Brown and *Miranda*

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The Warren Court's Brown *and* Miranda *opinions are among the most controversial of the twentieth century. Professor Seidman argues that these decisions exemplify the ways in which legal consciousness molds and distorts our view of social reality. The existence of a permanent, racially defined underclass, the most threatening of all the contradictions in our democracy, has been domesticated and controlled by constitutional adjudication, which produces a false sense of closure and resolution. Constitutionalism has primarily served to legitimate the status quo.* Brown *and* Miranda *have created a world in which we need no longer be concerned about inequality because the races are now definitionally equal and we need no longer be concerned about official coercion because defendants have definitionally consented to their treatment. Ambiguities persist in these legal doctrines that might potentially be harnessed to energize reformist political movements, but today the doctrines produce only the sensation of upheaval and revolt with none of the discomfort and insecurity that would accompany actual redistribution of social resources.*

Although Chief Justice Warren thought otherwise,[1] his opinions for the Court in *Brown v. Board of Education*[2] and *Miranda v. Arizona*[3] were probably the most significant of his tenure. The thesis of this Article is that these opinions share a common structure that has been widely misunderstood. Both *Brown* and *Miranda* have been perceived as major vehicles for social change, when in fact the decisions represent retreats in

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1. The *Brown* case and the changes that it brought about caused many people to believe that it was the most important case of my tenure on the Court. That appraisal may be correct, but I have never thought so. It seemed to me that accolade should go to the case of *Baker v. Carr* (1962), which was the progenitor of the "one man, one vote" rule. EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977); *see also* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 337 (1982) (claiming Warren thought that *Reynolds v. Sims* was his most important case); LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 435 (1967) (quoting Warren to the same effect).

2. 347 U.S. 483 (1954).

3. 384 U.S. 436 (1966).

the face of the impossibility of change. This misunderstanding of the two opinions helps explain their paradoxical subsequent histories.

Brown and *Miranda* are two of the most controversial judicial opinions of the twentieth century. Each generated a backlash that has permanently affected the political alignment of the country,[4] and for a time each threatened the very institution of judicial review.[5] Yet despite ferocious attacks on both decisions, and despite the change in the composition of the Court largely molded by those attacks,[6] both *Brown* and

4. For example, it is likely that the *Miranda* decision was a major factor in Richard Nixon's election to the Presidency in 1968. For an account of Nixon's use of the issue, see FRED P. GRAHAM, THE SELF-INFLICTED WOUND 9, 15 (1970).

It is also ironic that *Brown*, and the movement it ignited, paved the way for the election of the first President from the Deep South since before the Civil War. *See* Anthony Lewis, *Enforcing Our Rights*, 50 GEO. WASH. L. REV. 414, 422 (1982).

5. In the wake of *Brown*, most Southern members of Congress signed the *Southern Manifesto*, which asserted the right of states to ignore the decision and directly challenged the practice of judicial review. *See* 102 CONG. REC. 4515-16 (1956) [hereinafter Southern Manifesto]. For accounts of southern defiance of the Court, see J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961); J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE* 69-74 (1979).

Miranda was also greeted by a direct challenge to the Court's authority. The Senate Judiciary Committee approved a measure that would have divested the Supreme Court and other federal courts of jurisdiction to review state court decisions admitting confessions and would have abolished federal habeas corpus review of state judgments. *See* 114 CONG. REC. 11,189 (1968). Although these provisions were ultimately deleted from the bill, the statute, as finally enacted, purported to overrule *Miranda* in federal prosecutions. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. II, § 701(a), 82 Stat. 197, 210 (codified as amended at 18 U.S.C. § 3501(a)-(b) (1988)) (warnings a factor in voluntariness determination but not absolutely required). The provision has been widely ignored by the courts. *See, e.g.*, United States v. Adams, 484 F.2d 357, 362 & n.3 (7th Cir. 1973) (upholding instructions that would require the jury to find that the defendant was read his *Miranda* rights before it could consider his statements to the police); *see also* MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 130-34 (1980) (discussing the events that led to the enactment of § 3501 and stating that the Court has not had to confront the constitutionality of § 3501); Daniel Gandara, *Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officials and the Courts*, 63 GEO. L.J. 305, 307-08 (1974) (stating that the Supreme Court has not had to rule on the constitutionality of § 3501 because law enforcement officials have followed *Miranda* rather than the looser rules of the statute). *But cf.* United States v. Crocker, 510 F.2d 1129, 1137 (10th Cir. 1975) (dicta supporting constitutionality of § 3501).

6. Richard Nixon made the Supreme Court the centerpiece of his successful campaign for the Presidency in 1968. In his standard stump speech, he would say:

> A cab driver has been brutally murdered and the man that confessed the crime was let off because of a Supreme Court decision. An old woman had been murdered and robbed brutally, and the man who confessed the crime was let off because of a Supreme Court decision. And an old man had been beaten and clubbed to death, and the man who committed the crime was let off when he was on a spending spree in Las Vegas after he confessed, because of a Supreme Court decision.
>
> And I say, my friends, that some of our courts and their decisions in the light of that record have gone too far in weakening the peace forces as against the criminal forces in this country.

GRAHAM, *supra* note 4, at 15.

Nixon also promised Southern delegates to the 1968 convention that he would slow the rate of integration. *See* THEODORE H. WHITE, THE MAKING OF THE PRESIDENT, 1968, at 137-38 (1969). After his election, Nixon emphasized law and order in his highly publicized search for a new Chief

Miranda have survived.

To be sure, there is continuing although muted debate about the appropriate doctrinal route to the *Brown* result.[7] Nonetheless, today, it is common ground that *Brown* was correctly decided. Even in the South, *Brown* has taken on the status of a fundamental postulate for constitutional analysis. Acceptance of *Brown* has become a kind of admission ticket for entry into mainstream constitutional dialogue.[8]

The current status of *Miranda* is somewhat more ambiguous. As a rhetorical matter, critics on the right persist in calling for its demise,[9]

Justice, and made the appointment of a Justice from the South a major political issue. *See* JAMES F. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA 103, 115-16 (1973) (after the Burger appointment, Nixon clearly intended to nominate a Southerner to the Supreme Court); Louis M. Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 438 n.9 (1980) (Nixon's interest in Burger began as a result of Burger's hard-line dissents in a series of liberal D.C. Circuit criminal procedure decisions).

7. For example, in 1959 Herbert Wechsler suggested that the *Brown* result might be justified as an aspect of freedom of association, although he confessed that he had "not yet written the opinion" explaining why this right should prevail over the rights of those not wishing to associate. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

More recently, Justice Thomas has argued that *Brown* should have focused on a "defense of freedom [that] rejects slavery and its legacy of segregation as crippling to the exercise of human reason and excellence" and which is therefore "at fundamental odds with the founding principles." Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 991 (1987); *see also* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 68 (1989) ("*Brown v. Board of Education* would have had the strength of the American political tradition behind it if it had relied upon Justice Harlan's arguments instead of relying on dubious social science. That case might have been an opportunity to revive the Privileges or Immunities Clause as the core of the Fourteenth Amendment." (footnotes omitted)).

Judge Bork, on the other hand, has argued that the Court erred in not relying upon the original understanding of the Equal Protection Clause to justify its decision. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 74-84 (1990).

For what is without a doubt the most bizarre effort to find an alternative theory for *Brown*, see BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY 106 (1987) (*Brown* result defended as enforcing the constitutional right to travel).

For a survey of other, more conventional doctrinal routes to the *Brown* result, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 499-504 (2d ed. 1991) (setting forth several justifications and explanations for *Brown*); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1065-76 (1978) (proposing five ways of looking at *Brown:* "the color-blind constitution theory; the equality of educational opportunity theory; the white oppression of blacks theory; the freedom of association theory; and the integrated society theory").

8. It is striking that even the Warren Court's most bitter critics generally strain to exempt *Brown* from their otherwise comprehensive critiques of its handiwork. *See, e.g.*, SIEGAN, *supra* note 7, at 106 (discussing several ways that the *Brown* result can be justified on the basis of neutral principles); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14-15 (1971) (same).

9. A half-hearted campaign against *Miranda* initiated by the Meese Justice Department fizzled. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION: TRUTH IN CRIMINAL JUSTICE REPORT

and a lingering debate about its legitimacy continues in the law journals.[10] But most of the fire has gone out of the argument. Although the Court still ponders its ramifications and, remarkably enough, the degree to which it should be extended,[11] no sitting Justice has publicly con-

No. 1 (1986) (attack on *Miranda*); Jonathan I.Z. Agronsky, *Meese v.* Miranda: *The Final Countdown*, A.B.A. J., Nov. 1, 1987, at 86, 87 (reporting that Attorney General Meese instructed the Solicitor General to find a suitable test case that would enable the Supreme Court to reverse *Miranda*); *see also* Mark Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1009 (1988) (suggesting that *Miranda* is likely to survive current round of attacks); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda," 54 U. CHI. L. REV. 938 (1987) (attack on *Miranda* by then-Assistant Attorney General for Legal Policy, U.S. Department of Justice).

10. Most of the debate emanates from a single source. *See* Joseph D. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REF. 395 (1989) (recognizing and endorsing the Justice Department's attacks on *Miranda* as a significant contribution to modern legal thought in the area of criminal procedure); Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988) (arguing that the *Miranda* Court exceeded the legitimate exercise of judicial power); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) (same); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979) (arguing that *Miranda* represents an improper application of the voluntariness doctrine); *see also* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985) (suggesting that the Court should overrule *Miranda* as an inappropriate and ineffective application of constitutional principles). For some responses, see Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537 (1990) (rejecting Professor Grano's attacks on *Miranda* and suggesting that the decision is still viable); Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950 (1987) (refuting the attacks on *Miranda* made by Markman, *supra* note 9); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987) [hereinafter Schulhofer, *Reconsidering* Miranda] (rejecting the Justice Department's claim that *Miranda* interferes with effective law enforcement); Welsh S. White, *Defending* Miranda: *A Reply to Professor Caplan*, 39 VAND. L. REV. 1 (1986) (suggesting that *Miranda* represents an appropriate compromise between the interests of law enforcement and individual rights).

11. For example, even though *Miranda* itself imposed its famous requirements only when the police engaged in "questioning," the Burger Court extended the requirements to some situations in which the police confined themselves to declarative statements that were not literally questions. *See* Rhode Island v. Innis, 446 U.S. 291, 301-02 (1980) ("interrogation" includes declarative statements that a reasonable officer would know were likely to elicit an incriminating response). Even more remarkably, Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) announced a new, supplemental prophylactic rule prohibiting any police-initiated custodial interrogation after a suspect invoked the right to counsel. *See also* Minnick v. Mississippi, 111 S. Ct. 486, 491 (1990) (applying *Edwards* where suspect was allowed to consult with counsel and was then subsequently interrogated); Arizona v. Roberson, 486 U.S. 675, 682-85 (1988) (applying *Edwards* when suspect was interrogated about a different crime after invoking right to counsel). *But cf.* McNeil v. Wisconsin, 111 S. Ct. 2204, 2208 (1991) (suspect's invocation of Sixth Amendment right to counsel by appearing with attorney at judicial proceeding is not invocation of Fifth Amendment right for purposes of interrogation about an unrelated offense); Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983) (broadly interpreting what constitutes suspect initiation of a conversation with law enforcement officials under *Edwards*).

It would be an overstatement to say that *Miranda* has remained totally unscathed throughout the twenty-year assault on Warren Court criminal justice jurisprudence. For example, at the beginning of the Burger Court era the Court held that *Miranda* violations did not prevent the use of a suspect's statements for impeachment purposes. Harris v. New York, 401 U.S. 222 (1971); *see also* Oregon v. Hass, 420 U.S. 714 (1975) (reaffirming *Harris*). *But cf.* Doyle v. Ohio, 426 U.S. 610

tended that it should be overruled.[12] Candidates for political office are no longer required to take a stand on the *Miranda* issue, and police departments have long since ceased threatening dire consequences if the decision is enforced.[13]

How can questions that divided us so profoundly only a generation ago seem so uncontroversial today? Why has Chief Justice Warren's handiwork in these two cases survived even as his "activist" jurisprudential approach becomes increasingly irrelevant to modern law? In order to

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(1976) (suspect is denied due process when his postwarning silence is used for impeachment purposes). More recently, in New York v. Quarles, 467 U.S. 649 (1984), the Court has fashioned a "public safety" exception to *Miranda*; in that case a police officer's questioning of a rape suspect, caught after a foot chase, about the location of his weapon did not violate the suspect's rights, even though the questioning occurred prior to the *Miranda* warnings. In Oregon v. Elstad, 470 U.S. 298 (1985), the Court sharply limited the scope of "fruits" analysis after a *Miranda* violation has been established. *See also* Berkemer v. McCarty, 468 U.S. 420 (1984) (reading "custody" narrowly for *Miranda* purposes); Oregon v. Mathiason, 429 U.S. 492 (1977) (same).

But although some of these decisions reflect a far-from-generous reading of *Miranda*, most of them are consistent with its basic premises. For example, the impeachment cases are reconcilable with *Miranda* insofar as one is prepared to accept the relatively uncontroversial proposition that if a defendant chooses to testify, he can be compelled to submit to cross-examination. If the defendant can be compelled to submit to such questioning on the witness stand, it would seem to follow that earlier compelled statements should be admissible as well. Thus, the holdings of *Harris* and *Hass*—that statements inadmissible under *Miranda* are admissible to impeach on cross-examination—are perfectly consistent with *Miranda*'s premise that custodial statements made in response to interrogation are inherently compelled. The Court's holding that certain forms of custody, such as on-the-street *Terry* stops, are not inherently coercive, *see* Berkemer v. McCarty, 468 U.S. 420 (1984), seems similarly consistent with *Miranda*'s underlying concern.

Cases such as *Elstad* and *Quarles* are more difficult to reconcile with *Miranda*. Ironically, however, the very desire of the conservative Justices to limit *Miranda*'s application has caused the Court to embrace *Miranda*'s core premise. Thus, it is now the conservative majority that insists on the legitimacy of *Miranda* as a "legislative" prophylactic rule not directly commanded by the Fifth Amendment. *See Elstad*, 470 U.S. at 305-06 (O'Connor, J.); *Quarles*, 467 U.S. at 654 (Rehnquist, J.); Michigan v. Tucker, 417 U.S. 433, 444 (1974) (Rehnquist, J.). Conversely, it is now the liberal defenders of *Miranda* who insist that its constitutional legitimacy depends upon the fact that custodial interrogation comes within the literal meaning of "compulsion" as that term is used in the Self-Incrimination Clause. *See Elstad*, 470 U.S. at 347-48 (Breunan, J., dissenting); *Quarles*, 467 U.S. at 681-82 (Marshall, J., dissenting).

12. Several justices not otherwise known for their solicitude for the rights of criminal defendants have gone out of their way to state that they would not overrule *Miranda*. *See* Moran v. Burbine, 475 U.S. 412, 424 (1986) (O'Connor, J.) ("*[Miranda]* as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights."); Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date.").

13. A report by the American Bar Association found that "[a] very strong majority of those surveyed—prosecutors, judges, and police officers—agree that compliance with *Miranda* does not present serious problems for law enforcement." SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC'Y, AM. BAR ASS'N, CRIMINAL JUSTICE IN CRISIS 28 (1988); *see also* Schulhofer, *Reconsidering Miranda*, *supra* note 10, at 456 ("[T]he view that *Miranda* posed no barrier to effective law enforcement [has] become widely accepted, not only by academics but also by such prominent law enforcement officials as Los Angeles District Attorney Evelle Younger and Kansas City police chief (later FBI director) Clarence Kelly.").

understand this paradox, it is necessary to focus on the reasons for the controversy surrounding the two decisions in the first place.

There were, of course, many explanations for the opposition to *Brown* and *Miranda,* but two interrelated reasons are particularly revealing. First, each decision seemed threatening because each seemed to subvert existing power relationships. *Brown* confronted the permanently subservient status of blacks in American society and the shameful failure to make good on the great promises of the Reconstruction Amendments. Opposition to the decision was largely rooted in opposition to the redistribution of power and resources the decision seemed to portend.[14]

In *Miranda,* the threat of social change was hidden further beneath the surface. Yet the decision generated similar fears of social upheaval. Both supporters and opponents of *Miranda* understood that, in large measure, the crime problem *was* the race problem[15]—a theme to which I will return at the end of this Article. For supporters, constitutional protection for criminal defendants was a symbolic means of vindicating the promise of equality and humane treatment. For opponents, "handcuffing the police" meant a failure to control the new and frightening social disintegration that urban crime seemed to presage.

Second (and less significantly), each decision threatened conventional norms of constitutional adjudication. Critics claimed that the decisions amounted to "judicial legislation" in both a procedural and substantive sense.[16] The objection on procedural grounds was that the manner in which the Court addressed the issues raised by the cases was typical of the way a legislature, not a judiciary, solved problems. Instead of attempting to fashion individual justice based upon the particular facts before the Court, both decisions fashion rules for the future by grouping together large numbers of individual cases, much as a legislature would. Thus, the *Brown* Court forswore an investigation of the equality of individual black and white schools, and the effect of segregation on particular children, in favor of sweeping, empirically dubious generalizations. Simi-

14. *See* FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 61 (1978) ("Angry and resentful, most white southern citizens feared that the social order in which they had grown up could not survive the pending revolution . . . .").

15. For a discussion, see CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 117-65 (1978).

16. *See, e.g.,* Southern Manifesto, *supra* note 5, at 4515 (*Brown* was "a clear abuse of judicial power. . . . [climaxing] a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress"); Edwin Meese III, *Square Miranda Rights with Reason,* WALL ST. J., June 13, 1986, at 22 ("[I]n *Miranda* the [C]ourt rewrote the [Fifth Amendment] privilege [against self-incrimination] to mean something radically different and new." *Miranda* created a "codelike set of rules for police conduct . . . more properly devised by the legislative or executive branches of government").

larly, the *Miranda* Court reacted against a "totality of the circumstances" approach that required a sensitive exploration of the facts surrounding a particular confession, in favor of a prophylactic rule that irrebuttably presumed the invalidity of confessions secured in the absence of certain procedures.

The decisions were also legislative in a substantive sense. Critics claimed that the Court was imposing its own policy preferences rather than applying the preferences embedded in the Constitution.[17] The central move in each case was the substitution of a nontextual standard for a textual one. Thus, in *Brown* Chief Justice Warren transmogrified the constitutional requirement of equality into the extraconstitutional requirement of nonsegregation. In *Miranda,* he substituted an extraconstitutional inquiry into whether warnings were given for the constitutional mandate of noncompulsion.

Usually, these two reasons for opposition to *Brown* and *Miranda*—the threat of social change and the threat to conventional norms of adjudication—are viewed as interrelated. From this perspective, it was only by using legislative methodology—in both the substantive and procedural senses—that the Court could accomplish meaningful social change. As a procedural matter, the Court had no hope of controlling police behavior if it confined itself to a case-by-case evaluation of the handful of confession cases it was able to decide each year.[18] Nor was there much prospect of changing the subservient status of blacks by slogging through an endless series of equalization cases.[19] As a substantive matter, the

17. *See* Southern Manifesto, *supra* note 5, at 4516 ("[T]he Supreme Court [in *Brown*] . . . substituted their personal political and social ideas for the established law of the land."); *cf.* BORK, *supra* note 7, at 69-73 (discussing the tendency of the Warren Court to make policy).

18. As Professor Kamisar has pointed out, during the thirty years between Brown v. Mississippi, 297 U.S. 278 (1936), in which the Supreme Court first held that introduction of a coerced confession in a state criminal trial violated due process, and *Miranda,* the Court on average heard only one confession case per year. YALE KAMISAR, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test, in* POLICE INTERROGATION AND CONFESSION: ESSAYS IN LAW AND POLICY 41, 75 (1980).

19. The architects of the NAACP campaign against segregation understood this problem from the beginning. The original grant application to the Garland Fund, which provided early support for the campaign, emphasized taxpayer suits aimed at achieving equalization in the Deep South. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 132 (1977). But the initial blueprint for the legal campaign, drafted by Nathan Margold after the Garland money had been awarded, rejected this approach. Margold wrote:

> [T]he very multiplicity of suits which would have to be brought [in an equalization campaign] is itself appalling. . . . It would be a great mistake to fritter away our limited funds on sporadic attempts to force the making of equal divisions of school funds in the few instances where such attempts might be expected to succeed. At the most, we could do no more than to eliminate a very minor part of the discrimination during the year our suits are commenced. We should not be establishing any new principles, nor bringing any sort of pressure to bear which can reasonably be expected to retain the slightest force beyond that exerted by the specific judgment or order that we might obtain.

framers of the Fifth and Fourteenth Amendments could have had no conception of modern techniques of police interrogation, of the contemporary significance of public education, or of the intractable barriers to racial equality. Therefore, a boldly creative reading of the constitutional text was a necessary prerequisite to implementation of the framers' values.

In one sense this conventional view is correct. *Brown* and *Miranda* are indeed a consequence of the difficulties inherent in the use of traditional adjudicative methods to provide systemic protection for constitutional rights. But there is another sense in which the conventional view is wrong. My argument is that the legislative character of *Brown* and *Miranda* actually allowed the Court to defuse the promise of radical transformation that was immanent in prior precedent. I believe that *Brown* and *Miranda* have survived because, contrary to the implication in the Court's holdings, the decisions did not mandate a vast restructuring of power relationships. Rather, the decisions have served to justify and legitimate arrangements that would otherwise be severely threatened by constitutional rhetoric. Commonly viewed as monuments to the aggressive, self-confident assertion of judicial power, the decisions are actually tactical retreats in the face of implacable obstacles to change. Understanding and comparing the way in which the Court responded to these obstacles in each case tells us something important about the nature of constitutional law and about the antinomies that lie at its core.

I
A NOTE ON THE NATURE OF THE ENTERPRISE

Before recounting this story in detail, a word about methodology is in order. In what follows, I take the doctrine formulated by the Supreme Court at face value and treat the Justices who formulated it as proceeding in good faith. At each stage, my goal will be to make the best possible case for what the Supreme Court did. Moreover, I intend to do so using the standard techniques of legal argument and reasoning. I will assume that constitutional analysis is an autonomous, self-contained discipline with neutral, formal rules that bound the discourse in noncontroversial ways. My explanation of the doctrine, and my analysis of why it changed, will be from a vantage point entirely inside this discourse.

At the same time, I intend to treat judicial decisions as texts that matter to those who read them. I will proceed on the assumption that these texts have content that is not infinitely manipulable and that they have an impact on the actions of judges and primary actors who attempt to interpret them.

Id. at 133-34; *see also* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 26-28 (1987) (discussing the same events).

To many readers, this perspective will doubtless seem anachronistic, perverse, perhaps even evil. There are three sorts of objections to the enterprise.

A. The Formalism Critique

The notion that formal, doctrinal constraints drove all the results recounted below seems wildly implausible.[20] For example, even to those who believe that legal results are sometimes constrained by formal analysis, it will seem unlikely that the *Plessy*[21] Court was compelled by the sheer force of logic and argument—forced kicking and screaming, as it were—to conclusions it would rather have avoided. From today's perspective, Justice Brown's argument appears as no more than a rank rationalization for a result reached for racist reasons that the Court was

20. There is a vast literature on the extent to which doctrine determines legal outcomes. For important elaborations of the indeterminacy thesis, see Allan C. Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation,* 43 U. MIAMI L. REV. 541 (1989) (arguing that legal interpretation is thoroughly political and subjective, which increases the responsibility of those entrusted with authority); Girardeau A. Spann, *Deconstructing the Legislative Veto,* 68 MINN. L. REV. 473 (1984) (showing that INS v. Chadha, 462 U.S. 919 (1983), illustrates the indeterminacy of legal doctrine); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles,* 96 HARV. L. REV. 781 (1983) (discussing interpretivism and neutral principles as constitutional theories that constrain judges from making subjective changes, but arguing that each presupposes the principles on which it purports to rely). For some responses, see Philip Bobbitt, *Is Law Politics?,* 41 STAN. L. REV. 1233 (1989) (claiming that Tushnet has confused modality—a mode of constitutional reasoning—with ideology, pointing out that ideology demands consistent outcomes while modalities do not and that modalities predate the Constitution and are not indeterminate); Owen M. Fiss, *Objectivity and Interpretation,* 34 STAN. L. REV. 739 (1982) (contending that the freedom of the legal interpreter is not absolute, but is bounded by rules of interpretation respected by the legal community); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma,* 54 U. CHI. L. REV. 462 (1987) (stating that indeterminacy does not always accurately reflect legal phenomena, that it has not yet been formulated as a workable position, and that adherence to it may be counterproductive for critical legal scholars).

A footnote is hardly the place for a lengthy disquisition on this contentious debate. There are, however, two related points that substantially reduce the significance of the dispute, at least with regard to matters discussed in this text. First, opponents of the indeterminacy thesis do not appear to be making empirical claims about how judges act in the world or about how, as a conceptual matter, they necessarily must act. On the contrary, the opponents gain critical leverage by accusing judges of departing from the doctrine that *ought* to be determining their decisions. *See, e.g.,* BORK, *supra* note 7, at 81. Hence, the claim that Justice Brown's decision in *Plessy* was not, in fact, determined by legal doctrine does not threaten their position.

Second, proponents of the thesis do not appear to be making psychological arguments about how judges actually experience the world. They generally do not deny that judges sometimes *feel as if* they were constrained by legal doctrine. *See, e.g.,* Hutchinson, *supra,* at 560 ("[One] cannot discard the real experience that decisionmakers have of being compelled by doctrine . . . ."); Gary Peller, *The Metaphysics of American Law,* 73 CALIF. L. REV. 1151, 1155 (1985) ("I do not mean to deny the authenticity of the sensation that doing legal reasoning feels different . . . . But legal 'rationality,' the felt necessity with which one proposition seems to follow from another, is based on underlying structures of meaning."). Hence, their position would not be threatened by the fact that Justice Brown *thought* the result in *Plessy* was required by legal doctrine.

21. Plessy v. Ferguson, 163 U.S. 537 (1896).

ashamed to state candidly.[22]

This difficulty extends beyond the study of nineteenth-century doctrine. We have arrived at a stage in academic discourse on law where the study or interpretation of *any* text is problematic for some readers. Thus, it will doubtless seem implausible to some that *Brown* and *Miranda* have the content that I ascribe to those opinions. I argue below that these decisions served to cabin certain destabilizing tendencies in the earlier law of separate-but-equal and voluntariness. But this claim is coherent only if one believes that the *Brown* and *Miranda* texts have—or at least are experienced to have—some content that resists endless "deconstruction."

B. The Internal Validation Critique

Even if we assume that legal doctrine and text did constrain and "justify" the results discussed below, many will conclude that this fact demonstrates no more than that the problem is being analyzed from within the wrong paradigm. I will argue below that there was in fact a "law" of separate-but-equal and of voluntariness. These doctrines had an internal logic that gave rise to the kinds of questions that lawyers could dispute and judges could decide. But a natural response is that if it is really true that formal rules dictated the regime of coerced separation and oppression that the Supreme Court countenanced, then so much the worse for formal rules. The "internal morality" of law[23]—the formal virtues of consistency, generality, and transparency—do not guarantee that law will satisfy external moral standards. On the contrary, the autonomous character of legal reasoning serves to legitimate systems of oppression and to make contingent and unjust social arrangements appear inevitable and logical.[24]

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22. *But cf.* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 175 (1987) ("[Justice] Brown's most obvious failings in *Plessy* turn out to be fairly easily rectified into an exposition that legally was largely unexceptionable within the context of 1890s.").

23. *See* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969). Fuller believed that law had an "internal morality" relating to matters like the constancy of rules over time, the requirement that they demand only what is possible, and the requirement that they be available and clear to citizens. *Id.* at 41. The requirements of internal morality corresponded to principles of "natural law" in the sense that compliance with them was logically necessary for the endeavor of subjecting the conduct of people to rules. "They are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it." *Id.* at 96. They were to be distinguished, however, from the external morality of law, which related to the substantive aims of the law. *See id.* at 96-97, 153. Fuller thought that there was a necessary connection between internal and external morality. *See id.* at 153-54. For the best-known rejoinder, see H.L.A. HART, THE CONCEPT OF LAW 202 (1961) (noting that such a connection is "compatible with very great iniquity").

24. *See, e.g.*, E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 263 (1975):

> Most men have a strong sense of justice, at least with regard to their own interests. If the

C. The Theory-Centeredness Critique

Finally, it might be argued that the legal analysis recounted below is profoundly beside the point. In particular, it could be contended that the analysis of separate-but-equal in the next Part iguores the political, sociological, and experiential meaning of Jim Crow and of the fight against it. It captures neither the sense of subservience and oppression that was part of the daily lives of black people during the Jim Crow regime, nor the sense of empowerment that came with its demise.[25] Critical race scholars have forcefully reminded us that neither *Plessy* nor *Brown* can be fully understood on the level of theory. Any theoretical account fails to comprehend the real and important role played by the legal struggle against segregation in the ongoing political battle for liberation.[26]

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law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology is that it shall display an independence from gross manipulation and shall seem to be just.

For a similar argument in the context of the law of racial discrimination, see Freeman, *supra* note 7, at 1052. ("The doctrine cannot legitimize unless it is convincing, but it cannot be convincing in the context of antidiscrimination law unless it holds out a promise of liberation."). For a skeptic's view of the legitimating effect of law, see Alan Hyde, *The Concept of Legitimation in the Sociology of Law,* 1983 WIS. L. REV. 379, 386-400 (arguing that legitimacy—as a motive for adherence to the law—if it does in fact exist, owes its existence to sanctions).

25. Professor Williams has written forcefully about the experiential importance of the assertion of rights for African-Americans:

> The black experience of anonymity, the estrangement of being without a name, has been one of living in the oblivion of society's inverse, beyond the dimension of any consideration at all. Thus, the experience of rights-assertion has been one of both solidarity and freedom, of empowerment of an *in*ternal and very personal sort; it has been a process of finding the self.

Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights,* 22 HARV. C.R.-C.L. L. REV. 401, 414 (1987).

26. Black advocates of critical race theory have criticized their white colleagues for failing to appreciate fully the extent to which the insistence on rights has been empowering for the black community. For example, Professor Crenshaw has stated:

> The failure of [critical scholars] to incorporate racism into their analysis . . . renders their critique of rights and their overall analysis of law in America incomplete. Specifically, this failure leads to an inability to appreciate fully the transformative significance of the civil rights movement in mobilizing Black Americans and generating new demands.

Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 HARV. L. REV. 1331, 1356 (1988); *see also* Williams, *supra* note 25. I have no quarrel with Professor Crenshaw's description of these positive consequences that flow from the utilization of rights rhetoric. Indeed, much of what follows is a description of the fashion in which the rights-based struggle against Jim Crow promoted transformation. The problem is not with the civil rights movement, but rather with the "victory" it achieved and the rigidification and legitimation produced by that victory.

To be sure, at least in the short term, the "victory" in *Brown* also served to mobilize the Black community and to generate new demands. *See infra* text accompanying notes 130-31. But, tragically, most of those demands have remained unmet. Worse still, in the longer term, *Brown* has served to domesticate the contradictions and possibilities in prior doctrine, thereby providing powerful ideological undergirding for the refusal to meet those demands. For my argument supporting these assertions, see *infra* text accompanying notes 132-34.

D. A Response

These are important objections, and they need to be addressed explicitly at the outset in order to avoid misunderstanding. My ultimate aim is to advance the sort of external critique of constitutional reasoning suggested by the internal-validation criticism. My argument is that the internal logic of constitutional adjudication leads to results that are normatively unattractive from the outside. However, an external critique necessarily implies the existence of a coherent system that merits rebuttal.[27] If the system had no internal logic, as the formalism criticism implies, there would be nothing to critique.

Thus, in order to mount an external critique of constitutional reasoning, I intend to proceed as if that reasoning were autonomous. In most of what follows, I will ignore both the broad historical and sociological forces that unquestionably influenced the development of legal doctrine on the macro level and the narrower psychological and political predispositions of the Justices that unquestionably influenced individual opinions on the micro level.

In many places, this limitation will doubtless make my analysis seem incomplete and unsatisfying. For example, a full account of the movement from *Plessy* to *Brown* and beyond would surely place important emphasis on the shifting political climate that heavily influenced legal doctrine. Similarly, any analysis of the nineteenth-century law of separate-but-equal that fails to mention the central role of the racism inherent in the worldview of individual Justices is woefully incomplete.

As important as these factors are, however, I wish to put them to one side and to treat the doctrine as if it could be taken on its own terms. I do so not because I believe that legal doctrine is in fact autonomous, but because pretending that it is autonomous allows us to investigate the extent to which the doctrinal formulations help us to mold a worldview that makes some outcomes appear more plausible than others.

Thus in order to accept what follows below, one need not believe that legal doctrine standing alone determined any of the political outcomes I discuss. One need only believe that the way in which the Supreme Court has framed and decided legal issues has had some impact on our politics and that when Supreme Court Justices write opinions,

27. Professor Boyle has made an analogous point about more general critiques of liberalism. *See* James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 715 (1985) ("If we are rejecting essences, we cannot claim to have discovered *the* canonical, essential structure of thought from which liberal theorists depart at their peril."); *see also* Solum, *supra* note 20, at 498 (The indeterminacy inherent in legal doctrine "undercuts, rather than advances, the projects of both internal and external critique. . . . Stanley Cavell puts the point as follows: 'The internal tyranny of convention is that only a slave of it can know how it may be changed for the better, or know why it should be eradicated.' " (quoting STANLEY CAVELL, THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY, AND TRAGEDY 120-21 (1979))).

they are not altogether wasting their time. If that much is true, then doctrine is at least worth thinking about, and in order to think about it seriously, we must take it on its own terms.

Oddly, this perspective is not only necessary for the endeavor suggested by the internal-validation criticism; it is also consistent with the experiential and political perspective suggested by the theory-centeredness criticism. My argument depends upon the assertion that whatever the "ultimate" reality, we experience texts as having some determinate content and influencing us in certain ways. Thus, whether or not the Justices who formulated the doctrines of voluntariness and separate-but-equal were constrained in some ultimate sense, they *felt* constrained. Conversely, the experience of empowerment that came with the demise of this constraining ideology can be explained only because the ideology had real and determinate content for those oppressed by it.[28]

Similarly, a clever and imaginative reader of the *Brown* and *Miranda* opinions might be able to wrest from them ambiguities and contradictions that contain liberating and destabilizing potential. I will argue, however, that we have in fact experienced these decisions as limiting the possible legal worlds that we might construct. My aim will be not only to establish this fact, but also to offer an explanation for why these particular texts have had this impact on us.[29]

It is right, then, to argue that these experiences of constraint and liberation are at the core of the argument about *Brown* and *Miranda* in particular, and constitutional litigation in general. What matters is neither the ultimate reality of the doctrine nor its internal coherence, but rather the ways in which people experience it in their daily lives. Consequently, my focus will be exactly where the third criticism suggests it should be—on the external effects of constitutional doctrine. It does not automatically follow that these external effects have been salutary, however. Indeed, my argument is that the internal dynamics of the doctrine

28. My colleague, Gary Peller, has argued at length that even though the metaphors used by legal discourse to organize and comprehend reality are socially contingent, the perceptions that they create are experienced as real and determinate. *See* Peller, *supra* note 20, at 1156-57.

29. A separate question, which I largely ignore, is the extent to which the authors of these texts intended the results produced by them. A serious effort to explore this question would require a detailed examination of the worldview of Chief Justice Warren and his colleagues. Although I will not argue for the position here, my own hunch is that Warren did understand some of the limitations on judicial power described below and thought of *Brown* and *Miranda* as ways of dealing with those limitations. I also believe that he saw the decisions as ways of containing or channelling some of the more "extreme" demands that seemed to be justified by prior doctrine, although I am far less certain of this. I am quite confident that he had no conscious appreciation of the various contradictions in liberal doctrine explored below. It is important to understand, however, that my argument does not depend upon what Chief Justice Warren intended. Instead, it is addressed to the internal dynamics of constitutional litigation, which I believe push us in certain directions regardless of the intent of the participants in the enterprise.

more or less guarantee disappointment when the doctrine intersects with the external reality of daily life.

II
BROWN

A. Plessy *and the Dilemmas of Liberal Individualism*

In this Section and the following one I argue that the evolution of the law of separate-but-equal was driven by the intersection between the substantive and institutional questions raised by the Fourteenth Amendment. Although the nature of the intersection was debated in the Court's very first encounter with the Amendment,[30] its importance did not become apparent until the Court was confronted with the systematic racial segregation that became widespread in the South in the latter part of the nineteenth century.

My contention in this Section is that the intersection was problematic because of certain liberal assumptions shared by Justice Brown, who wrote for the *Plessy* majority, and Justice Harlan, who was the sole dissenter. These assumptions, principally concerning individual autonomy and equality in defining and pursuing the good, at first led the Court to remit the race issue to the political process. In Section B, I argue that growing awareness that the process was itself unequal and unfree eventually made the political solution unsatisfactory without suggesting a substitute for it. In Section C, I will argue that *Brown* constituted an effort to find a way out of this contradiction. Although *Brown* effectively overruled *Plessy,* the decision was made necessary by the Court's inability to escape from the paradigm that had made *Plessy* necessary in the first place.

30. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Writing for the majority, Justice Miller rejected an interpretation of the Fourteenth Amendment that would have upset the antebellum institutional structure for the enforcement of fundamental rights. Miller argued that before passage of the Fourteenth Amendment, most privileges and immunities of state citizens "lay within the constitutional and legislative power of the States, and without that of the Federal government." *Id.* at 77. He refused to read the amendment to create "so great a departure from the structure and spirit of our institutions" and to "fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character." *Id.* at 78.

In contrast, the dissenters argued that the Reconstruction amendments were designed to establish a system of pervasive federal protection for fundamental rights. Justice Swayne wrote that "[t]he prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members." *Id.* at 128 (Swayne, J., dissenting); *see also id.* at 93 (Field, J., dissenting) ("The amendment was adopted . . . to place the common rights of American citizens under the protection of the National government."); *id.* at 123 (Bradley, J., dissenting) ("The amendment was an attempt to give voice to the strong National yearning . . . [that] every citizen of the United States might stand erect . . . in the full enjoyment of every right . . . .").

The best way to see the problem that confronted the *Plessy* Court is to focus on one of the oddest passages in Justice Brown's opinion. Plessy had contended that enforced legal separation violated the Equal Protection Clause because it stamped blacks with a "badge of inferiority."[31] Justice Brown responded that the argument

> assumes 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.[32]

This passage is more than a little puzzling. Recall that Plessy was attacking the constitutionality of a statute that *compelled* both blacks and whites to utilize separate railroad cars whatever their individual preferences. How, then, did the Court think that it was defending the statute when it endorsed racial mixing occurring through "a voluntary consent of individuals"? Why was it Plessy who had to bear the charge of advocating "enforced commingling" rather than the state that was guilty of enforced separation?[33]

Some sense can be made of the Court's blindness to the state coercion in *Plessy* if one starts with the premise, apparently shared by both the majority and the dissent, that individuals should be left free to define for themselves the nature of the good. This position might be linked to a cognate agnosticism concerning the objective validity of individual taste and preference. On this view, it is wrong for the state to compel individuals to follow any particular life plan or for the state to choose any particular normative structure to help individuals to formulate that plan. Rather, the state provides only a neutral backdrop against which individuals choose their own goals.[34]

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31. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

32. *Id.*

33. For an explanation different from that offered here, see LOFGREN, *supra* note 22, at 178. Lofgren argues that when Justice Brown talked of "enforced commingling" brought about by "legislation," he was referring to "law in the broad sense, encompassing the law of the Constitution." *Id.* But even if Lofgren is correct when he asserts that Justice Brown meant to refer to constitutional law, his interpretation fails to resolve the puzzle. The constitutional interpretation Plessy argued for would only have *removed* a state-imposed requirement of separation. *See supra* text accompanying note 31. Plessy did not contend that The Civil Rights Cases, 109 U.S. 3 (1883), should be overruled, much less that the Constitution of its own force required private railroads to provide integrated service. Hence, his interpretation of the Constitution would not have *imposed* a state-enforced requirement of commingling.

34. *See, e.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10-12 (1980) (arguing that neutrality can be achieved); RONALD DWORKIN, A MATTER OF PRINCIPLE 192-204 (1985) (discussing the difficulties encountered by a liberal charged with the responsibility of propounding a theory of political distribution); John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251, 263 (1988) ("[J]ustice as fairness . . . hopes to satisfy neutrality . . . in the sense that the basic institutions and public policy are not to be designed to favor any particular comprehensive doctrine.").

This vision is coherent so long as individuals remain atomistic and disengaged from each other. Classically, problems emerge when different individual tastes or life plans conflict and cannot be reconciled. As Herbert Wechsler argued in his famous attack on *Brown*,[35] segregation posed just this dilemma. Of the individuals using Louisiana railroad cars, for example, some had an individual preference for riding with people of another race and some did not.

In an ideal world, this conflict might be resolved on an individual level. Conceivably, there might be a market where individuals desiring integrated and segregated seating bargain with each other with one group buying the other out. Alternatively, there might be competing railway lines offering integrated and segregated service. Even if there were only one line, it might provide three types of cars: black, white, and integrated.

None of these solutions is wholly satisfactory, however. Face-to-face bargaining among large groups of strangers riding railways every day might well be impractical. Moreover, even if these transaction costs could be overcome, the necessity of buying out every member of the other races would likely produce holdouts engaged in strategic behavior.

Perhaps these problems could be overcome by creating competing integrated and segregated rail lines. If ticket prices were established in a competitive market, and if the railroad were permitted to charge different prices to white and black customers depending upon the demand among each group for integrated and segregated accommodations, then perhaps the preferences of all riders could be vindicated to the degree that they demonstrated a willingness to pay.[36]

But the fundamental difficulty with this, or any other market solution, is that it fails to take segregation—or, for that matter, integration—seriously as an ideology rather than as simply a matter of individual taste. It is at this point that liberal individualism begins to double back

35. Wechsler asked: "Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?" Wechsler, *supra* note 7, at 34.

36. Professor Roback argues that in the absence of legislation compelling separate cars, streetcar companies would be motivated to adopt the most economically efficient rule. *See* Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. ECON. HIST. 893, 894-95 (1986). Although both segregation and integration produce negative externalities for passengers preferring the other system, each externality is likely to influence revenues, thereby forcing the company to internalize them. *Id.* at 896.

Roback also found that in the absence of legislation most companies did not provide segregated seating and that the companies resisted statutes that mandated segregation. *Id.* at 899. This finding suggests that private tastes for segregation were not strong enough to make a segregated system the efficient outcome. *But see* LOFGREN, *supra* note 22, at 17 (finding that segregation in streetcars was increasing by 1890 and that black travelers on regular railways more often than not encountered either segregation or discrimination in quality of service).

on itself. The taste for integration or segregation is not (or not just) for individual seating accommodations, but for the ability to live within a more general system or culture of which integration or segregation is a part. The ability of individuals to purchase integrated or segregated accommodations hardly satisfies those who believe that one system or the other is a moral imperative.[37] Indeed, allowing the marketplace to decide the issue reduces it to the level of personal preference and therefore denies its essentially moral character.

Systemic preferences of this sort pose a dilemma for liberal individualism. One response would be simply to reject the legitimacy of such preferences.[38] But this outcome is in tension with the unwillingness of liberal individualists to accept any collective definition of the good.[39] If one is to take seriously liberal agnosticism about the nature of the good, then systemic preferences must be accorded the same respect as any other normative judgments.[40] Liberals might therefore acknowledge the legitimacy of such preferences. However, because it is simply not possible to vindicate competing moral or systemic preferences, this outcome is certain to produce an irreconcilable conflict that requires the kind of collective response that liberals also reject. Either the system will be segregated or it will be integrated. The state has no choice but to formulate some rule that creates one system or the other, thereby frustrating the desires of one group or the other.

There is a partial escape from the dilemma: Liberals might abandon their opposition to collective action while continuing to insist upon normative neutrality. Thus, the state might formulate a collective response supporting one side or the other, yet maintain a neutral position with regard to the normative desirability of that response. In effect, the state would declare that although it was taking no official position on the desirability of segregation, and therefore no official position on compet-

37. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 44-51 (2d rev. ed. 1966) (describing the views held by George Washington Cable, Lewis Harvie Blair, and other Southern liberals of the late nineteenth century).

38. This is the position taken by Ronald Dworkin. *See* DWORKIN, *supra* note 34, at 196-97; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 274-76 (1977).

I argue below that the Court's acceptance of this position during the *Lochner* era helped to undermine the constitutional status of segregation. *See infra* text accompanying notes 70-71.

39. *See* H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 844 (1979) ("[T]hat governments should as far as possible be neutral . . . may be the true centre of liberalism, . . . but I cannot see that this ideal is explained or justified . . . as a form of . . . the duty of governments to show equal concern and respect for their citizens.").

40. In recent years this argument has been pressed most forcefully by Lord Devlin. *See generally* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 1-25 (1965). Although Devlin is sometimes read as arguing for a particular moral vision, his position is actually premised on the opposite assumption. It is the stance of liberal agnosticism regarding the good that drives him to the conclusion that the majority must be permitted to commit society to a particular moral vision. *See id.* at 7-11.

ing conceptions of the good, it was nonetheless permitting the vindication of systemic segregatory preferences because this outcome satisfied the desires of the greatest number of its citizens.[41]

Although inevitably collective, this response might be seen as respecting individual autonomy in the sense that it did not impose on anyone a *state* norm. Rather, the state was doing no more than aggregating and reflecting individual preferences in a neutral fashion in circumstances in which some sort of collective response was inevitable.

It was in this sense that Justice Brown apparently saw his decision as consistent with individual autonomy. Although allowing the state to maintain a system of segregation, the decision did not permit state endorsement of such a system.[42] It therefore left individuals free to maintain their own views about the desirability of segregation. For this reason, Justice Brown believed that "[l]aws permitting, and even requiring, [separation of the races] in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other."[43] Such laws are not stigmatizing because they do not constitute state endorsement of segregationist views. Rather, they do no more than recognize "established usages, customs and traditions of the people . . . with a view to the promotion of their comfort, and the preservation of the public peace and good order."[44] Validation of the Louisiana statute also did not entail validation of laws requiring

> separate cars . . . for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or . . . laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different

41. It would be a mistake, of course, to assume that segregated streetcars necessarily meet this requirement or to equate the passage of laws favoring segregation with a majority preference for this arrangement.

Using arguments drawn from the theory of public choice, Professor Roback argues that segregation statutes probably reflected defeets in the political process rather than majority preferences.

> The suppliers of a segregation ordinance are paid in the currency of (white) votes. The cost of casting a vote in favor of a prosegregation candidate is quite minimal in comparison with the cost of boycotting streetcars or even of paying a slightly higher farc for each ride. Thus, voters with even a very small demand for segregation, that is, those willing to pay only a small private price to ride in a segregated car, might be willing to vote in favor of a segregation law. . . . When blacks are disenfranchised, as they were at the turn of the century, the median preference for segregation rises, and segregation ordinances are more likely to pass.

Roback, *supra* note 36, at 897-98.

I argue below that attacks on the legitimating force of political outcomes played an important role in undermining Jim Crow. *See infra* Seetion II.B.2.

42. *Cf.* LOFGREN, *supra* note 22, at 184 (explaining that Justice Brown did not endorse popular racist sentiments, but used such sentiment as a link in his train of reasoning).

43. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

44. *Id.* at 550.

> colors . . . . The reply to all this is that every exercise of the police power mnst be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class.[45]

Only if the laws were enacted not for "the public good," but for the "annoyance or oppression of a particular class"—if maintenance of a segregatory system degenerated into state endorsement of the views of one group of citizens—would they be unconstitutional. Ironically, from this perspective it wonld be judicial *invalidation* of segregation laws that would be inconsistent with individual choice. Invalidation in the face of majority preference for the laws would necessarily endorse a normative position favoring integration at the expense of the individual choices of segregationists. Only by leaving the matter to the "black box" of the political process—a process that was itself presumed to be normatively neutral—could individual choice be respected in circumstances in which the choices of individuals necessarily conflicted.

It is important to understand that this perspective influenced not only the *Plessy* majority but also the dissent. For Justice Harlan the majority's opinion was wrong because it was not merely neutral but rather constituted an endorsement of one side of the argument. This was implicit, he contended, in the majority's distinction between the Louisiana segregation statute and other, more extreme measures that the majority characterized as unreasonable.

> Is it meant that the determination of questions of legislative power depends npon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound pnblic policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation.[46]

For both Justices Brown and Harlan, then, judicial intervention was problematic because it required a collective, coercive imposition of normative values. For Justice Brown, it followed that the court should leave the political resolution of conflicting individual preferences undisturbed—as long as this resolution constituted no more than a neutral aggregation of individual preferences and did not itself constitute a public endorsement of those preferences. For Justice Harlan, the Court's recognition of the reasonableness of the Louisiana statute, while holding in reserve the power to invalidate other more extreme, hypothetical statutes, was itself such a normative endorsement and, therefore, violated the very principle that the majority had relied upon.[47]

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45. *Id.* at 549-50.

46. *Id.* at 558 (Harlan, J., dissenting).

47. *Id.* at 563-64. The modern dispute about the constitutional status of laws prohibiting

The overlap between Harlan's views and those of the majority became more obvious three years after *Plessy* when Harlan wrote for a unanimous Court in *Cumming v. Richmond County Board of Education,*[48] rejecting the first Equal Protection challenge to segregated education to reach the Supreme Court.

In order to understand the issue in *Cumming,* it is necessary to understand what the Court left unresolved in *Plessy.* Although *Plessy* is often referred to as establishing the separate-but-equal principle, in fact the case says nothing about equality of treatment. The facts of *Plessy* allowed the Court to uphold the Louisiana statute without the necessity of giving content to this normative standard. Even though the Louisiana law required " 'equal but separate accommodations for the white, and colored races,' "[49] Plessy maintained that the law was inconsistent with constitutionally mandated equality. The *Plessy* Court simply rejected this claim without intimating any views on what ought to count as equal treatment in cases where such treatment was constitutionally required.

Thus, not until *Cumming* did the Court have to address the equality question. When it did, it approached the problem in a fashion that threatened to strangle equalization litigation in its infancy. The *Cumming* dispute arose when a group of black taxpayers challenged a tax levy designed to fund a white high school after the parallel black high school had been closed.[50] In a four-page opinion for a unanimous Court, Justice Harlan summarily rejected their claim.

To anyone with modern sensibilities, the substantive equality ques-

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homosexual sodomy provides an analogue to the *Plessy* debate. In Bowers v. Hardwick, 478 U.S. 186 (1986), both Justice White, writing for the majority, and Justice Blackmun, writing for the dissenters, invoked the ideal of judicial value-neutrality in much the way that Justices Brown and Harlan had almost a century earlier. Like Justice Brown, Justice White thought that judicial invalidation of a state restriction on association (this time between homosexuals) would illegitimately impose a contested moral vision on the country.

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Id. at 194-95.

Justice Blackmun, in turn, echoed Justice Harlan's argument. He maintained that the Court's failure to recognize the rights of homosexuals, while granting constitutional protection for the rights of heterosexual families, itself amounted to the endorsement of a contested moral vision. According to Blackmun, "The assertion that 'traditional Judeo-Christian values proscribe' the conduct involved cannot provide an adequate justification for [the statute]. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizeury." *Id.* at 211 (Blackmun, J., dissenting) (citation to brief omitted).

48. 175 U.S. 528 (1899).

49. *Plessy,* 163 U.S. at 540 (quoting Act of July 10, 1890, No. 111, § 1, 1890 La. Acts 152, 153).

50. *Cumming,* 175 U.S. at 529-31.

tion posed by *Cumming* seems easy and the result reached by the Court indefensible. If a school district could operate a high school for whites but not for blacks, it is hard to imagine how *any* state of affairs could violate the equality requirement. How could Justice Harlan, the great dissenter from the Court's assault on Reeonstruction in *Plessy* and the *Civil Rights Cases,*[51] have been so insensitive to the claim advanced in *Cumming*?

The problem faced by the *Cumming* Court was that from a liberal perspective, it was no more possible to define equality than to resolve the conflict between the preferences at stake in *Plessy.* Without an official, substantive definition of the good, the Court had no external yardstick with which to measure the adequacy of facilities that were not identical. In response to this problem, the plaintiffs proposed that a comparative yardstick be used. Instead of insisting that they were entitled to a high school as a substantive matter, they claimed that their entitlement should be measured by what whites received.[52]

There were two difficulties with this yardstick. First, if an accurate comparison was to be made, the groups to be compared had to be similarly situated. But they were not. As Justice Harlan explained, there was little demand for a black high school. With the funds in hand, the Board was apparently forced to choose between operating a black high school for the benefit of sixty children or operating a black primary school for the benefit of three hundred children.[53] If the problem is posed this way, it is not obvious that the Board's decision to close the high school, while keeping the primary school open, was inconsistent with the overarching goal of achieving real equality for blacks. Its decision "was in the interest of the greater number of colored children, leaving the smaller number to obtain a high school education in existing private institutions at an expense not beyond that incurred in the high school discontinued by the Board."[54]

Of course, this is not the only way to pose the problem. If the Board had been prepared to spend more money overall on the education of black school children, it could have operated a primary school and a high school. But it is at this point that the second problem takes hold. The plaintiffs in *Cumming* had not sought an additional expenditure of funds, and with only a comparative yardstick at its disposal, the Court was powerless to order such an expenditure.

> The substantial relief asked is an injunction that would either impair the efficiency of the high school provided for white children or compel the

51. 109 U.S. 3 (1883).

52. *See Cumming,* 175 U.S. at 540.

53. *See id.* at 544.

54. *Id.*

> Board to close it. But if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools.[55]

Because the Equal Protection Clause left the state free to satisfy the equality requirement by ratcheting down benefits for whites rather than ratcheting up those provided to blacks, there was no assurance that overturning the lower court's denial of the requested injunction would do anything to hasten the end of black subjugation.

Faced with these complexities in resolving the substantive question, the Court once again opted for an institutional solution that left the matter to the political process.[56] Because this process itself (supposedly) aggregated individual preferences in an equal way, it served to validate the outcomes that it produced.

A person who knew nothing about the South, and nothing about the role that Jim Crow played in enforcing status relationships, might be persuaded by Justice Harlan's approach. Abstracted from social context, the school board's resolution of the problem of limited resources and conflicting demands is not irrational. If one assumes that the Board was acting in good faith and counting the welfare of each of its constituents equally, there is little reason to reject its resolution of the problem. Justice Harlan's opinion explicitly makes this assumption.

> We are not permitted by the evidence in the record to regard [the Board's] decision as having been made with any desire or purpose . . . to discriminate against any of the colored school children of the county on account of their race. . . . [I]f it appeared that the Board's refusal to maintain [a high school for black children] was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen . . . .[57]

The history of equalization litigation between *Cumming* and *Brown* is largely a sustained and withering assault on Justice Harlan's assumption. Civil rights groups gradually made the Court see that public officials in the South were not making good-faith decisions regarding equality, but were instead entrenching a system designed to assure the permanent subservience of blacks. It followed from this realization that *Cumming*'s treatment of the institutional issue could not be defended; the substantive equality question had to be decided by the courts if it was to be decided at all.

At the same time opponents of Jim Crow were undermining the institutional case for a political resolution of the equality question, they were also exploiting the liberal individualist strands of *Plessy* and

55. *Id.*
56. *See id.* at 545.
57. *Id.* at 544-45.

Cumming to redefine the substantive content of equality by successfully attacking various forms of Jim Crow as failing to comport with the ideal of individual freedom of choice.

Although there is no indication that contemporary participants in this double-barreled assault on segregation fully understood the implications of what they were doing, their two strategies were on a collision course: while the first strategy served to lay the groundwork for a judicial resolution of the equality question, the second served to deprive the courts of the tools necessary for such a resolution.

B. From Plessy *to* Brown: *The Evolving Law of Separate-but-Equal*

1. Substantive Equality: Attacking the Anti-Individualist Outcomes of the Political Process

As noted above, *Plessy* and *Cumming* both rested uneasily on individualist rhetoric. But the rhetoric contained contradictions that, if skillfully exploited, could serve to undermine, as well as support, Jim Crow. There were two types of contradictions. First, liberal individualism rests on the right of individuals to pursue their own conceptions of the good. But some of these conceptions—such as the preference for a segregated society—are themselves not individualistic. The *Plessy* Court dealt with this problem by treating these preferences as equally worthy of respect on the theory that any other result would privilege one theory of the good, thereby undermining individualism. This stance forced the Court to accept a collective response to the dispute between segregationists and integrationists.

However, there is another way to escape the dilemma. An individualist might avoid contradiction by rejecting the legitimacy of preferences that are inconsistent with individualism. On this view, a court committed to individualism must draw a boundary between protected vindication of individual choice on the one hand and unprotected efforts to externalize preferences on the other. In the years between *Plessy* and *Brown,* opponents of Jim Crow were able to make some headway by convincing courts that they should adopt this latter stance, and that at least certain segregatory laws were invalid because they reflected nonindividualist preferences.[58]

The second contradiction stems from the incommensurability of different preferences or tastes. Because liberal individualism treats preferences as personal and disembodied, there is no external measure for comparing one to another or for valuing them other than by observing the way in which individuals value them. This problem has significant implications for judging the equality of separate facilities. On individual-

58. *See infra* text accompanying notes 60-90.

ist premises, the worth of these facilities must be measured in terms of the way they are valued by those who use them. As argued above, this absence of an external yardstick doomed the plaintiffs' equalization argument in *Cumming*.[59] But once the Court was ready to abandon *Cumming*'s institutional solution, it was not hard to turn this weakness into a strength: separate facilities were always vulnerable to constitutional attack because the inevitable differences between them did not correspond to the idiosyncratic preferences of the people forced to use them.

Cases decided under the regime of *Plessy* exploited both contradictions in the law of separate-but-equal to gradually narrow its scope. The Court's first encounter with the contradiction created by nonindividualist preferences came in *Berea College v. Kentucky*.[60] The college, a private institution, challenged the constitutionality of its conviction under a state statute that made it a crime to operate a school " 'where persons of the white and negro races are both received as pupils for instruction.' "[61]

Dissenting from the Court's affirmance of the conviction, Justice Harlan embraced the values of liberal individualism. Interestingly, his opinion did not attack the statute on Equal Protection Clause grounds. Rather, he relied upon then-emerging substantive due process principles to argue that the government lacked a legitimate interest in interfering with voluntary, private association:

> The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. . . . If pupils, of whatever race . . . choose with the consent of their parents or voluntarily to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or state, can legally forbid their coming together, or being together temporarily, for such an innocent purpose.[62]

Harlan's position can be understood as a rejection of external or nonindividualist preferences as a basis for upholding the statute: as long as the individuals engaging in a transaction do so voluntarily, those outside the transaction have no legitimate basis for interfering.

Although only Justice Day agreed with Harlan that the state statute was unconstitutional, it is significant that the majority was unwilling to engage him on the crucial issue of nonindividualist preferences. Instead, Justice Brewer, writing for the Court, managed to make the individualist

59. *See supra* text accompanying notes 48-57.

60. 211 U.S. 45 (1908).

61. *Id.* at 46 (quoting Act of Mar. 22, 1904, ch. 85, § 1, 1904 Ky. Acts 181, 181).

62. *Id.* at 67-68 (Harlan, J., dissenting).

argument face the other direction. Brewer argued that the state judgment affirming the statute rested on two independent grounds. The first ground, to which the state court had devoted the bulk of its opinion, was that Kentucky had a constitutionally adequate interest in forcing the separation of blacks and whites, even when they wished to associate with each other.[63] The majority thought it unnecessary to reach the merits of this argument, however, because the decision was also fully supported on the ground that Berea College, as a corporation created by the state, was not an individual and, therefore, had no natural right to teach at all. It followed that the state could condition the grant of a corporate charter in any way it chose.[64]

The fact that the majority felt compelled to adopt a fairly strained reading of the lower court opinion, to avoid Justice Harlan's argument,[65] suggests the seriousness with which it took the argument. This suggestion ripened into an actual holding nine years later when a unanimous Court used similar reasoning to strike down a segregation statute in *Buchanan v. Warley.*[66]

In *Buchanan* a white seller of a residence sued for specific enforcement of the sales contract against a black purchaser.[67] The purchaser defended on the ground that the sales contract was conditioned on his right to occupy the premises and that a city ordinance, making it unlawful for a member of one race to occupy a residence on a block upon which the majority of houses were occupied by members of the other race, prevented his lawful occupancy.[68] The seller, in turn, challenged the constitutionality of the ordinance, and the Court, in an opinion written by Justice Day, ruled in his favor. Justice Day's opinion sounds in substantive due process and concludes by squarely holding that the act violated "the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law."[69]

This emphasis on property rights in *Buchanan* placed the case in the tradition of *Lochner v. New York*[70] and allowed the Court to rely upon limitations on the police power implicit in that tradition. Among the most significant of those limitations was the rejection of wholly external or nonindividualist preferences as a legitimate basis for state regulation.[71]

63. *See id.* at 60-61.

64. 211 U.S. at 55-57.

65. As Justice Harlan effectively points out, the state court had added comments concerning Berea's corporate status as little more than an aside. *Id.* at 61 (Harlan, J., dissenting).

66. 245 U.S. 60 (1917).

67. *Id.* at 69-70.

68. *Id.* at 70.

69. *Id.* at 82.

70. 198 U.S. 45 (1905).

71. Thus, in *Lochner* Justice Peckham rejected out of hand the notion that maximum hour

But although the emerging law of substantive due process supported the Court's rejection of nonindividualist preferences, it also made the Court's position vulnerable to the same weaknesses that ultimately led to the unraveling of that doctrine. The difficulty in *Buchanan,* as in virtually all substantive due process cases, was that there were also individualist preferences supporting the statute. True, the transaction between Buchanan and Warley was voluntary, but that transaction had external consequences for their neighbors, who now found their individual preferences for segregated housing frustrated.

At several points in his opinion, Justice Day seems to acknowledge that individualist preferences can serve as a legitimate basis for the police power. He recognizes, for example, that "[c]ertain uses of property may be confined to portions of the municipality . . . because of the impairment of the health and comfort of the occupants of neighboring property."[72] In a curious passage at the end of the opinion he says, "[i]t is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."[73]

The passage is curious because it fails to explain why preventing race conflicts is not a sufficient state interest to render the limitations on the use of the property unprotected by the Constitution. Implicit in the Court's distinction between state interests that do and do not justify exercise of the police power is some sort of balancing approach. The Court seems to be deciding that certain uses are sufficiently deleterious to the "comfort of the occupants of neighboring property" to justify restrictions, while others are not.[74] Yet, as Justice Harlan forcefully argued when the *Plessy* Court attempted to make similar distinctions, this balancing is impossible in a world where all preferences are treated as equally worthy of respect. By giving greater weight to some preferences than others, the Court is therefore undermining the very tenets of liberal individualism it purports to be defending.

The *Buchanan* Court's property-rights focus was also significant because it served to distinguish *Plessy,* which, superficially at least, seemed to provide strong support for the purchaser. Justice Day argued that *Plessy* was distinguishable because it had involved "no attempt to deprive persons of color of transportation in the coaches of the public

laws could be justified "as a labor law, pure and simple." *Id.* at 57 (finding no reasonable basis for the state to interfere with the rights of bakers to make contracts of employment).

72. *Buchanan,* 245 U.S. at 75.

73. *Id.* at 81.

74. *See id.* at 80-81 (holding that control of racial tensions did not justify "depriving citizens of their constitutional rights and privileges" to own and dispose of property).

carrier."[75] Here, in contrast, " '[t]he effect of the ordinance . . . was to destroy the right of the individual to acquire, enjoy, and dispose of his property.' "[76]

Without further elaboration, this supposed distinction explains little. After all, the *Plessy* statute also destroyed the right of black individuals to "dispose of [their] property" in exchange for a seat in the white section of the coach. Conversely, black purchasers of real property in *Buchanan,* like black users of public carriers in *Plessy,* are left free to purchase "equal" services or property in segregated environments.

In order to make sense of the Court's distinction, one must assume that seats on a railroad are all more or less fungible, while different parcels of real property are distinct and, therefore, not "equal." Thus, while the black railway passenger is deprived of nothing other than the company of whites, the black purchaser of property loses the right to own a specific and unique parcel of land.

The intuition that each parcel of real property was "different," whereas most other goods were interchangeable, no doubt came naturally to the *Buchanan* Court. It is supported by the ancient equitable doctrine granting specific performance for contracts for the sale of real property.[77] Yet the purported distinction portended serious problems for maintaining the doctrine of separate-but-equal. For it is here that the dilemma posed by the incommensurability of idiosyncratic preferences takes hold. If individuals must be left free to define values for themselves, no two nonidentical entities, whether real property or not, are fungible. It will always be true that a person might place a value on the difference between the two entities, and the claim that the entities are equal even though separate will always be vulnerable to attack.

The Court had a brush with this problem three years before *Buchanan* in a case concerning rail transportation. In *McCabe v. Atchison, Topeka & Santa Fe Railway,*[78] the Court struck down a statute that required railroads to haul separate-but-equal coach facilities, but also authorized them to haul sleeping cars, dining cars, and chair cars for whites without requiring comparable black facilities. The state defended this provision on the theory that there was virtually no black demand for sleeping, dining, and chair facilities, and that it was therefore impractical

75. *Id.* at 79.

76. *Id.* at 80.

77. *See, e.g.,* Losee v. Morey, 57 Barb. 561, 565 (N.Y. App. Div. 1865) (specific performance required because " 'peculiar locality, soil, vicinage, advantage of markets and the like conveniences of an estate contracted for, cannot be replaced by other land of equal value' " (quoting Best v. Stow, 2 Sand. Ch. 298, 301 (N.Y. Ch. 1845)). For a discussion, see JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 180 (3d ed. 1989).

78. 235 U.S. 151 (1914).

to haul cars for this purpose.[79] In an opinion filled with individualist rhetoric, the Court rejected this rationale. The state's argument made

> the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. . . . It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.[80]

Although it may not have been apparent at the time, *McCabe*'s holding contained the seeds for a complete unraveling of the doctrine of separate-but-equal. If preferences were simply a matter of individual taste, and if the Equal Protection Clause prohibited the state from generalizing about what people preferred at the expense of idiosyncratic differences in tastes, then any difference between two facilities, however minor, could serve as a basis for a claim by such an individual that he was denied equal treatment because he would prefer one facility rather than the other.

The revolutionary implications of *McCabe* and *Buchanan* became apparent a generation later when the NAACP's school equalization campaign began to bear fruit in the Supreme Court. Its first victory in a school case came in *Missouri ex rel. Gaines v. Canada,*[81] decided in 1938. Missouri operated two state universities—the University of Missouri open only to whites, and Lincoln University, the parallel black institution. Although Lincoln, unlike the University of Missouri, had no law school, a state statute authorized the board of curators to arrange for attendance of black students at institutions in neighboring states and to pay reasonable tuition rates for such attendance. Gaines, a black, was denied admission to the University of Missouri Law School and claimed that his right to equal protection had thereby been denied.[82]

Writing for seven justices, Chief Justice Hughes agreed. It was "beside the point" in the Court's judgment whether the out-of-state school provided as valuable a legal education as provided by the University of Missouri.[83] Nor was it significant that Gaines was the only black student ever to apply to the University of Missouri. "The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes

79. *Id.* at 161.
80. *Id.* at 161-62.
81. 305 U.S. 337 (1938).
82. *Id.* at 342-43.
83. *Id.* at 349.

solely upon the ground of color."[84]

Taken alone, this observation hardly explains the result reached by the Court. Of course, the key question was "what opportunities Missouri itself furnish[ed]." But the state could fairly respond that Missouri "itself" had furnished Gaines with the opportunity to attend law school in a neighboring state. This opportunity was insufficient to satisfy constitutional standards only if it was not equal to the opportunity to attend law school in Missouri.

In light of the Court's concession that equality in objective value of the out-of-state education was "beside the point," the constitutional violation must stem from the frustration of Gaines' subjective desire to attend the in-state school. The individualistic premises of *McCabe* mean that Gaines was entitled to an equal right to vindicate this personal desire even if it was shared by no other member of his race. This view flows naturally from the position that the government has no business saddling individuals with collective definitions of the good. Whether or not anyone else shared his preference, it was enough that Gaines valued an in-state education and that, had he been white, he would have been able to vindicate his preference.

Although all this flows naturally from *McCabe,* it is hard to see the limits of the analysis. For example, from Gaines' individual perspective, it would matter not at all if Lincoln had an excellent medical school that the University of Missouri lacked. Nor would it matter if vast numbers of blacks wished to attend medical school and Gaines was the only member of his race interested in law school. As long as Gaines wanted to attend law school and Missouri offered a legal education to whites, the equality principle required that the state offer him a law school education as well.

Furthermore, there is no magical reason why the analysis should be limited to the division between different disciplines. Suppose, for example, that both Lincoln and the University of Missouri had law schools, but that Lincoln Law School offered law review, but not moot court, while Missouri offered moot court, but not law review. If the Court were to determine whether the two schools were equal for constitutional purposes, it would have to decide the value of moot court compared to the value of law review. But *McCabe*'s embrace of liberal individualism precludes such an inquiry. Instead, each individual must be allowed to determine for himself or herself the value of these goods. It would seem to follow that if an individual black student wished to participate in moot court and was uninterested in law review, this hypothetical system of segregated education would deny him or her equal protection.

The legal difficulties for those defending separate education became

84. *Id.*

more severe still when, on the eve of *Brown,* the Court extended the equalization analysis to intangible factors. In *Sweatt v. Painter*[85] the Court compared the segregated University of Texas Law School to an all-black law school opened after the litigation had commenced. The Court could easily have held that these facilities were unequal because of tangible differences, such as the size of the library and number of full-time faculty. But the Court did not limit its analysis to these factors. It went on to hold that the all-white school was superior in "qualities which are incapable of objective measurement" such as reputation of faculty, experience of administration, and influence of alumni.[86] Indeed, in *Sweatt* the Court suggested that in a society dominated by whites, the mere inability of blacks to associate with white students denied them equality.[87]

The Court emphasized the importance of the associative aspects of education directly in *McLaurin v. Oklahoma State Regents.*[88] Oklahoma had actually admitted McLaurin, a black, to the all-white University of Oklahoma Department of Education. However, he was made to sit in a special seat reserved for blacks, prohibited from eating with other students in the cafeteria, and given a special table in the library.[89] Because the physical facilities McLaurin utilized were identical to those used by white students, he could hardly claim that they were unequal. Nonetheless, the Court held that the restrictions placed upon him violated the Equal Protection Clause because they "impair[ed] and inhibit[ed] his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[90]

2. *Procedural Equality: Attacking the Legitimating Force of the Political Process*

As the preceding Section demonstrated, by the early 1950s the Supreme Court had come to understand that the individualist premises of *Plessy* created two contradictions. First, they meant that segregation could be justified *only* as a matter of individual preference and not as a moral system. When individual preferences for segregation and integration conflicted, it was necessary for the Court to weigh the strength of one set of preferences against the other. Yet the tenets of liberal individ-

85. 339 U.S. 629 (1950).

86. *Id.* at 634.

87. The Court noted that it could not consider petitioner's proposed education equal when it excluded association with racial groups comprising the majority of lawyers and judges with whom the petitioner might later interact. *Id.*

88. 339 U.S. 637 (1950).

89. *Id.* at 640.

90. *Id.* at 641.

ualism made any collective valuation of each set of preferences illegitimate.

Second, the difficulties posed by liberal individualism extended beyond the problem of determining when equal facilities could be separate to the problem of whether separate facilities were truly equal. The separate-but-equal doctrine demanded an inquiry into whether separate and inevitably different facilities were of equal value. Yet the insistence on the sanctity of individual choice and valuation deprived the Court of any objective basis for conducting this inquiry.

There is a sense in which there was nothing new about either of these predicaments. Justices Brown and Harlan had foreshadowed them in their *Plessy* and *Cumming* opinions at the very beginning. Indeed, it was precisely because liberal individualism left the Court without the tools to weigh conflicting preferences that the *Cumming* Court had remitted the equality issue to the political process.

The crisis for the old order was produced by the coupling of the critique of substantive equality with an effective attack on the legitimating force of the political process. This double-barreled assault deprived the Court of both the means to resolve equality disputes and any escape hatch permitting it to avoid decision.

The story of how the legitimating force of political resolution came to be undermined is a familiar one,[91] and it need only be sketched here. The very first arguments about the Fourteenth Amendment concerned the extent to which the Reconstruction Congress meant to restructure the political process. In the *Slaughter-House Cases*[92] the plaintiffs sought to convince the Court that the new amendment was intended to provide citizens with comprehensive protection against state overreaching. The Court rejected this view, holding that in general the framers did not mean to alter the system whereby the primary protection for individual rights came from the states themselves.[93]

To be sure, in powerful dicta, the Court did note that the main purpose of the Amendment *was* to alter this system in the limited class of cases where the rights of blacks were at stake.[94] But the *Civil Rights*

91. For an especially interesting account, see generally Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities,* 91 YALE L.J. 1287 (1982) (discussing the political theory behind footnote four of United States v. Carolene Products Co., 304 U.S. 144 (1938), and subsequent responses to the counter-majoritarian difficulty).

92. 83 U.S. (16 Wall.) 36 (1873).

93. *See id.* at 77-78; *see also supra* note 30.

94. After reciting the legislative history of the Reconstruction Amendments, Justice Miller wrote:

> [I]n 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

Cases[95] subsequently established that, even with regard to race, federal protection took hold only when it could be shown that the states had defaulted in their obligations to the newly freed slaves.[96]

Although Justice Harlan dissented in the *Civil Rights Cases,* and did not cite them in *Cumming,* his approach was clearly influenced by them: Harlan too was prepared to remit the black plaintiffs to the protections provided by the state political process unless they could meet their burden of demonstrating that their welfare had not been equally valued by that process. Given the difficulties outlined above in justifying a judicial resolution of the equality problem, it was crucial to keep this barrier as high as possible.

In the years following *Cumming,* a series of attacks on the legitimacy of the political process served to undermine this approach. The first assault came from the right and juxtaposed political outcomes with natural rights. A conservative Court responded to the upsurge of social-welfare legislation at the turn of the century by insisting on the values of property and contract in cases such as *Lochner v. New York.*[97] As already noted, this rights-based approach produced the first cracks in the legal regime of separate-but-equal in cases like *Berea College* and

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of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

Slaughter-House, 83 U.S. at 71.

It followed that "[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by [the Equal Protection Clause], and by it such laws are forbidden." *Id.* at 81.

95. 109 U.S. 3 (1883).

96. Today, the *Civil Rights Cases* are usually cited for the proposition that the Fourteenth Amendment only provides protection against governmental conduct. *See, e.g.,* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (relying on the *Civil Rights Cases* as establishing a dichotomy between forbidden deprivation caused by the state and unsanctionable deprivation caused by private conduct). However, the *Civil Rights* Court was at least as concerned with establishing the boundary between state and federal as with maintaining the distinction between public and private. The majority premised its position on the belief that the Fourteenth Amendment was not designed to oust state authority—even regarding racial matters—unless the state could be shown to have defaulted in its primary obligation to protect individual rights. Thus, the objection to the 1875 Civil Rights Act was not so much that it covered purely private conduct, as that it provided federal protection in the absence of a showing of a state default. The Court found the Act unconstitutional because

> [i]t does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment.

Civil Rights, 109 U.S. at 14.

97. 198 U.S. 45 (1905) (striking down a law that set maximum hours as an unconstitutional infringement on the right to contract); *see also* Adkins v. Children's Hosp., 261 U.S. 525 (1923) (striking down a law that set minimum wages as unduly interfering with right to contract); Adair v. United States, 208 U.S. 161 (1908) (striking down a law that criminalized discharges based on union membership as violating the right to contract). For a survey of the period, see BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 153-70 (1942).

Buchanan. It might have been possible for a reform-minded Court to have pursued a rights-based strategy so as to constitutionally mandate redistribution to the black underclass. But the natural-rights approach was at least temporarily discredited in the wake of the judicial controversy surrounding the New Deal and the Roosevelt appointments to the Court that followed that controversy.

The difficulties of "Lochnerism" were associated with some of the contradictions in liberal individualism discussed above. To be sure, the particular natural rights that the *Lochner* Court found in the Constitution were congenial to liberal individualists. But privileging these values over others that might have been selected was inconsistent with the opposition to collective definitions of the good. In contrast, political resolutions of these contested questions could be seen as no more than the vector produced by conflicting and equally weighted individual valuations. Hence, it came to be seen that respect for these political outcomes, rather than direct judicial enforcement of natural-rights principles, best embodied liberal principles.

The challenge for the post-*Lochner* Court was to find a stance that was consistent with this critique of *Lochner* while still allowing the Court to play a role in what the politically progressive Justices perceived as a struggle for social justice. The solution was an approach that focused on the supposedly undemocratic characteristics of the political process rather than on the substance of what it produced. This approach, epitomized by Justice Stone's famous footnote four in *United States v. Carolene Products Co.*,[98] could be justified as respecting individualism by insuring that individual preferences were in fact fairly aggregated by the state. Yet it also justified judicial intervention, not to enforce the substantive requirements of natural law, but to insure truly democratic decisionmaking.

The *Carolene Products* approach had a double relevance to the regime of separate-but-equal. First, blacks were the quintessential "discrete and insular minority" that needed judicial protection.[99] It was easy to see that prejudice directed against them had prevented them from forming the political coalitions that might have protected their interests. Indeed, the tragedy of Reconstruction was that racism prevented poor whites and blacks from finding common ground.[100] Moreover, there was

98. 304 U.S. 144, 152 n.4 (1938) (suggesting that the presumption of constitutionality may be weaker when enumerated rights, the political process, or discrete and insular minorities are affected by a law).

99. *See* Cover, *supra* note 91, at 1300-07 (discussing the extreme political exclusion of blacks and the application of footnote four to their situation).

100. For example, the post-Reconstruction disenfranchisement of blacks seems to have been motivated largely by the fear that the populist movement would ultimately produce a coalition of blacks and lower-class whites. *See* V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 8,

no need to resort to a subtle or controversial political theory to understand the current exclusion of blacks from the political process. In large areas of the country blacks were overtly and simply denied the franchise.[101] It was hypocrisy of the worst sort to remit blacks to a political process in which they had no role.

Second, Jim Crow itself served to create the political outcomes that the Court was asked to review. The pervasive system of segregation together with the elaborate racist ideology supporting it maintained the taboo against interracial political coalitions.[102] The system of inferior education provided by segregated schools and, perhaps more significantly, the constant psychological and physical degradation and intimidation that Jim Crow represented effectively kept blacks "in their place" and out of political power. This effect of segregation on the political power of blacks turned the *Cumming* approach into a cruel joke. On the one hand, the Court claimed that it could not tamper with Jim Crow because the political process was best equipped to measure the equality of separate facilities. Yet on the other hand, the very existence of Jim Crow served to bias that process against blacks.

Significantly, the Court decided *Gaines* only a few months after *Carolene Products,* and the implication that *Carolene Products* held for the problem in *Gaines* was obvious. The Court could no longer remit the equality question to the political process. Pervasive defects in that process—defects supported by the very sort of segregation under attack—meant that the Court could not escape giving substantive content to the equality requirement.

Indeed, it is a mark of the transformation that had occurred between *Cumming* and *Gaines* that the *Gaines* majority did not even allude to the institutional question. One must look to Justice McReynolds' dissent to

541 (1949) (suggesting that disenfranchisement movements were motivated by a fear that blacks might gain a pivotal role in southern politics); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 18, 36-37, 147-48, 203, 221 (1974) (discussing ways in which Southern democrats defused risk of out-faction/black alliances by means of antiblack rhetoric and disenfranchising legislation); STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969, at 9-10 (1976) (Conservative whites succeeded in "divid[ing] the poor by raising the spectre of 'nigger domination.' "); HENRY L. MOON, BALANCE OF POWER: THE NEGRO VOTE 72-73 (1948) (move to disenfranchise blacks sparked by fear of unity between blacks and poor whites).

101. In the wake of the Civil War, blacks were enfranchised throughout the South and exercised a notable amount of political power. For a detailed description, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 350-59 (1988). But black disenfranchisement in the 1880s and 1890s soon followed. *See* KEY, *supra* note 100, at 8, 539-47. For an argument that vigorous enforcement of black voting rights might have been sufficient to prevent racial discrimination without the need for further judicial intervention, see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory,* 77 VA. L. REV. 747, 788-819 (1991).

102. *See* Cover, *supra* note 91, at 1303-04 (noting that racial segregation made political exclusion seem normal).

find a hint that there might be an issue as to who should decide whether Missouri's treatment of black and white law school applicants was equal.[103] For the majority, it literally went without saying that the question must be resolved by the Court. The only issue was *how* it should be resolved.

To be sure, the *Gaines* Court stopped short of actually ordering the desegregation of state facilities. That step did not come until twelve years later when, in *Sweatt v. Painter,*[104] the Court finally held that the absence of an equal parallel institution required the admission of the black plaintiff to the University of Texas Law School.[105] But although it took many years for the Court to get there, the outcome in *Sweatt* was inevitable after *Gaines.* Once the Court had determined that the equality question needed to be judicially rather than politically resolved, it was clear that the demand for equality between separate institutions would be virtually impossible to satisfy.

Indeed, given *Gaines, Sweatt,* and *McLaurin,* the mystery is why the Court thought that something more needed to be said. Recall that on the eve of *Brown,* a generous reading of Supreme Court precedent supported the following propositions:

1. If the state provided separate facilities for blacks and whites, the Constitution required that they be equal (though the meaning of equal was undefined).[106]

2. The Court would determine for itself whether this constitutional requirement was satisfied and would accord no deference to judgments made by state officials concerning the comparability of the two facilities.[107]

3. It was impermissible to judge the significance of differences between facilities on an aggregate or collective basis. Rather, the constitutional question turned on the idiosyncratic valuations of individual

103. After quoting from Justice Harlan's opinion in *Cumming* to the effect that educational decisions should be made on the state level, *see* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 353 (1938) (McReynolds, J., dissenting), McReynolds argued: "The problem presented obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through theorization inadequately restrained by experience." *Id.* at 354.

104. 339 U.S. 629 (1950).

105. *See id.* at 636. The Court had earlier declined to take this step in Fisher v. Hurst, 333 U.S. 147 (1948). For an examination of *Fisher,* see Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958,* 68 GEO. L.J. 1, 6-9 (1979).

106. *See Gaines,* 305 U.S. at 344-45, 349 (provision of separate university for blacks not sufficient defense when petitioner seeks legal education and university lacks law school).

107. The *Gaines* Court disregarded, as "beside the point," the state court's finding that comparable opportunities were provided in another state, and then conducted an independent examination of the facilities in question without giving weight to the state's choice. *See id.* at 349-52.

users of the separate facilities.[108]

4. The equality of separate facilities was not just a matter of comparable or even identical physical resources. The calculation also had to take into account intangible factors such as the prestige of an institution, its tradition, and its standing in the community.[109]

5. Even if the state managed to equalize all of these factors, it still had not met its burden. In a society dominated by whites, blacks were treated unequally simply by their inability to associate with whites. Consequently, separate black facilities were required to compensate for this associational deprivation if they were to be constitutionally permissible.[110]

6. If the state failed to demonstrate that separate facilities were equal in the sense outlined above, then black applicants must be admitted to the white institution.[111]

Brown v. Board of Education[112] is widely regarded as one of the great landmarks in the history of constitutional law. For years it sparked intense and violent debate about the limits of judicial power. Nearly four decades later, far removed from the tumult and shouting, this controversy seems bizarrely misplaced. Given what came before, the real question is why *Brown* needed to be decided at all. The next Section addresses this question.

C. *The Two Faces of* Brown: *Dramatic Advance or Strategic Retreat?*

On a superficial level, the contribution of *Brown* was simple and dramatic. Whereas prior cases had taken the legitimacy of separate-but-equal as a starting point, *Brown* rejected this baseline. "We conclude," the Court announced, "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[113] Thus, even if a state somehow managed to satisfy the exacting standards for separate facilities spelled out in *McCabe, Gaines, Sweatt,* and *McLaurin,* it still would not have satisfied its constitutional obligation. The equality requirement could be met only by dismantling the system of dual education based upon race.

Unfortunately, however, this formulation solves one mystery only

108. *See id.* at 351 (petitioner's right was personal and could not be discounted based on lack of aggregate demand); McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151, 161-62 (1914) (same).

109. *See* Sweatt v. Painter, 339 U.S. 629, 634 (1950) (finding that intangible factors were very important to a complete comparison of schools).

110. *See id.* (education denying association with majority group in society could not be substantially equal); McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641-42 (1950) (state restrictions limiting associations with others during the educational process could not be sustained).

111. *See Sweatt,* 339 U.S. at 635-36 (petitioner ordered admitted to white school because black school judged unequal).

112. 347 U.S. 483 (1954).

113. *Id.* at 495.

by creating another: What is the "inherent" reason why separate facilities must be unequal? Surely one could imagine a situation in which enough human and monetary capital were devoted to a separate black school to make it equal to or better than a white school. The Court's holding seems to mean that even if vast resources were poured into an all-black school to compensate for intangible factors, even if the students in the school excelled in every respect, even if their performance was superior to that of white students and superior to what could be achieved in an integrated school, still their educational opportunity would be unequal to that afforded whites.

This puzzling assertion, which both made *Brown* necessary and distinguished it from the preceding cases, can only be understood as a reaction to the dilemmas of liberal individualism outlined above. But the reaction is ambiguous and raises deeper questions about the structure of constitutional litigation.

1. Brown *as a Rejection of Liberal Individualism*

One way to understand *Brown* is as a radical break with the tradition of liberal individualism from which it emerged. On this view, the dilemmas of valuation and justification that plagued the Court's efforts to formulate a law of separate-but-equal for half a century finally led the Justices to reject the paradigm of state neutrality and individual freedom to define and pursue the good. In its place, the Court erected an official normative structure that envisioned particular substantive outcomes as necessary for a just society. Thus, separate facilities were inherently unequal in the sense that they were incompatible with the role that blacks should play in American society, according to a specific and controversial normative vision insisted upon by the Court.[114]

There is much in the *Brown* opinion that supports this reading. For example, the Court's use of empirical studies on the effects of segregation on black schoolchildren can be understood only from this perspective. The controversy concerning the reliability of the studies[115] has tended to overshadow the more basic question of why they were relevant in the first place.

From the viewpoint of individualism, there are two problems with the Court's reliance on the studies. First, even if it is true that blacks learn better in an integrated than in a segregated environment, it simply

114. For a representative defense of *Brown* along these lines, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 57 (1962) (government cannot take actions that have the consequence of placing one group "in a position of permanent, humiliating inferiority").

115. *See, e.g.*, Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 70 (1978) ("The proferred evidence was methodologically unsound.").

does not follow from an individualist perspective that the state is obligated to foster integration. It is one thing to say that blacks and whites must have equal treatment. It is quite another to say that blacks are constitutionally entitled to the educational environment that maximizes their potential. The failure of the state to provide such an environment simply is not a denial of *equality.*

Second, at the very best, the empirical data demonstrate that *many* black children would learn more effectively in an integrated, rather than in a segregated, environment. But cases like *McCabe* and *Gaines* were not about what benefitted *many* blacks. Those cases insisted that the equality principle was an individual right and that the state was obliged to adjust the facilities it provided to accommodate individual preferences. It would seem to follow that if black students in a particular community—or, indeed, if a particular black student—performed better in a segregated environment, the state would be constitutionally obligated to satisfy this demand.

The Court's reliance on empirical data is more comprehensible if one sees the decision as reflecting the judgment that segregation was a substantive evil. Segregation is wrong not because it frustrates the individual preferences of those subjected to it, but because it is inconsistent with the position that blacks, *as a group,* should occupy in a normatively attractive society. On this view, the question is not whether any particular black student would learn better or be happier in a segregated or integrated environment. The question is whether segregation is just.

This reading of *Brown* is reinforced by the Court's emphasis on the cumulative effect of segregated schooling.[116] In perhaps the most famous passage in the opinion, Justice Warren wrote: "To separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[117]

To modern ears, this emphasis on the actual impact of segregation is

116. Several commentators have emphasized the "effects" orientation of *Brown* and argued that the post-*Brown* adoption of an intent standard amounts to a "taming" of *Brown. See* David A. Strauss, *Discriminatory Intent and The Taming of* Brown, 56 U. CHI. L. REV. 935 (1989); *see also* Freeman, *supra* note 7 (describing the Court's focus on purpose as taking a "perpetrator perspective"). As argued in the text, this is certainly one of several possible readings of *Brown,* and I do not understand either Professor Strauss or Professor Freeman to claim more than this. *See id.* at 1057-76 (detailing alternative readings of *Brown*); Strauss, *supra,* at 946-51 (characterizing the meaning of *Brown* as "uncertain"). To the extent that these commentators endorse what might be called a "betrayal" theory of post-*Brown* developments, however, I think that their case is overstated. The meaning of *Brown* was "uncertain" precisely because the opinion had embedded within it both the promise of radical transformation *and* the possibility of its own "taming" of the transformative possibilities of liberal doctrine. *See infra* text accompanying notes 254-56.

117. *Brown,* 347 U.S. at 494.

jarring. Modern equal-protection jurisprudence is dominated by questions about the intent of state actors who enacted a policy, not on the impact of that policy—at least when the state conduct does not facially discriminate against a minority group.[118] To be sure, the principle derived from *Brown* itself constitutes an exception to this general rule for cases involving state action that, although facially neutral, differentiates on a racial basis. But the exception is anomalous precisely because it stems from a consideration of the effect of the state action—a consideration that is usually treated as irrelevant when the action is not facially discriminatory on the basis of race.[119]

Brown's preoccupation with effect can also be understood as deriving from its rejection of liberal individualism. Modern intent standards take political aggregations of individual preferences as a baseline and treat judicial intervention as justified only when the vector produced by various individual preferences is distorted by the deliberate undervaluation of the welfare of racially identifiable individuals. But *Brown* seems to say that even a properly functioning political system can produce outcomes that are normatively unacceptable. Regardless of the intent of those who established segregated schools, the effect was to harm blacks "in a way unlikely ever to be undone," and this effect was simply unacceptable.

Thus, *Brown* might be understood as a radical break with the past. Instead of conflating norms and tastes and allowing moral questions to be determined by majority preferences, the Court was prepared to announce and insist upon a moral vision for the country. Instead of treating political outcomes as a matter of constitutional indifference, it was prepared to say that as a matter of justice, certain groups were required to exercise at least a modicum of power.

There are significant difficulties with this understanding of *Brown*, however. The first problem is that it turns *Brown* into an anomaly, a decision that is radically discontinuous not only with what came before, but also with what has followed. If it is true that Chief Justice Warren set out to dislodge liberal individualism, then his effort must be judged an

118. The seminal case is Washington v. Davis, 426 U.S. 229 (1976) (permitting a public-employment qualification test having a racially disproportionate impact to stand in the absence of either a claim or a showing of discriminatory intent). *See also* McCleskey v. Kemp, 481 U.S. 279, 292-97 (1987) (holding that proof of statistical disparity between races in likelihood of receiving death sentence does not invalidate a sentence; the defendant must prove racial bias in his particular case); Hunter v. Underwood, 471 U.S. 222, 227-33 (1985) (holding that a facially neutral provision in the Alabama Constitution that had the effect of disproportionately disenfranchising blacks violated Equal Protection Clause because of intent of drafters); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-71 (1977) (holding that a racially disproportionate effect is not enough to invalidate a zoning ordinance).

119. For a discussion of the tension between the *Brown* effects-based analysis and modern intent-based approaches, see STONE ET AL., *supra* note 7, at 617.

abysmal failure. As already noted, modern constitutional jurisprudence is entirely dominated by the rhetoric of individualism. If *Brown* constitutes a failed effort to depart from that rhetoric, it is puzzling that its holding has become totally uncontroversial.

Moreover, to examine the particular normative vision that *Brown* seems to have embraced is to become mired in contradiction. The main competitor to liberal individualism is a view that treats values as defined by collective entities rather than individuals. Instead of insisting on political structures that are normatively neutral and allowing individual freedom to pursue the good, this view treats individual preferences as inevitably constructed as a part of a group experience.[120]

But this communitarian vision coexists uneasily with integrationist ideology. Integrationists attacked separate-group identity and insisted on the homogenizing, unifying, and rationalizing force of public education.[121] Integration denied the relevance of group membership and assumed that individuals could establish their own identities independent of a cultural frame of reference.[122]

In addition, integration attacked group orientation in a manner that was potentially disparaging toward, and destructive of, black group experience. This was true on both the practical and symbolic level. Practically, integration meant the dismantling of black institutions throughout the country. These institutions had given meaning to the black experience and provided direction to the black community.[123] Symbolically,

120. *See, e.g.*, ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 31-35 (2d ed. 1984) (shared moral ends of community provide individuals with moral direction); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 147-52 (1982) (self cannot be defined apart from its community connections).

121. Professor Peller has argued that this integrationist vision is linked on a deeper level to a belief in

> a realm of impersonality, understood as the transcendence of subjective bias and contrasted with an image of a realm of distortion where particularity and stereotype reign. Integrationist beliefs are organized around the familiar enlightenment story of progress as consisting of the movement from mere belief and superstition to knowledge and reason, from the particular and therefore parochial to the universal and therefore enlightened.

Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 772.

122. Thurgood Marshall perfectly captured this individualist strain during his oral argument in *Brown II*: " 'Put the dumb colored children in with the dumb white children, and put the smart colored children with the smart white children—that is no problem.' " KLUGER, *supra* note 19, at 730.

123. This point was not lost on early critics of the NAACP's campaigu for integration. In a famous editorial published in 1934, W.E.B. DuBois argued that it was " 'the race-conscious black man cooperating together in his own institutions and movements who will eventually emancipate the colored race, and the great step ahead today is for the American Negro to accomplish his economic emancipation through voluntary determined cooperative action.' " TUSHNET, *supra* note 19, at 9 (quoting W.E.B. DuBois, *Segregation*, 41 CRISIS 20, 52-53 (1934)). For an account of DuBois' break with the NAACP over the integration issue, see *id.* at 8-10.

For contemporary criticisms of *Brown* on the ground that it has led to the destruction of black institutions and culture, see DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 103-22 (1987); HAROLD CRUSE, PLURAL BUT EQUAL: A CRITICAL STUDY OF

the assertion that black facilities were inherently unequal, that they could not be made equal regardless of the resources devoted to them, and that it did not matter how well students performed in them, implied that the mere nonexposure to whites deprived blacks of their rights.[124] Thus, to the extent *Brown* did constitute the enshrinement of a particular, substantive worldview, it seemed to establish the primacy of white culture and its values.[125]

Brown is similarly difficult to explain as part of a general power-redistribution program designed to comport with a substantive moral vision. Here it is necessary to think again about the regime that *Brown* displaced and to make comparative judgments. Had the Court chosen to take *Sweatt* and *McLaurin* seriously, it might have used segregationist ideology as a lever to pry loose from white society massive resources that could have made the promise of equal treatment a reality.[126] Making separate facilities truly equal would have necessitated compensation for all the associational and intangible disadvantages caused by isolation from the dominant culture. In short, it would have required the kind of money that might have really made a difference.

BLACKS AND MINORITIES AND AMERICA'S PLURAL SOCIETY 20-24 (1987); Peller, *supra* note 121, at 795-802.

124. Malcolm X made the point with characteristic directness:

> I just can't see where if white people can go to a white classroom and there are no Negroes present and it doesn't affect the academic diet they're receiving, then I don't see where an all-black classroom can be affected by the absence of white children. . . . So, what the integrationists, in my opinion, are saying, when they say that whites and blacks must go to school together, is that the whites are so much superior that just their presence in a black classroom balances it out. I can't go along with that.

Peller, *supra* note 121, at 764 (quoting MALCOLM X, BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS AND A LETTER 16-17 (George Breitman ed., 1970)).

125. *See* Derrick Bell et al., *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037, 1077 (1990) ("[S]chool desegregation implemented on the racial balance model, while of some benefit to the most able black children, perpetuated white superiority in both educational resources and the minds of many whites . . . . Even black students, who benefitted from attending better white schools, did not emerge unscarred from the experience.").

126. Professor Bell's fictional hero Geneva Crenshaw suggests how such a program might have been made operational:

> I don't agree that a better desegregation policy was beyond the reach of intelligent people whose minds were not clogged with integrationist dreams. . . . [S]uppose the Court had issued the following orders:
>
> 1. Even though we encourage voluntary desegregation, we will not order racially integrated assignments of students or staff for ten years.
>
> 2. Even though "separate but equal" no longer meets the constitutional equal-protection standard, we will require immediate equalization of all facilities and resources.
>
> 3. Blacks must be represented on school boards and other policy-making bodies in proportions equal to those of black students in each school district.
>
> . . . .
>
> . . . [R]ather than beat our heads against the wall seeking pupil-desegregation orders the courts were unwilling to enter or enforce, we could have organized parents and communities to ensure effective implementation for the equal-funding and equal-representation mandates.

BELL, *supra* note 123, at 112-13.

Doubtless, this scenario is hopelessly utopian, and neither the *Brown* Court nor the black community had the luxury to indulge utopian fantasies. As a practical matter, the cost of pursuing endless individual equalization suits throughout the country far exceeded the resources of either the NAACP or the courts that would have had to hear them.[127] The problem was especially acute because the individual nature of each determination meant that no victory could serve as a model for any other case.[128] Moreover, even if the resources to pursue this strategy had been available, it is surely naive to suppose that the Court would have had the political capital necessary to enforce such a massive redistribution.[129]

It is clear then that *Brown* marks a tactical retreat in the guise of a bold advance. Unable to make good on the promise of *Sweatt* and *McLaurin,* the Court utilized a rhetorical flourish to escape the trap it had set for itself. Because black and white schools would no longer be separate, the Court was effectively freed from the obligation of insuring that they were equal. Far from insisting upon and implementing a substantive vision of the good, the Court resorted to an empty slogan and thus avoided a serious engagement with the evils of racism.

And yet this cynical view is surely not the whole story. One can concede that the Court lacked the power to impose a radical restructuring of all of American society without conceding as well that *Brown* accomplished nothing, or that it was wrongly decided. After all, the Court can hardly be faulted for the political parameters within which it had to work. It had no choice but to make the best of a bad situation. *Brown* can be defended as a second-best solution. Unable to make good on the promises implicit in *Sweatt* and *McLaurin,* the Court had to settle for the creation of a symbol that might be used to build the political preconditions for real change.

On this view, the real importance of *Brown* stems not from the decision itself but from the struggle that it made possible. Although the Court could not produce real change itself, it could utilize constitutional rhetoric to serve an important symbolic and political function in mobilizing others to fight for change.

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127. On the eve of its great victory in *Brown,* the NAACP was desperate for funds to continue the struggle. *See* KLUGER, *supra* note 19, at 617.

128. *See supra* notes 18-19 and accompanying text.

129. The post-*Brown* struggle to enforce its desegregation mandate called into use every bit of the Court's political capital. Yet this struggle was child's play compared to the effort that would have been required to funnel into the black community the resources necessary to compensate for generations of oppression and neglect. Despite an overwhelming electoral mandate, total dominance of the legislative branch, and a much friendlier political climate, Lyndon Johnson's efforts to accomplish a small fraction of this project ten years after *Brown* met with only limited success and ultimately triggered a backlash that helped destroy his Presidency. It is simply folly to suppose that the Supreme Court, acting alone, could have successfully embarked on such a radical endeavor in 1954.

But symbols are slippery. Because they have the meaning that we choose to invest in them, they can be used for purposes not intended by their creators. The uses to which *Brown* has been put raise the most disquieting questions about constitutional litigation.

2. Brown *as a Victory for Liberal Individualism*

No understanding of *Brown* can be complete without an appreciation of the fact that the NAACP, for ideological reasons of its own, had embraced the overruling of *Plessy* and the creation of an integrated society as its central goal. When, after years of struggle, the Court finally interred the doctrine of separate-but-equal, it handed the NAACP, and that segment of the black community that had embraced the goal of integration, a tremendous victory.[130] One cannot overstate the sense of empowerment and liberation engendered by the victory.[131] Thus, *Brown* might be understood primarily on the level of political symbolism. By legitimating the demands of black integrationists, it gave them a potent rhetorical weapon in the struggle against both white racism and black nationalism. And by holding out the possibility of peaceful change, it served to counter the twin threats of lethargy and violence. In short, on this view *Brown* is the core of the modern civil rights movement.

Over the short term, this summary of *Brown*'s impact is largely accurate. Over the longer term, however, the effect of *Brown* has been precisely the opposite. Rather than sparking continued struggle for change, it has served to deaden political debate and to legitimate the status quo. This effect resulted from two problems that plague efforts to produce serious change through constitutional litigation.

First, the desire of litigators to win often leads them to compromise the goals they seek to achieve. A court victory holds the promise of all the short-term invigorating effects that the NAACP in fact realized through its triumph in *Brown*. But in seeking to win, litigators are motivated to compromise. Rather than insisting upon their ultimate goals, they will tailor their arguments to the views of the judges who will decide the case. Given this incentive, the long-term results of a victory can be worse than a defeat. A defeat leaves the plaintiff unsatisfied and angry, and potentially forms the base upon which new political organizing can be built. But a plaintiff who has secured precisely what he or she asked for is in a weak position to demand still more. What was once an eloquent insistence on "simple justice" soon begins to sound like incessant whining.

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130. *See* KLUGER, *supra* note 19, at 746-47 (offering evidence of the enthusiasm with which *Brown* was met).

131. *See* TUSHNET, *supra* note 19, at 144-45 (crediting the NAACP's campaign in *Brown* with being a model for public interest litigation).

This effect is often aggravated by a second risk in litigation. The natural tendency of litigation is toward resolution of contested issues. Participants are working toward a sense of closure, a sense that the matter has been settled in some final way. In *Brown* this sense of closure required a resolution of the antinomies in liberal individualism outlined above—antinomies that had fueled the creative energy for the legal battle in the years preceding *Brown*. But a sense of closure is hardly conducive to continued struggle.

Originally, these effects of the victory in *Brown* were obscured by the remedial struggle that followed in its wake. The Court's decision in *Brown II*[132] suggested anything but total victory and closure. The elliptical and contradictory wording of the decision constituted a self-conscious invitation to continued dialogue and conflict—an invitation that was eagerly accepted and that preoccupied the country for twenty years following the decision.[133]

Moreover, although the conflict initially centered on remedial questions, by the end of this period it came to be seen that the conflict could not be confined to remedial questions alone. Confronted with intransigence and delay in implementing its decisions, the Court began to explore the ambiguities inherent in both *Brown I* and *Brown II*. Result-oriented remedies were gradually transformed into a result-oriented right, and unavoidable ambiguities concerning the precise result required triggered organizing efforts that had an important impact on our politics.[134]

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132. Brown v. Board of Educ., 349 U.S. 294 (1955).

133. Professor Burt has made this invitation central to his defense of *Brown*. *See* Robert A. Burt, *What Was Wrong with* Dred Scott, *What's Right About* Brown, 42 WASH. & LEE L. REV. 1 (1985). The Court, in his view, "committed itself to facilitating a process of public conversation." *Id.* at 21. Because the Court "did not specify the precise meaning of [racial] equality . . . it forced the disputants into a process of sustained, direct public confrontation in forging a new resolution." *Id.* at 22.

Professor Burt is right in emphasizing the destabilizing, dialogic potential for judicial review. He is wrong, in my judgment, in overemphasizing the extent to which *Brown* realized this potential.

134. The key decision was Green v. County School Board, 391 U.S. 430 (1968), where the Court invalidated a "freedom of choice" plan that had in fact produced virtually no integration. Although the Court's opinion was written in the language of remedy, it clearly redefined the underlying right. For the first time, the Court made clear that *Brown* might require more than the dismantling of formal legal barriers to integration:

> The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent School in 1967 . . . 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system.

Id. at 441. The *Green* Court nowhere specified what a unitary system would look like, but if a system where blacks were "free" to attend white schools was not unitary, it would seem to follow *a fortiori* that a system where blacks were compelled to attend segregated schools in their neighborhood might not be unitary either. The Court held as much in Swann v. Charlotte-

Eventually, however, the creative energy that *Brown* engendered ran its course. It came to be seen that the *Brown* Court offered the country a kind of deal, and, from the perspective of defenders of the status quo, not a bad one at that. Prior to *Brown,* the difficulties in the incommensurability of goods and the valuations of preferences implicit in liberal individualism had meant that the black demand for equality could never be satisfied. Contradictions in the ideology of the separate-but-equal doctrine were permanently destabilizing and threatened any equilibrium.

By purporting to resolve those contradictions, *Brown* also served to end their destabilizing potential. The Court resolved the contradictions by definitional fiat: separate facilities were now simply proclaimed to be inherently unequal. But the flip side of this aphorism was that once white society was willing to make facilities legally nonseparate, the demand for equality had been satisfied and blacks no longer had just cause for complaint. The mere existence of *Brown* thus served to satisfy the demands of liberal individualism and, therefore, to legitimate current arrangements. True, many blacks remained poor and disempowered. But their status was now no longer a result of the denial of equality. Instead, it marked a personal failure to take advantage of one's definitionally equal status.

To summarize, *Brown* can be understood as the culmination of a process whereby, under the pressure of litigation, the contradictory and intractable requirements of liberal individualism were concretized and reduced into a judicially administrable test that robbed them of their destabilizing potential. This new test conferred upon courts an ability to map the liberal program onto the real world. In the short term, this ability translated into a victory for the advocates of social change. But in the longer term, the sense of closure resulting from the resolution of the contradictions has deprived liberal advocates of their best weapon for combating the status quo.

Brown is hardly the only example of the way in which this process functions. The next Part examines a strikingly similar phenomenon in the context of criminal procedure.

Mecklenburg Board of Education, 402 U.S. 1 (1971). Because the neighborhood schools found unconstitutional in *Swann* seemed all but indistinguishable from neighborhood schools throughout the North, the internal logic of the doctrine pushed the Court still further toward a vast broadening of the underlying right. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 219-36 (1973) (Powell, J., concurring in part and dissenting in part) (attacking the de facto/de jure distinction). Thus, for a time the tensions and creative possibilities presented by the definition of "equality" in pre-*Brown* litigation were replaced by similar tensions and possibilities in the definition of "unitary" in post-*Brown* litigation.

III
MIRANDA

Governmental neutrality and individual equality is one pillar upon which liberal individualism rests. Free will and individual choice is the other.[135] Just as the incommensurability of preferences threatens the concept of equality, determinism threatens the concept of free will.[136] Chief Justice Warren's opinion in *Brown* tamed the demand for equality by transforming it into a requirement of nonsegregation. His opinion in *Miranda v. Arizona*[137] tamed the demand for freedom by transforming it into a requirement that an incarcerated defendant hear a set of warnings and execute a waiver.

It would be an overstatement to say that *Brown* and *Miranda* share an identical structure, and it would be a serious mistake to ignore the different political and ideological roots of the two decisions. *Miranda,* unlike *Brown,* was not the culmination of an organized political campaign and there was never an important political constituency that sup-

135. *See, e.g.,* Douglas O. Linder, *Freedom of Association after* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878, 1881 (1984) (discussing the "tension between egalitarian, rights-oriented liberalism and communitarianism"); Andrew von Hirsch, *Injury and Exasperation: An Examination of Harm to Others and Offense to Others,* 84 MICH. L. REV. 700, 714 n.28 (1986) (arguing that liberalism represents a view concerning the "preeminent importance of personal liberty" rather than a view about harm, offense, paternalism, or legal moralism). *But cf.* Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights,* 1989 WIS. L. REV. 99, 118 (discussing the importance of "idiosyncratic groups" and arguing that what may appear to be group coercion of an individual may actually reflect the individual's desire to find personal fulfillment as part of a group); William P. Marshall, *Discrimination and the Right of Association,* 81 NW. U. L. REV. 68, 69 (1986) (describing the difficulty of identifying where freedom of association ends and impermissible discrimination begins).

Professor West has pointed out that government neutrality on the one hand and the primacy of individual choice on the other are linked in certain forms of liberalism.

> Legislative pronouncements of the nature of the good are not simply distrusted .... They are nonsensical; visions of the good are definitionally individualistic, because it is the individual, not the group, that is the source of value. Given this agnostic image of the self, normative (hence moral) discourse within liberalism is impossible because it is conceptually incoherent. Our "norms" cannot be the subject of debate, because our norms, values, and moral commitments are but disguised preferences, and our preferences are individualistic, given, and of equal weight. We value the individual's values tautologically. The individual is the source of value.

Robin L. West, *The Authoritarian Impulse in Constitutional Law,* 42 U. MIAMI L. REV. 531, 543 (1988).

136. A recurring problem for liberals is reconciling the primacy placed on individual choice with the observation that choice is at least partially determined by communal experience. Consider, for example, the comments of Professor Shiffrin:

> [Eclectic liberalism] affirms free will, the ability of individuals to create their own lives and their own interpretation of what it is to be a human being without denying that individuals are social beings whose values, perspectives, and outlooks are conditioned by their family, their relationships, their personal and social environment, and their culture.

Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship,* 30 UCLA L. REV. 1103, 1193 (1983).

137. 384 U.S. 436 (1966).

ported the result.[138] Whereas Chief Justice Warren's *Brown* opinion is notable for its simple and spare prose, *Miranda* is convoluted, repetitious, and seemingly interminable. This difference in style is probably attributable, at least in part, to the fact that Warren was able to fashion a unanimous court for *Brown,* while he was forced to respond to four angry dissenters in *Miranda.*[139]

These differences between *Brown* and *Miranda* make the survival of *Miranda* all the more remarkable. Given the massive ideological change on the Court since 1966, and the counterrevolution in criminal procedure that has followed in its wake, the failure of *Miranda*'s opponents to overturn a five-to-four decision that has always been unpopular borders on the miraculous. My argument in this Part is that *Miranda*'s survival is best understood by focusing on its functional and structural similarities to *Brown.*

The two decisions share at least six characteristics:

1. In both cases the prior regime had attempted to legitimate judicial outcomes by appealing to liberal ideology.

2. In both cases lawyers were able to exploit antinomies in that ideology so as to destabilize it and prevent closure.

3. In both cases the Court's institutional weaknesses left it unable to make good on the commitments contained in the prior doctrine.

4. Both opinions reflect conflicting impulses toward rejection and acceptance of the liberal ideology underlying prior doctrine.

5. Both cases can be understood as efforts to deal with the problems in prior doctrine by transforming an intractable metaphysical concept into a bureaucratically administrable test.

6. Both cases served to stabilize and legitimate the status quo by creating the illusion of closure and cohesion.

The remainder of this Part explores these similarities between the two opinions. The final Part adds a few comments about the relationship of both opinions to the problem of racial conflict and domination.

A. Voluntariness and the Legitimation of Punishment

The law of confessions as it developed in the years prior to *Miranda,* like the law of separate-but-equal prior to *Brown,* served to mediate between the individual and the collective so as to justify collective coercion through individualist rhetoric. The justification for criminal punish-

138. For an account of the political controversy surrounding the confession issue on the eve of *Miranda,* see LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 46-59 (1983).

139. Justice Harlan's dissenting opinion was joined by Justices Stewart and White. *See Miranda,* 384 U.S. at 504-26 (Harlan, J., dissenting). Justice White also filed a dissent joined by Justices Harlan and Stewart. *See id.* at 527-45 (White, J., dissenting). Justice Clark filed a separate opinion, dissenting in three of the four cases heard and concurring in the fourth. *See id.* at 499-504 (Clark, J., concurring in the result in part and dissenting in part).

ment—the most dramatic and violent example of state coercion—poses a special problem for individualists. Typically, the problem has been resolved by resort to the fiction of consent. Thus, the classic liberal response to the dilemma of punishment was the assertion that the individual criminal, by the very act of committing a crime, consented to just punishment directed against him.[140] Unfortunately, the nature of this "consent" was more than a little mysterious. Criminals who sought to escape detection and expressed a strong desire to avoid punishment once they had been detected manifestly did not "consent" to that punishment in any way resembling the usual meaning of the word.[141]

Ironically, liberal justifications for punishment have also relied on a second argument from consent that turns the first inside out: state coercion can be reconciled with individual autonomy precisely because the state does not compel consent to the punishment. Although the state could legitimately impose physical disabilities on a criminal, it could not change his status as a choosing agent. The state could legitimately do things to a criminal against his will, but it could not manipulate his will to accomplish collective ends. Because the criminal retains the freedom to resist punishment, the state has respected his status as a free and autonomous agent.[142]

These core premises of liberal theory played a crucial role in the

140. For example, Kant argued that a criminal had rationally consented to his own punishment. *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 105-06 (John Ladd trans., 1965) (judgment to commit a crime includes reasoning about possible punishment). Hegel advanced a similar position:

> The injury [the penalty] which falls on the criminal is not merely *implicitly* just—as just, it is *eo ipso* his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right *established* within the criminal himself, i.e. in his objectively embodied will, in his action. The reason for this is that his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as under his right.

GEORG HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 70 (T.M. Knox trans., 6th prtg. 1967). For a discussion of Hegel's view of punishment, see IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 75-77 (1989).

141. *See* Jeffrie G. Murphy, *Marxism and Retribution, in* PUNISHMENT AND REHABILITATION 74-92 (Jeffrie G. Murphy, ed., 2d ed. 1985) (arguing that the Kant and Hegel positions sound "obscurantist" because criminals "typically desire not to be punished," *id.* at 82).

142. *See, e.g.*, Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 232 (1984):

> [T]he criminals we punish are free beings, responsible for their actions. And you can't *make* a free human being believe something. In particular, you can't coerce people to be just for justice's sake. Punishment is the state's attempt to teach a moral lesson, but whether or not the criminal will listen and accept it is up to the criminal himself.

For efforts to justify the self-incrimination privilege on these grounds, see Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1138-39 (1982) (according to privacy theory, persons should have complete control of their revelations); Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87, 90-91 (1970) (purpose of the Fourth and Fifth Amendments is to preserve the autonomy of the accused).

development of the law of coerced confessions. The defendant's willingness to confess served to legitimate punishment, not only by providing powerful evidence of his guilt but also by instantiating his consent to punishment. Conversely, the prohibition against coercion preserved his status as an individual, choosing agent in the face of state authority. Just as the "black box" of politics served to reconcile conflicting individual preferences while seeming to avoid nonliberal collectivism in the context of nineteenth-century equal protection litigation, so too the ideology of free will served to preserve individualism in the face of collective coercion in the context of criminal procedure.

But liberal conceptions of freedom were no more capable of producing closure than were liberal conceptions of equality. In the sphere of equality, the Court was never able to judge the comparative worth of different facilities because it denied the legitimacy of any collective definition of the good against which those facilities could be measured. Similarly, in the sphere of liberty, the Court could never articulate a coherent conception of freedom because liberal ideology precluded the identification of, and the insistence on, any set of background conditions as the necessary precondition for a free act.

As the next Section argues, antinomies in the liberal conception of freedom, like the antinomies in the parallel conception of equality, had generative potential. The inability to produce closure meant that the lawfulness of every confession could be contested and that the legitimacy of punishment was always subject to attack. Section C argues that *Miranda,* like *Brown,* served to produce the illusion of closure and thus contained the creative energies unleashed by the contradictions in the prior regime.

B. The Dilemma of the Liberal Model: Assessing the "Voluntariness" of Confessions

In order to understand why the ideology of free will could not produce closure for the confession problem, one must first understand the historical background to the Supreme Court's decisions. The Court decided its first due process voluntariness case on the eve of a constitutional crisis. Three months after its decision in *Brown v. Mississippi,*[143] reversing two convictions that were based on confessions extorted by brutal torture, the Court struck down the Bituminous Coal Conservation Act of 1935 in *Carter v. Carter Coal Co.,*[144] thereby igniting a fire storm that ultimately revolutionized constitutional jurisprudence.

Superficially, there seems to be little connection between the problem of coerced confessions first addressed in *Brown v. Mississippi* and the

143. 297 U.S. 278 (1936).
144. 298 U.S. 238 (1936).

portentous events that followed in the wake of *Carter*. Certainly the Justices who decided *Brown v. Mississippi* could have had no notion of the connection. Although bitterly divided about the constitutional status of the New Deal and of state economic legislation, the Justices had little difficulty in unanimously concluding that "[c]ompulsion by torture to extort a confession"[145] turned a criminal trial into a "pretense" that failed to satisfy the requirements of due process.[146]

However, the Court's ability to give determinate and consistent content to the due process requirement of noncoercion announced in *Brown v. Mississippi* was critically affected by the searing battle over President Roosevelt's Court-packing plan in the ensuing year. The Court barely escaped from that immediate conflict with its independence intact.[147] But time was on Roosevelt's side, and he eventually succeeded through more conventional means in remaking the Court in his own image.[148] Although the Roosevelt appointees ultimately came to disagree bitterly among themselves, most of them came to the Court with certain core beliefs that were defined by their reaction to what had gone before. One of the most important of these was a rejection of law as an autonomous and natural phenomenon consisting of a series of logical categories awaiting discovery in the world.[149]

The Roosevelt appointees had little patience for the dichotomous distinctions that were at the heart of this legal formalism. For them,

145. Brown v. Mississippi, 297 U.S. at 285.

146. *Id.* at 286.

147. For accounts of the Court-packing plan and its aftermath, see LEONARD BAKER, BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT (1967); ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 176-235 (1941); LEO PFEFFER, THIS HONORABLE COURT: A HISTORY OF THE UNITED STATES SUPREME COURT 295-324 (1965).

148. President Roosevelt named eight Justices to the Court: Hugo L. Black, 1937; James F. Byrnes, 1941; William O. Douglas, 1939; Felix Frankfurter, 1939; Robert H. Jackson, 1941; Frank Murphy, 1940; Stanley F. Reed, 1938; Wiley B. Rutledge, 1943. LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 148 (1985).

149. *See, e.g.*, HELEN S. THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 170-73 (1960) (describing influence of American Legal Realism on Justices Frankfurter and Black); Donald W. Jackson, *Commentary: On the Correct Handling of Contradictions Within the Court, in* "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 58-60 (Stephen L. Wasby ed., 1990) (describing influence of realism on William Douglas); L.A. Powe, Jr., *The First Amendment and the Protection of Rights, in* "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS, *supra*, at 76 (describing Douglas as a "functionalist" for whom "nothing mattered more than the facts").

differences between direct and indirect,[150] between public and private,[151] or between national and local[152] were no more than constructs that had been utilized to mask the old pre-1937 Court's ideological opposition to the New Deal. The Roosevelt appointees believed that these constructs could and should now be manipulated to achieve the Roosevelt administration's technocratic ends. For the new Justices, law was a purposive endeavor, not a scientific enterprise. It consisted of creation rather than discovery.

Among the "natural" dichotomies rejected by the new Justices, the distinction between coercion and freedom held a special place. For the old Court, coercion was a natural category defined by departures from common-law principles protecting market allocations. The category lay at the core of the Court's effort to develop a law of substantive due process—the doctrine that threatened to strangle the New Deal. Thus, state maximum-hour legislation interfered with bakers' freedom of contract: they were—as a practical matter—"coerced."[153] Conversely, state enforcement of contractual obligations involved no coercion because such enforcement amounted to no more than the recognition of preexisting and "natural" background norms.[154]

For committed New Dealers, this conception of coercion as a natu-

150. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-42 (1937):

> We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

151. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 536 (1934):

> It is clear that there is no closed class or category of businesses affected with a public interest. . . . The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test . . . .

152. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 119-20 (1942):

> The Government's concern lest the Act be held to be a regulation of production or consumption, rather than of marketing, is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and "mining" are strictly "local" . . . . We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

153. *See* Lochner v. New York, 198 U.S. 45, 53, 57-58 (1905) (holding that the statute "necessarily interfere[d] with the right of contract" and that for the right to legislate to prevail over the right to contract, there must be a direct relation to the state interest at stake).

154. *See* Adair v. United States, 208 U.S. 161, 172, 174 (1908) (characterizing employer enforcement of "yellow dog" contract as aspect of freedom of contract and state prohibition of such contracts as coercion); Coppage v. Kansas, 236 U.S. 1, 7-8 (1915) (reaffirming *Adair* on nearly identical facts and finding no coercion when an employee was forced to choose between union membership and employment).

ral category was extremely uncongenial for a variety of reasons. First, sophisticated lawyers in the 1930s had read and assimilated determinist theories that made the very concept of free will problematic.[155] The concept included either too much or too little to produce much analytic leverage. From one perspective, virtually all human conduct was free in the sense that it was volitional. Even a person with a gun to his head retained the choice to refuse the demands of the gunman and suffer the consequences. From another perspective, virtually all human conduct was coerced. Choice was always embedded in an external context that made one alternative more attractive than the other; context could always be said to coerce the more attractive choice.[156]

There was therefore nothing "natural" or "preexisting" about the categories of coercion and freedom. One simply chose whether to focus on the volitional aspect of a decision, in which case it was free, or on the external context in which the decision was embedded, in which case it was coerced. This choice was normative rather than scientific. The categories were constructed for a purpose rather than discovered in the world.

There were also less philosophical reasons to reject the old ideology of freedom and coercion. Many New Dealers distrusted philosophical abstractions. They prided themselves in their pragmatism and realism.[157] From this perspective, the old ideology was simply extra baggage obstructing the reforms desperately needed to end the Depression. Those reforms revolved in part around an effort to establish positive, not merely negative, freedoms. It is no coincidence that two of the four freedoms Franklin Roosevelt proclaimed—freedom from want and freedom from fear—were positive in character.[158] Instead of equating freedom with

155. Of the legal realists, Jerome Frank was the most heavily influenced by Freudian theories. *See generally* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949); JEROME FRANK, LAW AND THE MODERN MIND (1963). On the influence of Freud on Frank, see WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS 124-25 (1968). On the more general impact of psychological determinism on legal thought during this period, see *id.* at 69-72.

156. For Realist efforts to debunk individual choice as a basis for "freedom of contract," see Robert L. Hale, *Bargaining, Duress, and Economic Liberty,* 43 COLUM. L. REV. 603, 603-08 (1943) (arguing that contractual relationships are a necessity of modern life); *see also* Morris R. Cohen, *The Basis of Contract,* 46 HARV. L. REV. 553, 567-68 (1933) (positing that "if the individual will is only a part of the world, it cannot be absolutely autonomous but must be subject to influences from the rest of the world").

157. The prophet of the revolt against formalism was Roscoe Pound, who wrote in 1910 that lawyers should "look the facts of human conduct in the face. Let us look at economics and sociology and philosophy and cease to assume that jurisprudence is self-sufficient. . . . Let us not become legal monks." Roscoe Pound, *Law in the Books and Law in Action,* 44 AM. L. REV. 35-36 (1910). By the 1930s, the revolt against formalism and embrace of pragmatism was in full flower. *See* RUMBLE, *supra* note 155, at 4-8.

158. *See* 87 CONG. REC. 44, 44-47 (1941) (address of the President of the United States) ("Four Freedoms" speech).

government passivity, New Dealers associated freedom with vigorous government intervention designed to control private forces.[159]

The very reforms that resulted from this intervention further undermined the old ideology. The *Lochner* Court equated freedom with market allocations undistorted by state action. Of course even in *Lochner*'s heyday, advocacy of this view required a wilful disregard of all the government intervention necessary to enforce the background allocations that allowed the market to function. But this sort of intervention was largely invisible, in part because it was so familiar and in part because it had been developed through common-law processes that were less conspicuous than legislative intervention.

With the onset of the New Deal and the sudden and pervasive legislatively mandated interpenetration of government and markets that it embodied, extraordinary powers of self-deception were necessary to identify a category of "private" decisions uninfluenced by exercises of state power. All private decisions came in a context of state incentives and disincentives that influenced them in a variety of ways. State neutrality was shown to be a myth; the government's failure to subsidize a private choice was just as coercive as the government's penalization of that choice.

Ironically, the Court's conservatives were the first to wrestle with the implications of this insight. In *United States v. Butler,*[160] a case decided slightly more than a month before *Brown v. Mississippi,* the Court invalidated the first Agricultural Adjustment Act because government subsidization of farmers who complied with its terms served to coerce the farmers who failed to comply.[161] Justice Roberts' opinion for the Court had a Janus-like quality, mired in the ideology of the past but foreshadowing the revolution that was to come.

Roberts seems to have understood that in a world dominated by government intervention, the failure to intervene could be every bit as

159. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 20-24 (1990) (discussing the reasons that government regulation was necessary to give substance to President Roosevelt's third and fourth freedoms—freedom from want and freedom from fear).

160. 297 U.S. 1 (1936).

161. *Id.* at 70. This was actually an alternative holding. Justice Roberts also maintained that "if the plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." *Id.* at 72.

This second argument is more than a little mysterious in light of Roberts' concession, earlier in the opinion, that Congress' spending power was limited only by the requirement that the spending be for the public welfare and need not be justified as incident to the other substantive powers granted to Congress in Article I. *See id.* at 65-66. If, as Roberts assumes *arguendo,* acceptance of federal funds was purely voluntary, and if, as he squarely holds, expenditure of funds was limited solely by the general welfare requirement, it is hard to see how the expenditure regulated subjects "reserved to the states." *Id.* at 72.

coercive as positive action. Thus, Congress unconstitutionally extended its writ by conditional spending that had the effect of coercing farmers into compliance.[162] This recognition of the reciprocal nature of offers and threats is strikingly modern.

Yet Roberts was unwilling to accept the logical implications of this view. He continued to insist that constitutional adjudication was mechanical and scientific, that the courts could "lay the article of the Constitution which is invoked beside the statute which is challenged and . . . decide whether the latter squares with the former."[163] The categories of free and coerced were hardly constructed. The delineation of the boundary between them was an act of discovery rather than creation. This disjunction between the insight driving the opinion and the use to which the insight was put made for a startling discontinuity. The opinion disintegrates into total incoherence when the Court tries to explain why some subsidies coerce but others do not.[164]

It was not until the New Deal liberals gained control of the Court that the argument of *Butler* was carried to its logical conclusion. The liberals shared Justice Roberts' insight that offers of benefits, like threats of burdens, can be coercive. They also understood that government intervention—especially on the federal level—could create as well as obstruct choice. The distinction between subsidies and burdens, like the distinctions between the other dichotomies driving formalist thought, was entirely arbitrary.

But for the liberals, this arbitrariness hardly supported judicial intervention. On the contrary, the fact that the categories were constructed meant that the act of categorization should be left to the political branches. Because any government intervention, or failure to intervene, could be seen as either coercive or noncoercive, the Court

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162. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. . . . This is coercion by economic pressure. The asserted power of choice is illusory.

Id. at 71.

163. *Id.* at 62.

164. In an especially murky paragraph, Roberts sought to distinguish the Agricultural Adjustment Act from the clearly constitutional restrictions that Congress regularly placed on the use of federal funds.

> We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. By the Agricultural Adjustment Act the amount of the tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the Federal Government. There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced.

Id. at 73. Although this difference was apparently "obvious" to the Justices who joined the *Butler* majority, it has continued to elude most readers of the opinion.

could not claim that it was engaged in a neutral, apolitical act when it placed various statutes in one category rather than the other. Judicial deference was therefore the appropriate stance. Intervention served to frustrate the popular will without neutral justification. Because categorization was seen as a political rather than a scientific exercise, it should be left to the political processes.[165]

Against this backdrop, it is obvious why the coerced confession problem posed difficulties for the new liberal majority. To be sure, *Brown v. Mississippi* was an easy case. Even the most skeptical legal realist would have little difficulty categorizing the beating and torture inflicted on Brown as coercive. But as soon as the Court moved away from this polar case, the difficulties in categorization that played so prominently in the New Deal critique of the *Lochner* era reemerged.

One possible response to these difficulties might have been judicial deference. As noted above, the Court adopted precisely this stance with regard to the enforcement of constitutional limits on federal power vis-á-vis the states. In an earlier period, the Court had also experimented with this approach in dealing with the analogous problem of defining equality. Just as the post-*Plessy* Court had attempted to avoid the intractably difficult determination of which differences in separate facilities denied equality by treating the question as political in cases like *Cumming*,[166] the Roosevelt Court could have deferred to states' fact-bound judgments about the nature of coercion.

This choice was unattractive for several reasons, however. First, the very political orientation that caused the Court to abandon the *Cumming* approach in *Gaines* blocked the deference escape route with regard to confessions. The new Justices and their supporters were political liberals, and their support for the New Deal was premised, at least in part, on the promise it held for the underprivileged. The defendants whose confession cases reached the Court were (at least in the eyes of the Justices who wrote about them) a veritable cross section of America's dispossessed: they were "illiterate[s],"[167] "ignorant negroes,"[168] and refugees

165. In Steward Machine Co. v. Davis, 301 U.S. 548 (1937), with Justice Cardozo—a *Butler* dissenter—writing for the newly empowered liberal majority, the Court upheld the constitutionality of the federal unemployment compensation system and sharply limited *Butler*. Cardozo argued that federal spending on unemployment compensation could be characterized as creating conditional "larger freedom," rather than coercing the states, and that without a nationally uniform system, states might be prevented from adopting the system by what today would be called a prisoners' dilemma. *See id.* at 587-90. Given this indeterminacy, the Court chose to "assume[ ] the freedom of the will as a working hypothesis," *id.* at 590, an assumption that gave Congress "a fair margin of discretion," *id.* at 594.

166. For a discussion of Cumming v. Richmond County Board of Education, 175 U.S. 528 (1899), see *supra* text accompanying notes 48-57.

167. Harris v. South Carolina, 338 U.S. 68, 70 (1949).

168. Brown v. Mississippi, 297 U.S. 278, 281 (1936).

from "a lowly environment" with "[n]o class or family [as their] all[ies]."[169]

A political resolution of the confession problem also conflicted with the technocratic aspirations of the New Deal. New Dealers were eager to free the country from constraining ideologies. Many of them viewed themselves as experts in policy management who applied rational methods to the solution of national problems.[170]

This technocratic perspective had a complex effect on the development of the law of confessions. On the one hand, the practice of extorting confessions was unprofessional and counterproductive. Many of the early cases reaching the Court came from rural areas, and the police practices under review must have struck the Justices as primitive indeed.[171] Certainly in a case such as *Brown v. Mississippi,* in which outright torture was utilized, the confession that resulted accomplished nothing in terms of solving or punishing crime. Such confessions were clearly unreliable. They were the product of bigoted and uneducated police forces, motivated by anger and racism rather than by the desire to achieve a socially optimal level of crime at the lowest possible cost. In

169. Culombe v. Connecticut, 367 U.S. 568, 640 (1961) (Douglas, J., concurring); *see also* Chambers v. Florida, 309 U.S. 227, 236 (1940) ("Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed . . . ."); *cf.* Haynes v. Washington, 373 U.S. 503, 522 (1963) (Clark, J., dissenting) (defendant "cannot . . . be placed in the category of those types of people with whom the Court's cases in this area have ordinarily dealt, such as the mentally subnormal accused, the youthful offender, or the naive and impressionable defendant" (citations omitted)).

Liberal concern for the welfare of these individuals was somewhat double edged. Put most charitably, liberals believed that the brutality directed against these individuals by "members of a dominant group in positions of authority," *Harris,* 338 U.S. at 70, symbolized broader disparities in power and resources, and gave moral force to the New Deal reforms. For an argument that the Court's early criminal procedure decisions were motivated by the desire to protect southern blacks from an unfair political process, see Cover, *supra* note 91, at 1305-06; Klarman, *supra* note 101, at 764; *see also infra* text accompanying notes 244-56.

From a less charitable perspective, this concern reflected patrician condescension. Just beneath the surface in many confession cases is an assumption that members of deviant subgroups were incapable of free and rational decisionmaking and, therefore, had to be protected from state manipulation. *See Chambers,* 309 U.S. at 241 (Black, J.) ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."). From either perspective, however, the Justices were disinclined to leave these groups to their fate.

170. Jerold Auerbach describes the New Dealers as characterized by a "commitment to flexibility, to instrumentalism, to skeptical realism, and to administrative discretion, applied by lawyers who were 'bred to the facts' . . . and to a case-by-case approach." JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 227 (1976); *see also* PETER H. IRONS, THE NEW DEAL LAWYERS 9-10 (1982) ("Most New Deal lawyers . . . emerged from law school with a veneer of progressive liberalism over a foundation of doctrinal orthodoxy and apolitical professionalism." *Id.* at 10).

171. *Cf.* Cover, *supra* note 91, at 1303 (suggesting that the unprofessional and decentralized character of southern police forces contributed to the reign of terror against southern blacks).

later cases, as the Court confronted more subtle means of coercion, it moved away from reliability as the sole ground for exclusion.[172] Yet even in these cases, the Justices worried about disproportion between means and ends, and about departures from the professional norms of police science.

On the other hand, the Court's policy-management perspective also made unattractive any solution that totally precluded reliance on confessions. The Justices saw themselves as realists and pragmatists who understood that some confessions were necessary to achieve the socially optimal degree of law enforcement. They recognized as utopian and impractical solutions such as banning all precharge interrogation or requiring the presence of a lawyer in every case.[173]

The Court thus tangled itself in a web of contradiction, preventing a permanent resolution of the confession problem and closing off all escape routes that would have remitted the problem to a different forum. The Justices' political liberalism and belief in rational policy management led to the conclusion that the cases had to be faced and decided on an individual basis. Yet the implausibility of theories premised on free will deprived the Justices of the standard tools for making a decision. In a world without such theories, the Court could have frankly acknowledged that its confession cases were political to the core. But such an admission would have mocked the Roosevelt critique of the Old Court and abandoned the new, hard-won orthodoxy that required deference to the political branches in the absence of neutral, apolitical grounds for judicial decision.

None of the Roosevelt Justices understood these contradictions better, or struggled with them harder, than Felix Frankfurter.[174] Throughout his long career on the Court, Frankfurter returned to the confession problem with obsessive regularity.[175] The story of his ultimate, utterly

172. *See* Rogers v. Richmond, 365 U.S. 534, 541 (1961) (stating that the constitutional principle of excluding coerced confessions did not require that they be found unreliable); Watts v. Indiana, 338 U.S. 49, 50 n.2 (1949) (citing Lisenba v. California, 314 U.S. 219, 236-37 (1941) for the proposition that a coerced confession is "inadmissible under the Due Process Clause even though statements in it may be independently established as true").

173. *See, e.g., Culombe,* 367 U.S. at 578 (plurality opinion) (recognizing that police interrogation is "indispensable in law enforcement" (quoting People v. Hall, 110 N.E.2d 249, 254 (Ill. 1953)) (internal quotations omitted)).

174. For a good description of the ways in which Frankfurter embodied some of the contradictions discussed above, see IRONS, *supra* note 170, at 8-9.

175. Justice Frankfurter often spoke for the Court on confession issues. *See* Rogers v. Richmond, 365 U.S. 534 (1961); Mallory v. United States, 354 U.S. 449 (1957); Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949); United States v. Mitchell, 322 U.S. 65 (1944); McNabb v. United States, 318 U.S. 332 (1943); Anderson v. United States, 318 U.S. 350 (1943); Hysler v. Florida, 315 U.S. 411 (1942); *see also* Fikes v. Alabama, 352 U.S. 191, 198 (1957) (Frankfurter, J., concurring); Stein v. New York, 346 U.S. 156, 199 (1953) (Frankfurter, J., dissenting); Stroble v. California, 343 U.S. 181, 198 (1952)

abject and deeply personal failure to make sense of the area poignantly embodies all of the difficulties outlined above.

Frankfurter addressed the confession problem for the last time as an old man at the very end of his long and brilliant career in *Culombe v. Connecticut.*[176] In sixty-seven pages of elegantly written prose, he purported to systematize, rationalize, and defend the quarter century of work that had gone before. The opinion admirably grapples with the problem in all its intricacy. It is meticulously researched and filled with erudition. It consistently eschews the easy rhetorical flourish that hides rather than explicates the full complexity of the problem. Yet despite these virtues, it is riven with contradiction from beginning to end and leaves the effort to justify and systematize the Court's role in shambles.

On a superficial level, Frankfurter's opinion seems driven by the rhetoric of freedom and coercion. Consider the following passage:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.[177]

Had Frankfurter really believed, as this passage taken in isolation suggests, that voluntariness and "governing self-direction" were phenomena that existed in the world, the Court's role would have been considerably simplified. The presence or absence of these phenomena would then be questions of fact, to be resolved by the courts below. But Frankfurter was not a formalist. He understood that voluntariness does not exist in the same way as a murder weapon or fingerprints. Rather, the voluntariness inquiry was actually a complex amalgam of three separate phenomena: the "crude historical facts,"[178] which apparently really did exist in the world; an "imaginative recreation . . . of internal, 'psychological' fact";[179] and the "application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances."[180] Frankfurter further

(Frankfurter, J., dissenting); Taylor v. Alabama, 335 U.S. 252, 272 (1948) (Frankfurter, J., concurring); Haley v. Ohio, 332 U.S. 596, 601 (1948) (Frankfurter, J., concurring); Malinski v. New York, 324 U.S. 401, 412 (1945) (Frankfurter, J., concurring).

176. 367 U.S. 568 (1961) (plurality opinion).

177. *Id.* at 602 (citation omitted).

178. *Id.* at 603.

179. *Id.*

180. *Id.*

added:

> The second and third phases of the inquiry . . . although distinct as a matter of abstract analysis, become in practical operation inextricably interwoven. This is so, in part, because the concepts by which language expresses an otherwise unrepresentable mental reality are themselves generalizations importing preconceptions about the reality to be expressed. It is so, also, because the apprehension of mental states is almost invariably a matter of induction, more or less imprecise, and the margin of error which is thus introduced into the finding of "fact" must be accounted for in the formulation and application of the "rule" designed to cope with such classes of facts. The notion of "voluntariness" is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes.[181]

The normative and constructive character of the voluntariness inquiry meant that the Court could not simply look to state courts for guidance. Yet it still had to determine how the inquiry was to be conducted. At this point Frankfurter resorted to the technocratic methodology of balancing. The Court was required to perform the "anxious task of reconciling the responsibility of the police for ferreting out crime with the right of the criminal defendant, however guilty, to be tried according to constitutional requirements."[182]

As a pragmatist, Frankfurter understood that this reconciliation could not be achieved by embracing either extreme. Thus, he admitted that questioning of suspects was " 'indispensable in law enforcement,' "[183] and once that fact was conceded, "whatever reasonable means are needed to make the questioning effective must also be conceded to the police."[184] In particular, the presence of counsel would "prove a thorough obstruction to the investigation" thereby "fortif[ying] the suspect . . . in his capacity to keep his mouth closed."[185] Yet Frankfurter also recognized that "[a]t the other pole is a cluster of convictions each expressive, in a different manifestation, of the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it."[186]

The confession problem was therefore an authentic dilemma, and it could not be resolved by subordinating one set of considerations to the other. The Court had no choice but to strike the appropriate balance in each case through a sensitive examination of all the facts and circumstances peculiar to it; "[n]o single litmus-paper test for constitutionally

181. *Id.* at 604-05.

182. *Id.* at 569.

183. *Id.* at 578 (quoting People v. Hall, 110 N.E.2d 249, 254 (Ill. 1953)).

184. *Id.* at 579.

185. *Id* at 580.

186. *Id.* at 581.

impermissible interrogation" had developed.[187]

This solution, however, served only to mire the Court in further contradiction. Most obviously, the case-by-case balancing approach undermined the Court's commitment to judicial deference. Justice Frankfurter was too sophisticated to accept a metaphysical free will/coercion dichotomy as providing a neutral ground for decision. But without some substitute for this standard, the balancing, policy-management approach was entirely empty. It specified a *procedure* for the Court to use, but no *substantive* measure to which the procedure could be applied.[188] Frankfurter hoped that the Court's common-law method would gradually clarify the law of confessions. But in fact, the method's substantive emptiness left the Court free in every case to strike the balance in any fashion it chose.

In a less obvious way, Frankfurter's approach also undermined the Court's technocratic and social justice goals. The Court's failure to specify a substantive standard meant that the problem resisted bureaucratic resolution. *Culombe* gave the lower courts very little guidance and, in effect, made every confession case appropriate for the exercise of the Supreme Court's certiorari jurisdiction. But the Court simply lacked the resources to hear and decide more than a handful of the confession cases presented to it every year.[189] Perhaps more significantly, the opinion's obstinate insistence on particularity deprived police departments of the kind of clear, bright-line standard that they might have effectively communicated to and enforced against individual officers in the absence of judicial oversight.[190] The Court thus created the worst of both worlds: its approach maximized its own workload while minimizing the impact of that work on the primary behavior it hoped to control.

The total futility of Frankfurter's efforts is illustrated by the *Culombe* opinion itself. Despite his herculean effort to clarify the law of confessions, he succeeded in attracting only one other Justice to his opinion.[191] Writing for the Court's liberal wing, Chief Justice Warren concurred in the result, but openly mocked Frankfurter's efforts to bring unity to the Court's confession jurisprudence. In an ironic invocation of

187. *Id.* at 601.

188. The point is forcefully made in T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972-76 (1987) (arguing that balancing involves many frequently unexamined difficulties when used as a method of constitutional adjudication).

189. *See* KAMISAR, *supra* note 18, at 75.

190. For contemporary criticism of the voluntariness approach along these lines, see *id.* at 1-25.

191. Although Frankfurter announced the judgment of the Court, his opinion was joined only by Justice Stewart. *Culombe*, 367 U.S. at 568 (plurality opinion). Chief Justice Warren, *id.* at 635, and Justices Brennan, *id.* at 641, and Douglas, *id.* at 637, each filed opinions concurring in the result; with Justice Black joining the Douglas opinion and Chief Justice Warren and Justice Black joining Brennan's opinion. Justice Harlan, joined by Justices Clark and Whittaker, dissented. *Id.* at 642.

Frankfurtian insistence on judicial restraint—an invocation that became more ironic still in light of his subsequent *Miranda* opinion—Warren chastised Frankfurter for departing from the Court's custom of deciding only the case that came before it: "The opinion which announces the judgment of the Court in the instant case has departed from this custom and is in the nature of an advisory opinion, for it attempts to resolve with finality many difficult problems which are at best only tangentially involved here."[192]

Frankfurter's pretensions to precision and objectivity were also mocked, although less intentionally, in Justice Harlan's dissenting opinion. Harlan, unlike Warren, purported to understand and agree with Frankfurter's voluntariness approach.[193] Yet his opinion read the same facts that Frankfurter thought clearly established coercion as showing that Culombe's confession was the "product of a deliberate choice."[194] Thus, the Justices who concurred on an analytical framework for resolving the problem disagreed on the result produced by that framework, while the Justices who concurred on the result disagreed on the analytic framework producing that result.

In short, the *Culombe* opinion was a total disaster. The Court had managed to produce a veritable treatise on the law of confessions with no majority opinion, no agreement on the appropriate standard, no agreement on how the standard endorsed by the plurality should be applied, and no prospect of enforcing that or any other standard in the courts below or in police departments across the country.

The *Culombe* fiasco laid the groundwork for *Miranda* in much the way that *Gaines* laid the groundwork for *Brown v. Board of Education.* The *Gaines* Court committed itself to a program of equalization that was theoretically confused and practically impossible.[195] Similarly, the *Culombe* plurality embraced a version of voluntariness that was analytically empty and, in any event, beyond the Court's power to map onto the real world.

The analogy runs even deeper. On the eve of *Brown,* the Court's effort to implement *Gaines* led to *Sweatt* and *McLaurin,* which, if taken literally, promised massive Court intervention to redistribute resources between the black and white communities—a promise on which the Court was institutionally unable to deliver.[196] On the eve of *Miranda,*

192. *Id.* at 636 (Warren, C.J., concurring in the judgment).

193. "I agree to what my Brother FRANKFURTER has written in delineation of the general principles governing police interrogation of those suspected of, or under investigation in connection with, the commission of crime, and as to the factors which should guide federal judicial review of state action in this field." *Id.* at 642 (Harlan, J., dissenting).

194. *Id.*

195. *See supra* text accompanying notes 81-84.

196. *See supra* notes 126-29 and accompanying text.

the effort to implement *Culombe* led to *Massiah*[197] and *Escobedo*,[198] which threatened to end police interrogation as an effective law-enforcement tool. As a practical political matter, the Court was institutionally powerless to enforce this result as well.

The key move in *Massiah* and *Escobedo* was a shift from the due process voluntariness inquiry to an inquiry into the meaning of the Sixth Amendment right to counsel. Massiah does not appear to have been coerced in the normal sense of the word. Indeed, government officials were not even present when Massiah made the statements he sought to suppress.[199] The statements were made in conversation with his codefendant Colson in an environment far removed from the kinds of physical and emotional pressures that had been the stuff of the Court's earlier voluntariness cases.[200] To be sure, Colson failed to inform Massiah that he had turned against him and was, at that very moment, broadcasting his incriminating statements through a hidden radio transmitter to a government agent.[201] But this problem, if really a problem at all, would seem to raise Fourth Amendment privacy concerns rather than voluntariness issues.[202]

In fact, the Court disposed of Massiah's case without resort to either voluntariness or search-and-seizure doctrine. Rather, it held that the absence of a lawyer at a time when the government was deliberately eliciting incriminating statements violated Massiah's right to counsel.[203]

It is easy to see why the Court, fresh from the *Culombe* fiasco, would be attracted to this ground for decision. Voluntariness is a metaphysical abstraction, but the presence or absence of counsel is a fact in the world. If there was to be any hope of having an actual impact upon lower courts and police departments, the Court had to devise requirements that were concrete and understandable. A Sixth Amendment approach held out the promise of rescuing the Court from the pointless philosophical speculation that had preoccupied it for thirty years.

Unfortunately there was also a downside to the Sixth Amendment approach. As Frankfurter had understood and expressly acknowledged in *Culombe*,[204] insistence on a right to counsel in the stationhouse would effectively end police interrogation as a useful law-enforcement tool. Virtually any competent lawyer would advise his client in the strongest pos-

197. Massiah v. United States, 377 U.S. 201 (1964).

198. Escobedo v. Illinois, 378 U.S. 478 (1964).

199. *Massiah*, 377 U.S. at 203.

200. *See id.* (conversation occurred in codefendant's automobile).

201. *Id.*

202. By the time *Massiah* was decided, the Court had made clear that a defendant tricked by a police agent wired for sound had assumed the risk of loss of privacy and therefore had no Fourth Amendment claim. *See* Lopez v. United States, 373 U.S. 427, 438 (1963).

203. *Massiah*, 377 U.S. at 206-07.

204. *See supra* text accompanying note 185.

sible terms to remain silent, and it would be a rare client indeed who would disregard such advice. Thus, a *Massiah* approach threatened to achieve one technocratic goal at the expense of another. The Court might have an impact on actual police behavior, but only at the price of forgoing the "anxious task" of balancing law-enforcement needs against individual rights without tipping the scale in either direction.

In *Massiah* itself, the Court left an escape hatch: the police deception had occurred after Massiah had been indicted and retained counsel. The Court's holding therefore did not reach the more typical case in which the defendant is interrogated at the stationhouse before formal charges are filed. But a few months later, in *Escobedo v. Illinois,*[205] the Court expanded the *Massiah* rule to cover just this situation. Escobedo, unlike Massiah, had not been formally charged. He had been arrested and subjected to standard police interrogation, albeit without counsel.[206]

Escobedo also differed from *Massiah* in a second respect. On its facts, the case might easily have been resolved in Escobedo's favor on traditional voluntariness grounds. The police failed to warn Escobedo of his rights, denied his express request to see counsel, continued questioning in the face of his obvious physical exhaustion, and tricked him into making statements that he clearly did not want to make.[207] Yet in the face of all this, the Court eschewed the voluntariness theory and squarely held that the mere absence of counsel required suppression of the confession.

This approach raises interesting questions concerning the role that the *Escobedo* Court expected counsel to play. In light of the Court's refusal to address or resolve the voluntariness question, we must assume for purposes of this decision that, contrary to the facts, Escobedo's statements were fully voluntary. But if this were so, the only role left for counsel would be to change his mind by convincing a person who previously wished to confess that confession was, after all, a mistake.[208]

It is, therefore, easy to see why defenders of police practices feared that the Court was well on the road to banning admission of all confes-

205. 378 U.S. 478 (1964).

206. *Id.* at 485 (holding that even though petitioner had not been formally indicted, stationhouse questioning "ceased to be a general investigation of 'an unsolved crime' " as soon as he requested an attorney).

207. *Id.* at 479-83.

208. The *Escobedo* majority noted the argument that the counsel requirement would effectively end all confessions because, in the words of Justice Jackson, " '[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.' " *Id.* at 488 (quoting Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part)). But instead of attempting to refute this characterization of the effect of its holding, the majority seemed to embrace it: "This argument, of course, cuts two ways. The fact that many confessions are obtained during [the preindictment] period points up its critical nature as a 'stage when legal aid and advice' are surely needed." *Id.*

sions.[209] *Escobedo* was not the end of the road. On the facts of the case, the police had not only failed to inform Escobedo of his right to counsel but also actively obstructed the ability of a lawyer, who had already been retained, to see his client. Moreover, the penultimate paragraph of *Escobedo* considerably narrowed its holding.[210]

But *Escobedo* had to be read together with *Massiah,* in which the Court found a Sixth Amendment violation despite the absence of any government obstruction of Massiah's ability to secure the advice of counsel and any police conduct, other than use of a double agent, that could be interpreted as impinging on the defendant's free will. And while *Massiah* standing alone could be limited to postindictment interrogation, *Escobedo* squarely rejected this limitation. Thus, taken together, *Escobedo* and *Massiah* threatened to create a virtually unwaivable right to counsel—a right designed not merely to insure voluntariness—that by hypothesis was present in any event in *Escobedo*—but, seemingly, to discourage even fully voluntary confessions.

Like *Brown, Miranda* is conventionally understood as dramatically expanding the scope of constitutional protection. Yet as with *Brown,* this popular perception reverses the real mystery about the case. Given *Massiah* and *Escobedo,* the hard question is, why did *Miranda* need to be decided at all?

C. *The Two Faces of Miranda: An Expansion of Individual Rights or a Confession of Institutional Incompetence*

Like *Brown, Miranda* differs from prior precedent in its insistence on a fictional identity. In *Brown* Chief Justice Warren asserted that all segregated education is inherently and necessarily unequal. In *Miranda* he asserted that all custodial interrogation in the absence of warnings is inherently and necessarily compelled.[211]

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209. In a bitter dissent, Justice White accused the majority of taking "another major step in the direction of the goal which the Court seemingly has in mind—to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not." *Id.* at 495 (White, J., dissenting).

210. The Court summarized its holding as follows:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment . . . ."

Id. at 490-91.

211. We have concluded that without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and

This insistence on an identity between compulsion and custodial interrogation is what makes *Miranda* different from all of the confession cases that preceded it. A close linkage between compulsion and custodial interrogation is also essential to the logic of *Miranda.* The requirement of a showing of "compulsion" flows from the *Miranda* Court's decision to abandon both the *Culombe* due process approach and the *Massiah-Escobedo* assistance-of-counsel approach in favor of a focus on the Fifth Amendment Self-Incrimination Clause.[212] A necessary precondition for reliance on that clause is the existence of compulsion. But a defendant at the police station is generally not *legally* compelled. Unlike a witness at trial, he cannot be held in contempt for failure to answer questions.

Chief Justice Warren surmounted this obstacle by equating interrogation while in custody with legal compulsion.[213] Once this equation was accepted, it followed that statements flowing from the interrogation were subject to the Fifth Amendment and could not be used at trial unless the compulsion was somehow dissipated. It could be dissipated, Chief Justice Warren maintained, only by administering the now-famous warnings and by providing the opportunity for the presence of counsel during interrogation.[214] A defendant thereafter claiming the right to remain silent cannot be further interrogated. Once warned, the defendant could relinquish his rights, but the state would have the burden of showing that those rights were relinquished knowingly and voluntarily. Under these conditions, a subsequent confession would no longer be compelled, and its introduction at trial would not violate the Fifth Amendment.[215]

Miranda thus departed from prior decisions by equating custodial interrogation without warnings to legal compulsion. But what is the justification for the equation? Like *Brown, Miranda* can be understood in two contradictory ways.

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to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

Id. at 467.

212. The Court noted that "[i]n these cases, we might not find the defendants' statements to have been involuntary in traditional terms," but held that "[o]ur concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest." *Id.* at 457.

213. We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

Id. at 461.

214. *See id.* at 468-69.

215. *Id.* at 475-77.

1. *Miranda as a Rejection of Liberal Individualism*

Miranda's equation of compulsion with custodial interrogation can be perceived as a dramatic break with the liberal assumptions that had driven earlier confession law. On this view, the Court bypassed the problems of justification and individual adjudication that had bedeviled Justice Frankfurter by confidently espousing a controversial collective conception of the good.

As a result of this rejection of the liberal model, the Court could adjudicate the problems of defendants as a group rather than as individuals, and could finally abandon the fact-specific investigation of individual circumstances that had been a hallmark of confession law for the previous thirty years. Instead of a case-by-case investigation into whether a particular defendant's will had been overborne, the Court opted for the kind of "single litmus-paper test" that Frankfurter had attacked a few years earlier.

This willingness to tackle the problems of defendants as a group rather than as individuals seemed to disregard one of the primary liberal justifications for judicial review. Liberals had always claimed that the Court protected the unique rights of each individual against unfair or inaccurate generalizations formulated by the political branches. In adopting the collective approach, the Court appeared unconcerned that some defendants who had not been warned might know their rights in any event or might confess freely. And although the Court professed to leave open the possibility that it would consider individual claims of coercion in cases in which the defendant had been properly warned,[216] it clearly anticipated that the warning-and-waiver procedure would dispense with the need to investigate the vast majority of such claims.[217]

The Court thus opted for a theory of group rather than individual rights. Just as the *Brown* Court forswore the task of making individual adjudications concerning the equality of separate facilities, the *Miranda* Court confidently subsumed the claims of individuals in an effort to restructure police-citizen interaction.

Miranda also rejected liberal individualism in a second way. Much as *McCabe* had treated equality as a matter of individual valuation, *Brown v. Mississippi* and its progeny had treated freedom as a matter of atomistic and disengaged individual choice. In these cases the Court repeatedly embraced the ideal of the autonomous individual, acting

216. *See id.* at 475.

217. The argument that the *Miranda* requirements served to guarantee Fifth Amendment rights would be undercut if a substantial number of involuntary confessions were obtained despite compliance with *Miranda*. For a discussion of the Court's post-*Miranda* treatment of voluntariness claims, see *infra* notes 239-40 and accompanying text.

according to his or her own desires, uninfluenced by pressures external to himself or herself.

Miranda can be read as decisively rejecting this version of freedom in favor of a contextual and communal ideal of choice. On this view, choice was not a matter for each lone individual acting in isolation. Instead, individuals always act in a social context: "free choice" is no more than the label attached to the *right* context that would determine the *right* choice. This orientation helps to explain how Chief Justice Warren could insist that *all* custodial interrogation was inherently coercive.[218] Statements resulting from such interrogation were never the product of isolated choice. It was always true that the statements were preceded by a form of social interaction with the police.

But for Warren, unlike Frankfurter, it did not follow that the Court should pursue the ideal of confessions that *were* the product of isolated choice. A search for contextless, isolated human action was a search for a chimera. Treating Warren's orientation as nonliberal therefore helps to explain his insistence on warnings and lawyers. Because the Warren Court viewed "freedom" as consisting of action taken within the framework of the proper sort of social interaction, it could guarantee freedom only by specifying that interaction. The police therefore had to inform the defendant of his or her rights, (one kind of interaction) and, unless the right was waived, the defendant had to consult with a lawyer (a second kind of interaction) before his or her statements could be said to be freely made.

On this reading, then, *Miranda* resolved the antinomies of prior liberal doctrine by rejecting that doctrine. The *Miranda* Court finally came to understand that the technocratic goals of post-New Deal judicial review could be achieved only by forsaking the outmoded ideal of individual adjudication and that the determinist premises of post-New Deal ideology required abandonment of the similarly outmoded ideal of individual choice.

While this interpretation captures a part of the *Miranda* court's motivation, however, the *Miranda* opinion is at once more complex and less coherent than the nonliberal interpretation suggests. The nonliberal view produced two contradictions, both of which relate to the contextualization of choice. The first problem concerns the nature of the waiver that *Miranda* permits. The Court held that all statements resulting from custodial interrogation are involuntary in the absence of counsel.[219] Thus, Chief Justice Warren turned away from the Sixth Amendment approach enunciated in *Escobedo* and *Massiah* and held that counsel is

218. *See Miranda*, 384 U.S. at 458.

219. *See id.* at 467.

required if a defendant is to be protected against the kind of compulsion outlawed by the Fifth Amendment:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.[220]

Superficially, this language suggests that a stationhouse lawyer must invariably be present if a defendant's confession is to be admissible. The Court avoided this conclusion, however, by acknowledging the possibility that a defendant might voluntarily waive the right to counsel without the presence of a lawyer.[221] To be sure, the Court established a high standard for such waivers. The government bears the "heavy burden" of proving that the waiver is knowing and intelligent.[222] Apparently it must do something more to meet this burden than simply demonstrate that the warnings were followed by a statement, and it can never meet the burden without demonstrating that warnings were in fact given.[223] But the fact remains that *Miranda* squarely rejected the proposition that all statements made without counsel are unconstitutional.

The legitimacy of such waivers is puzzling in light of the nonliberal premises seemingly endorsed in the rest of the opinion. If it is really true, as *Miranda* holds, that all statements made in response to uncounseled custodial interrogation are coerced, then how can the statement "I do not want a lawyer," made in response to a police inquiry and while in custody, ever be voluntary and binding?[224] The second contradiction runs deeper than the first. The Fifth Amendment is based on individualist assumptions. If *Miranda* is read as a rejection of liberal individualism, it tears the Fifth Amendment privilege from its ideological moorings without substituting any new grounding that might explain why we should care about self-incrimination.

Although systemic arguments are sometimes made for the Fifth

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220. *Id.* at 469.

221. This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. . . .

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Id. at 474-75.

222. *Id.* at 475.

223. *See id.* at 469 (a preinterrogation warning is "indispensable"), 475-76 (describing what are not instances of knowing and voluntary waiver).

224. *See* Richard H. Kuh, *Interrogation of Criminal Defendants—Some Views on* Miranda v. Arizona, 35 FORDHAM L. REV. 233, 234-36 (1966) (arguing that after *Miranda,* confessions should no longer be admissible at all because of the logical implication that a waiver of Fifth Amendment rights can never be intelligent).

Amendment privilege,[225] at its core the privilege rests on liberal assumptions about the conflict between individual and collective choice.[226] The very language of the amendment, with its reference to "compulsion" and testimony against oneself, presupposes a "self" that exists apart from the community. This self is equated with freedom and needs to be protected from the community that otherwise might overwhelm and destroy it. The right of silence thus represents a limitation on the claims that the community can make against the individual. Although the collective can coerce individuals in a variety of ways, there remains an essential core of individual will that cannot legitimately be subsumed and harnessed for purposes of self-destruction.

In contrast, *Miranda*'s holding appears to embrace a very different model of choice. The warning and counsel requirements seem to stem from a rejection of the possibility of an autonomous self. On this view, the dichotomy between the individual and the collective is false. Because human identity is determined by the social structures within which all humans live, human beliefs and desires are necessarily embedded in some sort of community experience and interaction.[227]

But if one believes that all choice is necessarily contextual and that no self exists apart from the way in which people interact with their surroundings and with each other, the Fifth Amendment's normative preference for silence becomes much more difficult to defend. It is unclear why anyone would favor an environment that makes criminals resistant to confession if confession would maximize the collective good. Put differently, the nonliberal might well ask why, of all the people with whom a defendant might interact before talking to the police, we should insist on a lawyer who, under prevailing professional norms, is certain to create a context in which the defendant will remain silent? Why does the Court not insist instead on the presence of a clergyman, or a psychiatrist, or a philosopher, or, for that matter, a prosecutor? Any one of these individuals would foster social interaction more conducive to confession and would be more likely to produce a socially useful and perhaps morally superior outcome.

225. *See generally* William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988) (arguing that the Fifth Amendment privilege responds to the problem of "excusable, self-protective perjury" and ensures confidence in the judicial process by allowing the guilty to obey the law without having to confess on the witness stand). For an investigation of the limits of such arguments, see Louis M. Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J.L. & HUMAN. 149 (1990) (discussing the usefulness and limitations of the idea that the privilege against self-incrimination can be understood as a prophylactic rule designed to protect against the legitimation of excessive punishment—legitimation produced by the illusion that the defendant desires or accepts the punishment).

226. *Cf.* Gerstein, *supra* note 142 (analyzing the extent to which the privilege can be justified as a protection of the individual's privacy).

227. *See supra* note 120 and accompanying text.

2. *Miranda as a Victory for Liberal Individualism*

These contradictions can be avoided by reading *Miranda* as embracing rather than rejecting liberal individualism. Almost certainly, this is the way that Chief Justice Warren viewed his own handiwork. Although *Miranda*'s holding is most easily explained in terms of a communitarian theory of choice, the opinion is filled with rhetoric celebrating the virtues of individual freedom.[228] But how can one reconcile the holding with the rhetoric?

They can be reconciled if one sees *Miranda* not as a confident assertion of judicial power, but as a confession of institutional weakness. On this view, the *Miranda* Court remained committed to the liberal ideal of individual choice, but embraced group rights and a contextual and communitarian model of freedom as the best available approximation for individual choice in an imperfect world. Just as the *Brown* Court came to realize that it simply could not achieve the promise of unmediated equality held out by cases such as *Gaines,* the *Miranda* Court understood that it could not achieve the promise of unmediated individual freedom implicit in its prior confession jurisprudence.[229]

In fact, the Court's effort to determine on a case-by-case basis whether the defendant had acted out of free will had resulted in disaster. In order to affect primary behavior, the Court had to convert this metaphysical concept into something concrete and workable in the real world. The *Escobedo-Massiah* counsel requirement was a first stab at accomplishing this transformation. Still, although the counsel test was more easily administrable than the discredited due process approach, its rigorous enforcement would have resulted in the elimination of confessions altogether[230]—clearly a politically unacceptable result. Like *Escobedo* and *Massiah, Miranda* established a practical and enforceable test for determining the admissibility of confessions. But unlike the counsel requirement, the warning-and-waiver procedure also held out hope that some statements would continue to be admissible if secured pursuant to the prescribed methods.[231]

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228. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("[T]he constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens.").

229. During the *Miranda* oral argument, Justice Black confessed that the Court was incapable of determining "[the admissibility of confessions] 'each time on the circumstances.' " KAMISAR, *supra* note 18, at 75 (quoting Unofficial Transcript of Oral Argument in *Miranda* and Companion Cases at 91 (oral argument of Mr. Earle for Petitioner in *Vignera v. New York,* a companion case to *Miranda*)).

230. *See supra* notes 197-209 and accompanying text.

231. There was widespread fear prior to *Miranda* that the Court would extend the right to counsel so far that it would effectively prohibit the use of all confessions. *See, e.g.,* BAKER, *supra* note 138, at 160 (ALI draft on eve of *Miranda* included obligation of police to warn defendant of right to remain silent, but provided that questioning need not be conditioned on presence of lawyer).

On one level, the *Miranda* compromise was brilliantly successful. Indeed, the very survival of *Miranda* through a quarter century of tumultuous change in criminal procedure is a tribute to Chief Justice Warren's masterful melding of liberal ideals into a judicially enforceable standard. The opinion offers something of value to both contending parties. For the police, the *Miranda* procedure was relatively easy to incorporate into their standard arrest practices. The warnings and waiver were placed on a card and distributed to all officers. An individual policeman, untrained in the philosophical intricacies of free will, now knew precisely what it was that he was supposed to do before talking to a suspect.[232] Moreover, despite initial fears to the contrary, doing it did not result in a huge decline in the number of confessions.[233]

For defendants, the warnings provided assurance that they would be aware of their rights. Indeed, paradoxically, the astounding success of this aspect of *Miranda* has made the warning requirements themselves somewhat obsolete. Today, the warnings have become a part of the general background knowledge in our culture. Most arrested citizens are likely to know of their rights whether or not they are told. The warning ritual nevertheless continues to serve a second, important function. Even if the defendant already understands his rights, the very fact that the police must recite them may help to dispel the sense of total isolation and powerlessness that otherwise pervades much custodial interrogation.

Thus, defenders of *Miranda* can argue that by abandoning some of the more unrealistic demands of individual adjudication, the Court achieved tremendous gains. After years of frustration, *Miranda* allowed the Court to implement the liberal program and then to preserve it from attack when the politics of constitutional adjudication were transformed.

There is surely some truth to this version of the *Miranda* story. But there is also reason to be suspicious of assertions that it is the whole story. To begin with, the claim that any authentic solution to the confession problem exists that could leave both sides satisfied must be viewed with considerable skepticism. The struggle over confessions is, after all,

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An amicus brief filed by the ACLU in *Miranda* argued that the Fifth Amendment required the actual presence of counsel and not merely advice as to the possible availability of counsel. *See* KAMISAR, *supra* note 18, at 49 n.11. At oral argument, Justice Stewart raised the possibility that the right to counsel was nonwaivable. *Id.* (citing Unofficial Transcript of Oral Argument in *Miranda* and Companion Cases at 84 (oral argument of Mr. Earle for Petitioner in *Vignera v. New York*, a companion case to *Miranda*)). After *Miranda* was decided, the ACLU's executive director expressed " 'regret that the Court did not take the final step of stating that the privilege against self-incrimination cannot be fully assured unless a suspect's lawyer is present during police station interrogation.' " Eric Pace, *Ruling on Police Hailed by A.C.L.U.*, N.Y. TIMES, June 14, 1966, at 25.

232. *See infra* text accompanying note 238.

233. For summaries of the empirical evidence, see Schulhofer, *Reconsidering* Miranda, *supra* note 10, at 455-61; *see also* KAMISAR, *supra* note 18, at 47-49 n.11.

a zero-sum game. If both the police and civil libertarians are satisfied with the outcome, it seems likely that somebody is being fooled.

The liberal-victory version of *Miranda* also runs up against logical difficulties. As already noted, the very compulsion inherent in custodial interrogation upon which *Miranda* relies to trigger Fifth Amendment protection would also seem to call into question the voluntariness of postwarning waivers.[234] Justice Goldberg, the author of *Escobedo,* put the point suceinctly in a pre-*Miranda* case: "Common sense dictates the conclusion that if the authorities were successful in compelling the totally incriminating confession of guilt, the very issue for determination, they would have little, if any, trouble securing the self-contained concession of voluntariness."[235] Neither, one might add, would they have much difficulty in securing a self-contained waiver. *Miranda* does not repeal by fiat the logical proposition that a document cannot validate itself.

This skepticism about the efficacy of the warning-and-waiver procedure is reinforced by the way *Miranda* has worked in practice. Although far from conclusive, the best data available suggest that *Miranda* has had essentially no effect on the percentage of incarcerated defendants who confess.[236] Defenders of *Miranda* typically point to this fact as proof that the concerns of the critics were vastly overblown.[237] The defenders have tended to overlook the fact that the data are in tension with the view that *Miranda* is serving any useful purpose.

All of this suggests that *Miranda,* like *Brown,* is best characterized as a retreat from the promise of liberal individualism brilliantly camouflaged under the cover of bold advance. From this perspective, the central point of *Miranda* was not the establishment of new rights in the stationhouse. *Escobedo, Massiah,* and *Culombe* had already created all the rights any defendant needed. The problem that *Miranda* addressed was how to curb these sweeping protections so as not to interfere with the preservation of interrogation as an effective weapon in the police crime-fighting arsenal. What *Miranda* added to *Escobedo, Massiah,* and *Culombe* was a mechanism by which the defendant could give up these rights. The warning-and-waiver ritual that is at *Miranda*'s core served to insulate the resulting confessions from claims that they were coerced or

234. Counsel for the petitioner argued that the stationhouse was " 'the worst place for waiver' " because " 'the party alleging waiver has control of the party alleged to have waived.' " KAMISAR, *supra* note 18, at 49 n.11 (quoting Unofficial Transcript of Oral Argument in *Miranda* and Companion Cases at 84 (oral argument of Mr. Earle for Petitioner in *Vignera v. New York,* a companion case to *Miranda*)).

235. Haynes v. Washington, 373 U.S. 503, 513 (1963).

236. *See* Schulhofer, *Reconsidering Miranda, supra* note 10, at 455-61 (discrediting post-*Miranda* empirical study conducted by the Department of Justice that attempted to show "damage to law enforcement").

237. *Id.*

involuntary.[238]

In theory, of course, *Miranda* did no more than add an additional layer of protection for defendants without depriving them of the right to raise voluntariness claims even if the police had complied with the *Miranda* requirements. But things have not worked out this way in practice. In the quarter century since *Miranda,* the Court has reversed only two convictions on the ground that post-*Miranda* custodial interrogation produced an involuntary statement.[239] This record contrasts with twenty-three Supreme Court reversals of convictions on voluntariness grounds in the comparable time period immediately preceding *Miranda.*[240] Not surprisingly, in the face of this silence at the top, many

238. The prosecution-protecting function of *Miranda* has not been lost on the conservative Justices who have declined to overrule it. *See, e.g.,* Michigan v. Tucker, 417 U.S. 433, 443 (1974) (Rehnquist, J.) ("To supplement this new doctrine, *and to help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost,* the Court in *Miranda* established a set of specific protective guidelines, now commonly known as the *Miranda* rules" (emphasis added).).

239. *See* Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (Fulminante's confession was coerced by a fellow inmate/informer who promised to protect Fulminante from other inmates if he would relate details of his participation in his stepdaughter's murder); Mincey v. Arizona, 437 U.S. 385 (1978) (statements made in response to the relentless questioning of investigating officers by barely conscious defendant who was confined to an intensive care unit were coerced); *cf.* Crane v. Kentucky, 476 U.S. 683 (1986) (conviction reversed because jury not allowed to hear evidence concerning voluntariness); Miller v. Fenton, 474 U.S. 104 (1985) (remanded to lower court to apply correct standard on habeas corpus without addressing merits of voluntariness claim).

In *Arizona v. Fulminante* the Court fairly clearly granted certiorari only because it wished to address the question whether a defendant's conviction must be reversed when admission of an involuntary statement is found to be harmless error. Its holding that reversal was not required serves to reduce further the possibility that many future convictions will be reversed on this ground. *See also* Connecticut v. Barrett, 479 U.S. 523 (1987) (holding that defendant's ignorance of full consequences of waiver decision does not vitiate its voluntariness); Colorado v. Spring, 479 U.S. 564 (1987) (holding that defendant's lack of awareness of all crimes he may be questioned about does not vitiate voluntariness of waiver decision); Colorado v. Connelly, 479 U.S. 157 (1986) (holding that involuntariness claim cannot be made out without showing of coercive activity by government agents).

In seven other post-*Miranda* cases, the Court reversed convictions involving pre-*Miranda* questioning because the police had not complied with *Miranda* procedures. *See* Beecher v. Alabama, 408 U.S. 234 (1972); Darwin v. Connecticut, 391 U.S. 346 (1968); Greenwald v. Wisconsin, 390 U.S. 519 (1968); Brooks v. Florida, 389 U.S. 413 (1967); Beecher v. Alabama, 389 U.S. 35 (1967); *In re* Gault, 387 U.S. 1 (1967); Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966); *cf.* Harrison v. United States, 392 U.S. 219 (1968) (conviction reversed on ground that subsequent statement was fruit of prior involuntary statement); Garrity v. New Jersey, 385 U.S. 493 (1967) (conviction of police officer reversed where confession obtained in absence of *Miranda* warnings and under conditions that, though noncustodial, were coercive).

240. *See* Jackson v. Denno, 378 U.S. 368 (1964); Haynes v. Washington, 373 U.S. 503 (1963); Lynumn v. Illinois, 372 U.S. 528 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Culombe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate, 367 U.S. 433 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Watts v. Indiana, 338 U.S. 49 (1949); Harris v. South Carolina, 338 U.S. 68 (1949); Upshaw v. United States, 335 U.S. 410 (1948); Lee v. Mississippi, 332 U.S. 742 (1948); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York,

lower courts have adopted an attitude toward voluntariness claims that can only be called cavalier.[241]

Thus, there is a good deal of evidence that *Miranda,* like *Brown,* traded the promise of substantial reform implicit in prior doctrine for a political symbol. I argued above that the *Brown* Court cannot be faulted for making this trade.[242] As a matter of hard political realities, the Court never could have actually implemented the reformist program promised in *Gaines, Sweatt,* and *McLaurin.* Surely, its power to make good on the promise of *Culombe, Massiah,* and *Escobedo* was no greater, and, once again, the Court can hardly be blamed for this impotence. The best the Court could do in both situations was to provide a political symbol that might assist others in the organizing, demanding, and resisting that is the stuff of oppositional politics.

As things turned out, however, the *Brown* symbol provided only limited utility to the advocates of reform.[243] The *Miranda* symbol has been even less useful. Because there is no organized political campaign comparable to the civil-rights movement dedicated to defending the rights of criminal suspects, there is no group that can take even limited advantage of the *Miranda* "victory."

Moreover, on the other side of the ledger, the legitimating and stabilizing impact of *Miranda* has been significant indeed. The vitality of the *Miranda* doctrine and its prevalence in our culture is largely attributable to this impact. Before *Miranda,* the illusive and contradictory character of free will provided every defendant with an arguable claim that his or her will had been overborne. The defendant's consent and, therefore, the legitimacy of the criminal sanction itself was always uncertain and contested.

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324 U.S. 401 (1945); Ward v. Texas, 316 U.S. 547 (1942); White v. Texas, 310 U.S. 530 (1940); Chambers v. Florida, 309 U.S. 227 (1940).

241. For an especially egregious recent example, see Purvis v. Dugger, 932 F.2d 1413 (11th Cir. 1991). The court had little difficulty finding that the defendant's confession was voluntary in the face of the following facts:

1. The defendant had the mentality of an eight- to ten-year-old and suffered from chronic schizophrenia.

2. The police deliberately separated him from his mother despite his repeated requests to talk to her and police knowledge that he was entirely dependent upon her.

3. During one interrogation session, the police pushed the defendant into a chair and threatened him with electrocution.

4. The ultimate confession was secured with the assistance of a psychiatrist. The psychiatrist advised the police to contact the defendant while he was separated from his mother, and the police carefully monitored his schedule so as to find him at a time when he was isolated. *Id.* at 1415.

5. The psychiatrist secured the incriminating statement with the use of thematic apperception cards. *Id.* at 1416.

If a confession can be voluntary under these circumstances, it is difficult to imagine what the court means by the term.

242. *See supra* note 129 and accompanying text.

243. *See supra* Section II.C.2.

The ritualistic reading of *Miranda* rights, followed by the execution of the waiver, powerfully combats this sense of possibility and doubt. The ritual is powerful precisely because it seems to be the very embodiment of consent and submission. By transmogrifying free will into the concrete warning-and-waiver procedure, the Court tamed the contradictions that would otherwise continually threaten the legitimacy of punishment in a liberal democracy.

Thus, the liberal victory in *Miranda* was ironic and double edged. The Court finally managed to reformulate the constitutional requirements for confessions in a fashion that actually made implementation of those requirements a realistic possibility. But the quid pro quo for this empowerment was a redefinition of the requirements that obscured the underlying contradictions inherent in an inquiry into voluntariness, and thereby cut off the endless striving and challenge that the inquiry had produced. As a result, the Court ended up contributing to the smugness and self-satisfaction that are the main enemies of growth and reform.

IV
BROWN AND *MIRANDA*

The tale of *Brown* and *Miranda* is a story about the ways in which legal consciousness molds and distorts our view of social reality. The cases tell of a bizarre universe of paradox and reversal. It is an Orwellian world, dominated by strange substitutions, where one concept stands for another, victory masks defeat, and impotence takes the form of empowerment. It is a world where things are not what they seem.

The previous Parts have argued that this distortion has served to domesticate and control the destabilizing aspects of liberal constitutionalism by producing a false sense of closure and resolution. In this last Part, I want to bring to the surface a theme that has been implicit throughout. The theme focuses on the fashion in which these perceptual distortions produced by constitutional adjudication have controlled the most threatening of all the contradictions in our liberal democracy: those produced by the existence of a permanent, racially defined underclass.

In *Brown v. Mississippi,* Chief Justice Hughes recounted the testimony of a deputy sheriff concerning the treatment of one of the defendants in the case. The deputy was asked if the defendant had been beaten. " 'Not too much for a negro,' " he replied.[244]

The deputy's testimony effectively suggests the linkage between official violence and racial discrimination[245]— between *Brown v. Mississippi*

244. Brown v. Mississippi, 297 U.S. 278, 284 (1936).

245. For a graphic description of the ways officially sanctioned violence, under the cover of law

and the other more famous *Brown* decision a generation later.[246] It was hardly an accident that the NAACP was preoccupied not only with racial segregation but also with the treatment of black criminal defendants.[247] From the founding of the country, official violence and racial segregation—the targets of the two *Brown*s—were the twin pillars supporting the subjugation of African-Americans.

Throughout this history, the possibility that disadvantaged blacks and whites would perceive a mutuality of interest and form a coalition to combat this subjugation constantly threatened it.[248] One role played by constitutional law has been to alter these perceptions in a way that has affected the possibility of such a coalition. With considerable oversimplification, the history of the subjugation of African-Americans can be divided into three phases, during each of which violence, enforced separation, and constitutional law have interacted in different ways, as summarized in the following chart:

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enforcement, reinforced the system of racial separation and subjugation, see NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 225-53 (1989).

246. Professor Cover has argued:

> Although the Court had never treated them as race cases, there can be little doubt that the decisions in *Moore v. Dempsey, Powell v. Alabama,* and *Brown v. Mississippi* made new criminal procedure law in part because the notorious facts of each case exemplified the national scandal of racist southern justice.

Cover, *supra* note 91, at 1305-06 (footnotes omitted).

247. Some of the NAACP's efforts in this direction were designed to fend off challenges from the left. *See* KLUGER, *supra* note 19, at 144-54 (discussing the conflict between the NAACP and the International Labor Defense when each organization wanted to use the famous Scottsboro trial to advance its own agenda); TUSHNET, *supra* note 19, at 38-42 (elaborating further on the role of the Scottsboro affair in influencing the NAACP's activities).

248. *See* Cover, *supra* note 91, at 1302-03 (discussing how extreme social pressures on whites prevented the type of interracial political coalition that might have been beneficial to disadvantaged blacks). Joel Williamson has argued that before the Civil War, the white slave-holding elite formed a cautious alliance with the most affluent and sophisticated free people of color so as to fend off attacks on slavery by the white masses. By 1915, the white elite abandoned this black connection and aligned itself with the white masses.

> The end result was a culture in the South in which black people were practically excluded from influence upon the ruling power, and ruling power was devoted almost exclusively to the benefit of white people. The third possible power line in the schematic, an effective and durable alliance between the black mass and the white mass, has never occurred in the South.

JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 512-13 (1984).

	FIRST PHASE: 1791-1865	SECOND PHASE: 1865-1966	THIRD PHASE: 1966-PRESENT
OFFICIAL VIOLENCE	Primary means of enforcing subjugation	Secondary means of enforcing subjugation	Less important as means of enforcing subjugation
ENFORCED SEPARATION	Secondary means of enforcing subjugation	Primary means of enforcing subjugation	Less important as means of enforcing subjugation
CONSTITUTIONAL RHETORIC	Legitimated violence and separation	Delegitimated violence and separation	Legitimated subjugation without violence or separation

In the first phase blacks were legally enslaved, and official violence served as the main means of subjugation, with separation playing only a minor role. Constitutional law, in turn, helped provide ideological justification for the system of violence that was slavery. There were, of course, obvious contradictions in the constitutional text, which abolitionists did their best to exploit. But it was an uphill battle at best. Constitutionalism served primarily to legitimate the status quo and to cut off the perceived possibility of legal change.[249] Thus, the Constitution's implicit endorsement of slavery carried with it an endorsement of the means by which masters controlled their slaves, and the Rendition Clause of Article IV made certain that official coercion extended even into the territory of "free" states.[250] Although opponents of slavery occasionally utilized constitutional rhetoric to resist this violence, they more often

249. In 1844, Wendell Phillips, a leading abolitionist, published *The Constitution: A Pro-Slavery Compact,* which forcefully argued that the Constitution was a compromise designed to make slavery legitimate. For a discussion, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 150-54 (1975). Phillips' position was opposed by other abolitionists who thought that the Constitution should be read in light of natural law. *See id.* at 154-58. This group had little success in their effort to convince the judiciary of their view, however. *See id.* at 159-74.

250. U.S. CONST. art. IV, § 2, cl. 3 provides:

> No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regnlation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

The Supreme Court and the lower federal courts generally read the provision to protect slaveholders even when they ventured into free states. *See, e.g.,* Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). For a discussion, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 236-84 (1981).

The Constitution also requires fugitives from justice to be delivered up to the state from which they fled. *See* U.S. CONST. art. II, § 2, cl. 2. On occasion, Southerners used this clause to gain jurisdiction over free blacks who assisted in slave escapes. *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), *overruled by* Puerto Rico v. Branstad, 483 U.S. 219 (1987). Controversy over the Extradition Clause is discussed in FINKELMAN, *supra,* at 6-7.

resorted to civil disobedience and other extraconstitutional means to protect the rights of African-Americans.[251] And when dramatic change finally occurred, it came not through litigation, but through force of arms.

The Civil War and the enactment of the Reconstruction Amendments inaugurated the second phase. During this period, violence continued to play an important role, but it was now supplemental. It served as an occasional stopgap that reinforced an ideology of subservience maintained in somewhat more subtle form on a quotidian basis by Jim Crow.[252] Here is how Joel Williamson described the interaction between violence and Jim Crow at late century:

> Violence and the great threat of violence was one way in which Radicals [in control of the South] sought to lower the self-esteem of blacks and thus render them more controllable on the way to their demise. But there were other, more subtle means to effect that end. . . .
>
> . . . .
>
> Radicalism had a special motive in its effort to pass laws to . . . separate the races in public places . . . . The Radical motive was to depress the expectations of blacks, especially black men, to make them less secure and ultimately less aggressive, to lead them to follow with minimal resistance the inevitable path to racial extinction. Radicals readily recognized . . . that blacks were already practically . . . segregated, but to Radicals the laws were useful in showing explicitly and blatantly the power of whites. They were tokens of hard and present truths and signs of things to come—of the surety of white supremacy and the futility of black resistance.[253]

This second phase was also marked by the growth of liberal constitutionalism as a means for combatting racial suppression. The Reconstruction Amendments provided a legal basis for challenge, and for half a century the Constitution served as an external referent from which this interlocking system of violence and segregation could be critiqued and, ultimately, destroyed.

Chief Justice Warren's opinions for the Court in *Brown* and *Miranda* brought this second phase to a triumphal conclusion. *Brown* eloquently and permanently interred the system of official separation that had served for almost a century as the post-Civil War analogues of the

251. For a book-length account of one such event, see NAT BRANDT, THE TOWN THAT STARTED THE CIVIL WAR (1990); *see also* LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 72-108 (1957) (discussing violent confrontations between abolitionists and those in favor of slavery); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 81-86 (1988) (discussing the role of the fugitive-slave law as a catalyst for conflict between proponents and opponents of slavery).

252. For a good description of the role of segregation in the reestablishment of white supremacy after redemption, see FONER, *supra* note 101, at 588-601.

253. WILLIAMSON, *supra* note 248, at 224-25.

slave codes. Of course, *Miranda* was about much more than just race. But an important impetus for the decision was the desire to constrain the unchecked police discretion promoting the official violence that reinforced subjugation of the black underclass.[254]

The demise of legal segregation and the curbing of official violence hardly meant the end of subjugation, however. Although the world has greatly improved for some African-Americans, a huge black underclass whose prospects are, if anything, worse than they were forty years ago, remains.[255] This final, post-*Brown* and *Miranda* phase has produced the most surprising reversal of all. The role of liberal constitutionalism has

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254. In an early draft of his *Miranda* opinion, Chief Justice Warren expressly acknowledged the connection between police interrogation techniques and racial subjugation:

> In a series of cases decided by this Court . . . Negro defendants were subjected to physical brutality—beatings, hanging, whipping—employed to extort confessions. In 1947, the President's Committee on Civil Rights probed further into police violence upon minority groups. The files of the Justice Department, in the words of the Committee, abounded "with evidence of illegal official action in southern states."

BERNARD SCHWARTZ, SUPERCHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 591 (1983).

In a memorandum to the Chief Justice, Justice Brennan objected to the passage, complaining that it "turn[ed] police brutality into a racial problem. If anything characterizes the group this opinion concerns it is poverty more than race." *Id.* The passage was omitted from the final draft. *Cf.* Klarman, *supra* note 101, at 764 (stating that the early "constitutional interventions in state criminal procedure involved Jim Crow 'justice' ").

255. In the period following the thirtieth anniversary of the 1954 Supreme Court decision against racial separation . . . a troubling dilemma confronts proponents of racial equality and social justice. The dilemma is that while the socioeconomic status of the most disadvantaged members of the minority population has deteriorated rapidly since 1970, that of advantaged members has significantly improved. . . .

> In several areas, blacks have not only improved their social and economic positions in recent years, but have made those improvements at a relatively faster rate than the reported progress of comparable whites. . . .
>
> But for millions of other blacks, most of them concentrated in the ghettos of American cities, the past three decades have been a time of regression, not progress. . . . [T]hese low-income families and individuals are, in several important respects, more socially and economically isolated than before the great civil rights victories, particularly in terms of high joblessness and the related problems of poverty, family instability, and welfare dependency.

WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 109-10 (1987).

One measure of the deteriorating living standards for many blacks is that, despite the considerable gains enjoyed by the black middle and upper class, the gap between overall black and white median income is growing. Between 1970 and 1986—during the very historical moment when southern resistance to *Brown* collapsed—black family income declined as a percentage of white family income. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-60, NO. 157, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1986, at 11 (1987) (decline from 61.3% to 57.1%). And although black schoolchildren are now attending officially desegregated schools, they are three times more likely than white children to be placed in classes for the educable mentally retarded and only one half as likely to be in classes for the gifted and talented. In high schools, black students are suspended about three times more often than whites. *See* Committee on Policy for Racial Justice, Visions of a Better Way 14 (1989). "[T]he average reading level of minority 17-year-olds is only slightly better than the average reading level of white 13-year-olds." CHILDREN'S DEFENSE FUND, A VISION FOR AMERICA'S FUTURE: AN AGENDA FOR THE 1990S 70 (1989).

flipped once again. Instead of providing a basis for critique of the status quo, as it did during the second phase, it again validates current arrangements.[256] The very decisions that dismantled the old system of overt segregation and official violence now frame a new consciousness that serves the old ends more efficiently and subtly. *Brown* and *Miranda* created a world where we need no longer be concerned about inequality because the races are now definitionally equal and a world where we need no longer be concerned about official coercion because defendants have definitionally consented to their treatment. When things go badly, then, it is hardly "our" fault. *Brown* and *Miranda* let us blame the victim in a way we never could under the old regime.

The story of *Brown* and *Miranda* thus encapsulates both the great attraction and great danger in liberal constitutionalism. On the positive side, the antinomies in liberal theory, far from the defects that its critics decry, actually provided a source for growth and challenge. The very process of litigation designed to exploit these antinomies provided an engine for political and social change. Moreover, the antinomies also permitted advocates of such change to harness legal doctrine in a fashion that produced litigation victories that, at least for a while, further energized reformist political movements.

On the negative side, the drive toward closure and resolution built into constitutional litigation produced a new system of legitimation made all the more powerful because it seemed to resolve these contradictions. To be sure, this new system is also riddled with contradictions that might in theory be exploited to produce social change. For example, the Court has never given us a coherent explanation of what it means for a school system to be unitary or what precisely must be shown to demonstrate that a waiver of *Miranda* rights is knowing and voluntary.

But, at least for the present, the possibility for exploitation of these ambiguities is only theoretical. As an experiential rather than theoretical matter, *Brown* and *Miranda* support the status quo. The imagery of consent and equality, so powerfully and simply invoked by Chief Justice Warren's rhetoric, dominates popular culture in a way that the old con-

256. My colleague, Gary Peller, has aptly described the way in which *Brown* relates to a perceptual system that reinforces the status quo:

> [I]ntegrationism is organized around an image of reason and neutrality that represents the transcendence of bias and prejudice. The liberal discourse of race represented by integrationism actually contains within itself two distinct ways to perceive social practices. On the one hand, the possibility of bias and prejudice constitutes a language of critique and reform that provides a framework to articulate what needs to be changed in society. On the other hand, this liberal discourse also constitutes a narrative of legitimation, a language for concluding that particular social practices are fair because they are objective and unbiased. This second aspect of liberal discourse embodies a conception of a realm of social life outside the influence of racial history and politics.

Peller, *supra* note 121, at 775.

fusing, complex, and contradictory law of separate-but-equal and voluntariness never could.

Moreover, the hold of *Brown* and *Miranda* is strengthened for the very reason that the decisions seemed to mark the victorious climax of a long and heroic struggle for social justice fought by groups that were outside the political mainstream. The decisions give us a kind of amusement-park version of social change. We can experience the *frisson* that comes with upheaval and revolt, all the while secure in the knowledge that we need not suffer any of the discomfort and insecurity that would accompany an actual redistribution of social resources.

It turns out, then, that for all the short-term gains they produced, *Brown* and *Miranda* have led us into a trap. Before the Civil War, when constitutional law first ensnared us in a system of repression based upon violence and coercion, it was armed conflict rather than law that provided the way out. Today, the constitutional rhetoric of *Brown* and *Miranda* support a perceptual system premised on notions of consent and desert rather than on overt violence and coercion. The escape route from our present predicament is not nearly so well marked.