Louis H. Pollak

Race, law & history: the Supreme Court from "Dred Scott" to "Grutter v. Bollinger"

I start from two points of departure: The first I draw from the contrasting contentions of counsel in a redistricting case argued in the Supreme Court in 1976.[1] The case addressed the validity of a 1974 New York statute that redrew state senate and assembly districts in Brooklyn with a view to enlarging the number of districts with "substantial nonwhite majorities." The attorney general of the United States, exercising a supervisory authority vested in him by the Voting Rights Act of 1965, had assented to the statute. In the Supreme Court, Nathan Lewin, the very able attorney for the white petitioners challenging the statute, argued that drawing district lines with race in mind was unconstitutional. In response to a question from the bench, Lewin acknowledged that drawing district lines with an eye to voters' political affiliations was permissible. But race was different, Lewin argued: "We think politics is part of the political process. Race is not part of the political process. Race is an impermissible standard."[2]

The very able lawyer representing the United States, Solicitor General Robert Bork, responded: "I was astounded when Mr. Lewin said that race is not a part of our political process. Race has been *the* political issue in this nation since it was founded."[3]

My second point of departure relates to W. E. H. Lecky, the Dublin-born scholar whose works ornamented British historiography in the second half of

Louis H. Pollak, a Fellow of the American Academy since 1972 and former dean of the Yale and University of Pennsylvania Law Schools, has been a federal judge in Philadelphia since 1978. He was one of the cohort of young lawyers who assisted Thurgood Marshall and his colleagues of the NAACP Legal Defense Fund in developing the legal strategy in "Brown v. Board of Education" and "Bolling v. Sharpe."

1 This essay, delivered as the 2004 Robert P. Anderson Lecture at Yale Law School in April of 2004, was written in tribute to Charles Hamilton Houston, William Henry Hastie, and Thurgood Marshall. I am indebted to two good friends – Frank Goodman and Victor Brudney – who reviewed this essay in draft and offered valuable criticisms and suggestions that have measurably strengthened the final product.

2 *United Jewish Organizations of Williamsburg, Inc. v. Carey*, No. 75-104 (U.S. Sup. Ct., October 6, 1976), transcript of argument, 33.

3 Ibid., 62. I note, by way of full disclosure, that, representing the NAACP as an intervenor, I too participated in the argument.

the nineteenth century. Lecky, so we are told, was invited to one of those vast manorial weekends in which, even as late as the Gladstone and Salisbury eras, the great aristocratic houses were wont to spread themselves. Lecky was unacquainted with his hostess, the duchess of something-or-other, but at dinner he nevertheless found himself seated to her left. After Her Grace had exhausted conversation with the guest seated to her right, she turned to Lecky:

> "Oh, Professor Lecky, you must remind me. What is it you do?"
>
> "Well, Your Grace, I'm a historian."
>
> "Goodness, Professor Lecky, that is too bad."
>
> "I beg your pardon, Your Grace, but I'm not sure that I understand. Why is it too bad that I'm a historian?"
>
> "Well, Professor Lecky, I do think that it's so much better to let bygones be bygones."

Perhaps some bygones can be left, like cuttings from the garden, to be raked into small heaps, gathered, and wheelbarrowed to the compost pile. But not the bygones of race. Not in America. Not yet.

Particularly, I suggest, this is of importance for those who labor in the vineyards of the law. From our nation's beginnings, the ways in which we treat persons of color have been the knottiest – the hardest to unravel – of the long threads that make up the law's fabric. Part of my submission in this essay is that the law's most flagrant failures – those instances in which our highest court has most dismally misused its authority – have been characterized by flagrant judicial misreadings of our history. On some occasions these misreadings have been bolstered by the myopia of racial prejudice. Also, on occasion, the Supreme Court's work has suffered because persons in positions of apparent or actual official authority have skewed the adversarial process, inappropriately urging the Court to decide what need not and should not have been decided, or supplying the Court with grievously incomplete, and hence slanted, information.

In its proper decisions about race, on the other hand, the Court appears to have been aware of the relevant history, has neither departed from nor embellished it, and has, on occasion, made it a building block in those decisions.

I begin, as one would expect, with *Dred Scott*.

In *Dred Scott*, it will be recalled, the Supreme Court, in the early months of 1857, was charged to determine the status of a slave taken by his army-surgeon master from the slave state of Missouri to military posts in the free state of Illinois and in federal territory where, under the Missouri Compromise of 1820, slavery was forbidden. Dred Scott had sued to gain freedom in the federal circuit court in Missouri, but that court had ruled against him. The circuit court's adverse decision was based on two facts: the Missouri Supreme Court, applying Missouri law, had ruled against Scott in a nearly identical state court suit; and the United States Supreme Court had ruled some years before that in suits to gain freedom the law of the state in which suit was brought was dispositive.

Accordingly, it appeared that Scott's appeal to the United States Supreme Court from the adverse decision of the federal circuit court would be fruitless, and, furthermore, that the Court would have no occasion to announce any new and significant legal principles.

But a funny thing happened on the way to the courthouse. In February of

1857, two months after the second argument (the case had been argued in April of 1856 and reargued in December), James Buchanan, the South-leaning Pennsylvania Democrat who had just been elected president and was to take office in less than a month, wrote to two of his friends on the Court – Justices Catron and Grier – intimating that it might be helpful if the Court were to resolve the most important issue on the national political agenda: the scope of congressional authority to regulate slavery in the territories.[4] That political issue could be treated by the Court as a legal issue because counsel for Dred Scott's putative owner had argued that the Missouri Compromise was unconstitutional.

Buchanan's improvident intervention in the judicial process was the curtain-raiser for what were to be four of the worst years in the annals of the presidency. And it was also the curtain-raiser for the worst decision in the annals of the Court. For the justices obligingly changed course. Rather than disposing of Dred Scott's appeal with a brief reiteration of principles of no novelty, the Court, speaking through Chief Justice Taney on March 6, 1857, two days after Buchanan's inauguration, announced that Congress had no authority to regulate slavery in the territories – thereby discarding a regular pattern of national legislative action dating back to the Northwest Ordinance, enacted in the very summer and the very city in which the Constitution was written.

For good measure, Chief Justice Taney also ruled that Dred Scott had no right to bring a lawsuit in the federal court because he was not a "citizen" within the meaning of the Constitution. According to Taney, not only slaves but also free blacks could never be a part of the American political community. They were forever to be outsiders because the thirteen states that agreed to the Constitution would never have "regarded . . . as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized."[5] In making his demonstration, Taney took particular note that Chief Justice David Daggett of Connecticut (who, it deserves mention, was one of the three founders of the Yale Law School) had ruled in 1834 that blacks were not part of the political community. "God forbid that I should add to the degradation of this race of men," Daggett had instructed a Connecticut jury, "but I am bound, by my duty . . . to say that they are not citizens."[6]

Justice Curtis, one of two dissenting justices, made patient demonstration that Taney was quite wrong in asserting that free blacks were without political rights when the Constitution was adopted. When the Articles of Confederation were ratified, Curtis noted, "all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens." Curtis quoted Article IV of the Articles of Confederation (the forerunner of the privileges and immunities clause in Article IV, § 2 of the Constitution): "The free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be

4 Don E. Fehrenbacher, *The "Dred Scott" Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 307, 309, 311 – 313.

5 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 416 (1857).

6 *Crandall v. State of Connecticut*, 10 Conn. 340, 347 (1834).

entitled to all the privileges and immunities of free citizens in the several States." Curtis then pointed out that when Article IV of the Articles of Confederation was being considered by Congress in 1778, a South Carolina motion to modify the opening words to read "The free white inhabitants" was defeated eight states to two, with one state's delegation divided. Curtis then inquired, "Did the Constitution of the United States deprive them [the free inhabitants who were not white] or their descendants of citizenship?" And in lawyerly fashion he answered that question:

> That Constitution was ordained and established by the people of the United States, through the action, in each State, of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were among those qualified to act on this subject. These colored persons were not only included in the body of "the people of the United States," by whom the Constitution was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.[7]

In December of 1856, after the argument but before the decision, Alexander H. Stephens, Georgia's leader in Congress, termed *Dred Scott* a "great case," hoping the Court would respond in the South's favor. And so the Court did, undertaking to enshrine slavery in the territories beyond the reach of the political process – forever. "Great cases," Justice Holmes was to say some forty years later, "like hard cases make bad law."[8] *Dred Scott* made bad law. "And the war came."[9]

After the Civil War, America moved swiftly to add three amendments to the Constitution: in 1865 the Thirteenth Amendment, abolishing slavery; in 1868 the Fourteenth Amendment, conferring citizenship on "[a]ll persons born or naturalized in the United States" (and thereby overruling the citizenship aspect of *Dred Scott*) and requiring every state to assure to "any person within its jurisdiction the equal protection of the laws"; and in 1870 the Fifteenth Amendment, guaranteeing to (male) blacks the right to vote.

At first the Supreme Court evinced a clear understanding of the genesis and weighty purposes of the amendments. In 1873, in the *Slaughter-House Cases*, Justice Samuel Miller spoke for the five justices of the majority:

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had

7 60 U.S. (19 How.) at 575 – 576.

8 From the dissenting opinion in *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1803).

9 Abraham Lincoln, *Second Inaugural Address*, March 4, 1865.

formerly exercised unlimited dominion over him.

But within a few years the Court changed course: first in 1883, in the *Civil Rights Cases*, and next in 1896, in *Plessy v. Ferguson*, the Court contrived to marginalize the Thirteenth Amendment and to gut the equal protection clause.

The *Civil Rights Cases* invalidated the 1875 Civil Rights Act in which Congress, seeking to enforce the newly liberating amendments, required "inns, public conveyances on land or water, theaters and other places of public accommodation" to serve all comers without regard to race. The Thirteenth Amendment did not support the requirement, the Court felt, because the racial discriminations the 1875 act prohibited were not aspects of slavery. Nor did the Fourteenth Amendment help: that amendment addressed discriminations imposed by state law, and the Court, speaking through Justice Joseph Bradley, perceived no discriminations that states had authorized. Quite the contrary, so Justice Bradley observed: "Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them."[10]

Justice Bradley's recital of the general obligation of innkeepers and public conveyances in every state to serve all comers was unexceptionable – it traced back in the common law for centuries, perhaps to Falstaff's time and before. But if Justice Bradley and his colleagues of the majority entertained the notion that in 1883, or in 1875, or in 1868 when the Fourteenth Amendment became part of the Constitution, a black person refused a room at an inn in New Jersey or Connecticut or North Carolina could secure some sort of redress in a state court, those justices were inhabiting a dream world. The law that Justice Bradley and his colleagues struck down was, at least as it related to inns and public conveyances, the very remedy that Congress had fashioned to secure for blacks the equal protection of the laws.

Justice Bradley offered a general preachment:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.

In this sonorous sentence, there are two arresting phrases. First: "the rank of a mere citizen." That is the very rank that Taney and his colleagues of the *Dred Scott* majority had worked so hard to deny to black Americans. Second: "the special favorite of the laws." What sense of his country's history or of his contemporary society could have driven Justice Bradley to the notion that the ex-slave had in the eighteen years since bondage become the law's special favorite? A private memorandum the justice appears to have written to focus his own thinking sheds some light:

> The law in question was passed to prevent discrimination on account of race and color. So far it is right ....
>
> It may be said generally that those things which are essential to the enjoyment of citizenship may be guarantied against discrimination on account of race and color.
>
> But what are essentials to the enjoyment of citizenship? Is the white man's theater such an essential, if the colored person is

10 *Civil Rights Cases*, 109 U.S. 3 (1883) at 25.

> free to have his own theater? Is the white man's carriage or railroad car such an essential, if the colored man has a suitable car provided for him? Is the white man's hotel an essential, if he can have his own hotel and public accommodations?
>
> It never can be endured that the white shall be compelled to lodge and eat and sit with the negro. The latter can have his freedom and all legal and essential privileges without that. The antipathy of race cannot be crushed and annihilated by legal enactment. The constitutional amendments were never intended to aim at such an impossibility.[11]

One justice – John Marshall Harlan of Kentucky, a former slave owner – dissented in the *Civil Rights Cases*. He read the word "slavery" in the Thirteenth Amendment more spaciously than his colleagues. Likewise with "citizen" in the Fourteenth Amendment – a term that, broadly read, infused the equal protection clause, and also, of course, gave muscle to the privileges and immunities clause. (As to privileges and immunities, Harlan was evidently prepared to depart from the narrow orthodoxy of the *Slaughter-House* majority, which, speaking through Justice Miller, had given the concept of citizenship – i.e., the constitutionally enforceable rights attendant on being a citizen of the United States – the narrowest possible scope. If that involved the risk of Miller's posthumous disapprobation, Harlan had, nevertheless, the comforting prospect that Bruce Ackerman and the late Charles Black would ultimately come to his aid.[12])

Harlan's dissenting opinion is a lengthy, and frequently redundant, discourse – a veritable anthology of observations, some legal, some historical, some cultural. At its best, the opinion speaks with quiet force:

> My brethren say, that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race, is – what had already been done in every State of the Union for the white race – to secure and protect rights belonging to them as freemen and citizens; nothing more. It was not deemed enough "to help the feeble up, but to support him after." The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.[13]

11 Quoted in Charles Fairman, *Reconstruction and Reunion, 1864 – 88*, vol. 2 (New York: Macmillan, 1971 – 1987), 564.

12 Bruce Ackerman, "Opinion," in Jack M. Balkin, ed., *What "Brown v. Board of Education" Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (New York: New York University Press, 2001); Charles L. Black, Jr., "The Lawfulness of the Segregation Decisions," *Yale Law Journal* 69 (1960): 421.

13 109 U.S. at 61.

Harlan wrote his dissent with the pen that Chief Justice Taney had employed in writing the Court's opinion in *Dred Scott*.[14]

In 1896, thirteen years after the *Civil Rights Cases*, came *Plessy v. Ferguson*, the debacle that, notwithstanding the Fourteenth Amendment, imposed humiliation-by-law on black Americans for half a century.

The question presented was the validity of Louisiana's 1890 statute – one of the Jim Crow laws that spread across the South in the 1880s and 1890s – requiring, with criminal penalties for violation, that black and white railroad passengers be seated in separate cars, with an exception for "nurses attending children of the other race." Because the railroad travel in question occurred within Louisiana, the statute was not open to challenge as a burden on interstate commerce.[15] So counsel for Homer Plessy, a pale-skinned man who declined to sit in the black car, based his case on the Thirteenth and Fourteenth Amendments.

Justice Henry Billings Brown wrote the Court's opinion. The heart of the opinion was the following memorable pronouncement:

> 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.[16]

Justice Brown was in one respect unique – he is the only justice in the Court's history to have studied law at both Yale and Harvard, albeit not for long enough to have received a degree from either institution. But in a more important respect Justice Brown was a typical member of the white establishment: "Brown accepted . . . without reservation" the "late nineteenth century prevailing opinion . . . that the Negro and Caucasian races were distinctly separate, with the Caucasian race assumed to be superior."[17] And so it was easy for Brown to reason his way to the conclusion that "separate but equal" facilities satisfied the Fourteenth Amendment.

Justice Harlan, once again in dissent, had a different view of the provenance and impact of the Louisiana statute. He recognized that laws of that kind "proceed[ed] on the ground that colored citizens are so far inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation."[18] Thus, Harlan, a border-state lawyer, acknowledged the contemporary social realities – the orig-

14 John V. Orth, "John Marshall Harlan," in Kermit L. Hall, editor in chief, *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992), 361 – 362.

15 *See Hall v. DeCuir*, 95 U.S. 485 (1877); cf. *Morgan v. Virginia*, 328 U.S. 373 (1946).

16 163 U.S. at 551.

17 In the issue of the *Harvard Law Review* celebrating that journal's one hundredth birthday, the late Leon Higginbotham noted that "four of the seven Justices who joined in the majority opinion [in *Plessy*] attended either Harvard or Yale Law School." A. Leon Higginbotham, Jr., "The Life of the Law: Values, Commitment and Craftsmanship," *Harvard Law Review* 100 (1987): 795, 812. The three justices other than Brown were Chief Justice Melville Fuller and Justices Horace Gray and George Shiras, Jr. Harlan learned his law at Transylvania University in Lexington, Kentucky.

18 163 U.S. at 560.

inal intent, if you will, of Jim Crow – that his colleagues failed to confront. Harlan, with the insight of Cassandra, concluded:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.
>
> In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case*.[19]

Harlan was not a great judge (Holmes, who served with him during his last years, said that his senior colleague "had a powerful vise the jaws of which couldn't be got nearer than two inches to each other"[20]), but in these two unhappy cases Harlan's vision, and his alone, was true.[21]

Next I turn to *Hirabayashi* and *Korematsu*.[22] Here my purpose is not to enlarge upon the grievous shortcomings of those two Supreme Court decisions upholding the government's opprobrious World War II treatment of Japanese Americans residing on the West Coast – first the humiliating curfew, and then the long months of arduous detention of upwards of one hundred thousand American citizens. The constitutional bankruptcy of the two decisions was made plain in 1945, only a year after *Korematsu* was decided, by Eugene Rostow of Yale in his celebrated article, "The Japanese American Cases – A Disaster."[23] I can add nothing to our late colleague's searing judgment of the record as it was then known.

This postscript to Rostow addresses the fact – not uncovered until the 1980s – that the justifications for the curfew and detention regimes offered by the government and accepted by the courts were profoundly flawed. The justifications involved recitals of potential acts of sabotage by Japanese Americans in furtherance of a Japanese invasion, and of the infeasibility of distinguishing loyal from disloyal Japanese Americans. To validate these recitals, the government put principal reliance on a document entitled "Final Report, Japanese Evacuation from the West Coast," whose stated author was Lieutenant General J. L. DeWitt, the commanding general on the West Coast who issued the regulations imposing curfews and requiring Japanese Americans to report to assembly points for transfer to inland detention camps. But the War Department did not tell the Justice Department, let alone the federal courts, that there was an original DeWitt report whose explanation of the military need for detention was so meager that it had to be editorially enhanced in Washington. Further, the Justice De-

19 Ibid., 559.

20 Quoted in Paul A. Freund et al., *Constitutional Law*, 4th ed. (Boston: Little, Brown, 1977), xi.

21 Cf. Justice Harlan's dissent in *Berea College v. Kentucky*, 211 U.S. 45, 58 (1908). But see *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899).

22 *Hirabayashi v. United States*, 320 U.S. 1 (1943); *Korematsu v. United States*, 323 U.S. 14 (1944).

23 *Yale Law Journal* 54 (1945): 489.

partment, in its *Korematsu* brief to the Supreme Court, refrained from advising the Court that some of the risks cited in the "Final Report" were contradicted by information assembled by the FCC and the FBI that the Justice Department in turn credited.[24]

The belated disclosures that the War and Justice Departments had massaged history with a view to gulling the judicial branch led Gordon Hirabayashi and Fred Korematsu, late in their honorable lives, to seek to remove the stain of criminality imposed four decades earlier. Relying on the venerable writ of *coram nobis,* each petitioner succeeded in persuading the judicial branch to undo injustice by setting aside his conviction.[25] The government offered only token opposition, mainly trying to limit collateral damage. Indeed, in Hirabayashi's case, the Ninth Circuit noted that "[t]he government agrees . . . that General DeWitt acted on the basis of his own racist views and not on the basis of any military judgment that time was of the essence."[26]

What emerges from this sorry episode was well summarized by Judge (now Chief Judge) Marilyn H. Patel of the District Court for the Northern District of California in the concluding paragraph of her opinion setting aside Korematsu's conviction: *"Korematsu* . . . stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."

Taken as a chapter in the Supreme Court's treatment of race, the 1943 decision in *Hirabayashi* and the 1944 decision in *Korematsu* seem, in retrospect, not only profoundly wrong at the time they were decided, but also jarringly out of harmony with the way other aspects of the law of race were by then beginning to unfold. The Court's actions in setting aside the capital convictions in the *Scottsboro Cases – Powell v. Alabama* in 1932 and *Norris v. Alabama* and *Patterson v. Alabama* in 1935 – signaled the justices' dawning understanding that blacks caught in the toils of the criminal process in state courts (particularly, but by no means exclusively, in the South) often found due process to be in short supply. And thus there began to be Supreme Court recognition that sustained federal judicial scrutiny was called for.

Also initiated in the 1930s was the NAACP's twenty-year campaign against *Plessy* – to challenge it frontally or to enforce "separate but equal" so stringently as to bankrupt its defenders. The architect of the campaign was Dean Charles Hamilton Houston of Howard Law School. Houston's 1938 victory in *Missouri ex rel. Gaines v. Canada*, forcing open the doors of the Missouri Law School to a black applicant, suggested that, at least with respect to graduate education, some members of the Court might not be unreceptive to chipping away at the *Plessy* edifice. In 1944 just a few months prior to *Korematsu*, Houston's young

24 The solicitor general's brief dealt with this problem by not including the contradicted recitals among those it expressly asked the Court to take judicial notice of, and by adding in a footnote that "'The Final Report of General DeWitt' . . . is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the Final Report only to the extent that it relates to such facts." Quoted in *Korematsu v. United States*, 584 F. Supp. 1406, 1418 (N.D. Cal. 1984).

25 *Hirabayashi v. United States*, 828 F.2d. 591 (9th Cir. 1987); *Korematsu*, 584 F. Supp. 1406.

26 *Hirabayashi*, 828 F.2d. at 601.

surrogates, William Henry Hastie and Thurgood Marshall, won a victory of enormous importance in the political arena: in *Smith v. Allwright*, Hastie and Marshall persuaded the Court that the so-called white primary, under which the Democratic Party maintained whites-only hegemony throughout the one-party South, unconstitutionally excluded blacks from effective participation in the political process. The stage was then set for Marshall, Houston, and Hastie to attack racially restrictive covenants, and they triumphed in *Shelley v. Kraemer* and *Hurd v. Hodge*. Thereafter, Marshall and Robert Carter, now under the banner of the NAACP Legal Defense Fund, resumed the attack on segregation in graduate and professional schools in *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents*.

But *Plessy* remained a brooding doctrinal presence until, in *Brown v. Board of Education* (a consolidation of public school cases arising in Kansas, Virginia, South Carolina, and Delaware) and in the companion District of Columbia case, *Bolling v. Sharpe*, the Court, on May 17, 1954, ruled that "in the field of public education the doctrine of 'separate but equal' has no place."[27] In the next several years, a series of *per curiam* decisions[28] in the wake of *Brown* were to establish that Jim Crow likewise had no place in the public beaches and golf courses and parks, in the municipal buses and airports and auditoria, and in the courthouses, that together make up the mosaic of community.[29]

Like *Dred Scott*, *Brown* and *Bolling* were argued on the merits twice. The first argument was in the fall of 1952. In June of 1953 the Court ordered reargument for the following term and directed counsel to address a series of questions. The first two questions sought guidance from counsel with respect to the meaning of the Fourteenth Amendment as understood by its framers and ratifiers. What evidence was there that the framers and ratifiers "contemplated or did not contemplate, understood or did not understand" that the amendment "would abolish segregation in public schools?" If there was no understanding that the amendment "would require the immediate abolition of segregation in public schools," did the framers and ratifiers nonetheless contemplate that, pursuant to the amendment, a future Congress or the courts, "in light of future conditions," might abolish public school segregation?

I do not recall any instance before or since when the Court expressly directed the parties to conduct a prescribed exploration of history. What lawyers and historians conducting that research in the summer of 1953 could not have known was that inside the marble walls a parallel inquiry was being conducted in-house – by Justice Frankfurter's conspicuously able law clerk, Alexander Bickel.[30]

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27 347 U.S. at 495 (1954).

28 See Ernest Brown, "Process of Law," *Harvard Law Review* 72 (1958): 77.

29 *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *New Orleans City Parks Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958); *Gayle v. Browder*, 352 U.S. 903 (1956); *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Schiro v. Bynum*, 375 U.S. 395 (1964); *Johnson v. Virginia*, 373 U.S. 61 (1963).

30 The Bickel memorandum, which Frankfurter circulated to his colleagues shortly before the December 1953 reargument, was the launching pad for Bickel's celebrated article, "The Original Understanding and the Segregation Decision," *Harvard Law Review* 69 (1) (1955). See Richard Kluger, *Simple Justice: The History of "Brown v. Board of Education" and*

In the event, the historical materials adduced by counsel put the Court's questions in somewhat sharper focus, but they did not answer those questions. As the Court, speaking through Chief Justice Warren, explained, the "discussion [by counsel on reargument] and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best they are inconclusive."[31] The Court therefore turned its attention to "the effect of segregation itself on public education"; but it recognized that "[i]n 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."

And so the Court decided the issues before it on the basis of a factual finding of the three-judge district court that had tried the case brought on behalf of Linda Brown by her father Oliver Brown in Topeka, Kansas. That district court had decided the case against Linda because it felt bound by *Plessy*'s "separate but equal" formula. But the district court had, nonetheless, made the following finding on the basis of the testimony it had heard: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."[32] The Supreme Court quoted and adopted that finding.

What the Court had done was cut the heart out of Justice Brown's *Plessy* pronouncement that the "badge of inferiority" was prompted "not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." What the Court in *Brown* did *not* do, and has been faulted for since, was to state flatly that racial segregation was imposed by whites on blacks in order to degrade them. We now know – what was not hard to conjecture in 1954 – that Chief Justice Warren understood that he could not rally a unanimous Court behind an opinion indicting white Southerners. The chief justice thought that unanimity – the unanimity that the Court had not achieved in *Dred Scott*, or in the *Civil Rights Cases*, or in *Plessy*, or in *Korematsu* – was worth a very great deal. It is hard to say persuasively that he was wrong.

Nonetheless, the feeling that a more powerful opinion could, and perhaps should, have been written has persisted. What may have been the first of those revisionist efforts was mine, in response to the expressed inability of the late Herbert Wechsler to locate a sound grounding for *Brown* – a critique that was a central ingredient of Wechsler's famous 1959 Holmes Lecture, "Toward Neutral Principles of Constitutional Law."[33]

The centerpiece of my version of *Brown* was an extended quotation from

Black America's Struggle for Equality (New York: Knopf, 1975), 655.

31 *Brown v. Board of Education*, 347 U.S. at 489.

32 Ibid., 494.

33 *Harvard Law Review* 73 (1) (1959). For those strongly committed to the rightness of *Brown*, the dubitante posture of Herbert Wechsler was a matter of serious concern. "Wechsler was, after all, a person of liberal persuasion who fully subscribed to the precepts of equality that undergirded *Brown*. More importantly, Wechsler was a lawyer and a scholar at the pinnacle of achievement and influence in our profession. As Judge [Richard] Posner, himself a figure of commanding professional status, put it in 1995 in *Overcoming Law*: '[T]here is no longer anyone in the legal profession who has the kind of stature that a Wechsler achieved.'" From Louis H. Pollak, "From Cardozo to Dworkin: Some Variations on Professor Nelson's Theme," *Saint Louis University Law Journal* 48 (2004): 860.

C. Vann Woodward's *The Strange Career of Jim Crow*. "[T]he Jim Crow laws," I quoted from Woodward,

> applied to all Negroes – not merely to the rowdy, or drunken, or surly, or ignorant ones. The new laws did not countenance the old conservative tendency to distinguish between classes of the race, to encourage the "better" element, and to draw it into a white alliance. Those laws backed up the Alabamian who told the disfranchising convention of his state that no Negro in the world was the equal of "the least, poorest, lowest-down white man I ever knew." . . . The Jim Crow laws put the authority of the state or city in the voice of the street-car conductor, the railway brakeman, the bus driver, the theater usher, and also into the voice of the hoodlum of the public parks and playgrounds. They gave free rein and the majesty of the law to mass aggressions that might otherwise have been curbed, blunted, or deflected.
>
> The Jim Crow laws, unlike feudal laws, did not assign the subordinate group a fixed status in society. They were constantly pushing the Negro farther down.

And to the Woodward quote I added – for the Court that I had allowed myself to impersonate: "We see little room for doubt that it is the function of Jim Crow laws to make identification as a Negro a matter of stigma. Such governmental denigration is a form of injury the Constitution recognizes and will protect against."

Having written my revision of *Brown*, I summoned up the pretentious humility to add that a "draft opinion, prepared in hindsight by one who has no responsibility to decide, is only an academic exercise designed to prove a point. The fateful national consequences of *Brown v. Board of Education* stem from the opinion and judgment actually rendered."[34] I suspect that Jack Balkin and his colleagues, who have crafted such a remarkable group of alternative *Brown* opinions,[35] would not disagree. But I will add here what I went on to say:

> Professor Wechsler, sympathetic to the result but skeptical of the rationale, is frankly uncertain of history's verdict: "Who will be bold enough to say whether the judgment in the segregation cases will be judged fifty years from now to have advanced the cause of brotherhood or to have illustrated Bagehot's dictum that the 'courage which strengthens an enemy and which so loses, not only the present battle, but many after battles, is a heavy curse to men and nations.'" But some are bold enough – or fool-hardy enough – to make the prophecy Professor Wechsler eschews: the judgment in the segregation cases will as the decades pass give ever deeper meaning to our national life. It will endure as long as our Constitution and our democratic faith endure.[36]

Fifty years after *Brown* – and notwithstanding the gravity of the race issues that are still unresolved – I remain of that view.

Ten years later, in 1969, a remarkable thing happened: Herbert Wechsler changed his mind. The occasion was a speech to a Texas bar group on developments in the law relating to civil liberties and civil rights.[37] In the course of his remarks, Wechsler noted that he had "spoken elsewhere of my difficulties with the

34 Louis H. Pollak, "Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler," *University of Pennsylvania Law Review* 1 (1959): 108.

35 Balkin, *What "Brown v. Board of Education" Should Have Said*.

36 Pollak, "Racial Discrimination and Judicial Integrity," 30 – 31.

37 Herbert T. Wechsler, "The Nationalization of Civil Liberties and Civil Rights," *Texas Quarterly* 12 (1969): 10.

School opinion [*Brown*]." And then Wechsler said:

> The decision is, however, more acceptable when its principle is seen to be that any racial line, implying an invidious assessment, may no longer be prescribed by law or by official action. That principle, it should be noted, means that race may still be made a factor in decision if the ground is not invidious in implication, as in striving for a racial balance to correct inequalities of opportunity that may be found.[38]

In changing his mind, Wechsler explained himself in terms that support the Court's most recent important decision on racial matters, *Grutter v. Bollinger*. In this 2003 case, the Court ruled that factoring race into the admissions decisions of the University of Michigan Law School was compatible with the Constitution. To be sure, Justice O'Connor's opinion for the Court in *Grutter* was keyed to deference to the school's perception of its compelling educational interest in assuring a diverse student body, rather than to "striving for a racial balance to correct inequalities of opportunity."

But I suggest that in the years to come, *Grutter* may also be perceived as a conduit to the more widely applicable uses of affirmative action adumbrated in Wechsler's sober second thought. Those are the uses that will be seen to be rooted in *Brown* – a *Brown* to be read not simply as an essay about public schools, but rather as a recognition of a fundamental fact of our nation's history, namely, that, as Laurence Tribe has recently put it, "the social meaning" of racial segregation "was white supremacy."[39] That is what *Brown* stands for, but it is not what *Brown* forthrightly said.

The forthright judicial acknowledgment of the history that John Harlan and Vann Woodward understood only came in 1967 when the Court, in *Loving v. Virginia*, invalidated Virginia's antimiscegenation law. That law, captioned as intended to "Preserve Racial Integrity," criminalized marriage between a "white person" and anyone other than another "white person." The law left all persons of color free to marry any person of their same or any other color.[40] The Court, speaking through Chief Justice Warren, the author of *Brown* and *Bolling*, ruled that "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia only prohibits interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."[41]

Race and law and history had, at long last, come together.

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38 Ibid., 23. In fairness to Wechsler, I should note that he did not express any policy enthusiasm for remedial programs of this sort.

39 Remarks of Laurence Tribe at a panel entitled "Looking Forward," concluding the *Harvard Celebration of the 50th Anniversary of Brown v. Board of Education*, Harvard Law School, April 17, 2004.

40 The Virginia legislature that enacted the antimiscegenation law relaxed its rigor in one respect. A person with "one-sixteenth or less of the blood of the American Indian and . . . no other non-Caucasic blood" was statutorily deemed "white." The Registrar of the State Bureau of Vital Statistics explained that the purpose of this accommodation was "to recognize as an integral part of the white race the descendants of John Rolfe and Pocahontas." 388 U.S. at 5 n. 4.

41 *Loving v. Virginia*, 388 U.S. 1 (1967).