Pace Law Review

Volume 26
Issue 2 *Spring 2006*

Article 2

April 2006

Authenticating American Democracy

Kathleen A. Bergin

Recommended Citation
Kathleen A. Bergin, *Authenticating American Democracy*, 26 Pace L. Rev. 397 (2006)
DOI: https://doi.org/10.58948/2331-3528.1158
Available at: https://digitalcommons.pace.edu/plr/vol26/iss2/2

Authenticating American Democracy

Kathleen A. Bergin*

I. Introduction

In *Hamdi v. Rumsfeld*,[1] the Supreme Court outlawed the Executive Branch policy of subjecting alleged "enemy combatants" to indefinite detention without formal charges, access to an attorney, or procedural due process protections. The irony of imposing such restraints while the United States fought to "liberate" the people of Iraq was not lost on Justice O'Connor who reminded us that: "It is during our most challenging and uncertain moments . . . that we must preserve our commitment at home to the principles for which we fight abroad."[2] The decision in *Hamdi* helped repair America's standing in the international community at a time when other nations questioned its commitment to democratic ideals.[3]

Hamdi is just one of the many cases decided against a backdrop of extant global insecurity where the Court has measured the constitutionality of domestic governmental practices against international expectations.[4] This trend is punctuated by the recent retirement of

---

* Associate Professor of Law, South Texas College of Law, Houston, TX; LL.M., New York University Law School; J.D., University of Baltimore School of Law. Special thanks to my friend and mentor, Derrick Bell, for inspiring and contributing to the development of this Article. Thanks also to Shelby D. Moore, Alfred Brophy, Bryan K. Fair, Maxine Goodman, Njeri Mathis, Angela Onwuachi-Willig, Antoinette Sedillo-Lopez, and Gloria Valencia-Weber for insightful comments on earlier drafts, and the participants of the 2005 Southeast/Southwest People of Color Scholarship Conference who attended a presentation of this Article. I am indebted to John D. Fassett, former law clerk to Supreme Court Justice Stanley Reed, for bringing the Court to life through our many correspondences. I also thank my able research assistant, Ellie Portwood, whose tireless efforts are woven through each and every sentence of this Article.

1. 542 U.S. 507 (2004).

2. *Id.* at 532.

3. *See, e.g.*, Conor Gearty, Editorial, *A Blow for Freedom*, THE GUARDIAN, July 6, 2004, at A17; Augusta Conchiglia, *U.S.: Land of the Unfree*, LE MONDE DIPLOMATIQUE, Jan. 2004, at 21.

4. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Vieth v. Jubelirer, 541 U.S. 267 (2004); Grutter v. Bollinger, 539 U.S. 306 (2003); Lawrence v. Texas, 539 U.S. 558 (2003). The international implications of these cases are discussed *infra* notes 217-34.

Justice O'Connor, who strived through her voting record and extra-judicial activities to preserve America's reputation abroad.[5] O'Connor's retirement provides a timely opportunity to investigate to what extent the need to authenticate an image of American democracy steers the course of domestic constitutional development in times of international crisis. This Article undertakes that task. Focusing primarily on *Brown v. Board of Education*,[6] it explains how the Court's unanimous 1954 decision to outlaw racially segregated schools reflects in large part a judicial effort to overcome political obstacles that obstructed the Nation's Cold War initiatives. This same international consciousness influenced the resolution of *Hamdi* and other recent cases that reconsidered established constitutional standards against a backdrop of escalating international volatility.

Why undertake this project? First, in the case of *Brown*, accounting for the influence of the Cold War takes us closer to understanding why a unanimous Court initiated such a radical departure from cultural and jurisprudential traditions.[7] Second, teaching the interdependence of law,

5. *See, e.g.*, *Roper*, 543 U.S. at 604-07 (O'Connor, J., dissenting); *Grutter*, 539 U.S. at 331 (O'Connor, J.). Apart from her judicial decisions, Justice O'Connor publicly promotes the United States' system of government as a model for developing nations to follow. *See* Elizabeth F. Defeis, *A Tribute to Justice Sandra Day O'Connor from an International Perspective*, 27 SETON HALL L. REV. 391, 392 (1997).

6. 347 U.S. 483 (1954). Two separate opinions constitute the decisions collectively identified in the popular literature as "*Brown*." In the first decision, which would become known as *Brown I*, the Court held that racially segregated schools violated the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 484. In the second decision, which would become known as *Brown II*, the Court set forth procedures to remedy that violation. *See* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955). The legal challenge originated in four lower court cases involving school segregation statutes in Kansas, Virginia, South Carolina, and Delaware that the Supreme Court consolidated on appeal. *See* Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951); Briggs v. Elliott, 103 F. Supp. 920 (E.D.S.C. 1952); Davis v. Prince Edward County, 103 F. Supp. 337 (E.D. Va. 1952); Belton v. Gebhart, 87 A.2d 862 (Del. Ch.), *aff'd*, Gebhart v. Belton, 91 A.2d 137 (Del. 1952). A companion case to *Brown I* struck down segregated schools in the District of Columbia under the Due Process Clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). Unless otherwise indicated, references in this Article to "*Brown*" refer to *Brown I*.

7. *See* Mary L. Dudziak, *Brown and the Idea of Progress in American Legal History: A Comment on William Nelson*, 48 ST. LOUIS U. L.J. 851, 851 (2004) ("If we isolate *Brown* from the rest of history, it not only narrows our understanding of [other] historiographic questions, it also leaves us unable to fully understand *Brown* itself."). That no other case in the history of the Supreme Court has achieved *Brown's* iconic status spotlights the importance of understanding the cause and consequences of the decision. *See* Paul Finkelman, *Civil Rights in Historical Context: In Defense of* Brown, 118 HARV. L. REV. 973, 974 (2005) (book review) (naming *Brown* "perhaps the most important judgment ever handed down by an American Supreme Court"); DERRICK A.

politics, and social progress in times of conflict rebuts the presumption that courts operate in an institutional vacuum.[8] Third, and perhaps most importantly, investigating the foreign policy underpinnings of *Brown* helps explain why the Court, though it struck down racially segregated schools, declined to order school officials in the South to immediately and effectively comply with that ruling.[9] This approach to *Brown* in turn helps explain the sensitivity some Justices today have shown in *Hamdi*,[10] *Lawrence v. Texas*,[11] *Roper v. Simmons*,[12] and elsewhere[13] for preserving America's reputation as a fair and inclusive democracy, while creating some uncertainty as to whether our most cherished rights will be recognized in practice.[14]

Gauging whether international political crises influence the outcome of domestic judicial decisions is no easy task. With respect to *Brown*, the incongruity between the racial practices of the United States and those of other nations is not expressly cited by the Court as a reason for

---

BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 4 (2004) [hereinafter SILENT COVENANTS] (describing *Brown* as a legal "landmark"); Jack M. Balkin, Brown v. Board of Education*: A Critical Introduction*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3-4 (Balkin ed., 2001) (calling *Brown* "the single most honored opinion in the Supreme Court's corpus"); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*, A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY xxvii (2001) (identifying *Brown* as "the most eagerly awaited and dramatic judicial decision of modern times"); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988) (ranking *Brown* "one of the most celebrated civil rights cases in American History") [hereinafter *Cold War Imperative*]. Only *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), which provided a catalyst for the Civil War, rivals *Brown* in terms of social significance. Unlike *Brown*, however, a general consensus exists that *Dred Scott* was wrongly decided. *See* Matthew D. Lassiter, *2005 Survey of Books Related to the Law: Does the Supreme Court Matter? Civil Rights and the Inherent Politicization of Constitutional Law*, 103 MICH. L. REV. 1401, 1405 (2005).

8. *See* Clayborne Carson, *Jim Crow's Enduring Legacy*, 57 STAN. L. REV. 1243, 1247 (2005) (book review) ("To argue that even Supreme Court Justices pay attention to political and social realities should hardly surprise anyone familiar with contemporary scholarship in the field of constitutional law."); *see also* Michael J. Klarman, Brown *at 50*, 90 VA. L. REV. 1613, 1619 (2004) [hereinafter Brown *at 50*] ("All judicial decision-making involves extralegal or political considerations, such as the judges' personal values, social mores and external political pressure.").

9. *See infra* notes 237-38 and accompanying text.

10. 542 U.S. 507 (2004).

11. 539 U.S. 558 (2003).

12. 543 U.S. 551 (2005).

13. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267 (2004); Grutter v. Bollinger, 539 U.S. 306 (2003).

14. *See infra* notes 242-47 and accompanying text.

rejecting public school segregation.[15] For most of the Justices, the purported educational impact of racial segregation provided a compelling reason for the Court's decision independent of the Cold War, as did the moral outrage of segregation itself.[16] The Justices did not pursue a Cold War line of questioning at oral argument,[17] nor did they discuss the foreign policy implications of desegregation during the Court's judicial conferences.[18] When placed in historical context, however, the appellate record, judicial conference notes, and personal correspondences with a former Supreme Court law clerk,[19] all point to foreign policy as one reason why *Brown* at least emerged as a unanimous decision. In *Hamdi, Lawrence*, *Roper*, and other recent cases, the impact of America's role in the War on Terror is evident in the language of the decisions themselves.[20]

This Article assesses the role of the judiciary in preserving an image

---

15. The Court conducted two rounds of oral arguments in *Brown I*. The first took place in December 1952, the second in December 1953. Though only one argument is typically allowed in a Supreme Court appeal, the Justices agreed to order a second oral argument to delay its decision and work towards achieving the strongest possible consensus for striking down public school segregation without any concurring or dissenting opinions if possible. The strategy of delay also was devised to enable the South to adjust to the prospect of a desegregation ruling. Generally accepted as the most comprehensive account of the oral arguments and internal deliberations in *Brown* is RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 545-749 (2d ed. 2004) [hereinafter SIMPLE JUSTICE]. Other excellent histories include Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in* Brown, 49 N.Y.L. SCH. L. REV. 741, 750-57 (2004-2005); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 292-312 (2004) [hereinafter JIM CROW]; PATTERSON, *supra* note 7, at 46-85; Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867 (1991); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 34-44 (1979).

16. *See infra* notes 91-100 and accompanying text.

17. Briefs and transcripts of the oral arguments in *Brown I* and *Brown II* are compiled in 49-49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (Kurland & Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

18. Judicial conferences are conducted in secret, but notes taken by Justices Burton, Clark, Douglas, and Jackson during the conferences on *Brown I* and *Brown II* were subsequently released to the public and compiled into a first person narrative of the deliberations. *See* THE SUPREME COURT IN CONFERENCE (1940-1985), THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS (Dickson ed., 2001) [hereinafter CONFERENCE DISCUSSIONS].

19. In preparation for this Article, the author corresponded several times with John D. Fassett, law clerk to Justice Stanley Reed during the 1953-1954 judicial term. Copies of the correspondence are on file with the author.

20. *See infra* notes 215-34 and accompanying text.

of American democracy during times of international crisis. Following this introduction, Part II focuses on *Brown* and the academic literature that contextualizes America's school segregation controversy within the larger framework of mid-century global instability.[21] It supplements previous scholarship that attributes the outcome in *Brown* to Cold War considerations by identifying elements of the appellate record previously overlooked in the literature.

Parts III and IV build on those studies that examine *Brown* from the outside by probing it from the inside. The discussion examines the Court's internal deliberations to demonstrate that the political environment created by the Cold War did in fact influence the outcome of the case. Significant attention is given to the role of Justice Stanley Reed, whose vote in *Brown* was necessary to produce a unanimous opinion. Part III explains why unanimity was so critical to the success of desegregation and identifies the personal, philosophical, and pragmatic convictions that initially led Justice Reed to draft a dissent proposing to uphold segregation.[22] In light of these concerns, Part IV finds the explanation for Justice Reed's turn-about in his anxiety over the looming global security situation and trust in the Executive Branch to solve that crisis.[23] The historical record suggests that Justice Reed considered unanimity in *Brown* a necessary response to the global exigencies and domestic racial challenges that converged during the Cold War.[24]

Part V transports the lessons of the Cold War into the twenty-first century's War on Terrorism by identifying a series of recent cases where the Court engaged in constitutional adjudication with an eye towards protecting the United States' image among other nations. Like *Brown,*

---

21. *See infra* notes 28-70 and accompanying text.

22. *See infra* notes 71-154 and accompanying text. Though Reed struggled to reach a conclusion on the constitutionality of racially segregated schools, he considered *Brown* the most important case of his judicial career and agreed with the prevailing view that "if it was not the most important decision in the history of the Court, it was very close." *See* SIMPLE JUSTICE, *supra* note 15, at 709.

23. *See infra* notes 157-212 and accompanying text.

24. Barry Cushman is correct in stating that "it is always hazardous to offer general characterizations of a justice's jurisprudence, as the complexity of a jurist's record so often confounds stereotypical assessment." Barry Cushman, *The Great Depression and the New Deal*, University of Virginia Law School Public Law and Legal Theory Working Paper Series, Working Paper No. 23, 14-15 (June 2005). In light of his conversion in *Brown*, perhaps this observation rings truer for Justice Reed than for many of his colleagues. Nonetheless, as Cushman's impressive survey of the Court's New Deal jurisprudence suggests, a jurist's judicial philosophy comes into view by contextualizing her or his judicial record against the backdrop of social, economic, and political realities. This Article does exactly that with respect to Justice Reed.

the decisions in *Lawrence* and *Roper* struck down state statutes that imperiled the United States' public commitment to fairness and justice.[25] Other cases, such as *Hamdi*, *Grutter v. Bollinger*, and *Vieth v. Jubelirer* show an even more aggressive international consciousness than was present in *Brown*.[26] Whereas *Brown* conformed domestic constitutional standards to international norms in a way that had the full support of the Executive Branch, the Court today has aligned judicial outcomes with global expectations in outright contradiction to Executive Branch policy.[27] Part VI concludes by assessing the Court's attempt to authenticate an image of American democracy while accounting for the reality that many of the democratic principles espoused by the Court have yet to be fully realized in practice.

II. Domestic Liabilities in a Global Crisis

Cold War politics are not expressly mentioned in *Brown* as a reason for expanding the meaning of equality under the Fourteenth Amendment. Instead, the justifications offered for rejecting "separate but equal" public schools relate to the adverse impact the Court concluded those schools would have on the intellectual development, psychological wellness, and probable life outcomes of Black children. Yet *Brown* was more than a well-intentioned attempt to redirect the racial priorities of a region bent on perpetuating the life of Jim Crow. Considered against the appellate record established in the case, unanimity in *Brown* inescapably meant to forestall a foreign relations nightmare. This Part builds upon earlier studies that place *Brown* among the Court's most important national security decisions by identifying relevant aspects of the record that situate the desegregation controversy within the larger context of the Cold War. It lays the foundation for that discussion by first examining the decision itself.

A. Engaging the Old Guard

Brown held that public school segregation violated the Equal Protection Clause of the Fourteenth Amendment.[28] It did so by creating an exception to the 1896 case of *Plessy v. Ferguson*,[29] which permitted

25. *See infra* notes 224-34 and accompanying text.
26. *See infra* notes 215-23 and accompanying text.
27. *See infra* note 235 and accompanying text.
28. *Brown*, 347 U.S. at 484.
29. 163 U.S. 537 (1896).

states to segregate access to "separate but equal" public facilities. Though that standard remained applicable in other circumstances, it did not apply to public schools where racial segregation was found to be "inherently unequal."[30] This conclusion rested on a finding that segregation interfered with the psychological well-being of Black school children. According to the Court, segregation created lasting liabilities that could not be overcome by any physical or financial parity between Black and White schools.[31] The Court explained that:

> Segregation of whites and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[32]

Social science evidence provided an empirical justification for rejecting the "separate but equal" doctrine in the context of public schools. The constitutional question could not be resolved by resort to the original intent of the Fourteenth Amendment nor its interpretation in *Plessy* since neither accounted for the special role of public education in the twentieth century.[33] By that time, the Court noted, education was "required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship."[34] States could not condition access to public schools on account of race, the Court held, because education served "the most important function of state and local governments"[35] and reinforced a "democratic society."[36]

---

30. *Brown*, 347 U.S. at 484.

31. The Court rested its conclusion on the findings of social scientific evidence cited in the famously maligned "Footnote 11." *See id.* at 495 n.11. For a review of the literature on Footnote 11, see Michael Heise, Brown v. Board of Education, *Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 292-96 (2005); Sanjay Mody, Brown *Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002).

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

33. *Id.* at 490-92.

34. *Id.* at 493.

35. *Id.*

36. *Id.* States remained free to restrict access to other public institutions in compliance with the "separate but equal" standard, however.

B. Critical Crossroads

Scholars including Derrick Bell, Mary Dudziak, and others consider *Brown* a critical Cold War case. To make their point, they draw parallels between the Cold War objectives of the Truman Administration and the political consequences of a judicial decision rejecting the constitutionality of segregated schools. In the years leading up to *Brown*, they explain, President Truman had sought to stabilize the geo-political balance upturned by communist expansion by persuading third world nations to adopt a democratic form of government. White supremacy, however, manifest through racially segregated public schools, made it nearly impossible for the Administration to win the trust and loyalty of Black and Brown populations.[37] When the Court in *Brown* outlawed segregated schools, it affirmed the dignity and equality of all citizens in a participatory government. Doing so, these scholars assert, restored America's image in the world, handing the United States a crucial ideological advantage over the Soviet Union at the height of the Cold War.

Bell is perhaps most emphatic in his contention that *Brown* reflected the Cold War priorities of the Truman Administration rather than an authentic commitment to racial equality, integration, or better schools.[38] He places *Brown* on a continuum of events, including the abolition of slavery in the North, President Lincoln's Emancipation Proclamation, and the Reconstruction Amendments, that in his view advanced the course of racial progress only by chance.[39] To Bell, each measure was adopted to meet an economic, political, or military emergency, making Blacks the incidental beneficiaries of White-oriented goals.[40] This phenomenon of "interest-convergence" doomed the desegregation campaign until racially separate schools could be packaged as a liability

37. *See* Brown *at 50*, *supra* note 8, at 1620.

38. *See* Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 12 (1976) [hereinafter *Racial Remediation*]; *see also* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980) [hereinafter *Interest-Convergence*]. Bell expanded on this theme in subsequent works. *See* SILENT COVENANTS, *supra* note 7, at 59-68; DERRICK BELL, AFROLANTICA LEGACIES 116-19 (1998) [hereinafter AFROLANTICA LEGACIES].

39. *See* SILENT COVENANTS, *supra* note 7, at 50-58; AFROLANTICA LEGACIES, *supra* note 38, at 116-19.

40. *See* SILENT COVENANTS, *supra* note 7, at 49 ("[B]lack rights are recognized and protected when and only so long as policymakers perceive that such advances will further interests that are their primary concern."); *Racial Remediation*, *supra* note 38, at 12.

to Whites. The condition for doing so did not occur until mid-century when the need to salvage America's reputation outweighed the Nation's material and emotional commitment to White privilege. *Brown* became possible, Bell concludes, only when Black demands for racial justice coincided with the government's interest in global stability.[41]

Mary Dudziak documented proof of Bell's thesis in a 1988 *Stanford Law Review* article.[42] She concluded that the Truman Administration's racial justice platform, State Department warnings against the international impact of Southern policies and practices, and the public relations nightmare caused by America's deplorable treatment of Blacks created a desegregation "imperative" the Court could not ignore.[43] The Justices themselves appreciated the Court's ability to promote foreign policy and publicly acknowledged the impact of domestic segregation on world affairs.[44] Retrospectives commemorating the 50th anniversary of

41. *See* SILENT COVENANTS, *supra* note 7, at 59. Bell sees a contemporary manifestation of this "interest-convergence" theory in *Grutter v. Bollinger*, 539 U.S. 306 (2003), wherein the Court upheld narrowly tailored race-based admission programs in higher education. As Bell points out, the Court in *Grutter* declined to acknowledge that traditional admission standards privilege White applicants, choosing instead to justify its conclusion based on the strategic and economic advantages of educational diversity. The Court specifically noted that more than 300 organizations, including educators, labor unions, Fortune 500 companies, and retired military and civilian defense officials submitted briefs in support of affirmative action. To Bell, this line of reasoning shows that the Court was willing to accommodate the educational demands of non-White applicants because it appreciated the benefits of "diversity in the classroom, on the work floor, and in the military, not the need to address past and continuing racial barriers" to higher education. *See* Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1625 (2003).

42. *See Cold War Imperative*, *supra* note 7; *see also* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS, RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) [hereinafter COLD WAR CIVIL RIGHTS]. For a sympathetic review of arguments proffered in Dudziak's book, see Richard Delgado, *Explaining the Rise and Fall of African-American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002).

43. *See Cold War Imperative*, *supra* note 7, at 73-113.

44. In 1954, Chief Justice Earl Warren stated that the American system of Justice was on trial "at home and abroad," and lauded the role courts could play in confirming American ideals and contributing to world stability. Justice Douglas wrote about the ideological conflicts of the Cold War upon his return from a trip to India in 1950. He considered domestic policies towards Blacks "a powerful factor" in the United States relationship with that nation. *See* WILLIAM O. DOUGLAS, STRANGE LANDS AND FRIENDLY PEOPLE 296 (1951). In 1953, he wrote of traveling to Pakistan where he learned that Asians sympathized with the Soviet Union because they viewed the United States as an unfair and intolerant nation. *See* WILLIAM O. DOUGLAS, BEYOND THE HIGH HIMILAYAS 317, 321-23 (1953). These sources are recounted in COLD WAR CIVIL RIGHTS, *supra* note 42, at 104-06. The other Justices traveled extensively before *Brown* and "could not have helped but recognize the international concern over American civil rights abuses." *See*

Brown also recount the strategic benefits of desegregation to America's standing in the Cold War.[45]

The milieu of Cold War hysteria paints only part of the picture leading to the unanimous decision in *Brown*. Shifting the focus away from the external political climate to the Cold War arguments placed directly on the record in *Brown* clarifies the relationship between international politics and constitutional adjudication. To date, the

---

id. At least one judge presiding over the challenge to racially segregated schools at the trial level appreciated the scope of America's image problem. Judge Waties Waring, dissenting from the decision that upheld segregated schools in Clarendon County, South Carolina, noted the "clear and important" consequences of racial segregation, "particularly at [a] time when our national leaders are called upon to show to the world that our democracy means what it says and that it is a true democracy and there is no undercover suppression of the rights of any of our citizens because of the pigmentation of their skins." Briggs v. Elliott, 98 F. Supp. 529, 548 (E.D.S.C. 1951) (Waring, J., dissenting).

45. *See, e.g.*, Mary L. Dudziak, Brown *as a Cold War Case*, 91 J. AM. HIST. 32 (2004); Justice Ruth Bader Ginsburg, Brown v. Board of Education *in International Context*, 36 COLUM. HUM. RTS. L. REV. 493, 493 (2004) ("Although the *Brown* decision did not refer to the international stage, there is little doubt that the climate of the era explains, in significant part, why apartheid in America began to unravel after World War II."); Brown *at 50*, *supra* note 8, at 1620; RICHARD DELGADO, JUSTICE AT WAR 157-61 (2003). For additional sources, see *Cold War Imperative*, *supra* note 7, at 64 n.9. Though *Brown* measurably improved the United States' legitimacy in the eyes of the world during the Cold War, debate continues over the decision's actual impact on domestic race relations and educational reform. *See, e.g.*, Finkelman, *supra* note 7, at 978 ("[W]e are far better off as a society with the result in *Brown* than we would have been with a different outcome."); Angela Onwuachi-Willig, *2005 Survey of Books Related to the Law: For Whom Does the Bell Toll: The Bell Tolls for* Brown*?*, 103 MICH. L. REV. 1507, 1534-35 (2005) (defending the moral and practical benefits of the victory in *Brown*); Jack Greenberg, Brown v. Board of Education*: An Axe in the Frozen Sea of Racism*, 48 ST. LOUIS U. L.J. 869, 888 (2004) (crediting *Brown* with transforming power relationships that privileged Whites); ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION 243 (2003) ("[T]he terrain would have been much bumpier and the playing field an awful lot less level without the effort of those men and women who developed the strategy, argued the case, and changed history in *Brown v. Board of Education*."). Others criticize *Brown* for accommodating Southern obstruction that continues to interfere with meaningful public school desegregation. *See, e.g.*, SILENT COVENANTS, *supra* note 7, at 2 (describing *Brown* as "a decision that promised so much and, by its terms, accomplished so little."); Bryan K. Fair, *The Darker Face of* Brown*: The Promise and Reality of the Decision Remain Unreconciled*, 88 JUDICATURE 80, 81 (2004) (regretting that *Brown* "appear[s] to give substantive reform with one hand only to take it away with the other"); JIM CROW, *supra* note 15, at 441-42 (positing that *Brown* unnecessarily provoked a White backlash that disrupted racial progress being made through political channels); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* xv (2004) ("[F]ifty years after *Brown* there is little left to celebrate."). For a bibliography of scholarship related to *Brown*, see William H. Manz, Brown v. Board of Education*: A Selected Annotated Bibliography*, 96 LAW LIBR. J. 245 (2004).

literature that examines *Brown* from this perspective draws its conclusions almost exclusively from the foreign policy concerns articulated in briefs submitted to the Court by the National Association for the Advancement of Colored People (NAACP) and the Department of Justice.[46] Yet an even broader coalition of organizations submitted briefs that argued the centrality of desegregation to the Nation's survival, including the American Civil Liberties Union (ACLU), the American Veterans Association, and the American Federation of Teachers.[47] In partnership with the NAACP and the Department of Justice, this alliance wove a case against segregation that served the Nation's Cold War interests in three ways: it capitalized on the allied victory of World War II, promoted peaceful democratic proliferation, and neutralized the influence of anti-American propaganda.

C. *Launching the Assault*

The NAACP and its supporting amici in *Brown* portrayed the Cold War as an extension of the allied victory in World War II which confirmed the United States' commitment to racial justice and equality. The Brief submitted by the NAACP explained that the South's racist ideology contravened American values and depleted the political capital the Nation had earned throughout the Twentieth Century "fighting racism at home and abroad."[48] The American Veterans Committee agreed, urging the Court to outlaw segregated schools in the interest of "the national welfare both at home and abroad."[49] It considered "the elimination of racial discrimination" a "core" democratic principle and condemned the South for perpetrating the same brand of racism the Committee's members fought against in World War II.[50]

Building on this theme, the briefs juxtaposed the evils of

46. *See, e.g.*, *Cold War Imperative*, *supra* note 7, at 109-12; PHILIP A. KLINKNER, ROGERS M. SMITH, THE UNSTEADY MARCH 234-41 (1999); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 130-32 (3d rev. ed. 1974); A. BLAUSTEIN & C. FERGUSON, JR., DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 10-12 (1957).

47. *See generally* LANDMARK BRIEFS, *supra* note 17.

48. Br. for Appellants in Nos. 1, 2 and 4 and for Resp'ts in No. 10 on Reargument at 31, Brown v. Bd. of Educ., 347 U.S. 483 (1954) [hereinafter NAACP Brief], *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 544-45.

49. Br. for Am. Veterans Comm., Inc., Amicus Curiae at 2, Brown v. Bd. of Educ., 347 U.S. 483 (1954) [hereinafter Veterans Brief], *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 246.

50. *Id.*

segregation with the proven benefits of desegregation. The NAACP reminded the Court that Black citizens contributed to the Nation's victory in World War II through volunteer military service and skilled work in desegregated factory production units.[51] The briefs also credited America's post-War dominance to desegregation in the armed services that occurred under President Truman's orders in 1948.[52] The American Federation of Teachers verified the "universal" consensus among America's military elite that an integrated regiment "is desirable and works out very well in spite of all contrary predictions."[53] The resulting visual of desegregated schools as a training ground for integrated military service evoked a strategy for projecting America's global prominence into the Cold War.

Second, the briefs showed that segregation directly threatened the Nation's survival because it compromised America's ability to promote democracy among emerging nations as a strategy of peaceful communist containment. The Department of Justice urged the Court to place the problem of racial discrimination "in the context of the present world struggle between freedom and tyranny," maintaining that the United States could not present democracy as the "most civilized and most secure form of government yet devised" without mending "existing flaws" in its own political system.[54] The "factor of color," as the American Federation of Teachers described it, discouraged geographically strategic "sections of the darker world" from aligning with the United States against the Soviet Union.[55] A constitutional

51. *See* NAACP Brief, *supra* note 48, at 14, *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 55-56 ("Extensive desegregation has taken place without major incidents in the armed services in both Northern and Southern installations and involving officers and enlisted men from all parts of the country, including the South . . . . During the last war, many factories both in the North and South hired Negroes on a non-segregated, non-discriminatory basis.").

52. Additional Br. of the Am. Fed'n of Teachers as Amicus Curiae at 22, Brown v. Bd. of Educ., 347 U.S. 483 [hereinafter Teachers Brief], *reprinted in* 49A LANDMARK BRIEFS, *supra* note 17, at 422.

53. *Id.* This argument was somewhat disingenuous. In reality, notable military leaders dragged their feet implementing Truman's desegregation order, including then General Dwight D. Eisenhower, who testified before the Senate Armed Services Committee in 1948 in defense of segregated units. *See* SIMPLE JUSTICE, *supra* note 15, at 322.

54. Br. for the United States as Amicus Curiae at 6, Brown v. Bd. of Educ., 347 U.S. 483 [hereinafter DOJ Brief], *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 121.

55. Teachers Brief, *supra* note 52, at 25, *reprinted in* 49A LANDMARK BRIEFS, *supra* note 17, at 425.

commitment to racial equality was needed to authenticate American democracy in the eyes of developing nations.[56] "Survival of our country in the present international situation is inevitably tied to resolution of this domestic issue," the NAACP cautioned.[57]

Third, segregation proved a potent source of anti-American propaganda that diminished America's influence and standing in the world community. As the ACLU explained, "[l]egally imposed segregation in our country, in any shape, manner or form, weakens our program to build and strengthen world democracy and combat totalitarianism."[58] In the "ideological world conflict" of the Cold War, it warned, "[w]e cannot afford, nor will the world permit us, to rest upon democratic pretensions unrelated to reality."[59] The American Federation of Teachers told of how the Nation's failings, "so far as people of color are concerned," received constant attention at the United Nations and in "the press of [other] countries."[60] The resulting strain on diplomatic relations made it difficult for the United States to mediate "upheavals taking place among the darker people of the world."[61] Desegregation, in contrast, promised to create "a reservoir of good will for us in the vast world of color" by confirming "to millions in Asia and Africa that the United States is willing to give more than lip service to the principles on which it is founded."[62]

The Department of Justice punctuated this narrative, pointing to White business owners in the Nation's capital who embarrassed the United States in "the conduct of foreign relations" by refusing to service Black foreign diplomats.[63] Episodes like these subjected the United

---

56. *See* Teachers Brief, *supra* note 52, at 5, *reprinted in* 49A LANDMARK BRIEFS, *supra* note 17, at 405 ("A decision in favor of integrated schooling on every level is necessary, not only to give substance to our declared principles but to win over the peoples of Asia and Africa to a belief in the sincerity of the United States.").

57. NAACP Brief, *supra* note 48, at 194, *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 707.

58. Br. on Behalf of Am. Civil Liberties Union, et. al as Amici Curiae at 186, Brown v. Bd. of Educ., 347 U.S. 483 [hereinafter ACLU Brief], *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 186.

59. ACLU Brief, *supra* note 58, at 28, *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 183.

60. Teachers Brief, *supra* note 52, at 25, *reprinted in* 49A LANDMARK BRIEFS, *supra* note 17, at 425.

61. *Id.*

62. Teachers Brief, *supra* note 52, at 25, *reprinted in* 49A LANDMARK BRIEFS, *supra* note 17, at 425.

63. *See* DOJ Brief, *supra* note 54, at 7, *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 120-21.

States to constant attack "in the foreign press, over the foreign radio, and [in] the United Nations."[64] The "graphic failure of democracy" in the Nation's capitol and elsewhere gave foreign interests, most notably the Soviet Union, "the most effective kind of ammunition for their propaganda warfare."[65] Even "friendly nations" questioned the United States' "devotion to the democratic faith."[66] In France, Austria, Germany, and Belgium, the ACLU wrote, both the liberal and conservative press accused the United States of fabricating an image of democracy that masked its "actual practices at home."[67]

Public school segregation was an especially damaging and persuasive propaganda theme. The ACLU reported that segregated schools had been the "subject of much adverse press comment" in those foreign countries the United States "was trying to keep in the democratic camp."[68] School segregation had been "singled out for hostile foreign comment in the United Nations and elsewhere," the Department of Justice confirmed, leading other nations to question how "such a practice can exist in a country which professes to be a staunch supporter of freedom, justice and democracy."[69] Racial segregation jeopardized "the effective maintenance of our moral leadership of the free and democratic nations of the world."[70]

These submissions situated the school desegregation controversy

64. DOJ Brief, *supra* note 54, at 7, *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 122. Charges against the United States for genocide against Blacks had been brought in the United Nations. This was particularly damaging given the United States' role in creating the world body. *See Cold War Imperative*, *supra* note 7, at 94-98. For a general history of the United Nations and the formative role of the United States, see STANLEY MEISLER, UNITED NATIONS: THE FIRST FIFTY YEARS 3-20 (1995).

65. DOJ Brief, *supra* note 54, at 7, *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 119, 122. In 1949, the U.S. embassy in Moscow described the status of Black Americans as "[o]ne of the principal Soviet propaganda themes regarding the United States." *See Cold War Imperative*, *supra* note 7, at 89.

66. DOJ Brief, *supra* note 54, at 6, *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 121.

67. *See* ACLU Brief, *supra* note 58, at 28-31, *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 183-86. Criticism also came from British, Norwegian, Dutch, and Greek press outlets that viewed the United States as hypocritical "in claiming to be the champion of democracy while permitting practices of racial discrimination" within its borders. For a survey of anti-American propaganda on this issue, see *Cold War Imperative*, *supra* note 7, at 80-93.

68. ACLU Brief, *supra* note 58, at 28, *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 183.

69. DOJ Brief, *supra* note 54, at 8, *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 123.

70. *Id.*

within the larger context of America's twentieth century world liberation campaign. Doing so emphasized the interplay between law and politics at a time of international crisis which ultimately steered the course of domestic constitutional development in response to the Cold War.

III. Global Security Confronts Judicial Restraint

The Cold War arguments pressed by the NAACP and its supporting amici did not immediately persuade every Justice in *Brown* to reject segregated schools. Most reluctant to alter established constitutional standards of equality appeared to be Justice Stanley Reed. At the Court's initial conference following the first round of oral arguments, Justice Reed announced his intent to vote in favor of the South under the "separate but equal" standard established in *Plessy v. Ferguson.*[71] He began work on a draft dissent once it became clear that a majority of his colleagues leaned in the opposite direction.[72] Though the eventual agreement against segregation reached by eight Justices disposed of the constitutional question, Reed's assent was crucial to the practical outcome of the case. White racial hegemony was built on a foundation of segregated schools that Southern loyalists vowed to violently defend.[73] The Justices in the majority understood that even a single dissent could ignite "racial warfare"[74] by injecting a measure of legitimacy to that cause. To succeed, desegregation required more than majority support. It required unanimity. Less than ten days before the Court announced its

71. 163 U.S. 537 (1896).

72. In August 1953, Reed predicted that he, then Chief Justice Fred Vinson, and one additional unnamed Justice would vote to uphold racially segregated schools, though he was then the only Justice known to have written a draft dissent. *See* JOHN D. FASSETT, NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY 567 (1994) [hereinafter NEW DEAL JUSTICE]; SIMPLE JUSTICE, *supra* note 15, at 593-94, 602; PATTERSON, *supra* note 7, at 55, 64-65. Chief Justice Vinson had died of a heart attack in September 1953, and was replaced by Earl Warren who came to the bench with no reservations about striking down segregation. Warren tirelessly lobbied his colleagues, and within a short time persuaded Justices Black and Clark, who hailed from Alabama and Texas, respectively, to join the majority. Justice Reed was the harder sell. *See* SIMPLE JUSTICE, *supra* note 15, at 603. Despite Warren's admiral pursuit of unanimity in *Brown*, his legacy is tarnished by the role he played in implementing the federal government's internment of Japanese-Americans during World War II while he served as Attorney General of California. *See generally* Sumi Cho: *Redeeming Whiteness in the Shadow of Internment: Earl Warren,* Brown, *and a Theory of Racial Redemption*, 40 B.C.L. REV. 73 (1988).

73. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 648 ("There will be serious incidents and some violence if the Court holds segregation unlawful.").

74. *See* SIMPLE JUSTICE, *supra* note 15, at 603.

decision Reed changed his vote.[75] What ultimately inspired Reed is therefore responsible for the final unanimous outcome in *Brown*.[76]

Strong personal, philosophical, and pragmatic convictions anchored Reed's proposed dissent in *Brown*. First, Reed was a segregationist who could not reconcile a vote favoring desegregation with his own racial priorities.[77] Second, given his conservative legal philosophy, Reed hesitated to overrule a century of precedent that confirmed the authority of individual states to segregate access to public facilities, particularly when the Constitution itself authorized Congress, and not the Court in his view, to establish a nationwide policy on race.[78] Third, Reed rightly understood that a decision to strike down segregated schools could provoke a violent Southern backlash beyond the capacity of the Court to restrain.[79] This Part examines the depth and dimensions of Reed's

---

75. *See infra* notes 175-76 and accompanying text.

76. Though Justice Reed has been overlooked for the most part in the historical literature, he has received increased scholarly attention in recent years. This Article nonetheless remains the only piece of legal scholarship to thoroughly consider how the Cold War influenced Reed's judicial philosophy and approach to desegregation. John D. Fassett, Justice Reed's law clerk during the 1953-54 term, authored the only biography dedicated exclusively to the life of Justice Reed, and one of two law review articles, other than the instant piece, that spotlights Reed's pivotal role in *Brown*. *See* NEW DEAL JUSTICE, *supra* note 72; *see also* John D. Fassett, *Mr. Justice Reed and* Brown v. The Board of Education, THE SUPREME COURT HISTORICAL SOCIETY YEARBOOK (1986) [hereinafter YEARBOOK], http://www.supremecourthistory.org/04_library/subs_volumes/04_c18_k.html. Stephen Ellmann addresses Reed's impact on unanimity in *Brown* but makes only passing reference to the foreign policy considerations impacting his final vote. *See* Ellmann, *supra* note 15, at 760. In 2004, four law clerks who served at the Court when *Brown* was decided, including Fassett, participated in a roundtable discussion commemorating the 50th anniversary of the decision. The event is recounted in John D. Fassett et. al., *Supreme Court Law Clerks' Recollections of* Brown v. Board of Education, 78 ST. JOHN'S L. REV. 515 (2004) [hereinafter *Recollections*]. Upon his death in 1980, the *Kentucky Law Journal* dedicated a commemorative volume to the life of Justice Reed that included contributions from several Supreme Court Justices and one former law clerk. *See* Bennett Boskey, *Justice Reed and His Family of Law Clerks*, 69 KY. L.J. 869 (1981); William J. Brennan, Jr., *Tribute to Mr. Justice Reed*, 69 KY. L.J. 717 (1981); Warren E. Burger, *Stanley Reed*, 69 KY. L.J. 711 (1981); Potter Stewart, *Stanley Forman Reed*, 69 KY. L.J. 719 (1981); *see also* Morgan D.S. Prickett, *Stanley Forman Reed: Perspectives on a Judicial Epitaph*, 8 HASTINGS CONST. L.Q. 343 (1981). Historical sources on Justice Reed include F. WILLIAM O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT: THE RELIGION CLAUSES (1958); F. William O'Brien, *Mr. Justice Reed and Democratic Pluralism*, 45 GEO. L.J. 364 (1957); Lewis C. Green, *Mr. Justice Reed*, 7 ST. LOUIS BAR J. 17 (1957); *Mr. Justice Reed—Swing Man or Not?*, 1 STAN. L. REV. 714 (1949) [hereinafter *Swing Man*].

77. *See infra* notes 80-113 and accompanying text.

78. *See infra* notes 115-37 and accompanying text.

79. *See infra* notes 138-54 and accompanying text.

commitment to racially segregated schools to show that his racial ideology, judicial philosophy and pragmatic concerns predictably should have led him to side with the South.

A. Breaking Rank

Reed was a segregationist. His proposed dissent in *Brown* attempted to forestall the inevitable breakdown of racial hegemony in the South. Accustomed to the confined company of Whites, the prospect of desegregation conflicted with Reed's "personal prejudices and deeply held beliefs about proper social relations."[80] Though three years at Yale and a brief stint in Paris expanded his worldview, his experiences there were pressed between a traditional Kentucky upbringing and a longstanding career among the White power elite in Washington, D.C.[81] As a Justice, he refused to temper his racial convictions despite the tension and embarrassment this sometimes caused the Court. He declined to address Black workers by their last name, a courtesy he apparently extended to Whites,[82] and when the Court proposed to open its annual holiday party to Black employees, Reed refused to attend.[83] Incidents like these earned Reed a reputation for being "thick headed," "ruthless," and "anti-black."[84]

That these convictions distanced Reed from the majority's position in *Brown* is not surprising given the impact of race on his judicial record up to that point. In 1947, Reed recused himself from pivotal housing discrimination cases reportedly because he owned property subject to a restrictive covenant prohibiting future sales to non-Whites.[85] In 1949, legal observers described him as "markedly insensitive" to civil rights claims.[86] His frustration with the Court's emerging liberalism peaked in

---

80. Finkelman, *supra* note 7, at 1009.

81. *See* NEW DEAL JUSTICE, *supra* note 72, at 10-15.

82. *Id.* at 559.

83. *Id.* at 560. This episode is also recounted in BERNARD SCHWARTZ & STEPHEN LESHER, INSIDE THE WARREN COURT 69 (1983); JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 334-36 (1975).

84. *See* NEW DEAL JUSTICE, *supra* note 72, at 359; SIDNEY FINE, FRANK MURPHY—VOL. 3. THE WASHINGTON YEARS 262 (1984).

85. *See* NEW DEAL JUSTICE, *supra* note 72, at 444-47 (discussing Shelley v. Kraemer, 334 U.S. 1 (1948), and Hurd v. Hodge, 334 U.S. 24 (1948)). Justices Jackson and Rutledge also recused themselves for the same reason. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 698.

86. *See Swing Man*, *supra* note 76, at 723. Even after *Brown*, Reed's civil rights record continued to earn "one of the very lowest liberal ratings." *See* O'Brien, *supra* note

1952 when it upheld a federal statute that banned segregation in Washington, D.C. restaurants.[87] Reed begrudgingly sided with the majority based on principles of statutory construction but regretted having to cast a vote that ultimately allowed "a Negro" to walk "right into the restaurant [and] sit down and eat at the table right next to Mrs. Reed."[88]

When Reed did vote in favor of desegregation, he did so in narrow circumstances based on the separate but equal doctrine, canons of statutory interpretation, or Dormant Commerce Clause rules that prohibited obstructions to interstate trade.[89] This strategy carefully preserved the racial hierarchy that ordered Southern society. It served White economic interests by making room for sporadic and transitory interracial exchanges, but stabilized legal impediments to more lasting or intimate Black and White relations.[90]

Reed's personal investment in White supremacy made it impossible for him to acknowledge the racist ideology underlying segregation. This set him apart from his more progressive colleagues. In his first judicial conference discussing *Brown*, Justice Warren stated: "The more I read and hear and think, the more I come to conclude that the basis of the principle of segregation and separate but equal rests upon the basic premise that the Negro race is inferior. . . . If oral argument proved anything, the arguments of Negro counsel proved that they are not

---

76, at 364. These sources are discussed in NEW DEAL JUSTICE, *supra* note 72, at 646, 651.

87. *See* District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953).

88. NEW DEAL JUSTICE, *supra* note 72, at 560-61; *see also* SIMPLE JUSTICE, *supra* note 15, at 595.

89. *See, e.g.*, Henderson v. United States, 339 U.S. 816 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948); Morgan v. Virginia, 328 U.S. 373 (1946); Ry. Mail Ass'n v. Corsi, 326 U.S. 88 (1945); Smith v. Allwright, 321 U.S. 649 (1944); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Mitchell v. United States, 313 U.S. 80 (1941); Hale v. Kentucky, 303 U.S. 613 (1938); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938). Though Reed's adherence to the separate but equal doctrine was unwavering, several Justices urged during their discussion of these cases that the Court take more aggressive action. In *McLaurin* and *Sweatt*, for example, Justice Douglas favored overruling *Plessy* outright, while Justice Black was willing to abandon the separate but equal rule in the specific context of graduate schools. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 639-40, 642-43. Though *Sweatt* and *McLaurin* are generally understood to have created an exception to the separate but equal doctrine in the context of higher education, the Justices intended only to reaffirm the rule from *Plessy*. *See infra* notes 128-37 and accompanying text.

90. *See* JIM CROW, *supra* note 15, at 222-23.

inferior."[91] Justice Douglas seconded that view,[92] as did Justice Minton, who saw segregation as the South's "invidious" response to abolition and a substitute means for Whites to degrade Blacks in the absence of slavery.[93] "The only justification for segregation is the inferiority of the Negro," he stated. Neither could Justice Black escape that "the reason for segregation is the belief that Negroes are inferior," that its purpose "is to discriminate on account of color."[94] His brief but notorious membership in the Alabama Ku Klux Klan prior to joining the Court surely provided him this insight.[95]

Racial segregation repulsed even the Court's more politically detached members. Though Justice Jackson purported during conference that he did not "know the effect of segregation, or the reason for it," he had previously admitted to a friend that he had "no sympathy with racial conceits which underlie segregation policies."[96] In a draft concurrence in *Brown*, he characterized the practice as "morally indefensible,"[97] driven by a presumption that Blacks were "inferior, illiterate, retarded or indigent."[98] Justice Frankfurter's position on the matter likewise evolved. As late as 1950, he refused to label segregation a "badge of inferiority."[99] Two years later at the judicial conference in *Brown*, however, Frankfurter reminded his colleagues that he worked as assistant General Counsel for the NAACP, hired the Court's first Black law clerk, and experienced anti-Semitism first-hand, all of which sensitized him to the indignities of segregation.[100]

The anti-racist ideology behind desegregation that surfaced in *Brown* placed Justice Reed in a precarious position.[101] A vote with the

---

91. CONFERENCE DISCUSSIONS, *supra* note 18, at 654.

92. *Id.* at 652, 658.

93. *Id.* at 653.

94. *Id.* at 648.

95. *See* ROBERT K. NEWMAN, HUGO BLACK: A BIOGRAPHY 89-100 (2d ed. 1997).

96. *See* Brown *at 50*, *supra* note 8, at 1616.

97. *Id.*

98. *See* SIMPLE JUSTICE, *supra* note 15, at 693.

99. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 640 (discussing McLaurin v. Okla. State Regents, 339 U.S. 637 (1950)).

100. *See id.* at 650; MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 128-29 (1991).

101. Despite the rhetoric used to decry racial segregation during the judicial conferences, the language in *Brown* conspicuously omits any recognition of the kinship between segregation and White supremacy. Chief Justice Warren intentionally left accusatory language out of the opinion in order to elicit voluntary compliance from the South. Commentators have labeled this concession a significant failing, one that

majority would make him complicit in the demise of a racial order he desperately sought to preserve. Alternatively, a dissent would expose the incongruity between Reed's own racial prejudice and the democratic principles he was bound to uphold.

Reed solved this conundrum by reference to *Plessy*. The reasoning in that case allowed Reed to manipulate his aversion to Blacks into a neutral justification for segregation. In 1896, the Court in *Plessy* turned a blind eye when a Black passenger ejected from a White train car challenged Louisiana's segregation statute under the Equal Protection Clause of the Fourteenth Amendment on the ground that it promoted the inferiority of Blacks. If segregation "stamps the colored race with a badge of inferiority," the Court retorted, it is "solely because the colored race chooses to put that construction upon it."[102] Though a statutory exemption permitting Black servants to travel alongside White employers laid bare the true purpose for color-coding train cars,[103] the Court endorsed the lie that the legislators who drafted the statute had acted "in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[104] That theme resurfaced in *Brown* with the South's fabricated claim that segregation benefited Blacks[105] by avoiding "special problems" associated with integrated schools.[106]

Reed invoked the same defense of segregation at the judicial conference. He urged his colleagues to "start with the idea that there is a large and reasonable body of opinion in various states that separation of the races is for the benefit of both."[107] Recalling the line of questioning

---

ultimately backfired and forestalled progress towards actual desegregation by allowing racism to flourish in the guise of formally race-neutral laws. *See* Catherine MacKinnon, Brown v. Board of Education, *in* Balkin, *supra* note 7, at 148-51; *see also* Alfred L. Brophy, *The World of Reparations: Slavery Reparations in Historical Perspective*, 3 J.L. SOC'Y 105, 112 (2002) ("[O]nce state-required discrimination had been removed [by *Brown*], there was much work to be done to remove the effects of past discrimination").

102. *Id.* at 551.

103. *See Plessy*, 163 U.S. at 541.

104. *Id.* at 550.

105. *See, e.g.*, Tr. of Oral Arg., at 16, Brown v. Bd. of Educ., 347 U.S. 483 (1954), *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 429 ("There was behind these [segregation] acts a kindly feeling; there was behind these acts an intention to help these people who had been in bondage."); *see also* Davis v. County Sch. Bd., 103 F. Supp. 337, 340 (E.D. Va. 1952) ("Maintenance of the separated systems in Virginia has not been social despotism . . . in practice it has begotten greater opportunities for the Negro.").

106. *See* Br. for Appellees at 31, Brown v. Bd. of Educ., 347 U.S. 438 (1954), *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 98.

107. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 649.

he pursued during oral argument, Reed proclaimed that racial segregation "is not done on a theory of racial inferiority, but on racial differences. It protects people against the mixing of races."[108] Though segregation was gradually disappearing in voting, transportation, and employment, he reasoned, Blacks had not "thoroughly assimilated" into American society.[109] Until that time, states retained the right to police racial boundaries within the limits of the "separate but equal" doctrine.[110]

This line of reasoning was no less tortured in 1952 than it was in 1896. Reed's professed belief that segregation avoided racial friction ignored the social, economic, and educational disadvantages that brewed resentment among Blacks and perpetrated a myth of Black inferiority and undeserved entitlement among Whites.[111] He endorsed a state interest in avoiding "race mixing," oblivious that the interest in preserving White

---

108. *Id.* at 656. During oral argument, Reed rhetorically asked attorney T. Justin Moore, appearing on behalf of the state of Virginia, whether Virginia had not made a legislative determination "[t]hat the greatest good for the greatest number is found in segregation?" Tr. of Oral Arg., at 30, Brown v. Bd. of Educ., 347 U.S. 483 (1954), *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 377. When questioning Thurgood Marshall on the motives behind racially segregated schools in South Carolina, Reed stated that, "I suppose there is a group of people, at least in the South, who would say that segregation in the schools was to avoid racial friction." Tr. of Oral Arg., at 16, Brown v. Bd. of Educ., 347 U.S. 483 (1954), *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 345.

109. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 649.

110. In taking this position, Reed overlooked an epidemic of non-enforcement of *Plessy*'s separate equality standard. Throughout the South, per-pupil expenditures for Whites exceeded expenditures for Blacks by as much as tenfold. *See* SCHOOL DESEGREGATION IN THE 21ST CENTURY 20 (Rossell et al. eds., 2002). Funding schemes that relied on tax revenues to support public schools added to the insult of segregation by forcing Black parents to finance superior facilities their children could not attend. The most glaring inequalities occurred in the Deep South, especially in states called to defend their racial practices in *Brown*. Black schools in Clarendon County, South Carolina were so abysmal that County lawyers did not even attempt to portray them as equal when the case got to trial. *See* Briggs v. Elliott, 98 F. Supp. 529, 531 (E.D.S.C. 1951). Two Black schools had no water fountain. One had no desks. None had a working toilet. Black schools in Prince Edward County offered no science, history or business preparation course, though each was taught at the White schools, and had no gym, no shower, no changing room, and no dining hall. *See* REMOVING A BADGE OF SLAVERY, THE RECORD OF *BROWN V. BOARD OF EDUCATION* 41-43 (Whitman ed., 1992). In parts of Mississippi, Maryland, Georgia, and Kentucky, Black schools did not even exist. Those that did were so neglected that teachers doubled as custodians, cooks, and dishwashers. *See* CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 16, 49 (2004). Only when threatened with desegregation did Southern lawmakers allocate funds for improving Black schools. *See, e.g.*, *Briggs*, 98 F. Supp. at 540 (Waring, J., dissenting); *see also* SIMPLE JUSTICE, *supra* note 15, at 578.

111. *See* Tr. of Oral Arg., at 16-17, Brown v. Bd. of Educ., 347 U.S. 483 (1954), *reprinted in* 49 LANDMARK BRIEFS, *supra* note 17, at 345-46.

purity itself inherently degraded Blacks.[112] He even ascribed a benign motive to Southern segregationists while admitting their malicious intent "to hold Negroes down," deprive them of "educational equipment," and "to keep the Negro as a laborer."[113] This disingenuous attempt to justify racial subordination proved the very sentiment Reed seemed desperate to deny.

B. Formalizing Resistance

Reed acknowledged that racial bias colored his objectivity in *Brown*.[114] Yet even the ability to tame that impulse would not have changed his position on racially segregated schools, which he considered a matter of state sovereignty that should not be usurped by "judge-made law."

Court watchers generally considered Reed a judicial conservative, especially in matters involving states' rights.[115] He promoted this image by publicly endorsing a firm division of authority between the judicial and political branches of government. In a 1949 address to the American Law Institute, Reed offered this justification of narrow statutory interpretation over a more accommodating judicial posture:

> There is an elemental principle, a postulate, of judicial decision. This is that the judiciary is to declare the law and not make it. It is more sound and true than most legal aphorisms. It properly defines the federal judicial power in relation to the precise and clear-cut elements of a statute.[116]

This same philosophy informed Reed's gradualist approach to constitutional adjudication which prioritized existing government order

---

112. *See supra* notes 107-09 and accompanying text.

113. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 649.

114. *Id.* at 655. Reed stated during the judicial conference: "I am trying to approach this question without past prejudices. I want to work this out in the best way." *Id.*

115. *See, e.g.*, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, 2388 (Leon Friedman & Fred L. Israel eds., 1969) (labeling Reed a "civil rights conservative"); John P. Frank, *The United States Supreme Court: 1947-48*, 16 U. CHI. L. REV. 1, 1 (1948) (describing Reed's civil liberties record as "unusually conservative"). When nominated to the bench, Justice Reed's supporters tailored their predictions of his judicial philosophy to appeal to their constituents. Then Senator Sherman Minton, who would later join the Court as a Truman appointee, described Reed as a "liberal and a good lawyer." Senator Tom Connally of Texas labeled him an "accomplished lawyer of the conservative type." *Id.; see also* KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE 119 (2004).

116. NEW DEAL JUSTICE, *supra* note 72, at 654.

over claims of individual rights.[117] Leary of radical social change, Reed preferred an entrenched governmental power structure, leaving the legislative branch to tinker with the status quo.[118] In 1985, Henry Abrahamson wrote of Justice Reed:

> [O]bservers generally label him as being far more of a judicial conservative than a liberal on the bench–probably because, 'opposed to government by judges,' he moved more slowly and cautiously than his colleagues on the frontiers of constitutional change, and because he was reluctant to ride with his more liberal associates in their escalating rulings that favored individuals vis-à-vis government.[119]

Reed's hostility to "government by judges," or "krytocracy" as he called it, meant with regard to segregated schools that the Court "should not move to change the law. If there is to be change, Congress should do it."[120] So far as Reed was concerned, the "bare words" of the Fourteenth Amendment were too ambiguous to support a judicial conclusion that the Equal Protection Clause prohibited racial segregation.[121] Even stretching the text to reach that interpretation would not give the Court authority to act. During oral argument, Reed pressed Assistant Attorney General Lee Rankin on the limits of judicial power, seeking to understand how the Court could intervene when the Fourteenth Amendment expressly empowered Congress to legislate a national policy on race.[122] Absent

---

117. *See* THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, *supra* note 115, at 2388; *see also* NEW DEAL JUSTICE, *supra* note 72, at 647.

118. A 1950 speech in Mason County, Kentucky captures Reed's philosophy of ordered government:

> In dealing with the government . . . changes follow only from general acceptance of their need. The first essential of progress is law and order. Unless necessity demands revolutionary changes, reason and sound judgment depart from the land that seeks improvement in turmoil and recrimination. Democratic government requires law and order as the basic essential of operation.

Id. at 489.

119. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 217 (2d ed. 1985). At the Court's memorial service commemorating Reed's passing in 1980, then Chief Justice Burger recalled Reed's philosophy that "a Court entrusted with the great power of judicial review should not confuse its role with the role and function of the political branches of the Government." *See* NEW DEAL JUSTICE, *supra* note 72, at 656.

120. CONFERENCE DISCUSSIONS, *supra* note 18, at 656.

121. *See* Tr. of Oral Arg., at 35, Brown v. Bd. of Educ., 347 U.S. 483 (1954), *reprinted in* 49A LANDMARK BRIEFS, *supra* note 17, at 536.

122. *See* Tr. of Oral Arg., at 14-15, Brown v. Bd. of Educ., 347 U.S. 483 (1954), *reprinted in* 49A LANDMARK BRIEFS, *supra* note 17, at 462-63. Section 5 of the Fourteenth Amendment authorizes Congress to pass "appropriate legislation" to prevent states from denying individuals "equal protection of the law." *See* U.S. CONST. amend.

federal action to that effect, Reed thought, the matter devolved entirely to the States.[123]

Precedent was on his side. Segregated schools had survived judicial scrutiny in state and federal court since the end of the Civil War, thirty years before *Plessy* approved the "separate but equal" doctrine.[124] Since that time, Congress had repeatedly declined to pass anti-segregation legislation[125] and by 1954, twenty-one states and the District of Columbia officially endorsed the practice.[126] Even those Justices appalled by racial segregation conceded that precedent backed the South.[127]

Two 1950 decisions resulting in Court ordered integration confirmed as much. When the Court in *Sweatt v. Painter*[128] forced the University of Texas Law School to admit its first Black student, it did so based on the inexcusable disparities between the state's White and Black law schools.[129] Though the decision referenced the "inherent" inequality

---

XIV.

123. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 649, 655.

124. *See, e.g.*, Graham v. Bd. of Educ., 114 P.2d 313 (Kan. 1941); Dameron v. Bayless, 126 P. 273 (Ariz. 1912); Bd. of Educ. v. Bd. of Comm'rs, 78 P. 455 (Okla. 1904); Wong Him v. Callahan, 119 F. 381 (C.C.N.D. Cal. 1902); People *ex rel.* Cisco v. Sch. Bd., 56 N.E. 81 (N.Y. 1900); Martin v. Bd. of Educ., 26 S.E. 348 (W. Va. 1896); Chrisman v. Mayor of Brookhaven, 12 So. 458 (Miss. 1893); Lehew v. Brummell, 15 S.W. 765 (Mo. 1890); Maddox v. Neal, 45 Ark. 121 (1885); United States v. Buntin, 10 F. 730 (C.C.S.D. Ohio 1882); Ward v. Flood, 48 Cal. 36 (1874); State *ex rel.* Stoutmeyer v. Duffy, 7 Nev. 342 (1872); State *ex rel.* Garnes v. McCann, 21 Ohio St. 198 (1871); Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850).

125. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 986-89 (1995); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252-53 (1991).

126. Seventeen states required racial segregation in public schools: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Four states gave local school districts the option of segregating students: Arizona, Kansas, New Mexico and Wyoming. *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 277 (1997).

127. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 653-59.

128. 339 U.S. 629 (1950).

129. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 642. Sweatt was admitted to the Texas State University for Negroes, a facility temporarily housed in a basement near the state capitol in Austin while permanent facilities for Blacks were being constructed in Houston. The discrepancies between the Black and White law schools were staggering. At the University of Texas, nineteen faculty members taught 850 White students. The library contained 65,000 volumes. The school offered law review experience and had a reputation as an established institution. At the Texas State University for Negroes, five professors taught twenty-three Black students. Its library held 16,500 volumes. It did not have a law review, and it was unaccredited. Only one of its graduates was admitted to

of segregated schools,[130] notes from the judicial conference clarify the Court's limited intent to order integration solely because Texas did not provide a comparable legal education to Blacks.[131]

Similar concerns compelled the Court in *McLaurin v. Oklahoma*[132] to enjoin graduate school officials from requiring the sole Black student to sit at a desk outside the main classroom, study on the mezzanine floor of the library, and eat in the cafeteria at a time and table away from White students. According to the Court, such humiliating conditions made it impossible for McLaurin to obtain an education "equal" to his White peers.[133] Rather than limit Oklahoma's authority to operate segregated institutions, the decision merely held that a Black student already admitted to a White school was entitled to all the benefits and privileges enjoyed by White students.[134]

Justice Reed therefore approached *Brown* with an understanding that *Sweatt* and *McLaurin* affirmed the holding of earlier desegregation cases that tested exclusionary admission policies against the requirement of separate equality.[135] *Sweatt* and *McLaurin* both involved Black students selectively denied educational benefits afforded to Whites. Neither case questioned the constitutionality of racially segregated institutions that provided separate equality.[136] Justice Reed impressed

---

the state bar. *See Sweatt*, 339 U.S. at 632-34.

130. *See id.* at 632-34

131. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 654-58.

132. 339 U.S. 637 (1950). *Henderson v. United States*, 339 U.S. 816 (1950), a third case decided the same day as *Sweatt* and *McLaurin*, outlawed racial segregation in railway dining cars. The Southern Railway Company had adopted a policy of restricting Black passengers to an area behind a drawn curtain and moveable partition. Though *Henderson* involved the interpretation of a congressional statute, the Court cited *McLaurin* to emphasize that the separation in both cases furthered no other purpose than to invidiously emphasize the inferior status of Blacks. *Id.* at 825.

133. *See McLaurin*, 339 U.S. at 641-42; *see also* CONFERENCE DISCUSSIONS, *supra* note 18, at 640.

134. During the judicial conference on *McLaurin*, Frankfurter emphasized the "circumstances of [McLaurin's] admission" without stating whether he would have forced the University to admit him if an "equal" Black school was available. *Id.* Minton said that once admission is granted, "it must be on an equal footing." *Id.* Reed took a similar view, asking rhetorically: "When you admit a person to school, should he have full freedom? You must admit him on an equal basis." *Id.* at 639.

135. *See* Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

136. Though *Brown* cited *Sweatt* and *McLaurin* as authority for finding that racially segregated public schools were "inherently unequal," the understanding in 1950 was that neither case meant to outlaw segregation. As one commentator observed, "[t]he intention of the words and the intention of the author did not necessarily square." *See* Whitman,

this point on Thurgood Marshall during oral argument in *Brown*.[137]

For Reed, nothing in the language of the Fourteenth Amendment, any act of Congress, or the Court's judicial precedent supported a vote favoring segregation. Absent the controlling weight of personal prejudice, the Court's own precedent precluded the professed anti-krytocrat from initially supporting desegregation.

C. *Confronting "Racial Warfare"*

As described above, Reed could not reconcile a decision to strike down segregation with his own racial convictions or judicial precedent. Had he been able to do so, the Court's inability to enforce such a ruling provided a third reason Reed proposed a dissent in *Brown*.

Nowhere was desegregation more of a threat to White racist orthodoxy than in the public schools. Friendships there, among eager and experimental adolescents, had the potential to cross the color line, making way for interracial romance and sexual intimacy. This taboo fueled the region's panicked opposition to Black civil rights and desegregation even prior to *Brown*.[138] Save for bans on interracial marriage, separate Black and White schools were the White South's best defense against supposed racial annihilation.[139]

Prior to 1954, the Court strategized to limit the South's opposition to forward-looking judicial decisions on race. It did so by controlling internal procedures, carefully selecting its docket, and narrowly tailoring the scope of desegregation opinions. On more than one occasion, the Court enlisted Justice Reed to author controversial desegregation opinions hoping that the delivery from a Southern segregationist would assuage the region's hostility.[140] Cases that struck down segregation in

---

supra note 110, at 112. Even if *Sweatt* and *McLaurin* were read to abolish segregation in post-secondary educational institutions, their particularly narrow holding did not prohibit segregation in public elementary or high schools.

137. *See* Tr. of Oral Arg. at 25-26, Brown v. Bd. of Educ., 347 U.S. 483, *reprinted in* 49A LANDMARK BRIEFS, *supra* note 17, at 473-74.

138. *See* RENEE C. ROMANO, RACE MIXING: BLACK-WHITE MARRIAGE IN POSTWAR AMERICA 192 (2003).

139. For a contemporaneous example of segregationist rhetoric linking public school desegregation with interracial sex and "mongrelization," see THEODORE GILMORE BILBO, TAKE YOUR CHOICE: SEPARATION OR MONGRELIZATION (1947).

140. For example, when the Court forced political parties in Texas to open primary elections to Black voters in *Smith v. Allwright*, 321 U.S. 649 (1944), Justice Jackson successfully petitioned Chief Justice Stone to reassign the opinion writing to Justice Reed after it had been given to Justice Frankfurter. Jackson feared the repercussions of having

public transportation or business establishments had cross-racial appeal because they served the economic interests of Whites. Other decisions, like *Sweatt* and *McLaurin*, applied only when "equal" opportunities were not available. Even then, the Court limited its holding to institutions of higher education, careful in both cases not to interfere with racial segregation in the more volatile environment of public schools. Moreover, because relatively few Blacks pursued post-secondary education compared to Whites when *Sweatt* and *McLaurin* were decided, neither decision threatened to upend the psychological or economical advantage Whites held over Blacks either in or outside of the classroom. The resulting interracial contacts among adults in a graduate classroom, bus terminal, or coffee shop simply would not destabilize the existing racial hierarchy in the same way as massive desegregation among hormonally charged youths. Public schools were different.[141]

Desegregated grade schools were so pregnant with possibilities unacceptable to the South that Whites lashed out against Blacks even before *Brown* got to trial. Throughout the region, Blacks were discharged from employment, denied bank credit, chased out of town, and beaten and killed by a resurgent Klan.[142] Even Blacks having absolutely no involvement with the desegregation campaign faced retribution.[143] Southern lawmakers actively instigated violence by challenging the Court's authority and proclaiming their own intent to obstruct desegregation should the Court rule against them.[144] Even many

---

Reed speak for the Court because he was Jewish. He reasoned that the decision, "bound to arouse bitter resentment, will be much less apt to stir ugly reactions if the news that the white primary is dead, is broke to it, if possible, by a Southerner who has been a Democrat and is not a member of one of the minorities which stir prejudices kindred to those against the Negro." *See* NEW DEAL JUSTICE, *supra* note 72, at 361-62; *see also* MCMAHON, *supra* note 115, at 154. Reed was also assigned an opinion that struck down a Virginia statute mandating racial segregation on interstate busses. *See* Morgan v. Virginia, 328 U.S. 373 (1946).

141. *See* Whitman, *supra* note 110, at 168; *see also* CONFERENCE DISCUSSIONS, *supra* note 18, at 659.

142. *See* OGLETREE, *supra* note 45, at 4; SIMPLE JUSTICE, *supra* note 15, at 303.

143. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, 112 (1987).

144. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 648, 659 n.70 (discussing statements of South Carolina governor James F. Byrnes); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, 158-59 (1994). This rabid opposition became even more pronounced after the Court announced its decision in *Brown I*. During oral arguments in the remedial phase of *Brown II*, S. Emory Rogers, arguing the case for South Carolina, acknowledged bluntly that White citizens of Clarendon County "would not send our white children to the Negro schools." SIMPLE JUSTICE, *supra* note 15, at 734-35; J. HARVIE WILKINSON, FROM *BROWN* TO *BAKKE*,

Southern district court judges, schooled in the racist tradition of their homeland, were presumed ready to betray their constitutional obligations in order to preserve segregation.[145]

Making matters worse, federal support for desegregation all but evaporated when Dwight D. Eisenhower succeeded Harry Truman as President while the Court continued to debate *Brown*.[146] Though Eisenhower authorized the Department of Justice to submit a supplemental Brief in support of desegregation, his attorney general asked the Court to outlaw segregation without in fact requiring the South to immediately dismantle segregated schools.[147] The fateful "all deliberate speed" standard proposed by the Administration discouraged enforcement and positioned the South to stall the pace and progress of actual change.[148] If this did not make clear the new administration's

---

THE SUPREME COURT AND SCHOOL INTEGRATION 63 (1993). Attorneys for Alabama, Arkansas, Georgia, and Virginia all threatened to shut down the public schools, repeal compulsory attendance laws, or take other measures to subvert *Brown* if segregation was abolished. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 665-66; SIMPLE JUSTICE, *supra* note 15, at 736. *See also* WALDO E. MARTIN, JR., *BROWN V. BOARD OF EDUCATION*: A BRIEF HISTORY WITH DOCUMENTS 31 (1980) (noting that the Justices "perceived the depth of white racist attachment to Jim Crow."). These developments prompted Justice Frankfurter's remark during the judicial conference on *Brown II* that "nothing would be worse . . . than for this court to make an abstract declaration that segregation is bad and then have it evaded by tricks." SIMPLE JUSTICE, *supra* note 15, at 574.

145. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 665. n. 85. Justice Black lamented that the Court had "no more chance to enforce [desegregation] in the Deep South than to enforce Prohibition in New York City." *Id.*

146. *See* COLD WAR CIVIL RIGHTS, *supra* note 42, at 130. Unlike President Eisenhower, President Truman pursued a broad racial equality agenda that was driven by moral incentives as well as a need to court the increasingly powerful Black vote. *See* BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 137 (1997); Philip Elman, interviewed by Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 818 (1987). Truman bypassed predictable opposition in Congress by using his executive authority to achieve civil rights gains for Blacks, including desegregating the armed forces and creating the Commission on Civil Rights. He pledged federal support for equal rights initiatives in an address at the NAACP's national convention and famously instigated the Dixiecrat defection when he endorsed a 1948 Democratic Party platform that supported equal rights for Blacks. *See* ROSSELL, *supra* note 110, at 21.

147. *See* Supplemental Br. for the United States on Reargument as Amicus Curiae at 182-87, Brown v. Bd. of Educ., 347 U.S. 483, *reprinted in* 49A LANDMARK BRIEFS, *supra* note 17, at 1048-53.

148. *See* OGLETREE, *supra* note 45, at 11 ("The Courts' reluctance to take a more forceful position on ending segregation immediately played into the hands of the integration opponents").

tepid commitment to Black civil rights,[149] Eisenhower himself surely did. Just before *Brown* was decided, Eisenhower explained to Chief Justice Warren at a White House dinner that Southern segregationists were not bad people, "[a]ll they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big, black bucks."[150]

These developments caused Justice Reed and the rest of his colleagues significant trepidation about the impact of *Brown*. Reed was present when Justice Clark predicted "violence" and "troubles" from a desegregation ruling,[151] which Justice Black warned would put the Court on the "battle front" of a war with the States.[152] One account has Black warning that "[t]he guys who talked nigger would be in charge .... There would be riots, the Army might have to be called out."[153] When contemplating the constitutional status of segregation, Reed openly questioned how the Court could implement a desegregation decree and curb the South's reaction. Though he hoped that schools in the border region would serve as examples, he knew the inevitability of revolt in the Deep South.[154]

D. Closing Ranks

Motivated by a racist ideology, avowed judicial conservatism, and the prospect of vicious Southern defiance, Reed staked out a position favoring public school segregation. After "extended intellectual turmoil,"[155] however, Reed changed his vote, siding with the majority to overturn established precedent in a move that subordinated states' rights to the President's political agenda. The only explanation Reed expressly provided for his conversion is found in a memo to Justice Frankfurter written shortly after *Brown*. It states simply that the many considerations

149. Eisenhower never publicly endorsed *Brown* and privately stated that desegregation would lead to social disintegration. PATTERSON, *supra* note 7, at 80-82; STEPHEN AMBROSE, EISENHOWER: SOLDIER AND PRESIDENT 367-68 (1990).

150. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 655, n. 60; SCHWARTZ & LESHER, *supra* note 83, at 87; *see also* EARL WARREN, THE MEMOIRS OF EARL WARREN 291 (1977).

151. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 659.

152. *Id.* at 648.

153. PATTERSON, *supra* note 7, at 54. The threat of a backlash was significant enough that during the debates in *Brown*, Justices Clark, Burton, and Jackson each conditioned their vote on a promise of gradual enforcement. *See* CONFERENCE DISCUSSIONS, *supra* note 18, at 652-53, 659.

154. *Id.* at 649.

155. NEW DEAL JUSTICE, *supra* note 72, at 657.

favoring segregation "did not add up to a balance against the Court's opinion," and that "the factors looking toward fair treatment for Negroes are more important than the weight of history."[156]

This statement fails to explain adequately Reed's vote against segregated schools. There is no indication that Reed awoke to the moral outrage of segregation, and well into retirement he insisted that pre-*Brown* judicial opinions supported the South. History also proved him right on the difficulties of enforcement given the ferocity of Southern opposition. By all accounts, Reed changed his vote without ever abandoning these sentiments. There is, however, one constant in Reed's judicial record that trumped his commitment to segregation, deference to *stare decisis*, and pragmatic doubts about the institutional limitations of the Court: a steadfast commitment to national security. At the height of the Cold War, Reed's vote favoring desegregation fit neatly into that paradigm.

IV. Global Exigencies and the Pursuit of Democratic Authenticity

The foreign policy implications of America's racial policies trumped every motivation Reed had for supporting segregated schools. The historical record bares this out. First, Reed investigated the status of racial segregation across the globe to determine whether the legal standing of Blacks in America conformed to international norms.[157] Conceding the importance of cultivating goodwill among developing nations, Reed knew that desegregation would promote America's reputational standing and military dominance. Second, though a segregationist, Reed had previously voted to strike down state segregation statutes that jeopardized national priorities.[158] Third, despite his asserted judicial conservatism, Reed established a record of aligning his votes with the foreign policy objectives of the Executive Branch.[159] Cold War anxiety ultimately infused Reed's nationalist philosophy in a way that likely made him receptive to the national security concerns proffered by the NAACP, the Department of Justice, and the supporting amici in *Brown*. From this perspective, the Cold War provided the conditions for unanimity in the case.

156. YEARBOOK, *supra* note 76; NEW DEAL JUSTICE, *supra* note 72, at 577.

157. *See infra* notes 170-76 and accompanying text.

158. *See infra* notes 183-89 and accompanying text.

159. *See infra* notes 204-09 and accompanying text.

A. Cold War Anxieties

Brown does not expressly characterize desegregation as a Cold War imperative. The decision nonetheless patently advanced the Nation's quest for democratic idealism and communist containment. In *Brown*, the Court acknowledged "the importance of education to our democratic society," emphasizing that it "is required in the performance of our most basic public responsibilities, even service in the armed forces."[160] Education, it said, "is the very foundation of good citizenship."[161] This rhetoric harmonized public school desegregation with two key strategies for winning the Cold War. It authenticated American democracy by formalizing equal treatment as a component of "good citizenship" and maximized participation in the United States military.[162]

These strategic benefits of public school desegregation would have assuaged Reed's anxiety over the possibility of communist invasion. Reed's participation in World War I sensitized him to the need for a strong military and by mid-century, the precarious outcome of the Rosenberg trials, the conspiracy conviction of Communist leader Eugene Dennis, and the on-going McCarthy investigations exposed democracy's weak-points.[163] Reed's 1952 vote in the famous *Youngstown* Steel Seizure Case confirms that he contemplated *Brown* in the grips of anti-communist apprehension.[164]

In *Youngstown*, Reed sided against the majority in voting to recognize President Truman's authority to seize domestic steel mills to ensure a continuous supply of arms and ammunition to American troops defending South Korea against communist aggression. America's involvement in foreign hostilities, as the dissent understood, constituted part of a broader effort to arrest communist advancement before it

160. *Brown*, 347 U.S. at 493.

161. *Id.*

162. The Court recently cited these same objectives as a justification for upholding diversity-based admissions programs in colleges and universities. *See Grutter*, 539 U.S. at 330 (O'Connor, J.) (noting support for affirmative action among "high ranking" military officers and civilian leaders who consider a "highly qualified, racially diverse officer corps . . . essential to the military's ability to fulfill its principle mission to provide national security"); *id.* at 331 (affirming the importance of "preparing students for work and citizenship," and the role of education in "sustaining our political and cultural heritage" (citing Plyler v. Doe, 457 U.S. 202, 221 (1982))).

163. *See* Correspondence with John D. Fassett (on file with the author); *see also* NEW DEAL JUSTICE, *supra* note 72, at 502 ("In each of the key cold-war cases, Justice Reed was firmly among the group supporting governmental powers and action.").

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

breached the continent. The Soviet Union, the dissent pointed out, maintained "the largest air force in the world and . . . ground forces much larger than those [] available to the United States and [its allies]."[165] America's military shortcomings made the transnational effort to repel invasion an exercise "in self-preservation through mutual security."[166]

Along with his colleagues in dissent, Reed feared that communist expansion had brought the world within a half-step of obliteration. "A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict," the dissent forewarned.[167] How the community of nations responded to that threat would "dramatically influence the lives of many generations of the world's peoples yet unborn."[168]

These statements, published after notice of appeal had been filed in *Brown*, and just seven days before the Court consolidated arguments in the case,[169] confirm that Reed would have calculated the strategic costs of racial segregation on the Nation's investment in world stability. Two months after *Youngstown*, Reed instructed his law clerk, John D. Fassett, to investigate whether the United States' treatment of Blacks conformed to international practice.[170] Reed himself had researched the matter as early as 1945 when he concluded that a global consensus had emerged against slavery and in favor of universal suffrage but that nothing in the relevant international conventions or domestic laws of other countries prohibited "separate but equal access" to public facilities.[171] Reed re-

165. *Id.* at 669 (Vinson, J., dissenting).

166. *Id.* at 670. *Youngstown* continues to shape the scope of Presidential authority, as can be seen in cases involving the Bush Administration's policy towards alleged "enemy combatants" and the treatment of prisoners held by the U.S. military in Guantanamo Bay, Cuba. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005); Padilla v. Hanft, 389 F.Supp.2d 678 (D.S.C. 2005); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004). For the historiography of *Youngstown*, see MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE, THE LIMITS OF PRESIDENTIAL POWER (1977).

167. *Youngstown*, 343 U.S. at 668 (Vinson, J., dissenting).

168. *Id.* at 670.

169. On June 9, 1952, the Supreme Court consolidated the appeals pending from Kansas and South Carolina. *See* Briggs v. Elliot, 72 S. Ct. 1078 (1952); Brown v. Bd. of Educ., 72 S. Ct. 1070 (1952). On October 12, 1952, the Court consolidated the two final appeals from Virginia and Delaware. *See* Brown v. Bd. of Educ., 344 U.S. 1 (1952). *Youngstown* was decided on June 2, 1952. This procedural history of *Brown* is recounted in COTTROL, *supra* note 45, at 139.

170. *See* NEW DEAL JUSTICE, *supra* note 72, at 566-67.

171. *See id.* at 561; *see also* YEARBOOK, *supra* note 76.

examined that conclusion in 1952 after joining *Youngstown*'s apocalyptic dissent and hearing oral arguments in *Brown*.

Though reluctant to tailor domestic constitutional standards to international norms, Reed admitted that "the attitudes of the rest of the world toward segregation is worthy of consideration."[172] To better understand the "attitude of other nations on that subject," Reed had Fassett locate "any expression by any official representative of any country" or the United Nations regarding the legal status of segregation.[173] Fassett's biography of Justice Reed does not identify what material he uncovered. But Reed already knew that at least some countries had moved to outlaw racial segregation.[174] International considerations continued to cause Reed "much thought" even after he filed a draft dissent in January 1954.[175] Over the next several weeks, Fassett pressed the political advantages of desegregation, and on May 7, Chief Justice Warren visited Reed's chambers to ask rhetorically whether he thought a fractured decision was "really the best thing for the country."[176] *Brown* was announced ten days later, with Reed's vote against segregation making it a unanimous opinion.

B. Forward March

The Cold War vulnerabilities articulated in *Youngstown*'s dissent tested Reed's segregationist philosophy and deference to states' rights when he contemplated the constitutionality of racially segregated schools. Under less foreboding circumstances, Reed had used his position as a Justice to promote national domestic interests despite his professed aversion to "judge made law." Certainly then, Reed would have prioritized America's foreign policy objectives over his commitment to legislative deference and respect for the sovereignty of individual states.

---

172. *See id.*

173. *See id.*

174. *See, e.g.*, Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 39 n.16 (1948) (acknowledging 1944 Racial Discrimination Act enacted by Province of Ontario).

175. *See* YEARBOOK, *supra* note 76; NEW DEAL JUSTICE, *supra* note 72, at 571.

176. Richard Kluger suggests that it was Chief Justice Warren who persuaded Justice Reed during this meeting to join the rest of his colleagues in striking down racially segregated schools. *See* SIMPLE JUSTICE, *supra* note 15, at 702. Fassett recounts a different version of events, proposing that Justice Reed decided to abandon his dissent as early as December of 1953, after the two had discussed the implications of racial segregation on the nation's position in the Cold War. *See Recollections*, *supra* note 76, at 555; NEW DEAL JUSTICE, *supra* note 72, at 572.

Though tagged as "a civil rights conservative,"[177] Reed's voting pattern more accurately places him among the less "judicious" of his contemporaries on the bench.[178] Douglas described Reed as "one of the most reactionary judges" of his time.[179] Frankfurter called him "unjudicial minded"[180] and launched a personal crusade to tame his judicial activism. Among the many correspondences Frankfurter delivered to Reed on the primacy of legislative deference was a memo entitled "Footnote on objectivity," that warned: "[P]recisely because it is so easy to make one's own necessarily limited personal experience with affairs the yardstick of the constitutional power of governments, a Justice must have humility .... in not unconsciously arrogating to one's own notions of policy the commands of the Constitution."[181] At best, Reed's judicial conservatism wavered.

Though disinclined to interfere with the sovereign prerogatives of individual states, Reed's activism peaked when state legislation clashed with federal objectives. In those circumstances, Reed reflexively engaged the power of the Court to advance overarching priorities, even before federal lawmakers articulated a national policy by pre-empting state law. Reed's initial conference vote to strike down a California market regulation in the absence of a federally mandated commercial standard drew this acerbic response from Frankfurter:

> I cannot rid myself of the conviction that all your difficulties in the [case] derives [sic] from your conviction that such state controls ... are bad economics and bad for the country.... You may be right as a statesman—but it's none of your damn business as a judge construing [the Constitution and] you must restrict yourself to your modest but ample scope of authority.[182]

By 1954, it was not uncommon for the Court to advance national priorities against the States when Congress declined to do so through federal legislation. This approach came to dominate the Court's post-1945 Dormant Commerce Clause jurisprudence which Reed himself

177. *See supra* notes 115-19 and accompanying text.

178. By his own admission, Reed thought it imprudent to rule on the merits of a case without considering broader consequences in situations not immediately presented to the Court. *See* NEW DEAL JUSTICE, *supra* note 72, at 351; LASH, *supra* note 83, at 205.

179. *See* NEW DEAL JUSTICE, *supra* note 72, at 379.

180. *Id.*; *see also* FINE, *supra* note 84, at 159 (discussing Frankfurter's perception of Reed's judicial philosophy).

181. *See* NEW DEAL JUSTICE, *supra* note 72, at 351; LASH, *supra* note 83, at 188.

182. *See* NEW DEAL JUSTICE, *supra* note 72, at 348 (discussing Parker v. Brown, 317 U.S. 341 (1943)).

championed in *Morgan v. Virginia*[183] to void a state segregation statute that applied to interstate busses.[184] *Morgan* reflected a judicial compromise between the *laissez-faire* absolutism initiated under Chief Justice Fuller and the unwavering legislative deference shown by the early Roosevelt Court.[185] In 1945, Chief Justice Stone announced that when faced with congressional inaction, it was "[the] Courts, and not the state legislature, [which] is under the commerce clause the final arbiter of the competing demands of state and national interests."[186] *Morgan* confirmed as much. Justice Reed explained that Congress had ultimate authority under the Constitution to prohibit state segregation statutes that burdened interstate trade. When Congress failed to act, however, the

183. 328 U.S. 373 (1946).

184. Other examples include Henderson v. United States, 339 U.S. 816 (1950); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948).

185. Both Courts recognized Congress' authority under the Commerce Clause to exposit national commercial policy, but gave radically different interpretations to congressional silence. The Fuller Court established a baseline of implicit disapproval whenever Congress declined to enact federal legislation expressly authorizing state market regulations. Together with the emergence of the *Lochner*-era's substantive due process rules, the Court's Commerce Clause cases at the time effectively constitutionalized a free market system which tolerated little to no restraint on trade or commerce. *See, e.g.*, Leisy v. Hardin, 135 U.S. 100, 109-10 (1890) ("[S]o long as Congress does not pass any law to regulate [the sale of goods], or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammeled."); Walling v. Michigan, 116 U.S. 446, 458 (1886) ("[W]here Congress has exclusive power to regulate commerce, its non-action is equivalent to a declaration that commerce shall be free."). In contrast, the early Roosevelt Court adopted a baseline of tacit congressional approval by recognizing concurrent state authority over economic markets unless expressly preempted by Congress. *See, e.g.*, Parker v. Brown, 317 U.S. 341, 367 (1943) ("[I]n the absence of inconsistent Congressional action, [instability in California's raisin market] is a problem whose solution is peculiarly within the province of the state."); California v. Thompson, 313 U.S. 109, 113 (1941) ("Notwithstanding the Commerce Clause, [market] regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court."). At the same time, the reality of congressional inertia coupled with the dangers of economic gridlock driven by inconsistent state regulations caused some members of the Court to reconsider its hands-off philosophy. *See, e.g.*, Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring) ("[T]he practical result [of too much deference] is that in default of action by us, [the states] will go on suffocating and retarding and Balkanizing American commerce, trade and industry."). Ultimately, the realists of the Roosevelt Court adopted an approach that enabled the judiciary to strike down state regulations when it perceived an undue burden on economic development. *See, e.g.*, S. Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945). The development of the Court's Dormant Commerce Clause cases has inspired new scholarship in recent years. *See, e.g.*, Cushman, *supra* note 24; Robert Post, *Federalism in the Taft Court Era, Can it be "Revived"?*, 51 DUKE L.J. 1513 (2000); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997).

186. *S. Pac.Co.*, 325 U.S. at 769.

burden fell on the judiciary to move in its stead.

Morgan explains how Reed could have reconciled his conservative judicial philosophy with a desegregation decision in *Brown* that arrested the general police power of Southern states. In *Morgan,* the Court proclaimed judicial authority to strike down a state transportation statute even though the Constitution expressly authorized Congress to regulate inter-state trade under the Commerce Clause of Article I. Faced with congressional silence in that context, Reed affirmed the Court's role in fostering economic integration: "[B]ecause the Constitution puts the ultimate power to regulate commerce in Congress, rather than the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the statute unconstitutional."[187] *Brown* implicated the same balance of power by inviting the Court to outlaw state segregation statutes even though the Constitution delegated race-based policy decisions to Congress under section five of the Fourteenth Amendment.[188] The same nationalist philosophy that prompted Reed to subordinate state sovereignty to the Nation's economic security in *Morgan* would have enabled him to strike down state segregation statutes that threatened the Nation's survival in *Brown.*[189]

C. *Heeding Commands*

The nationalist priorities reflected in *Morgan* superseded Reed's commitment to segregation and states' rights. Reed's allegiance to the

187. *Morgan*, 328 U.S. at 380.

188. For a discussion of Congress' institutional capacity under section 5 in light of the school desegregation experience, see William D. Araiza, *Courts, Congress and Equal Protection: What* Brown *Teaches Us About the Section 5 Power*, 47 HOW. L.J. 199 (2004).

189. According to Michael Klarman, the Court's commerce cases reflect an evolving willingness to protect civil rights despite adverse precedent favoring segregation. *See* JIM CROW, *supra* note 15, at 220-22. While this might have been true for the other Justices, there is little evidence to support that claim with respect to Justice Reed. As Klarman himself acknowledges, none of these cases criticize Southern race policy and each was decided under Dormant Commerce Clause principles which enabled the Court to forbid segregation in the limited circumstance of interstate activity without addressing more significant forms of racial discrimination in housing or education. Moreover, Klarman's assertion is belied by other decisions during the same period that rejected claims of racial discrimination, at least when the government claimed national security was in issue. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943).

Executive Branch provided additional motivation for aligning his vote in *Brown* with the Nation's Cold War objectives.[190]

Reed's loyalty to the Executive department is best understood in light of the circumstances surrounding his appointment to the bench. The second of eight Justices appointed by Franklin Delano Roosevelt, Reed's nomination in 1937 was part of a calculated strategy to nationalize political authority and concentrate it in the office of the President.[191] At the time, Southern politicians in control of key congressional committees blocked Depression era recovery reforms precisely because they feared that a consolidated federal government would undermine state authority to enforce racial segregation.[192] Any legislation that eked past Congress was struck down by the Hughes Court which was comprised of jurists hostile to Roosevelt's reorganization plans and legislative restraints on individual autonomy. Thus, the two roadblocks to Roosevelt's "modern presidency" were Southern racial politics and the make-up of the Court.[193]

Bulldozed by uncooperative legislators he could not depose, Roosevelt set out to advance his agenda through the judiciary by reconstituting a Court sympathetic to his constitutional vision–one the Department of Justice would articulate in strategically selected appeals.[194] Reed was an obvious choice. Up to that point Reed had spent his entire public career in service of the Executive Branch, capping a tour of duty in World War I with key positions in the Hoover Administration. In 1935, he was named Roosevelt's Solicitor General.[195] The stinging defeats he suffered in that capacity when defending the President's economic recovery package before the Court left a lasting impression about the destructive power of an uncooperative judiciary.[196] The team

190. Even commentators who described Reed as judicially conservative noted his unyielding deference to the Executive Branch. *See* NEW DEAL JUSTICE, *supra* note 72, at 654.

191. *See* MCMAHON, *supra* note 115, at 107.

192. *See id.* at 105.

193. *See id.*

194. *See id.* at 144-76.

195. Reed served as Counsel for the Federal Farm Board and General Counsel to the Reconstruction Finance Administration under President Herbert Hoover before being named Roosevelt's Solicitor General. *See Recollections*, *supra* note 76, at 521.

196. *See* NEW DEAL JUSTICE, *supra* note 72, at 82-130. *The New York Times* described Solicitor General Reed as "an important legal aide in forwarding and defending the policies of the New Deal." Editorial, N.Y. TIMES, Mar. 19, 1938, at 9. In that capacity, Reed represented the United States in several pivotal cases, with mixed results. *See, e.g.*, Ashton v. Cameron County Water Improvement Dist., 298 U.S. 513 (1936);

of insiders Roosevelt assembled to formulate the administration's response to the "economic royalists," as Roosevelt called them,[197] included Reed, whose appointment to the bench one commentator describes as a fallback to Congress' 1937 defeat of the "Court Packing" plan.[198] Reed's ascension to the bench, therefore, came with an implied mandate "to buttress the modern presidency and destabilize southern democracy."[199]

Reed was faithful to that mission, especially in times of crisis. In 1942, he took the highly unusual step of speaking publicly on behalf of Roosevelt's war effort at a presidential re-election rally. He urged the audience to support whatever "civil or military" plans the President proposed to protect the Nation and its allies "against the aggressors."[200] Reed himself put those words into practice by affirming Roosevelt's discretion to impose curfews on persons of Japanese ancestry, including American citizens, during World War II.[201] He did the same one year later when Roosevelt authorized military officials to force Japanese-Americans from their homes into internment camps.[202] He was equally

---

Carter v. Carter Coal Co., 298 U.S. 238 (1936); Hopkins Fed. Sav. & Loan Ass'n v. Cleary, 296 U.S. 315 (1936); Jones v. SEC, 298 U.S. 1 (1936); United States v. Butler, 297 U.S. 1 (1935).

197. *See* NEW DEAL JUSTICE, *supra* note 72, at 131.

198. *See* MCMAHON, *supra* note 115, at 118-19. To balance the interminably activist Justices dominating the Hughes Court, none of whom planned to retire in the near future, Roosevelt proposed the "Court Packing Plan" to increase the number of Justices serving at one time to as many as fifteen. Legislative opposition, particularly though not exclusively from Southern senators, killed the proposal. *See* Cushman, *supra* note 24, at 46-49; NEW DEAL JUSTICE, *supra* note 72, at 147-61.

199. MCMAHON, *supra* note 115, at 97-8.

200. *See* NEW DEAL JUSTICE, *supra* note 72, at 307.

201. *See* Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943). For a discussion of wartime civil rights abuses against Japanese-Americans, see PETER IRONS, JUSTICE AT WAR (1983).

202. *See* Korematsu v. United States, 323 U.S. 214 (1944). Forty years after being convicted for refusing to comply with a military order to report to the internment camps, Fred Korematsu returned to federal court pursuant to a procedural mechanism that allowed him to renew his appeal. The presiding judge vacated his conviction, stating that Korematsu "stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees." Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). Five years later, Congress passed the 1988 Civil Liberties Act, formally apologizing for the Japanese internments and providing $20,000 in reparations for each surviving victim. In 1998, Korematsu was awarded the Presidential Medal of Freedom by President Bill Clinton for the courage he showed opposing injustice. *See* Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 414 n.13 (2005). Despite the universal

solicitous when President Truman called upon the Court to outlaw instances of racial segregation. In fact, Reed's vote favored the Executive Branch in every racial discrimination case that Truman's Department of Justice argued before him prior to *Brown*.[203] Both Roosevelt and Truman justified their respective racial policies in the name of national security.

Reed's support for the Executive Branch is especially transparent in those cases directly implicating wartime relationships with other nations. *Youngstown* is one example.[204] *Schneiderman v. United States*[205] is another. In 1943, Congress sought to denaturalize Russian-born William Schneiderman claiming that his communist affiliations made it impossible for him to pledge fealty to the United States government when he had applied for citizenship sixteen years earlier.[206] The dispute tested the constitutionality of democratic loyalty oaths that made Communist Party members ineligible for citizenship. Its resolution placed the Court in a quandary: reject the oath and remove the Nation's supposed first line of defense against subversive infiltration, or uphold it and upend the budding United States/Soviet alliance the Executive Branch had so carefully cultivated.[207]

Writing for the majority, Justice Murphy side-stepped the tricky constitutional issue by dismissing the government's claim for lack of evidence regarding Schneiderman's alleged subversive activities.[208] It was Justice Reed, however, who is identified as having devised the strategy for avoiding a political fire-storm and disposing of the case on evidentiary grounds to satisfy the State Department.[209]

---

criticism by civil libertarians and constitutional scholars against the Japanese curfew and internment cases, Reed continued to defend his vote in each case after retirement, stating: "I think, even now, that the Court was entirely correct in this matter." *See* NEW DEAL JUSTICE, *supra* note 72, at 345.

203. *See* Henderson v. United States, 339 U.S. 816 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950). Reed did not participate in Shelley v. Kramer, 334 U.S. 1 (1948) or Hurd v. Hodge, 334 U.S. 24 (1948), where the Department of Justice asked the Court to prohibit judicial enforcement of racially discriminatory property sales transactions. *See supra* note 85 and accompanying text.

204. *See supra* notes 164-68 and accompanying text.

205. 320 U.S. 118 (1943).

206. *Id.* at 120-22. Schneiderman is discussed at length in NEW DEAL JUSTICE, *supra* note 72, at 356-59; *see also* J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 312-16 (1968).

207. *See* NEW DEAL JUSTICE, *supra* note 72, at 357.

208. *Schneiderman*, 320 U.S. at 125.

209. *See* NEW DEAL JUSTICE, *supra* note 72, at 357-58; HOWARD, *supra* note 206, at

Reed's record of purposefully aligning critical decisions with the foreign policy goals of the Executive Branch would have made him especially receptive in *Brown* when the amicus coalition, particularly the Department of Justice itself, presented Southern segregation as a domestic affront to President Truman's national security agenda.[210] The very racial commitments that drove Southern lawmakers to reject Roosevelt's progressive economic reforms now obstructed Truman's Cold War campaign. Against this backdrop, Reed surely perceived the South's defense of segregation in *Brown* as one more in a long line of regional assaults against a President's agenda.[211] As it was during the Great Depression, Southern lawmakers were unilaterally risking the Nation's survival in a selfish effort to preserve regional racial entitlements. On this view, a dissent in *Brown* would compromise the very reason Reed was named to the bench. A vote with the majority

312-13. Both the majority and dissenting opinions disclaimed any political motivation for their respective dispositions of the case. *See Schneiderman*, 320 U.S. at 119 (Murphy, J.) ("We agree with our brethren of the minority that our relations with Russia, as well as our views regarding its government and the merits of Communism are immaterial to a decision of this case."); *id.* at 171-72 (Stone, J., dissenting) ("[This] case has obviously nothing to do with relations with Russia, where petitioner was born, or with our past or present views of the Russian political or social system."). Their effort was for the most part unconvincing. *See* H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 170 (1981) (describing Justice Frankfurter's belief that "[w]hat is plain as a pikestaff is that the present war considerations—political considerations—are the driving force behind the result of this case."); *see also* Lewis Wood, *Red's Citizenship Declared Valid by U.S. Supreme Court in 5-3 Ruling*, N.Y. TIMES, June 22, 1943, at A1; Editorial, *Beliefs Are Personal*, WASH. POST, June 24, 1943, at 12.

210. Reed's biographer writes that Reed "believed in, and deferred to the exercise of, strong powers by the president and Congress not only pursuant to the Commerce Clause but also under other constitutional provisions, particularly the power successfully to prosecute war and to guard the nation against subversion." NEW DEAL JUSTICE, *supra* note 72, at 651. Reed himself stated, "I'm on the side of the power of the Federal Government to use all of its energies, either to crush incitements to rebellion, or to fight a war." *Id.* at 345. These statements explain the loyalty Reed may have been compelled to show the Executive Department in *Brown*, even though the case did not directly involve a question of presidential authority.

211. *See* MCMAHON, *supra* note 115, at 119. In addition to obstructing early New Deal legislation and leading the opposition to Roosevelt's Court Packing plan, Southern lawmakers in the 1930s killed Roosevelt's proposed anti-lynching legislation. *Id.* at 114-17. Controversy over this unfortunate episode resurfaced in June 2005 when eighty-five United States Senators passed a Joint Resolution apologizing for the Southern filibuster against the anti-lynching bill. Though the apology received strong bipartisan support, Senate Majority Leader Bill Frist of Tennessee refused repeated requests to permit a roll-call vote which would have forced individual senators to record their opposition. As of June 28, 2005, fifteen Senators still refused to lend their name to the non-binding symbolic resolution. *See* Scott Shepard, *Frist Vetoed Roll-Call on Anti-Lynching Bill*, THE DAILY REFLECTOR (Greenville, N.C.), June 15, 2005, at 4.

required only that he complete the job he was appointed to do–advance an Executive agenda against a Southern blockade.[212]

V. From the Cold War to the War on Terror

Brown's commitment to racial equality and human dignity legitimized the ideal of participatory governance, handing the United States a crucial ideological advantage over the Soviet Union at the height of the Cold War. Fifty years on, the world has welcomed ninety-eight additional nations into the democratic camp.[213] And yet stability eludes the globe. The death of communism in the decades succeeding *Brown* has given birth to rogue nations, harbored terrorists and weapons of mass destruction that hold hostage prospects of future democratic proliferation.[214] It is not surprising then to see the internationalist worldview that captured unanimity in *Brown* reappear among some Justices with the United States locked in a War on Terrorism.

A. Internationalizing Rights and Representation

The Justices who rejected the constitutionality of the Bush Administration's detention procedures in *Hamdi* sought to align the Nation's practices with a constitutional guarantee of due process which recognizes the dignity and worth of each individual.[215] Justice O'Connor wrote of the need to "preserve our commitment at home to the principles

---

212. During oral arguments, Assistant Attorney Lee Rankin acknowledged the futility of waiting for Congress to outlaw segregation: "[T]he reason why this case is here was that action couldn't be obtained from Congress . . . because of the present membership or approach of Congress to that particular question." *See* Tr. of Oral Arg., at 16, Brown v. Bd. of Educ., 347 U.S. 483, *reprinted in* 49A LANDMARK BRIEFS, *supra* note 17, at 527-28. Southern segregationists who held key Senate committee chairs refused to pass legislation supported by President Truman to prohibit racial discrimination in voting, employment, and government contracting. Truman's civil rights achievements were thus limited to areas under executive authority that did not require congressional approval, including desegregation of the military and the support of the Department of Justice as *amicus curiae* in desegregation cases. *See* COLD WAR CIVIL RIGHTS, *supra* note 42, at 82-102; Greenberg, *supra* note 45, at 888; *see also* ALONZO L. HAMBY, LIBERALISM AND ITS CHALLENGERS: ROOSEVELT TO REAGAN 65 (1985).

213. The most recent data available identifies twenty-two electoral democracies in existence in 1950. By 2000, that number rose to 120 out of 192 existing countries. *See* FREEDOM HOUSE, DEMOCRACY'S CENTURY: A SURVEY OF GLOBAL POLITICAL CHANGE IN THE 20TH CENTURY 2 (2000).

214. *See* Fred Hiatt, *Democracy in Trouble; Now We Understand That It's Not Inevitable*, WASH. POST, Sept. 20, 2004, at A21.

215. 542 U.S. 507 (2004); *see also supra* notes 1-3 and accompanying text.

for which we fight abroad."[216] Her opinion in *Hamdi* captures the same internationalist philosophy that facilitated majority agreement against segregated schools in *Brown*.

This was not the first time in recent years that a judicial admonition against the deprivation of democratic liberties was guided by the lessons of *Brown*. In 2005, a majority of Justices in *Vieth v. Jubelirer*[217] recognized a cause of action under the Fourteenth Amendment's Equal Protection Clause against politically gerrymandered electoral districts that denied individual voters a fair and effective opportunity to influence the political process.[218] Such tactics, Justice Kennedy explained, do not "serve the interests of our political order. Nor should [they] be thought to serve our interests in demonstrating to the world how democracy works."[219]

Two years earlier, the interdependence of racial equality, educational opportunity, and democratic legitimacy led a majority of the Court in *Grutter v. Bollinger*[220] to approve of race-friendly college admissions standards that promote educational advancement for a "critical mass" of under-represented minorities.[221] Justice O'Connor acknowledged "the overriding importance of preparing students for work and citizenship" and described education as "pivotal to sustaining our political and cultural heritage . . . [and] the very foundation of good citizenship."[222] Justices Ginsburg and Breyer agreed, adding that race-based admission standards promote equal opportunity and conform to "international understanding" and multi-lateral Conventions.[223] These Justices carried forward the Cold War lessons of *Brown*: that a learned

---

216. *Hamdi*, 542 U.S. at 532.

217. 541 U.S. 267 (2004).

218. Though five Justices voted to dispose of the case against the plaintiff, only four concluded that political gerrymandering claims are non-justiciable. *See id.* at 281 (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., Thomas, J.) (finding political gerrymandering claims non-justiciable); *id.* at 306 (Kennedy, J., concurring) (dismissing the instant claim but concluding that the Court should not foreclose all future political gerrymandering claims); *id.* at 217 (Stevens, J., dissenting) (articulating "partisan considerations" test to adjudicate justiciable gerrymandering claims); *id.* at 347-50 (Souter, Ginsburg, JJ., dissenting) (stating five part political gerrymandering standard); *id.* at 355 (Breyer, J., dissenting) (identifying extreme partisanship and risk of entrenchment as potentially problematic gerrymandering considerations).

219. *Id.* at 316-17.

220. 539 U.S. 306 (2003).

221. *See generally id.* at 311-44.

222. *Id.* at 331 (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

223. *Id.* at 344 (Ginsburg, Breyer, JJ., concurring).

citizenry authenticates participatory governance in a way that strengthens the Nation's image before the world.

B. *Rogue States and the Power of Judicial Neutralization*

In the same year that *Grutter* was decided, six members of the Court stood up to protect a new generation of unfairly marginalized citizens in *Lawrence v. Texas*[224] when they barred the state from selectively imposing criminal penalties on same-sex couples. Texas not only stood apart from most of the country by punishing adults who engaged in private sexual intimacies, it contradicted the expectations of "other nations" that form part of "our Western civilization."[225] The Court ruled the Texas statute unconstitutional because it interfered with a protected liberty interest that "has been accepted as an integral part of human freedom in many countries."[226] These words, written in 2003, captured the sentiment underlying unanimity in *Brown* fifty years earlier–that our federal order of government does not permit individual states to compromise the Nation's standing in the global community.

Most recently, in *Roper v. Simmons*,[227] five Justices found the state of Missouri in violation of the Eighth Amendment when it sentenced a seventeen-year-old to death. The conclusion that the juvenile death penalty was "cruel and unusual" rested in part on the fact that the practice contravened international norms. Justice Kennedy wrote of the "stark reality" that the United States was the only country in the world that sanctioned such punishment, and that Iran, Pakistan, Saudi Arabia, Nigeria, and China, among other nations known for brazen human rights abuses, had abolished or publicly disavowed the practice.[228] Imposition

224. 539 U.S. 558 (2003). Justice Kennedy's majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer, addressed the claim in *Lawrence* under the Due Process Clause of the Fourteenth Amendment. *See id.* at 562. Justice O'Connor wrote a concurring opinion that invoked the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 578.

225. *Id.* at 573. The Court cited with approval a decision by the European Court of Human Rights that outlawed an Irish statute criminalizing homosexual conduct, noting that the decision was presently authoritative in the 45 member states of the Council of Europe. *Id.*

226. *Id.* at 577. Not every member of the Court is willing to hold American lawmakers to international expectations. *See id.* at 598 (Scalia, J., dissenting) ("'[T]his Court . . . should not impose foreign moods, fads, or fashions on Americans.'" (quoting Foster v. Florida, 537 U.S. 990, n.* (2002) (Thomas, J., concurring in denial of certiorari))).

227. 543 U.S. 551 (2005).

228. *Id.* at 575.

of the juvenile death penalty also violated the United Nations Convention on the Rights of the Child, which every country in the world had ratified, save for the United States and Somalia.[229] "[I]t is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty," Kennedy concluded.[230]

Justice Kennedy went on to explain the value of an international consensus on the scope and status of individual rights. He identified the "innovative principles" codified in the Constitution, including the rights of criminal defendants, individual freedom, and human dignity that remain "central to the American experience" and "essential to our present-day self-definition and national identity."[231] The express affirmation of these fundamental rights by other nations and peoples "underscores the centrality of those same rights within our own heritage of freedom," he wrote.[232]

Even Justice O'Connor, who dissented in *Roper*, acknowledged the relevance of foreign and international law to American constitutional jurisprudence. Not only did the Eighth Amendment itself draw meaning "directly from the maturing values of civilized society," the Nation's evolving standards of human dignity were connected to "the values prevailing in other countries," she opined.[233] An "international consensus" on matters of criminal punishment, she stated, "can serve to confirm the reasonableness of a consonant and genuine American consensus."[234]

Together, these decisions bring into the Twenty-First Century the global consciousness that made unanimity possible in *Brown*. Each spotlights the unique ability of the Court to preserve America's reputational capital among the free nations of the world by confirming core democratic principles. In addition, each contextualizes the role of the judiciary within a larger framework of governmental operations by providing concrete examples of adjudicatory outcomes that respond to international crises. In fact, some members of the Court today occasionally display a more formidable worldview than was apparent even in *Brown*. The decision in 1954 furthered the foreign policy

229. *Id.* at 576.
230. *Id.* at 577.
231. *Id.* at 578.
232. *Id.*
233. *Id.* at 605 (O'Connor, J., dissenting).
234. *Id.* O'Connor concluded that a domestic consensus against the execution of juveniles had not developed, however.

objectives of the Truman Administration, which itself petitioned the Court to strike down racially segregated schools in order to advance Cold War objectives. In *Hamdi*, *Grutter*, and *Vieth*, however, the Court relied on international norms to justify judicial outcomes that expressly contravene the policies of the present Administration.[235]

VI. Conclusion: Mission Accomplished?

The Court has not always responded to political exigencies in ways that promote the ideal of American democracy. On more than one occasion it has condoned violations of the very freedoms American troops fought to defend in this century's wars.[236] Moreover, because foreign policy priorities too often compete with claims of fundamental rights, the Court today has been, and will continue to be, called upon to balance conflicting interests between government leaders and individual citizens that in past wars aligned. In recent years, however, a majority of the Court soldiers forward the conclusion unanimously embraced at the height of the Cold War: that America's place in the world matters, and the Court plays a vital role in preserving it.

An honest assessment of the Court's role in authenticating American democracy, however, must also take account of whether its decisions ensure actual implementation of cherished constitutional principles. In *Brown*, the Court struck down racially segregated schools but ceded to Southern demands for time to implement desegregation. The Court waited an entire year after *Brown* was decided to issue a remedial decree, and even then it cautioned the states to move ahead with "all deliberate speed."[237] It imposed no target date for either commencing or completing the desegregation process, and specifically authorized district court judges, which it charged with responsibility for monitoring compliance, to reject a plan that was too ambitious or

235. The Bush Administration's "enemy combatant" policies were directly at issue in *Hamdi*. Though *Grutter* involved a challenge to a state affirmative action program, the Justice Department submitted an *amicus* brief in the case asking the Court to hold race-based admission policies unconstitutional. *See* Br. for the United States, as Amicus Curiae, Grutter v. Bollinger, 539 U.S. 306. The outcome in *Vieth* maintained a Republican congressional stronghold which appreciably improved the ability of George Bush to advance his Administration's political objectives. Redistricting efforts throughout the nation are widely understood to favor the policies of the present administration. *See* R.G. Ratcliffe, *DeLay's Investment Pays Off*, HOUSTON CHRONICLE, Oct. 10, 2003, at A1.

236. *See supra* notes 201-02 and accompanying text.

237. *See Brown II*, 349 U.S. at 301.

interrupt a plan that proved too disruptive in application.[238] State lawmakers exploited this arrangement and intentionally subverted *Brown* while federal officials willingly looked the other away.[239] The racial composition of Southern schools changed little in the first decade after *Brown*,[240] and today are fast reverting to a state of segregation not seen in thirty years.[241]

More recent cases that purport to affirm America's democratic pedigree have been rendered as fractured opinions, and the outcome reached by a majority of Justices is often undercut by political action. Yasser Hamdi was never afforded access to an attorney or a due process hearing as the Court required, but was "released" by the Executive Branch to Saudi Arabia on the condition that he renounce his United States citizenship.[242] In *Vieth*, five Justices recognized an Equal Protection claim for political gerrymandering, but could not agree on a basis for determining when a district dilutes the weight of a vote in violation of constitutional standards.[243] The Court effectively recognized a cause of action for a claim that cannot be judicially enforced.

There is more. The Court in *Grutter* emphasized the value of education to productive and effective citizenship when it upheld diversity-based affirmative action plans.[244] Yet the political opposition to affirmative action has led many colleges and universities to abandon programs intended to promote access to students of color despite discriminatory obstacles that continue to manipulate admission criteria to the benefit of non-minorities.[245] In *Lawrence*, though the Court recognized a substantive right to sexual intimacy, it declined to ascribe full legal protection to gay and lesbian citizens against other forms of discrimination. Following the decision, twelve states passed

238. *See id.* at 299-301.

239. Gerald N. Rosenberg, *Tilting at Windmills:* Brown II *and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation*, 24 LAW & INEQ. 31, 34-38 (2006).

240. *Id.* at 34 ("By the 1963-64 school year, barely one in one hundred African-American children in the eleven Southern states of the Old Confederacy was in a school with Whites.").

241. *See* GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 2 (2001).

242. Joel Brinkley, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15.

243. *See supra* note 218.

244. *See supra* notes 220-23, and accompanying text.

245. Jonathan D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. TIMES, Mar. 14, 2006, at A1.

referendums to ban same-sex marriages in an effort to forestall further recognition of the human dignity that inheres in every individual of any sexual orientation.[246] Finally, in *Roper*, the Court's decision to outlaw the juvenile death penalty, though consistent with international standards, fell short of meeting the growing consensus against imposition of the death penalty under any circumstance.[247]

Thus, while the Court has attempted to confirm America's democratic heritage through the process of judicial decision-making, its own efforts on occasion fail to ensure to a meaningful degree that democratic principles will be realized. In other instances, democratic momentum meets opposition, ironically, by democratic branches of government. The merits of the Court's internationalist approach can be debated, as can the response by elected officials to judicial internationalism. What appears undeniable, however, is the Court's continuing role in attempting to authenticate American democracy in times of global exigency.

246. These measures brought to nineteen the total number of states that restrict marriage to the union of one man and one woman. *See Texas Approves Gay Marriage Ban*, THE DALLAS MORNING NEWS, Nov. 9, 2005, at A1; America Votes 2004, Ballot Measures, http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures (last visited Apr. 20, 2006).

247. "The world continued to move closer to the universal abolition of capital punishment during 2005. By the end of the year 86 countries had abolished the death penalty for all crimes .... 11 countries had abolished it for all but exceptional crimes, such as wartime crimes. At least 25 [other] countries ... had not carried out any executions for the previous 10 years or more and were either believed to have an established practice of not carrying out executions or had made an international commitment not to do so." Amnesty International, Death Penalty Developments in 2005, http://web.amnesty.org/web/web.nsf/print/7F1DAA21CB800C9080257155005 3E0DE.