

A Century of Social Reform: The Judicial Role

Dennis J. Hutchinson

*(Were you looking to be held together by lawyers?
Or by an agreement on paper? or by arms?
Nay, nor the world, nor any living thing will so cohere.)*

– Leaves of Grass

THE HISTORY of “Law, Lawyers and Justice in the Twentieth Century” is a story of rights and their nationalization. It is also the story of the rise of the federal judiciary from tax collector and federal jailer to superintendent of a nation’s aspirations for social justice. And finally, it is the story of the organizational plaintiff and the lawsuit created for dual purposes – to remedy grievances, and to establish political capital for a cause. The story begins not on January 1, 1900 – or 1901, if you prefer – but in the aftermath of the Civil War with the debate over the content and meaning of section one of the Fourteenth Amendment. That provision

guaranteed that no one within the jurisdiction of a state would be “deprived of life, liberty or property without due process of law” or denied “equal protection of the laws.” The language is as opaque as it is ambitious, and its meaning is tangled in the political urgency of the day.

The language is now so familiar to us, and we associate with it so much litigation over the years, that it requires an energetic act of imagination to understand how the issues looked to the 39th Congress in 1866 when the Amendment was debated. The impetus for the Amendment was Andrew Johnson and his truculent posture toward Reconstruction of

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the South, which had been socially and economically decimated by the Civil War. Johnson wanted to rebuild, the Radical Republicans in Congress wanted to sow salt in the wounds, but no one wanted to make political sacrifices in the process. Thaddeus Stevens, the most Radical of the Republicans, proposed language for the Fourteenth Amendment which was clear and insistent, and thus politically unacceptable: "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race."¹ His party blanched, because they feared that the language and other provisions of the proposed amendment would force them to campaign in the fall for black suffrage – a result viewed as political suicide. So the compromise language – "equal protection" – was adopted.² Both skittish Republicans and conservative Democrats were now appeased.

Nobody was quite sure what the compromise language meant, but there was widespread agreement over what it did *not* mean. It did not mean that blacks, or other racial groups, would enjoy social equality, which was construed at a minimum to be racially mixed public accommodations or, at a maximum, to be inter-racial marriage. (Indeed, by the end of the century, "social equality" was a snickering euphemism in the South for miscegenation.) Nor did the language mean "special protection" for blacks or any other racial groups. The contemporary understanding, to the extent any common thread can be safely tracked, is that the Fourteenth Amendment was designed to secure equal treatment in "political and civil" spheres, at least on the surface. If blacks failed to prove they could read, of course they could be denied the vote – the

legal line rested on capacity, not race, or so the conventional wisdom ran throughout the first generation after the Amendment's ratification. Motive was irrelevant to liability, with John Marshall Harlan the singular, and somewhat eccentric, exception.

The striking feature of *Plessy v. Ferguson*³ in 1896, then, is not that it upheld state-imposed racial segregation in rail transportation, but that it was not unanimous. The conclusion was foregone, especially after the invalidation more than a decade before of the Civil Rights Act of 1875,⁴ which criminalized racial discrimination by private parties providing public accommodations. *Plessy* was so unexceptionable that the *New York Times* played the story on page 13 under "Railroad News." Homer Plessy's lawyer, Albion W. Tourgee, was an old carpetbagger and best-selling novelist whose skills were honed, and then I think frozen, in the 1870s. When a group of New Orleans blacks decided to take a stand against the new Louisiana rail segregation law, Tourgee convinced them that he could win in the Supreme Court by drafting a plaintiff who was nearly white (*Plessy* had one great-grandparent who was black) and then arguing that the law deprived him of his property right of being able to pass for white, a violation of the Due Process Clause. The Supreme Court dismissed the argument with a rhetorical flick of the wrist, but Tourgee contributed one ingredient to constitutional discourse. In his brief before the Court, he quoted an image without citation from one of his novels, and the phrase so arrested John Marshall Harlan that he used it, without attribution, in his celebrated dissent. The phrase, vivid but wholly lacking in historical foundation, was, of course, "our constitution

1 Quoted in Andrew Kull, *The Color-Blind Constitution* (Cambridge: Harvard, 1992), at 67.

2 *Id.* at 85-86. See generally Earl Maltz, *The Fourteenth Amendment as Political Compromise – Section One in the Joint Committee on Reconstruction*, 45 *Ohio St. L.J.* 933 (1984).

3 163 U.S. 537 (1896).

4 *The Civil Rights Cases*, 109 U.S. 3 (1883).

is colorblind.”⁵

At bottom, *Plessy v. Ferguson* has been more of an academic villain than a precipitating cause of racial discrimination. The plight of racial minorities, especially blacks, in the early twentieth century was much more a function of the unstable foundation of the Fourteenth, and Fifteenth, Amendments, and of the dramatic political shift in the middle of the last decade of the nineteenth century. One of the many consequences of the Panic of 1893 – the worst depression in the country before 1929 – was the rise of the Populist Party. Southern Populists recruited blacks, who had enjoyed electoral power during Reconstruction, and even supported them for jury duty and other civic activity. Recognizing the threat, Southern Democrats abandoned all pretense of moderation and began a decade-long campaign of disenfranchising blacks. For example, in 1890 there were 130,000 registered black voters in Louisiana; by 1904 – thanks to literacy tests, poll taxes and intimidation – the number was 1,300. The purge of black voters was accompanied by lynch law, which, as C. Vann Woodward wrote, “took a savage toll on Negro life.”⁶ Lynching reached its peak during the 1890s, with a national average of more than three unlawful executions a week; most occurred in the South and all but a few of the victims were black.⁷

The only substantial protection offered by the Fourteenth Amendment at the turn of the

century, said many critics, was to railroads. In 1886, apparently on the faith of Roscoe Conkling’s assertion at oral argument, the Supreme Court announced that corporations were “persons” for purposes of the Due Process Clause;⁸ railroads and other companies were therefore freed from the yoke of oppressive rate structures and legislatively suppressed returns on investment. The Court also narrowly construed the reach of Congress’s constitutional power to regulate interstate commerce, thus insulating “manufacture” (in the form of the Sugar Trust) from the reach of the Sherman Antitrust Act.⁹

On the other hand, the Court discovered teeth in the Sherman Act to uphold injunctions against striking railroad workers and to penalize unions that advocated consumer boycotts against targeted employers.¹⁰ For the most part, state courts dictated the legal scope of labor behavior. The Supreme Court of the United States entered the fray in 1898 by upholding Utah’s daily maximum-hour limit for coal miners.¹¹ Less than a decade later, the Court went the other way – at least on the surface – and invalidated a maximum-hour law for bakery workers. The case, *Lochner v. New York*,¹² gave name to a now-discredited intellectual era, but only for lawyers and scholars years later. In fact, *Lochner* was a pro-labor decision if not a pro-union decision. The statute, which limited the workday to ten hours and work weeks to 60 hours, was supported by

5 163 U.S. at 559. Tourgee first used the phrase in *Bricks Without Straw* (1880), according to Bonnie Mathews (Mrs. John Minor) Wisdom. Owen Fiss, *Troubled Beginnings of the Modern State* (VIII Holmes Devise History of the Supreme Court), at 354 n. 10 (1993).

6 C. Vann Woodward, *Origins of the New South* (Baton Rouge: LSU, 1951, 1971), at 351.

7 For a recent review of the statistics, see Mark Curriden & Leroy Phillips, Jr., *Contempt of Court: The Turn-of-the-Century Lynching that Haunted a Hundred Years of Federalism* (New York: Faber & Faber, 1999), at Appendix One.

8 *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, 396 (1886).

9 *United States v. E. C. Knight, Co.*, 156 U.S. 1 (1895).

10 See *In Re Debs*, 158 U.S. 564 (1895); *Loewe v. Lawlor* (*The Danbury Hatters' Case*), 208 U.S. 274 (1908); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911).

11 *Holden v. Hardy*, 169 U.S. 366 (1898).

12 198 U.S. 45 (1905).

the growing Bakers' Union and became law a year after the Supreme Court's Utah decision; non-union bakers, fearing for their livelihoods, opposed the new law.¹³ Thus, *Lochner v. New York's* invalidation of the statute bolstered small, so-called "boss bakeries" with fewer than five employees and narrow profit margins – the heart of the industry – and preserved jobs. The union shops, fewer in number, were losers, but only temporarily (seven years after *Lochner*, bakers in New York collectively bargained a 10-hour day). The case is another reminder that history is a tool in the hands of the present and not an objective snapshot of the past.

The turn of the century brought a rebounding economy and growing agitation for social reform. Muckraking magazines such as *McClure's* and later *The New Republic* exposed the dark side of prosperity and urged legislation to control the economic juggernaut. But the Supreme Court's treatment of the Sherman Act taught that judicial philosophy was as important as legislative energy. Shortly after he became President, Theodore Roosevelt explained the intersection between politics and adjudication:¹⁴

In the ordinary and low sense which we attach to the words "partisan" and "politicians," a judge of the Supreme Court should be neither. But in the higher sense he is not in my judgment fitted for the position unless he is a party man, a constructive statesman keeping in mind his relations with his fellow statesmen in other branches of the Government. The

Supreme Court of the sixties was good exactly insofar as its members fitly represented the spirit of Lincoln. This is true at the present day.

Some time later, in a private letter, Roosevelt reduced his grand formula to a candid checklist. Writing privately about Horace Lurton, whom he wished to appoint to the Court, he said: "[T]he nominal politics of the man has nothing to do with his actions on the bench. His real politics are all important." Simply put, Roosevelt wrote, Lurton was "right on the Negro question, right on the power of the Federal Government, right on the insular business, right about corporations, right about labor." The fact that Lurton was nominally a Democrat was irrelevant to the President.

Theodore Roosevelt's checklist serves as an instructive syllabus of the judicial agenda for the first half of the twentieth century. The most significant curricular developments prior to World War I did not occur inside courtrooms, however. It is true that the Supreme Court invalidated peonage laws under the Thirteenth Amendment and grandfather clauses under the Fifteenth,¹⁵ but the Court blinked when presented with systemic electoral discrimination. Reviewing the tainted operation of elections in Alabama, the Court wanly concluded that the allegations presented only a "political question."¹⁶ By 1910, with the Court now presided over by a former Confederate officer and prisoner of war, reformers turned to Congress. Meeting on the one-hundredth anniversary of Abraham Lin-

13 Most non-union bakers worked more than 100 hours a week and lived in tenement buildings on top of basement bakeries. These "boss bakeries" depended on long hours to turn a profit. The maximum-hour law helped larger union shops, whose workers lived off-site, to compete more effectively against the master bakers – a wedding of reform (the basement ovens were widely portrayed as "unhealthful") and self-interest. Joseph *Lochner's* conviction for violating the statute was upheld by both lower state courts, although by only one vote at each level. 177 N.Y. 145 (1903); 73 App. Div. 120 (1902). On the case, see Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence: KU, 1998).

14 Henry F. Pringle, *Theodore Roosevelt* (New York: Harcourt Brace, 1931, 1951), at 184.

15 *Bailey v. Alabama*, 219 U.S. 219 (1911); *Guinn v. United States*, 238 U.S. 347 (1915).

16 *Giles v. Harris*, 189 U.S. 475 (1903).

coln's birth, a group of activists agreed to form the National Association for the Advancement of Colored People. One of the primary objectives of the new NAACP was to secure federal legislation against lynching. At approximately the same time, the American Federation of Labor decided to mount a lobbying campaign in Congress to prohibit the labor injunction statutorily. In 1914, the Clayton Act barred injunctions against peaceful picketing and Samuel Gompers, head of the AFL, hailed labor's "Magna Carta." The law was ambiguously drafted – and probably could not have passed otherwise – so lower federal court judges continued as before; the Supreme Court sanctioned the pattern in 1921,¹⁷ and the labor injunction remained a commonplace for another decade. Laws prohibiting child labor were struck down during this period by the Court;¹⁸ the reason, as it had been a generation before in the Sugar Trust case, was that Congress was illicitly trying to regulate manufacture, not commerce.

The NAACP failed to secure federal protection against lynching, but even uglier developments bookended the World War. In 1915, D.W. Griffith produced *Birth of a Nation*, an artistically breathtaking achievement in motion pictures but also a vicious caricature depicting rapacious freed slaves and corrupt reconstruction legislatures; standing against these twin evils were the poor but noble Ku Klux Klansmen. President Woodrow Wilson endorsed, and thus legitimated, the film, and most members of the Supreme Court confirmed Wilson's judgment by attending a publicized private screening.¹⁹ The film was seen by millions of Americans who immedi-

ately acquired a vivid sense of history. The NAACP tried to prevent the film's screening in major eastern cities, but the failure only underscored the film's message. A revived Klan used the film as a recruiting device, and by 1925 an estimated five million white men were Klan members. For a brief political minute, the Klan controlled the legislatures of Texas, Oklahoma, Oregon and Indiana, and the governorship of Colorado.²⁰ Widely publicized excesses extinguished the Klan politically even faster than it had risen; by 1930, the Klan was dead, at least as a formal political force.

Woodrow Wilson's worse contribution to race relations was more lasting. Early in his first administration, he capitulated to his Postmaster General, who wanted to segregate all Post Offices by race. Soon, Jim Crow swept throughout the executive branch. Following the War, the worst race riots since the Civil War occurred, and hundreds of blacks died in Arkansas, Tulsa, St. Louis, Chicago and elsewhere.

One of the riots during this period produced a decision in the Supreme Court which signaled the faint beginning of an end to the Court's refusal to engage legal issues related to Jim Crow. *Moore v. Dempsey*²¹ arose from riots in Phillips County, Arkansas, in the fall of 1919. As many as 200 blacks and five whites were killed. Six blacks were sentenced to die for the murder of whites following the riot. The NAACP supported the defendants' application for habeas corpus, which the Court granted in an opinion by Justice Oliver Wendell Holmes, Jr. Holmes – who had found Alabama's racist election regime a "political

17 Duplex Printing Co. v. Deering, 254 U.S. 443 (1921).

18 Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

19 See Richard Schickel, D. W. Griffith: An American Life (New York: Simon & Schuster, 1984), at 270.

20 See generally Shawn Lay (ed.), The Invisible Empire in the West: Toward a New Historical Appraisal of the Ku Klux Klan in the 1920s (Urbana: U of I, 1992).

21 261 U.S. 86 (1923).

question” earlier. Holmes now concluded that the trial was held in a mob atmosphere and thus violated Due Process of Law. Justices McReynolds and Sutherland dissented, because lower courts had reviewed the allegations and found no violation and because they feared widespread federal interference with state prerogatives. The theme would be played with variations for the rest of the century.

The significance of *Moore v. Dempsey* can be overstated, but it was much more significant than is usually assumed by retrospective histories of the interwar period. Putting to one side the hollow victory over municipally required residential segregation in 1917,²² *Moore* was the first major victory for the NAACP and confirmed its national credibility in the courts. The opinion by Justice Holmes enjoyed more weight because it repudiated his position in a similar case less than a decade earlier. And, more than anything else, the decision cast a harsh spotlight on what passed for due process of law in southern courtrooms when blacks were in the dock.

The shift from viewing Jim Crow as a “political question” – either technically or functionally – to viewing Jim Crow as presenting constitutionally justiciable questions begins with *Moore v. Dempsey* in 1923.²³ It is not

too much to say that the seeds of the constitutional revolution we identify with the 1950s and 1960s were sown in the 1930s. There were two plantings, so to speak. The better-known planting, of course, was the Constitutional Revolution of 1937, in which the Court turned about face, acknowledged the breadth of Congress’s power over interstate commerce, acknowledged that the so-called *Lochner* principle did not preclude states from setting maximum hours, and thus defused Roosevelt’s plan to “pack the court.” A year later, the Court announced its New Testament: in exchange for not interfering with state regulation of the economy, the Court would be warranted constitutionally in intervening where individual liberty was compromised; significantly, the theory was announced in a footnote of an otherwise dull decision.²⁴

The second planting was a series of decisions further condemning Jim Crow criminal justice. The two sets of cases involving the “Scottsboro Boys” – framed for raping two women – demonstrated that *Moore v. Dempsey* was not a fluke.²⁵ *Brown v. Mississippi* in 1936 invalidated three convictions of black tenant farmers who had been convicted of murdering a white planter.²⁶ The only evidence against the defendants were confessions, which local

22 *Buchanan v. Warley*, 245 U.S. 60 (1917). Except at the margins, *Buchanan* made little difference to the growing pattern of residential segregation in urban areas because segregative ordinances were replaced by private covenants running with the land. Cf. David E. Bernstein, “Philip Sober Controlling Philip Drunk: *Buchanan v. Warley* in Historical Perspective,” 51 *Vanderbilt L. Rev.* 797 (1998), who argues that the covenants were not necessarily effective but produces no data other than a few court cases and ignores the overwhelming racial segregation in urban areas that developed before World War II.

23 In 1914 Justice Charles Evans Hughes suggested in dicta that *Plessy v. Ferguson* required attention to equality of facilities as well as to separation, *McCabe v. Archison, Topeka & Santa Fe Ry.*, 235 U.S. 131, 161-162, but an elliptic four-person concurrence in the judgment seemed to suggest he was ahead of his time. *Id.* at 164 (White, CJ, Holmes, Lamar, McReynolds, JJ).

24 *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938).

25 *Powell v. Alabama*, 287 U.S. 45 (1932); *Norris v. Alabama*, 294 U.S. 587 (1945). See generally Dan T. Carter, *Scottsboro: A Tragedy of the American South* (Baton Rouge: LSU, 1969, rev. ed., 1979); James Goodman, *Stories of Scottsboro* (New York: Pantheon, 1994).

26 297 U.S. 278 (1936). See Neil R. McMillen, *Dark Journey: Black Mississippians in the Age of Jim Crow* (Urbana: U of I, 1989), ch. 6.

officials blithely acknowledged were produced by brutal and repeated whippings. *Brown* was a unanimous opinion by Chief Justice Charles Evans Hughes, who in many respects paved the way for the post-World War II egalitarian revolution. The Hughes opinion, unlike the more famous flourishes by Justice Holmes in *Lochner* and in the child labor cases, is coldly matter-of-fact and relies heavily on the two-man dissenting opinion filed in the Mississippi Supreme Court. Indeed, the courage of lower state court judges in both *Scottsboro* and in *Brown* provided authentication to legal claims of the NAACP that were often derided locally or troubled procedurally.

Outside the courtrooms and courthouses, the question of southern justice suffered more unwanted publicity. In the fall of 1934, Claude Neal was lynched in northern Florida for the brutal rape of a white girl. He “confessed” and was abducted from his jail cell by an organized mob, which notified the Associated Press of plans for Neal to be tortured, lynched and burned while still alive.²⁷ The public audacity of the mob caused a national outcry and the NAACP re-doubled efforts for anti-lynching legislation, but President Franklin D. Roosevelt refused to support the bill. When the bill finally came to a vote in the Senate it was filibustered by southern Senators led by Hugo Black and James F. Byrnes. The issue continued to smolder through the end of the decade, and the nationwide revulsion at Neal’s grisly execution made it the last lynching-by-public-invitation in the South.

What neither the NAACP nor defenders of the old order could fully appreciate was that a steady river of less conspicuous but no less ugly accounts of southern justice were rolling

through the Supreme Court of the United States. One petition for certiorari after another recounted allegations of coerced confessions, casual brutality in custody, manufactured evidence and juror misconduct. Yet case after case was precluded from review by procedural default, inept counsel or no counsel at all. *Scottsboro* and *Brown v. Mississippi* were the Supreme Court’s vehicles for condemning a system whose corruption was evidenced daily. There is little direct evidence of the impact that this grisly docket had. The stench was so strong, however, that one of the *Scottsboro* opinions was written in stern terms by Justice Sutherland, who had dissented in *Moore v. Dempsey*. And a decade later, when the Court invalidated private racial restrictive covenants, Chief Justice Fred Vinson pointedly relied on *Moore* and, in notes, to *Brown* and the *Scottsboro* cases, as “exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment.”²⁸

The formulation of Vinson’s language is telling. The Court did not begin to promote racial equality before the law in the 1930s or 1940s by relying on the Equal Protection Clause, with its murky theoretical pedigree. Instead, the Due Process Clause was the weapon. The Court in the 1920s had shown the way with decisions upholding the constitutionality of non-public schools and the right to teach and learn foreign languages.²⁹ The same era condemned the Equal Protection Clause, in Justice Holmes’ chilly phrase, as the “usual last resort of constitutional arguments.”³⁰ When the interwar Court did look to the Equal Protection Clause, sparks flew. In 1938, Chief Justice Hughes spoke for a 6-man majority which said the Clause was violated by

27 See generally James R. McGovern, *Anatomy of a Lynching: The Killing of Claude Neal* (Baton Rouge: LSU, 1982).

28 *Shelley v. Kraemer*, 334 U.S. 1, 16, 17 & nn. 16 & 18 (1948).

29 *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923).

30 *Buck v. Bell*, 274 U.S. 200, 208 (1927).

Missouri's refusal to allow a qualified black resident of Missouri to attend an in-state law school (the state was willing to pay his tuition to go out of state). Justice McReynolds's dissent sounded more like D.W. Griffith than a federal judge:³¹

Under the opinion just announced, I presume [Missouri] may abandon her law school and thereby disadvantage her white citizens without improving petitioner's opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races.

The majority opinion did for Equal Protection what *Moore v. Dempsey* had done for Due Process – put Jim Crow on the table for constitutional negotiation.

The case, entitled *Missouri ex rel Gaines v. Canada*, was no accident, of course, but one of several crafted by the NAACP under a strategy adopted in 1929 to attack Jim Crow at what the organization viewed to be its heart – deprivation of equal educational opportunities, and the state-sanctioned inculcation, from kindergarten, of a racial caste system. *Gaines* was the first victory under the strategy in the Supreme Court, but the world turned upside down three years later when the United States entered World War II. Lloyd Gaines never attended law school, disappeared and was never heard of again.

The Supreme Court figuratively suited up for war. In fact, Justice Murphy wanted to don a uniform and head back to the Pacific (he had served as High Commissioner of the

Philippines in the mid-thirties), but cooler heads – including Murphy's – prevailed. Eight Nazi saboteurs discovered that war-time justice meant judicial review but no grand jury or trial by jury; Japanese residents on the West Coast discovered that the war power trumped the Due Process Clause, to the point of sanctioning removal from their homes and detention in concentration camps without evidence of personal culpability; and both producers and consumers learned that the Office of Price Administration had essentially autonomous powers for the duration.³² Even when the Court vindicated individual rights, as in *West Virginia Board of Education v. Barnette*³³ – the second flag-salute case – war drums were ringing in the background. The decision reversed an earlier ruling, *Minersville v. Gobitis* in 1940,³⁴ in which the Court had held 8-1 that the Free Exercise Clause did not insulate Jehovah's Witnesses from being punished in public schools for refusing to salute the flag. Shortly after the first decision, *The New Republic* pointed out that a Nazi court had rejected similar claims made by Witnesses in Germany; the *Gobitis* majority collapsed, several justices used a marginally related case to confess error, and *Barnette* provided atonement in 1943.³⁵

As a general matter, it is difficult to assess the significance that World War II had on the thinking of the justices about the issues that were rolling to a boil in the late 1930s. There is a lively debate over how much Justice Robert H. Jackson was affected by his year-long experience as Chief Prosecutor at

31 *Missouri ex rel Gaines v. Canada*, 305 U.S. 337, 353 (1938).

32 *Ex Parte Quirin*, 317 U.S. 1 (1942); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); cf. *Ex Parte Endo*, 323 U.S. 283 (1944); *Yakus v. United States*, 321 U.S. 414 (1944); *Steuart & Bros. v. Bowles*, 322 U.S. 398 (1944).

33 319 U.S. 624 (1943).

34 310 U.S. 586 (1940).

35 See David R. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* (Chicago: UofC, 1962); *Jones v. Opelika*, 316 U.S. 584, 623-624 (1942) (Statement of Black, Douglas, Murphy, JJ: "... we now believe it [*Minersville*] was also wrongly decided").

the Nuremberg war crimes trials in 1945-46.³⁶ Some think Jackson was shaken by the ruthless, corporate efficiency of the Nazi regime, so much so that he was hesitant to vindicate freedom of speech, especially by what he saw as mass movements such as the Communist Party USA. In fact, I think Jackson was hostile to Communism before he went overseas and found no reason to soften his views when he worked with Soviet personnel during the trials. Jackson's achievement at Nuremberg should be remembered for what it was, not for what it taught him or what he hoped for (which was an international rule of law). By insisting that the trials be conducted on the basis of documentary evidence, he created a mountain of indexed records detailing exactly what the Nazi regime did and thus precluding any credible denial of the holocaust; by insisting on due process – as opposed to the summary execution preferred by the British – he kept the Allies on the moral high ground and prevented the Nazi leaders from becoming martyrs.³⁷ Jackson's colleagues on the Supreme Court, especially Chief Justice Harlan Fiske Stone, disparaged the trials and Jackson's involvement both before and during the event. Nonetheless, Jackson's documentary strategy and his now-forgotten opening statement deserve more admiration than they now enjoy.

The war cast both a direct and indirect shadow over the Supreme Court's docket at mid-decade. Anti-Japanese sentiment remained high on the West Coast, and the

Court invalidated restrictions on land transfers and on fishing licenses.³⁸ Less directly, Jim Crow was back in Court, first in the form of restrictive covenants, to which I have already referred, and then in graduate schools of education and law.³⁹ Much had changed since Lloyd Gaines was in court. The institutionalized, and barbarous, racism of the Nazi regime begged to be a post-war lesson, however imprecisely; the valor of black servicemen during World War II was widely known and more honored than during the first war, even if not fully appreciated; and the color line was finally crossed in professional sports in 1947.

Even taken in aggregate, these factors are secondary in terms of shaping both the Court's direction and its velocity in the late 1940s. The pivotal year in the post-war period was 1948 and the key man was President Harry Truman. Consider the list of executive initiatives in that year: Truman ordered desegregation of the armed forces, he proposed re-establishment of the war-time Fair Employment Practices Committee and a civil rights commission, and his attorney general filed and signed a brief *amicus curiae* in the restrictive covenants case – the first time that an attorney general had ever put the imprimatur of the Justice Department on a private civil rights suit.⁴⁰ Those decisions, plus his steadfastness in the face of the Dixiecrat walkout at the 1948 Democratic Convention, gave Truman overwhelming black votes in Cleveland, Chicago and Los Angeles – and helped put him over the top in all three critical states.

36 The reconsideration began in earnest with Jeffrey D. Hockett, *Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial*, 1990 *Supreme Court Review* 257, later revised and adapted in *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson* (Lanham, MD: Rowman & Littlefield, 1996).

37 See Dennis J. Hutchinson, *Justice Jackson and the Nuremberg Trials*, *Journal of Supreme Court History* 105 (1996 No. 1).

38 *Oyama v. California*, 332 U.S. 633 (1948); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948).

39 *McLaurin v. Board of Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

40 See generally Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley: California, 1959).

More significantly, the United States Justice Department was now fully enrolled in the NAACP crusade, officially as *amicus curiae* in most cases, implicitly as underwriter of the litigation campaign to dismantle the constitutional foundations of Jim Crow. The point was not lost on the justices, who relied on the Department first to rationalize the case for overruling *Plessy v. Ferguson* (which the Department formally urged first in 1950)⁴¹ and second for enforcing whatever edict they produced. As it turned out, reliance was too clever by half. The Court invalidated segregation in professional schools by unanimous votes in 1950, and *Plessy's* fate was sealed. The only question that remained was how to frame relief for the 11 million children affected by the decision in 1954. Having been unanimous on the right, the Court knew it needed to be equally unambivalent on the question of relief, and on that point the price of unanimity was temporization.⁴² The Department continued to put in appearances, but soon it was clear that President Dwight Eisenhower thought the Court was on a fool's errand, and the executive branch provided no back-up. Blacks were routinely terrorized again in the South. Emmet Till, a 14-year old boy from Chicago, was lynched in 1955 for whistling at a white girl while visiting family in Mississippi; a week before Till's arrival, a black man who had voted in a Democratic primary election was shot to death at high noon in front of a Mississippi courthouse; neither case resulted in a conviction, and there was no arrest in the shooting. The Civil Rights Act of 1957 did no more than establish a division in the Depart-

ment, and three years later the division legal staff consisted of one lawyer. As a consequence, the Court and the NAACP were left to fend for themselves in fashioning decrees. The task of implementing a social revolution in the guise of a federal court order fell to what professor Jack Peltason rightly called *58 Lonely Men*⁴³ – the federal trial judges of the Jim Crow South. By 1964, less than two per cent of black children covered by *Brown* were attending public schools with white children. Not until Lyndon Johnson's Great Society machinery used the carrot and stick of federal funds to spur compliance in the old Jim Crow states did desegregation begin to quicken.

The Supreme Court was left exposed – politically exposed, in effect – for almost a decade by an executive branch unwilling or reluctant to enforce the promise of equality propounded in *Brown*. Even now, scholars debate whether *Brown* had any more than a symbolic effect.⁴⁴ Without entering too deeply into the question, there is no doubt that the moral ambition of *Brown* began to develop heart and muscle to go with its soul with the passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and so on. Politically accountable branches had now spoken, enforcement mechanisms were in place, and the Court's so-called countermajoritarian problem was muted.

The old South did not go quickly or quietly, however, and the resurgence of the Ku Klux Klan was not crushed until President Lyndon Johnson put the heat on the FBI to gut the Klan after Viola Liuzzo was murdered in

41 Brief of the United States, *Henderson v. United States*, 339 U.S. 816 (1950), at 40.

42 See generally Dennis J. Hutchinson, *Unanimity and Desegregation: Decision-Making in the Supreme Court, 1948-1958*, 68 *Georgetown L.J.* 1 (1979).

43 J.W. Peltason, *58 Lonely Men: Southern Federal Judges and School Desegregation* (New York: Harcourt, Brace & World, 1961).

44 See, e.g., Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 *U. Va. L. Rev.* 7 (1994), and Commentaries published there. See also Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 *Georgetown L.J.* 433 (1994).

1965. The Kennedy administration was caught flat-footed in 1961 by the Freedom Rides, got out-flanked in Mississippi a year later over the admission of James Meredith to Ole Miss, and did not hit its stride until 1963 in the staged showdown with Governor George Wallace over the admission of two black students to the University of Alabama. Still, before Johnson took aggressive action, four little girls were murdered by a bomb in Birmingham, Alabama, three civil rights workers were executed by Mississippi Klansmen who conspired with a local sheriff, and Medgar Evers was assassinated outside his own home. As it had in the late 1920s, the Klan dissolved quickly and almost as completely in the late 1960s. The achievement was a point of pride for the Johnson administration, but congressional hearings in 1975 revealed that the techniques used to undermine the Klan were almost as brutal as the Klan itself, and that the same covert operations were used against Martin Luther King and the Klan's protagonists, too. Under the leadership of Attorney General Edward Levi, the hearings spurred restrictive charters for FBI and CIA activities.

The hearings coincided with what the *New York Times* began to refer to anxiously as the Supreme Court's "turn to the right." The point was not inapt, but also not without irony. Remember that only three Presidential candidates since 1900 ever made the Court an explicit campaign issue – Theodore Roosevelt in 1912, Barry Goldwater in 1964 and Richard Nixon in 1968. (FDR didn't announce the

Court-packing plan until three months after his landslide victory over Alf Landon.⁴⁵) Although Nixon was able to appoint four justices to the Supreme Court during his first term, the Court continued the trajectory that began after World War II – school busing to enforce *Brown v. Board*, abortion as a constitutional right, the Due Process Clause controlling state welfare and prison systems, a constitutional moratorium on the death penalty, and expansive interpretation of the Civil Rights Act of 1964.⁴⁶ Then, almost suddenly, the Court slammed on the brakes: busing could not cross school district lines, abortion could be restricted and need not be subsidized by the state, due process could be satisfied without face-to-face hearings, the death penalty was constitutional as long as certain predicates were satisfied, and proving employment discrimination was more and more difficult.⁴⁷

Cynics trotted out Mr. Dooley's crack about "the Supreme Court following the 'fiction returns,'" as if the allusion undermined the legitimacy of the Court's new posture. But remember the statement by Theodore Roosevelt I quoted earlier? The Supreme Court, and the entire federal judiciary, are inescapably linked with politics in the largest sense. Americans expect appointees to the Supreme Court to "fitly represent" the "spirit" of their benefactor, to use Roosevelt's formula. The Constitution contemplated that judicial confirmation would be a political process, beginning with one elected official but requiring approval by a separate electoral body, and,

45 Roosevelt's criticisms of the Court were more muted than menacing, although he firmly defended the constitutionality of the New Deal. See William E. Leuchtenburg, *When the People Spoke, What Did They Say?*, 108 *Yale L.J.* 2077 (1999).

46 *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971); *Roe v. Wade*, 410 U.S. 113 (1973); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Wolf v. McDonnell*, 418 U.S. 539 (1974); *Furman v. Georgia*, 408 U.S. 238 (1972); *Griggs v. Duke Power*, 401 U.S. 424 (1971).

47 *Milliken v. Bradley*, 418 U.S. 717 (1974); *Harris v. McRae*, 448 U.S. 297 (1980); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).


since 1913, one that was popularly elected. When a very small group of individuals are chosen by a multi-stage political process to provide content to historically remote and often ambiguous language, we should not be surprised by frequent course corrections.

The point provides cold comfort to those who view the courts as forums for achieving stable social change. One of the most controversial books in my field during the last decade has been *The Hollow Hope* by Gerald Rosenberg, who is a political scientist at the University of Chicago. Gerry concludes that courts, by their nature, are incapable of producing social reform if their decisions lack underlying political support – an argument he traces through a number of areas including civil rights and the criminal law. His final paragraph says:⁴⁸

American courts are not all-powerful institutions. They were designed with severe limitations and placed in a political system of divided powers. To ask them to produce significant social reform is to forget their history and ignore their constraints. It is to cloud our vision with a naive and romantic belief in the triumph of rights over politics. And while romance and even naiveté have their charms, they are not best exhibited in courtrooms.

When I read that paragraph in draft form, I ached to supply Gerry with my recollection of an incident that I thought supported his

point. I could not at the time, because I promised my source that I would not quote him until after his death. The source was Thurgood Marshall and I can repeat the story to you now. In 1979, I wrote a sustained account of the Supreme Court's decision-making process in racial segregation cases from *Gaines* to *Cooper v. Aaron*.⁴⁹ As part of my research, I interviewed Marshall on background. What would become Gerry Rosenberg's argument later weighed heavily on Marshall, who felt that his own campaign against Jim Crow, which began in the mid-1930s and did not end personally until he became a federal judge in 1961, had produced empty or unstable victories. He said the biggest mistake he made was assuming that once Jim Crow was deconstitutionalized, the whole structure would collapse – "like pounding a stake in Dracula's heart," he said. But in the twelve months between *Brown I* and *Brown II*, he realized that he had yet to win anything. He drove the point home to me, and concluded our conversation, by comparing how he felt the day after *Brown I* in 1954 and after *Brown II* in 1955: "In 1954, I was delirious. What a victory! I thought I was the smartest lawyer in the entire world. In 1955, I was shattered. They gave us *nothing* and then told us to work for it. I thought I was the dumbest Negro in the United States."

Thurgood Marshall's hard-won wisdom is a caution to us all. 

48 Gerald N. Rosenberg, *The Hollow Hope* (Chicago: U of C, 1991), at 343.

49 358 U.S. 1 (1958).