sort of loose charges that when closely inspected fail to prove either informed or compelling. The primary failing of these critiques, it proves, is a significant neglect of historical and precedential context, a brief survey of which follows.

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204. Reviewing HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM, Judge Louis Pollak captures the basis for these and like responses to *Brown*: Hart and Wechsler, he says, "took as given that, as a general matter, federal courts, including the Supreme Court, were to exercise the awesome power of judicial review very infrequently, and concomitantly, were to fashion remedies of very modest scope. That premise has been significantly . . . undercut by *Brown* . . . ." Lewis E. Pollack, *Hart and Wechsler's The Federal Courts and the Federal System*, 56 U. CHI. L. REV. 811, 819 (1989) (book review).

205. Wechsler, *supra* note 4, at 15.

206. *Id.* at 5.

207. *Id.* at 34.

208. *Id.* at 12.

209. BICKEL, *supra* note 5.

210. *Id.* at 16-17.

211. Indeed, "Progressive realists rejected the idea of neutral principles . . . . [with some wondering] whether Wechsler's demand for "neutral principles" and Bickel's "passive virtues" were themselves and ideology that camouflaged political objections to Warren Court activism." MINDA, *supra* note 8, at 39.

### 2. The Crisis That Was Jim Crow

The opposition of law and civil rights jurisprudence derives in significant part from the fact that, Reconstruction Amendments notwithstanding, the system of Jim Crow which the civil rights movement sought to dismantle was authorized and supported by law. In particular, a peculiar understanding of private action, property rights and governmental authority collected under *Plessy v. Ferguson's* "separate but equal" doctrine to locate the injuries of Jim Crow in its victim's self-perception, to guard the right of private citizens to segregate as a part of property and associational and expression rights, and to uphold legislative enforcement of segregation as a valid expression of political will, widespread exclusion of black Americans from the political process notwithstanding.

Though the doctrine of judicial restraint "was so dominant within the Supreme Court after 1937 that by the mid-forties it had hardly any critics,"[212] it was significantly and unavoidably challenged by the doctrine of separate-but-equal. The challenge was unavoidable because the doctrine could be sustained only by embracing a distinctly pre-realist formulation of the doctrine's nature and operation. Even granting post-realists concerns with institutional integrity,[213] Jim Crow, and especially its constitutional memorialization in the doctrine of "separate but equal," forced further elaboration of notions of judicial restraint, beyond the simplistic view that courts should not invalidate state or federal legislative action if such invalidation can be avoided. Even the more narrow form of restraint that legal process theorists gave realists' rule skepticism could not hide the contradictions inherent in the translation of "separate but equal" from doctrine

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212. COX, *supra* note 157, at 4.

213. Professor Cox saw egalitarian defenses of desegregation cases as unavoidably in conflict with characterizations of the institutional limitations of the judiciary.

> If one judges solely by the immediate legal results of Supreme Court decisions, the current era must be called a time of extraordinary creativity and progress. [A]fter [some] qualifications are noted, surely there would be general and enthusiastic praise for the main lines of development .... There can be very few who would wish to revive the caste system under the pretense of "separate but equal" ....
>
> The problem is more complex for those who think partly in institutional terms and believe that in the long run human events may be profoundly influenced by the allocation of powers among governmental agencies and by the way in which the judiciary exercise its share of power—more complex not because they are any less enthusiastic over the substantive progress but because it has been accomplished by major institutional changes whose long-range consequences are difficult to measure and which the present Court sometimes seems to brush aside without careful consideration in its enthusiasm for immediate progress.

COX, *supra* note 157, at 12-13.

to fact. If any substantial notion of rule of law was to be maintained, its pervasive absence under Jim Crow needed to be addressed.

*Plessy v. Ferguson*[214] established the doctrine of separate but equal in its rejection of Homer Adolph Plessy's claim that Louisiana's Act 111 of 1890 violated the equal protection clause of the Fourteenth Amendment and the Thirteenth Amendment's prohibition of badges and incidents of slavery.[215] The legislation required segregation of the races on intrastate trains. Simply, the *Plessy* opinion itself, penned by Justice Brown, is the source of the 1950's realist challenge.

Perhaps surprising to an informed student of the system of legal segregation that the opinion legitimated, *Plessy* is structured as an affirmation of the idea that the Fourteenth Amendment places limits on state government's ability to oppress its citizens. Justice Brown insists that "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[216] Brown maintained, however, that segregation of races did not oppress. His argument proceeded in two stages: first, the statute was "reasonable"; second, any oppression was not a consequence of law.

Brown's first argument establishes a broad deference to state legislatures on matters of legislative reasonableness. This deference is limited, however—a matter often forgotten in the "activist" diatribes against the Warren Court. At its core is the court's validation of segregation as a legitimate social policy under the auspices of justified deference to customs and usages. "In determining the question of reasonableness [the legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view for the promotion of their comfort, and the preservation of public peace and good order."[217] The tautology thus created justifies exercise of police power in conformance with the limits of the constitution precisely because it is exercised. However, Brown's reading is less ridiculous than its illogic implies. Courts at the time generally assumed that a legislature's capacity to make drastic changes in the legal order was quite limited.[218]

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214. 163 U.S. 537 (1896).

215. The "badges and incidents" reading of the Thirteenth Amendment was articulated in the *Civil Rights Cases*, 109 U.S. 3 (1883). It was rejected in that case as a justification of the Civil Rights Act of 1875, which the court invalidated.

216. *Plessy*, 163 U.S. at 550.

217. *Id.*

218. Judge Calabresi noted that "legislative revision had to overcome many obstacles, for the American tradition was anything but sympathetic to easy majoritarianism. . . . After passage, a legislative action had to undergo the ordeal of 'strict interpretation' if it was in derogation of the common law."

> In traditional common law thinking, legislatures were presumed to seek only particular results when passing statutes; they were thought to lack intent (or even competence) to make more fundamental changes in the common law. Thus each new statute underwent a process of interpretation by courts which often considerably narrowed the potential scope of the statute's impact.[219]

While this approach to legislation operated with regard to derogations from the common law, it provides a revealing explanation of *Plessy's* "reasonableness" argument.

At base, *Plessy* stood for white supremacy. In dismissing Plessy's Thirteenth Amendment argument, Brown argues that inequality cannot constitute a proof of servitude: "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races and must exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races or re-establish a state of involuntary servitude."[220] For the *Plessy* majority, "color" is a natural distinction which *"must"* exist as long as it exists. Legal distinctions on the basis of race cannot, for Justice Brown, destroy equality because they are inevitable. Justice Brown further locates the reflection of inevitable racial segregation in other decisions, some of which predated the Fourteenth Amendment.

Justice Brown's main reference is especially telling because it contradicts the import of the separate but equal construct that the Court affirms. Chief Justice Shaw in the Massachusetts Supreme Court case, *Roberts v. Boston*,[221] is quoted to support the view that, once equality before the law is declared, no equality in treatment is required.[222] Chief Justice Shaw's argument is based on the existence of self evident distinctions between classes of citizens:

> [W]hen this great principle [equality] comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same

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GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 4 (1982).

219. *Id.* at 186 n.15. *See* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936) (expressing sympathetic view of limited view of statutes); Landis, *Statutes and the Sources of Law in* HARVARD LEGAL ESSAYS 213 (1934); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (criticizing judicial jealousy).

220. *Plessy*, 163 U.S. at 543.

221. 59 Mass. (5 Cush.) 198 (1849).

222. *Plessy*, 163 U.S. at 544.

> civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment.[223]

On its own terms, *Plessy* manifested a contradiction: it presumed that equality is to be ensured and protected from unreasonable or bad faith oppression but that such oppression did not include segregation. What reconciled it is the acceptance of self-evident distinctions between capacities and qualities of persons. Separation was "reasonable" because it was imbued with the logic of white superiority that justified not merely the separation of races but the more extensive allocation of social perquisites to white Americans.

*Plessy's* second argument for segregation's reasonableness further operated to obscure the opinion's internal contradictions. In *Plessy,* Justice Brown sought to privatize the notion of inferiority. Any inferiority that Plessy felt was self imposed, intangible, and irrelevant:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.[224]

Brown places any effect of government action on the subjects' reactions. Segregation is problematic only if perceived so and perception, a private matter, is not the subject of constitutional protection. Apart from turning a blind eye to what is even today the clear intent of the segregation statutes, Brown justifies segregation by insulating it from any legislative efforts to eliminate it. While most of the opinion seeks to deny that the statue has any effect on social relations (apart from what "insecure" black Americans might attribute to it), he accepts that such statutes have an effect when it comes to implied white reactions to being "forced" to intermingle with black Americans. Not only can legislation not upset the (natural) order of prejudice,

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223. *Id.*

224. *Id.* at 551.

it is improper to do so absent the mutual consent of everyone—i.e. the consent of white folk.

The effect of *Plessy* was dramatic. In short order, segregation was the widespread order, not only in the South where most black Americans still lived but everywhere substantial numbers of black Americans lived, some degree of separation of the races was memorialized in practice and law.[225] *Plessy* involved state regulation of public services. It could, therefore, be read as creating a broad license for states to regulate undisturbed by judicial second-guessing that would be widely unpopular. However, the regime which *Plessy* validated corrupted state behavior to such a degree that a multifaceted regime of official segregation on behalf of majority preferences coupled with official enforcement of private segregative preferences emerged.[226] The extent and scope of segregation was such that government and private action became so closely coupled that legal historians continue to fight over just which controlled.[227] The inability to isolate the influence of either public or private segregative preferences would seem to indicate, if nothing else, that the two were intimately bound in the post-*Plessy* world.

The apartheid that coalesced under *Plessy* was characterized by segregation, but also saw the advancement of the ideology of white supremacy that underlay its rationale. The close relationship between official and private segregation brought on by *Plessy*, far short of preempting violence of recalcitrant supremacists, further sustained the deterioration of the rule of law which, in the form of open rebellion had helped topple Reconstruction years earlier. In the name of protecting white citizens from the bogy of black criminals, cast as more and more inhuman (and therefore threatening), the

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225. A substantial debate exists among historians as to when segregation of the races emerged. The leading theory is C. Vann Woodward's in THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974). Woodward argues that *Plessy* ignited massive segregation that did not generally exist in thirty or so years following emancipation. Joel Williamson argues that segregation at significant levels dates as far back as the immediate post-war period. *See* JOEL WILLIAMSON, AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861-1877 (1965). In all events, historians agree that the system of Jim Crow which existed at the time of *Brown* came into full form in the first years of the Twentieth Century.

226. These racial attitudes are succinctly reflected in the views of Mississippi's turn of the century populist Governor, James "White Chief" Vardaman, as described by historian David Oshinsky:

> His logic was familiar. Freedom, he said, had been a disaster for the Negro. It had failed to make him more honest or responsible or to teach him self-restraint. "He is a barbarian still," the White Chief asserted, with a "thin veneering of civilization" and an "increased capacity for crime."

DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 92 (1996); *see also* I.A. NEWBY, JIM CROW'S DEFENSE: ANTI-NEGRO THOUGHT IN AMERICA, 1900-1930 (1965).

227. *See, e.g.*, RICHARD ALLEN EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

increasingly severe oppression of black Americans was enforced by numerous, periodic lynching and mob attacks on black communities.[228]

Rapidly, any sense of "rule of law" had disappeared on race matters. Gerald Gaus, for example, identifies four senses of "rule of law" as (1) rule by law, contrasted with rule by men; (2) protection of personal freedoms, or protection of important rights; (3) applicability of law to government, "not only that government rule *through* laws but also that it be ruled *by* laws"; and (4) that some independent body exist to ensure confirmation with laws, even, to some degree those viewed as wrong.[229] The system of Jim Crow birthed by *Plessy* failed in all four senses. Race relations were governed as much by the tyranny of pro-segregation citizens who, no matter their actual number, were able to compel government and private conformance with segregation. Law, and therefore rights, were unequally enforced. Governmental institutions became in many instances mere tools for the advancement of segregation. When they did or could not produce favored results, official institutions were often abandoned or circumvented. And, rights which came into conflict with the order of white supremacy were often ignored. This is not to suggest that black citizens under Jim Crow were without rights, only that their oft designated "second class-citizenship" meant that those rights were subordinated to other interests.

Most importantly, any notion of equality in the Fourteenth Amendment had been so narrowly interpreted by *Plessy* that the only obligation on the state's part was recognition that black Americans were citizens, a declaration fully made by the amendment itself. Any implication that the amendment might prohibit discrimination was effectively undercut. Under such a view, only direct evidence of bad faith could support a claim under the amendment. But the realist revolution, in addition to transforming characterizations of what judges did, transformed characterizations of the Constitution. If judges were political actors who made policy when they decided a case, so were other political actors. An often overlooked corollary of the transformation of what judges did was a more frank recognition of what legislators did. No longer were legislatures incapable of intending to fundamentally modify a complex and interrelated (natural) common law which was conceived a part of lived experience; legislatures became law-givers whose actions defined an independent and politically rooted law. Such law could be conceived only as having real effect on lived experience. In an important way, therefore, *Plessy's* conception of what effect the separate but equal law had on its black

228. *See* IDA B. WELLS-BARNETT, ON LYNCHINGS; SOUTHERN HORRORS; A RED RECORD; MOB RULE IN NEW ORLEANS (William Loren Katz ed., reprinted 1991).

229. Gerald F. Gaus, *Public Reason and the Rule of Law* in 34 NOMOS: RULE OF LAW 328, 328-30 (1994).

subjects could not be sustained in a post-realist world that recognized that regulation of public affairs, be it judicial or legislative, substantially affected its subjects. Inferiority could not be explained as self-imposed any longer; it was the product of inferiority-creating policy.

With new insights into the origins and effects of policy, the assumptions of *Plessy* fell apart and its "separate but equal" doctrine became incapable of being squared with the reality of the world it justified. Informed by these changes, *Plessy* could not be sustained on any ground. Allegiance to formalism would expose the fallacy of the decision's assumption that the Louisiana statue did not foster inequality. Allegiance to a realist view would reveal that the decision's separate but equal doctrine was a cloak for the white supremacy-based regime that it justified. Moreover, social and natural sciences, in which the realists invested great importance, had by the 1950's discarded the eugenics theories that supported *Plessy's* white supremacist presumptions.[230] The existence of such substantial inequality as was American apartheid under the banner of equality, simply became unsustainable.[231]

Jim Crow in the middle of the twentieth century, therefore, posed federal judges with quite a dilemma: any vigorous analysis of *Plessy* would reveal it to be unsustainable, while the very understandings that had made this revelation possible also made judges conscious of their own limited power. The legal landscape demanded action; long existing but newly embraced structural limitations counseled for inaction. In six equal education cases leading to *Brown* the Court evidenced a realization of this dilemma. Each time the Court confronted the dilemma by issuing as narrow a decision as possible. By 1950, in a trilogy of cases the Court had gone as far as it could without abandoning *Plessy*.[232] In the most memorable of these decisions, *Sweatt v. Painter*,[233] the Court was forced to say that, for professional education, a hastily erected separate facility was not equal. The *Sweatt* Court strongly implied that the segregated professional education of the sort that was rapidly being established in southern states to avoid the invalidation of segregation could not be made equal. All that remained to force the dilemma on the court was that separate education be argued incapable of being equal. So far the court had avoided the substantive contradictions of the *Plessy*

230. *See* STEINBERG, *supra* note 30, at 29-33.

231. *See* Cover, *supra* note 92, at 1313-15 (judicial intervention was perhaps least intrusive means of destroying American apartheid).

232. Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Ok. State Regents, 339 U.S. 637 (1950); Henderson v. United States, 339 U.S. 816 (1950).

233. 339 U.S. at 629.

regime and had held plaintiffs to all traditional limitations on the Court's power to review cases. In *Brown,* it became unable to avoid the first question.

## IV. *BROWN'S* THREE OPINIONS: RECONCILIATION OF THE ACTIVIST/REALIST DILEMMA AND THE BIRTH OF THE ACTIVIST INSECURITY

The Warren and early Burger Courts responded to the challenges of Jim Crow and the civil rights movement by reviving previously moribund Reconstruction Era civil rights statutes[234] and by reinvigorating constitutional provisions[235] (especially the Reconstruction Era Amendments[236]) as grounds for further congressional action. While these responses most certainly are substantively activist, they are restrained in important ways which are signaled by *Brown*. Though *Brown* was regarded as the epitome of Warren Court activism to its contemporary legal process critics, *Brown's* reconciliation of judicial restraint with social crisis is, it seems, the better view of its contribution to modern jurisprudence.[237] While this observation may appear surprising, *Brown* can be read to represent the Court's allegiance to authoritative sources of law in concrete cases (consistent with legal process concerns) and providing that remedy which appeared necessary to give the applicable law its meaning.[238] Most controversial of these three observations is the assertion that the *Brown* decision was true to the constitutional source of law. Indeed, most criticisms of *Brown* characterize the decision in precisely opposite terms: the Justices are seen to have abandoned their views of "law" in favor of a "social policy" they regarded as appropriate. However, close inspection of the opinion locates this concern in an extrapolation from the decision's invocation of social science materials and apparent concern with social conditions. And, although this seems to be the frame within which the Justices understood their action,[239] it overlooks why the Justices felt compelled to decide the case in the first place.[240] Below, it is argued that, rather than using legal rules to disguise decision based on these "external"

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234. *See* Runyon v. McCrary, 427 U.S. 160, 172 (1976) (reviving 42 U.S.C. § 1981); Griffin v. Breckenridge, 403 U.S. 88, 101-02 (reviving 42 U.S.C. § 1985(3)); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-39 (1968) (reviving 42 U.S.C. § 1982); Monroe v. Pape, 365 U.S. 167, 186-87 (1961) (reviving 42 U.S.C. § 1983). *See also* White, *supra* note 6, at 147-52, 160-205.

235. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

236. *See Runyon*, 427 U.S. 160; *Jones*, 392 U.S. at 409.

237. Robert Cover implies so much, arguing that a congressionally based response to Jim Crow probably would have produced a fascist or at least authoritarian centralization of governmental power. *See* Cover, *supra* note 92.

238. Restraint is here defined as Lamb's six maxims of restraint. *See* Lamb, *supra* note 76, at 14-22.

239. *See infra* text accompanying notes 241-57.

240. *See* TUSHNET, *supra* note 180, at 187-95.

factors, the Warren court invoked these "external" factors in order to conceal its decisional basis from what it anticipated would be an unsympathetic reception—to conceal the fact that its decision was necessitated by the nature of the constitutional judicial process.

If this account is believed, *Brown* is, at its core, closely aligned with modern positivists and normative process oriented theorists. The decision is bounded by the limitations on the interpretative exercise that restrict the Court to careful consideration of authoritative sources of law: the Constitutional text, apparently applicable precedent, and the peculiar nature and demands of the facts before the Court. Of course, these considerations should not be so heavily weighted that they reduce to a new version of Langdellian formalism. However, severe limitations, in fact, result from this approach, as exemplified by the slow response of the Court to the requests of civil rights activists for help from the often wild and pernicious manipulation of state legal systems against them in the decade following *Brown*.[241] Pushed by the limitations of its approach (and suffering the activist charges that followed controversial decisions on other constitutional issues), the Court sought refuge in the relative comfort of statutory enactments, reading them with the same concern for constitutional structure, statutory text and applicable precedent that it had given *Brown*.[242] These reconciliations of the dilemma presented by Jim Crow and suppression of civil rights advocates in the post-realist world are complete and workable. This approach is born in *Brown*, as illustrated below. But first, a brief description of the *Brown* Court's sense of what it was doing is necessary to set up what this interpretation runs against and why the Justices' own vision of their behavior should not be taken at face value.

### A. *The* Brown *Court's View of the* Brown *Dilemma: Right Policy, No Law*

Wechsler and Bickel's assessment that the *Brown* Court had abandoned accepted legal precepts in favor of choosing a preferred policy draws some of its force from the fact that this is what much of the Court thought it was doing.[243] Justices Frankfurter and Jackson, in particular held these views. And though the public could not know what the private deliberations of the Justices concerned, Bickel had been Frankfurter's clerk and had first hand knowledge of the Justices' apprehension.

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241. *See* THE WARREN COURT, *supra* note 11, at 4-7.

242. *See* White, *supra* note 6, at 160-205.

243. This account is derived from Mark Tushnet's reading. *See* TUSHNET, *supra* note 180, at 271-310; S. Sidney Ulmer, *Earl Warren and the Brown Decision*, 33 J. OF POLIS. 89 (1971); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L. J. 1 (1979). The leading work on the deliberations is RICHARD KLINGER, SIMPLE JUSTICE (1976).

In Mark Tushnet's detailed account of the Justices' deliberation, the question is said to have been framed very early by Justice Jackson. Tushnet portrays Jackson as "ambivalent"about segregation and thus unsure about the resolution of the consolidated cases.[244] Jackson exerted significant influence on the framing of the issue in *Brown*, perhaps because of his ambivalence. Jackson regarded the issues in the case as presenting questions of "politics" rather than "law." For Jackson, the legal case for upholding *Plessy* was solid: the legislative history of the Fourteenth Amendment was, at best, silent on segregation in education, the contemporaneous Congress had established segregated schools in the District of Columbia, and the precedent of *Plessy* seemed both reasonable and firmly established.[245] In all, the Court's discussion of the case in 1952, prior to ordering reargument, concerned what "legal" grounds could be invoked when legislative history seemed to go against the plaintiffs[246] and adherence to precedent seemed to counsel for allegiance to *Plessy*. Most strongly, the Justices seemed to want to avoid a "sociological" decision.[247]

This view of the case is clearly what dominated the Court's own view of what it was doing. However, two things are obscured by this explanation of the Justices' self-image and therefore explanations of the *Brown* decision. First, it is not apparent in this explanation why the Justices felt bound to resolve the case. Their expressions of a dilemma seems to suggest they felt trapped, and yet nothing in their concerns reflect why they were.[248] Second, this explanation obscures the role of prejudice in *Plessy* and the precedential line it had established. As the concept of white supremacy was being eroded, so was *Plessy*. As such the "law" versus "sociology" frame of Jackson was

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244. TUSHNET, *supra* note 180, at 188-89.

245. *Id.* at 190. Tushnet builds this argument especially on the memorandum of Justice Jackson's clerk, William Rehnquist. *Id.* However, it is apparent that Jackson held many if not most of these views on his own. *Id.* at 212. Although, in the end these views did not control in Jackson's decision to ultimately overrule *Plessy*.

Justice Frankfurter clearly embraces Justice Jackson's framework. This is evident in the five questions for reargument which Frankfurter drafted for the court. *See id.* at 194-95. The first two ask about legislative intent and the third asks about the court's power to decide the case against or without support of legislative intent. Frankfurter seems to be asking whether the court can abandon ordinary legal precepts to resolve an important case.

246. TUSHNET, *supra* note 180, at 193.

247. *Id.*

248. Indeed, part of the problem may be that Tushnet's reading of the accounts of the debates is tainted by the standard explanation of Justices' behavior. As this Article adopts Tushnet's reading as a starting point, his errors may be reproduced here. However, Tushnet later recognizes that there are other ways the Justices may have conceived of the issue and which, through the influence of Frankfurter and Jackson, they avoided.

always false, obscuring the fact that the "precedent" of *Plessy* had already eroded.

Reading accounts of the Court's hand wringing in the 1952 conferences, one must ask why the Justices were having this discussion at all. It is tempting to think, as some critics imply, that the Court was reaching out to take and decide the case. However, this explanation runs against the Justices own assessment of the prospects for the case in 1952. Frankfurter thought that *Plessy* would be narrowly overruled (5-4); Burton and Jackson thought it would be overruled, perhaps with a greater margin (2 to 4 dissenters); while Douglas thought *Plessy* would be upheld by a close vote (5-4).[249] If the Justices were so sure of the impropriety of *Plessy*, they needed not be so worried; if they were sure that *Plessy* was correct, they needed not disturb it. Rather, the question was in fact a close one. The plaintiffs had carefully and deliberately presented the question of *Plessy's* legitimacy in its most bare form after years of chipping at the edges of the doctrine.[250] Moreover, the Court's prior decisions, especially in *Sweatt*, had already undercut the basis of *Plessy* by exposing its basic presumption of black inferiority.

The main "sociological" fact presented in *Brown* undercut any force that might have been ascribed to *Plessy*: *Plessy* was about white supremacy. It took Justice Black, son of the South and former Ku Klux Klan member to point out that "Segregation rested on the idea of Negro inferiority; one did 'not need books' or other sociological evidence 'to say that.'"[251] When *Brown* is again the subject of conference discussion after reargument, the new Chief Justice, Earl Warren, echos the assessment of Black. The "basic premise of [*Plessy* was] that the Negro race is inferior."[252] On this basis Warren rejected *Plessy*, setting up its demise.[253]

The Court, then, understood itself as being presented with a choice between allegiance to law or sociology. But the Court was in this position only because ordinary legal precepts had forced it to a decision. Tushnet describes the hostility of some questions presented to the NAACP lawyers during reargument as having "an unfriendly edge because the justices were

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249. *Id.* at 187. Tushnet reminds that these predictions should be cautiously embraced. They were mostly made two years later, after *Brown* had been decided, and were based on mere speculation as no votes were taken on the cases in 1952.

250. *See id.* at 116-36.

251. *Id.* at 192.

252. *Id.* at 210. That *Plessy* was based on prejudice and that the precedential force of the decision had already been undercut by the Court's recent decision were emphasized by Marshall and the NAACP at the second oral arguments. *See* TUSHNET, *supra* note 241, at 207.

253. In the second conference Warren and Burton echo the new theme, that it was time to act. *Id.*, at 210. This replaced the near obsessive desire for delay that had characterized the Court in 1952 and which Frankfurter ultimately determined was crucial to the resolution of the case. *Id.* at 195.

unhappy at being forced to choose one side or the other of their ambivalences. Yet it was precisely the brilliance of Marshall's strategy that he forced the justices to choice, believing—correctly, as it turned out—that once he forced them to choose they could make only one decision."[254] The uncomfortable choice which Marshall forced was whether the Court was prepared to reaffirm the white supremacy that underlay *Plessy*. Correctly anticipating that the precedential force of *Plessy* was sufficiently undercut, reaffirmation or abandonment of *Plessy* was all that the Court could choose between.

### *B.* Brown *as Three Opinions in One: The Activist Insecurity in* Brown's *Remedial Hedge*

In an attempt to reconcile the status of *Brown* as a watershed opinion with his theory of "Constitutional Moments," Professor Bruce Ackerman notes that "when measured by the great historical markers of the past, the Supreme Court's decision[] in *Brown* . . . did not come at [a] moment[] when a mobilized citizenry was demanding a fundamental change in our fundamental law."[255] This lack of support for identifying a "*Brown* moment" does not lead Ackerman to dismiss *Brown's* importance but, rather, to note that it was more an "inspired act of political prophecy" in that "its critique of injustice was inspired by a profound sense of moral truth" and that "the Court could somehow predict that its moral critique would prove politically successful."[256] This treatment of *Brown* is cast in terms that have dominated analyses of the opinion since it was issued. Ackerman explains *Brown* by justifying the activist judicial review that virtually all commentators assume the decision manifests.[257] Ackerman's explanation is compelling, but differs little in form or content from criticisms of the opinion as failing to conform with "neutral principles," "passive virtues," reason, tradition, or (as Ackerman partially frames his response) predictive accuracy.

*Brown*, however, can be read in a way more true to its circumstances and more consonant with the visions of the court's role extant when it was decided. However, one must be disabused of the desire to explain substantive objections with its result as "neutral" or principled objections to its process. Indeed, the desire to give comfort to those who believed *Brown* wrong seems to have so widely infected discussion of the case that not only did

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254. *Id.* at 216.

255. ACKERMAN, *supra* note 66, at 133.

256. *Id.* at 137-38. Ackerman acknowledges that "as a prophetic utterance, [*Brown*] was a weak rhetorical performance," but goes on to offer a subtle two pronged explanation of the *Brown* opinion's "synthetic point: twentieth-century developments since *Plessy* have undermined the interpretive premises that informed Justice Brown's reading of 'equal protection.'" *Id.* at 142-50.

257. *Id.* at 146-50.

commentators then not entertain alternate readings of the opinion, but that forty years of comment, both supporting and disparaging the opinion, have failed to give sufficient weight to the case's *legal* context. More specifically, commentators seem to have been so eager to explain why the Court should not have interpreted the Constitution, that they have overlooked the most obvious reasons for the Court's decision: the growth of precedent in conflict with the penumbral case, *Plessy v. Ferguson.* Thus, while Ackerman is by no means incorrect in noting that *Plessy's* reading of the equal protection clause had become antiquated, that observation begs a reason for courts to invalidate old readings of Constitutional text—that is, it begs for an argument in support of a particular judicial activism. Debates which have focused on the propriety of the decision's result have thus created a circle where an activist interpretation is offered for the opinion, for which a justification for activism must be offered, then applied to the opinion. For present purposes, it matters not what sort of justification is offered, though such justifications matter in discussions of the nature of a Constitution, as such; the question remains, was *Brown* an activist opinion?—No!

1. Rereading *Brown*

Fundamentally, *Brown v. Board of Education*[258] reversed *Plessy v. Ferguson*.[259] While the decision is rightly celebrated as a central precedent in modern American jurisprudence, it has been from the beginning widely criticized for representing some version of unwarranted activism. As noted above, many merely disagreed with the result of the decision. However, the more forceful arguments have traced that offered by Professor Wechsler's influential *Neutral Principles* article. Wechsler's article initiated a flood of scholarship aimed at providing a reasoned basis for the *Brown* decision (or judicial review more generally). Its focus, Chief Justice Warren's argument that

> Our decision . . . cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.
>
> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if

258. 347 U.S. 483 (1954).
259. 163 U.S. 537 (1896).

> segregation in public schools deprives these plaintiffs of the equal protection of the laws.[260]

This statement and what followed it rightly caught the attention of commentators. It is the axis on which the opinion turns. Following the Chief Justice's statement of the case and recitation of related precedent on the matter, it introduces the four pages in which the Court declared the requirements of equal protection in the Fourteenth Amendment.[261] Importantly, the quoted passage frames the parameters of that discussion, dismissing the possibility of the Court focusing on the "equality" of separate facilities in the particular cases before it, circumscribing the force of historical considerations, and insisting that the relevant inquiry is the actual distribution of government benefits.[262] The passage's tone and terms dismiss the binding force of both precedent (*Plessy*) and historical intent. It implies preference of "ought" over "is," declaring, it appears, an age of normative jurisprudence aimed at producing the just order.

Of course, many of these implications can be easily squared with the broad teachings of realism, especially the rule skepticism of radical realist. For sure, allegiance to *Plessy's* separate but equal doctrine for its own sake seems ridiculous if public education was separate but unequal in any respect. And, it must be remembered, realists exhibited substantial confidence in the possibility of social science to provide answers to difficult policy questions. In the pages that followed the quoted passage, the Chief Justice did not disappoint these realists. He noted that, "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority," citing in what has become a very controversial reference, the work of several social scientists, some of whom had testified as plaintiff's experts in the trial court.[263]

But it is this reference to the extra-doctrinal, this self-conscious deprecation of institutional limits that invited the ire of legal process scholars who not only credited the widespread criticisms of those who disagreed with the result of the case on the basis that it was "political," but saw below this political charge the lack of a basis for the Court to justify reversing the decisions of political branches. In Wechsler's terms, "neutral principles" or in Bickel's, "passive virtues," needed be located to bound these sort of exercises.

These arguments are persuasive, as evidenced by their substantial influence over the years; but their influence cannot escape the confines of

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260. *Brown*, 347 U.S. at 492-93.
261. *Id.* at 493-96.
262. *Id.* at 492-93.
263. *Id.* at 494-95 n.11.

*Brown's* axis. Both critics and defenders of the *Brown* decision, with some reason, have taken the axis to represent the real meaning of the opinion. In part because the question of what limits there are on judicial review is complex and interesting (and perhaps intractable), this passage has been seized upon to frame the discussion. Can a court disregard precedent and history in order to ensure a just order? This is an interesting question, but it is not clear, forty-five years of comment notwithstanding, that it is the question that is essential to explaining the *Brown* opinion.

While *Brown* and its axis passage may rightfully be invoked to initiate and frame discussions of judicial review, the Court's resolution of the case and therefore its resolution of the problems of judicial treatment of controversial problems in a constitutional legal order might be explained otherwise. Unfortunately, it seems that the volume and hostility of segregationists opposition to the *Brown* result may have raised issues that, while interesting, have unduly dominated *scholarly* appraisal of the opinion. Indeed, one might wonder how the decision can still be regarded as a central precedent, when its basis is so widely criticized. The answer may be that reasonable critics of the *Brown* opinion do not really believe that the controversial elements of that opinion—the axis statement and the social science support—did or were meant to explain the opinion. This argument forms the basis for an alternative explanation of the opinion.

What is fundamentally absent in most criticisms of *Brown* is an appreciation of the Chief Justice's introductory statements. In three paragraphs the Chief Justice brings the reader to the issue; he points out that the otherwise disparate cases raise a single issue;[264] he defines that issue as raised by the fact that, "In each instance, [the plaintiff children] had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race;"[265] and that the plaintiffs have insisted that this segregation could not be squared with the terms of the Fourteenth Amendment.[266] With the question so framed, the Chief Justice called the legislative history on the matter a draw[267] and proceeded to survey

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264. *Id.* at 486.

265. *Brown*, 347 U.S. at 487-88.

266. "The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws." *Id.* at 488.

267. *Id.* at 489. This matter had been the subject of the re-argument of the case, which Warren pointed out immediately, giving his dismissal of the matter an informed impression. While it remains fair to read this dismissal in light of the axis of the opinion as more evidence of the opinion's departure from traditional constitutional lawmaking deference to the intended meaning of the text, rhetorically Warren places the dismissal in a place that works against that argument. Its location in the introductory passages of the opinion implies that Warren was not convinced that it aided resolution of the core dilemma of the case which he defines straightaway.

the related precedent, which he offered in two lines.[268] The first line included the Court's then recent line of equal education cases.[269] The second line was comprised by *Plessy's* singular legitimization of separate but equal.[270]

Warren's recitation of these lines revealed that he believed they were in actual conflict. While he noted that the Court had not had occasion to confront *Plessy* directly in any of the cases,[271] he credited the recent cases more than necessary had he believed they were merely not on point. His words:

> In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In *Cumming v. County Board of Education*, and *Gong Lum v. Rice* the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter* the Court expressly reserved decision on the question of whether *Plessy v. Ferguson* should be held inapplicable to public education.
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> In the instant cases, that question is directly presented.[272]

The Chief Justice, in the early, introductory passages of the opinion, had conceded (or constructed) a conflict with *Plessy*. He had dismissed the possibility of Langdellian constructivist reasoning, passing up the possibility framed in *Sweatt* to limit *Plessy* to public transportation. He had acknowledged that the equality cases cited, though not in actual conflict with *Plessy* exerted control on the case at bar, and he had taken that conflict to mean that he was forced to decide the validity of *Plessy*. This construct is reasonable on its own terms, but it also draws substantial support from any open-eyed view of history, constitutional construction, and social fact.

Everyone understood that *Plessy* had not been limited to public transportation (importantly *Plessy* involved state regulation of public transportation), but had been extended to the segregated allocation of public benefits like public education, to segregation in employment, public contracts, and to the administration of criminal justice (which the Supreme Court had begun to address). Indeed, *Plessy* had extended beyond direct state action

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268. *Id.* at 490-91.
269. *Id.* at 490.
270. *Brown*, 347 U.S. at 491.
271. *Id.* at 492.
272. *Id.* at 491-92.

altogether, serving as the basis for legitimating public enforcement of private segregation thorough, for example, the law of trespass or contracts.

Moreover, *Plessy* was an authoritative reading of the Constitution, not merely an interpretation of state statute. As such, the contrary implications of the recent cases could not be ignored or dismissed through a distinction. Were the Court to merely declare that *Plessy* applied only to public transportation, or the regulation of public services, it would have been overruling the authority which segregating states had read into the decision. The effect would have been no less dramatic than the course taken and certainly no less troublesome since such a distinction, while in strict accord with narrow versions of stare decisis would be plainly ridiculous. If the recent education cases implied that the *Plessy* regime was not in fact equality producing, the Court was obliged to choose between validating *Plessy* or replacing it with an equality producing regime

Finally, it would take a substantially narrow view of the use of the legal order used before and after *Brown* to put civil rights activists in jail to believe that the validation or condemnation of segregation was not a matter about which many were personally invested. The Court had successfully side-stepped the issue in the previous six decisions but were in 1952 presented with it directly. The Court was in one of those rare positions that forced it to say what the world should look like. That it choose to say it should look differently (and that its decision may have been "right") cannot detract from the fact that it was compelled to decide. No decision would have, at this dramatic point, been as much a decision as any. Indeed, while strong arguments have been made that seek to reassess the role of the *Brown* decision in sparking the civil rights movement, one can only wonder how charged segregationists might have been, or how demoralized black Americans might have become if the "law" had reaffirmed segregation. These speculations aside, the Court's treatment of *Brown* did matter.

With these factors in mind, it seems that the most important part of the opinion actually is hidden, as realist noted was often the case, in the otherwise innocuous rendition of the background law. By describing the problem in a particular way, Warren belied the Court's view that it was compelled to decide what its recent cases implied—that, in fact, segregation was not equality. This, of course, seems to only bring the opinion to the axis and what most critics find troublesome: the apparent lack of a basis for decision. This is true; however, the criticisms of activism are not limited to concern with the reference to extra-legal sources but, rather, point to these extra-legal sources to argue that the court has improperly exercised judicial review.

These critiques miss two components of Warren's recitation. First, it is *Plessy* that created the mess. Second, the Court's old fashioned formalism *is* its reason, not the extra-legal materials that can be very easily viewed as imported to relieve a realist court of the anxiety of being formalist in a case

that was sure to prompt opposition and, as Ackerman notes,[273] lacked an overwhelming popular movement in support of its result.

As it is often said, "two wrongs do not make a right" and, therefore an activist reading of the Fourteenth Amendment in *Plessy* cannot itself redeem *Brown*. However, if taken as Warren presents it, *Plessy's* view of the relation between law and society could not be squared with the implications of its own doctrine. From *Cumming* to *Sweatt*, the Court had enforced separate but equal, seeking to resolve the contradictions that *Plessy's* attempt at resolving inequality with equality had produced. As any student of Jim Crow immediately understands, *Plessy* fudged the relationship between law and society (in its declaration that inferiority was created by black victims of segregation) because it pretended that white supremacy did not underlie segregation and because it further perpetuated the myth that government regulation and largess would and could be administered equally and that, if that were done, private discrimination might be beyond the scope of government regulation. Separate but equal simply could not stand on its own terms. Herculean attempts to maintain its myth of equality not only blurred the line between state and private segregation, but it enlisted the state in the wholesale and unmitigated mission of advancing and preserving white supremacy. Thus, while it may be improper to note in polite company, any reading of *Brown* that pretends that the Court's overruling *Plessy* was an act of activism has simply succumb to the very legitimization of white supremacy that consumed the nation and, therefore, otherwise reasoned arguments like federalism and judicial restraint. Significant social and political effects aside, as a doctrinal matter, *Brown* was inevitable.

The second component of Warren's recitation leaps from these contradictions of *Plessy*. As a matter of old fashioned Langdellian constructivism, the questions raised by the plaintiffs in *Brown* required the invalidation of *Plessy*, whether the Court invoked Myrdal or Clark's understandings of modern society or not. Thus, before Warren's opinion reaches its axis, the case had been resolved.

The imbalance of this approach, and Warren's candid recognition in the axis of the problems attendant to saying that one approach to a legal problem has not worked (although enduring for sixty years), required ballast. It requires no leap of faith to understand that a Court staffed by survivors of the realist revolution, erstwhile authors of *Erie*, might be uncomfortable saying that "precedent made me do it" when they overrule precedent, or that "the logical deductions from the legal rule to its application in this concrete case create an irreconcilable conflict in the terms of the rule that demand a new rule be crafted." While legal process scholars may have been dissatisfied with

273. ACKERMAN, *supra* note 66, at 135.

the realist answer offered, one wonders whether they would have been more comfortable with the anti-realist formalism really at work.

*Brown* may, therefore, be explained in three Parts:

1. *The Formalist Opinion.* The Warren opinion was consistent with previous race cases at that time in that it was extremely conservative. It required the plaintiffs to satisfy all the traditional requirements of jurisdiction, justicablity, and constitutional claim. It sought to reconcile the challenged practice with the controlling precedent, which had at that point licensed state segregation, and, when the internal contradictions of the controlling doctrine proved incapable of being resolved without discarding or reformulating the precedent, conceded that the precedent would have to be changed. In the jurisprudential vacuum this move created, it chose the implications of its recent decisions (those that had exposed the flaws in the doctrinal line) to the original precedent, as the basis for the new precedent. Then, in crafting that new precedent, the Court sought to limit it to the narrow case before it—"We conclude that in the field of public education the doctrine of 'separate but equal' has no place."[274]

2. *The Realist Opinion.* Lacking the widespread support that would ensure the Court's reputation, and fearing attacks on the formalist opinion as transparent or "legalistic," Warren offered a realist opinion to cover the formalist opinion. The formalist opinion was relegated to introductory material and the realist opinion offered as a resolution to the irreconcilable questions critics of the formalist opinion would surely say was all that the formalist construct could produce. Warren himself, or the Court for that matter, may, as realists, have seen *Plessy* as more compelling than this Article treats it and, therefore, seen the formalist opinion as producing an irreconcilable question.[275] The realist opinion may have been less their answer to potential critics than one they truly believed. It does not matter, though, except that such a view, like most criticisms of the *Brown* opinion seem to assume *Plessy* was intelligible and workable.) In realist fashion, the realist opinion framed a question (can separate education be equal education);

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274. *Brown*, 347 U.S. at 495.

275. The nature of Warren's opinion, perhaps appropriately, seems to be rooted in Justice Jackson's ultimate resolution of his misgivings about overruling *Plessy*. In the conference after reargument, Jackson took the implications of his view that the case presented a clash between law and politics, concluding any decision they made would be a "political" one. TUSHNET, *supra* note 180, at 211. On this basis he drafted a memorandum focusing on "realist" factors—the moral wrongness of segregation, the inevitability of its demise, the limited ability of the court to change people's feelings. *Id.* at 211-12. In the end, Jackson, the justice most concerned with discovering a "legal" basis for resolving the case, abandons it in his memorandum and suggests that the ground for abandoning segregation is its false premise that Negroes are inferior, *id.* at 213, and the centrality of education as an institution of modern society. *Id.* Though this memorandum was not circulated, it was shown to Warren and Frankfurter. *Id.* at 213-24.

identified the core matter (the educational performance and psychological well being of children); surveyed the relevant data on that matter (Myrdal, Frazier, Brameld, Deutscher and Chein, Witmer and Kotinsky, and Clark); and fashioned a rule that conformed with prevailing scholarly authority. While this approach was clearly an anathema to populism and hard to reconcile with democracy, these matters were excluded from its terms; the realist opinion did not in terms pretend to answer weighty questions of Constitutional structure; this was done by the axis. Indeed, after the axis, the Constitution is not mentioned; in the first two of the three pages after the axis, Warren speaks of "equal educational opportunities,"[276] "segregation with the sanction of law" [retarding] "mental development."[277] Even in his discussion of *Sweatt* and *McLaurin*, mentioned in the third page, he invokes the law only to summarize that, because separate cannot be equal, segregation violates the Fourteenth Amendment.[278] If understood as additional support for the formalist opinion, the troubling judicial review implications of the realist opinion disappear and the principle of *Brown* shines through the apologia, which so woefully failed to insulate the opinion from criticism and proved completely unhelpful in ensuring the legitimacy of the Court on this difficult matter.

3. *The Remedial Hedge.* The last paragraph of the opinion deferred remedies until *Brown II*.[279] Though independently controversial, this move is integral to the three-part opinion of *Brown*. By excluding remedial matters, the Court's deference to the political branches and its own consciousness of its limited power is made most clear. This point has been discussed extensively, but it is helpful to connect it to the prior components of the opinion.

### 2. The Realist Hedge as a Manifestation of the Activist Insecurity

The formalist *Brown* opinion, revealed by a comprehensive reading of the whole, is the *Brown* opinion. The formalist opinion's justification is not found, as Bickel or Bork have advanced,[280] in the happenstance of its predictive capacity. Such a view, far from proving an alternative to unreasoned political decision making, validates only those decisions that happen to endure, even if, as is partially the case with *Brown*, only because it upset so many who agreed with it that it was a regularly topic of scholarly debate. Rather, *Brown* is correct on both doctrinal and moral legal grounds.

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276. *Brown*, 347 U.S. at 493.
277. *Id.* at 494 (quoting Gebhart v. Belton, 87 A.2d 862, 865 (Del. 1952)).
278. *Id.* at 493.
279. *Id.* at 496.
280. *See* BICKEL, *supra* note 5; Bork, *supra* note 39.

Doctrinally the decision eradicated an unworkable interpretation of the Constitution that, even if it were somehow historically accurate, was internally inconsistent in addition to being premised on an ideologically loaded, inaccurate picture of the world, the law and the relation there between. *Brown* also happens to produce the right moral legal outcome. The decision filled the void left by its eradication of separate but equal with a substantive argument that, even if it were proven inaccurate as a matter of educational psychology, endures because it highlighted the value of citizens' right to be free of oppression. Disagreements over the extent of that pronouncement, its application to individuals versus groups, and the extent of the duties it created for governments have been legion. Nevertheless, even the loose character of the realist opinion, when subordinated to the formalist opinion, prove confined and instructive.

Even if *Brown* had not proved prescient, if its substantive holdings had not proven widely influential, the decision would still have been justified and important. The manner in which the Warren Court filled the void created by the invalidation of separate but equal may have turned out to have been wrong (it may someday, yet). However, the key aspect of the *Brown* opinion, manifest in the formalist opinion, is that the *Plessy* regime needed to be replaced. Because that regime had to that point given meaning to the Fourteenth Amendment, its eradication begged replacement. The decision stands on that basis alone. Any decision which proves only half successful at replacing an unworkable order succeeds nonetheless since the key element is its accurate assessment of the defects in the previous regime.

This evaluation of *Brown* is significant because it frames a basis for evaluating the criticisms of the decision on activist grounds and it highlights the approach taken by the Court in adjudicating civil rights matters which, nearly always, raise issues that can be conceived as "political." Most importantly, activist criticisms, even of the most reasoned quasi-result oriented type, are revealed to have been beside the point. The academy has benefitted immeasurably from questioning *Brown's* realist opinion. For twenty years after the decision, various unified theories of constitutional law have benefitted from searching for the basis for judicial review, most especially concerning controversial questions (such as segregation when *Brown* was decided). Though these questions arise from *Brown*, they are not necessarily the essence of the decision.

The most constructive lesson of this re-read is that formalism, outdated Langdellian constructivism, was fully up to the task of supporting civil rights, albeit in a limited way. Rigorous legal analysis is as capable of exposing flaws in doctrine as it is at obscuring the policy decisions underlying judicial decision making and interpretation. Although this argument is rightly open to criticism for being bereft of normative content—and it does not in terms distinguish between the moral and immoral in its discovery of internally

contradictory rules—the slow, piecemeal approach to adjudication such as which culminated in *Brown* holds greater promise as a means of jurisprudential development than today's neo-realists give it credit. Though this author maintains that the errors of *Plessy* should have never been committed to doctrine and should have been perceived and eradicated earlier, there remains room to celebrate the benefits of a formalism that both orders change and is capable of making it.

At some point, this argument deteriorates into a trite civics lesson quality celebration; but a second important lesson of this reread reveals this formalism to be at least a lesser of two evils. What should be troubling for any informed student of civil rights law is the Court's reluctance to have the formalist opinion stand on its own. As a realist Court, the *Brown* Court was comprised of members, like Justice Frankfurter, who had roundly criticized the formalism expressed in *Lochner*. It is therefore not unlikely that the Justices thought their opinion would be dismissed as pure politics in the name of formalism. What they offered in the realist opinion was pure politics without formalism, drawing the very charges of activism they might have sought to avoid.

The concern here has two components. First, the resort to the realist opinion raises questions over why the Court felt race cases mandated a "soft" treatment. Surely this Court was not prepared, at least not then, to suspend threshold requirements such as standing to allow it to reach the underlying matter. Why should it become soft when issuing its reasons. The only answer seems to be that it had tacitly legitimated segregationist arguments that whites had a "right" to be free of black Americans, even such that the state should support that right in its allocation of benefits. This is so much as saying that the court had internalized the white supremacist ideology underlying Jim Crow. In doing so, *Plessy* was less "political," less contradictory, and the case of segregationist more compelling. The "soft" realist opinion, was, to the Court, a necessary element of its argument's persuasiveness.

Critics of the realist *Brown* opinion also legitimized the white supremacists' demands. Indeed, their legitimization is often enough taken so far as to frame the issue as irreconcilable without resort to the "political." In addition to obscuring the "political" nature of *Plessy*, this approach deprives the court of any basis for deciding controversial decisions. Illegitimate judicial review becomes any judicial review that produces "wrong" outcomes; when it becomes impossible to choose between sides in a dispute (for these critics, *Brown*, for some *Roe v. Wade*[281]), no review is the implied requirement. Decades of failed attempts to produce neutral principles for

281. 410 U.S. 113 (1973).

review prove the futility of these exercises. *Brown* reveals the basic failing of the attempt to be rooted in a forced neutrality on contested events.

The second related basis on which the courts escape to the soft realist opinion should be troubling is that it evidences a troubling lack of faith in the rule of law. Formalism, it is true, should not be uncritically or exclusively followed. However, the abandonment of the formalist opinion in *Brown* and its apparent lack of influence on subsequent commentators foreshadows an opposition of civil and human rights with "law." Few today, informed by pragmatic jurisprudential theories—like legal realism, law and economics, critical legal studies—would suggest that judges should ignore the social circumstance of the cases before them or the effects of the judgments they render. However, many seem to hold on to the view that civil and human rights protections can be won only by sacrificing "hard law," formalism. The structure of the *Brown* opinion manifests and defines this reaction to "doing good." Although there were strong doctrinal reasons for deciding *Brown*, the concern with illegitimacy (expressed as activism), led the Court to offer the softer realist argument as the prominent argument and to hide the truly determinative aspects of the opinion. This ***Activist Insecurity***, an exaggerated concern with judicial power, undercuts the force of *Brown*.[282]

Celebration of *Brown's* formalist reconciliation of the competing demands of judicial restraint and Jim Crow's challenge to the government's political legitimacy should be cautious. The formal approach, especially in the absence of a broadly developed corpus of constitutional rights, was of limited value at the time *Brown* was decided. It should be remembered that, in *Brown*, the rights of the equal protection clause were already "in play," so to speak. In addition to the privations of Jim Crow, the *Brown* plaintiffs came to the Constitution with an authoritative reading (albeit unfavorable) of relatively clear constitutional language in hand. Moreover, it had taken years to locate and to expose the vulnerable elements of the doctrine, years during which widespread lynching terrorized the population. Moreover, the formalist approach, used to interpret the Constitution, raised the stakes of the litigation to such an extent that ancillary questions of constitutional law were vested with heightened importance. The Court's equal protection jurisprudence turned as much on questions of "state action" as it did on the substantive scope of the equal protection clause. Accordingly, as Professor Mark Tushnet reminds us, the Court did very little in aid of civil rights workers during the

282. A subsequent work by this author promises to demonstrate how the Activist Insecurity worked to devastate subsequent statutory constructions invoked by the court to protect rights beyond the limits of the *Brown* opinion.

decade following *Brown* and especially until 1962 when two more conservative justices were replaced.[283]

But the formalist reconciliation in *Brown* is instructive. More than just showing that on matters of substantive Constitutional expansion, the point on which the Warren Court is most accurately described as activist, the Court's treatment of civil rights law was far from unbounded or activist, *Brown* is a precursor to the approach taken in the Court's treatment of Reconstruction Era civil rights statutes. Since they were congressionally enacted statutes, the Court's treatment of Reconstruction Era legislation was less troubled by post-realist restrictions of judicial authority. The Court maintained a conservative approach to the statutes: endeavoring to give the terms their natural and intended meaning (in deference to federal political branches) while desperately seeking to maintain some measure of state autonomy. Although the formalist approach is more confident and lasts into the Burger Court, *Brown's* formalism and, especially, the *Activist Insecurity* that led Warren to hide it, in the 1970's and 1980's structured the treatment of these statutes by the Court.

283. THE WARREN COURT, *supra* note 11, at 4-5.