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Richard Delgado

Jean Stefancic

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THE SOCIAL CONSTRUCTION OF *BROWN v. BOARD OF EDUCATION*: LAW REFORM AND THE RECONSTRUCTIVE PARADOX

RICHARD DELGADO*
JEAN STEFANCIC**

INTRODUCTION

Broadly speaking, there are two views about *Brown v. Board of Education*.¹ The conventional view holds that *Brown* is one of the two or three most important cases in American legal history. According to this interpretation, *Brown* supplied the impetus for the modern civil rights movement, demonstrated that courts, at least at times, can assert moral leadership, and emphasized that African Americans are entitled to live in the United States on terms equal to whites.²

The other view, that of the revisionists, holds that *Brown v. Board of Education* accomplished relatively little, either in the short or long run.³ Revisionists argue that *Brown* is the product of a momentary convergence between white and black interests that began to fade soon thereafter.⁴ Some argue that landmark cases like *Brown* may even impair the cause of black rights by inducing a mood of unwarranted euphoria among supporters

* Charles Inglis Thomson Professor of Law, University of Colorado. J.D., Boalt Hall School of Law, University of California, Berkeley, 1974.

** Research Associate, University of Colorado School of Law. M.A., University of San Francisco, 1989.

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

2. Books in this general vein include RICHARD KLUGER, *SIMPLE JUSTICE* (1976); and JUAN WILLIAMS, *EYES ON THE PRIZE* (1987). For a discussion of the conventional view and its alleged weaknesses, see Michael J. Klarman, *Brown, Racial Change and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

3. On the revisionist view of *Brown*, see, for example, Klarman, *supra* note 2; on the revisionist view of law reform generally, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); see also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

4. *E.g.*, Bell, *supra* note 3.

while stiffening resistance on the part of diehards and white supremacists.⁵ Revisionists and conventionalists are apt to differ not only in their understanding of *Brown*, but in their interpretation of how social change occurs. In general, revisionists hold that social reform is difficult to achieve, especially through law, and that gains have a way of slipping back.⁶ The more sanguine conventionalists argue that if *Brown* has not brought about racial justice by itself, we can at least move closer to this goal through further effort. *Brown* has certainly helped; and if it has fallen short, what we need is a *Brown III* or a *Brown IV*.⁷

Although these and other differences separate the revisionists and the conventionalists, in one respect they both approach *Brown* in the same manner. Each examines the situation that prevailed before and after *Brown* and asks: Did the landmark decision make a difference? Were the forces that led to the 1960s-era reforms already in motion before *Brown*? Did *Brown* benefit white elites more than it benefited blacks? If it benefited blacks, did it help mostly middle-class blacks, leaving the underclass as badly off as before? Both groups, in short, examine *Brown* longitudinally and temporally, looking for evidence of causation or its lack. The argument has what we might call a vertical character: One lines up the situation that prevailed before *Brown*, and that after, and looks for signs that *Brown* brought about changes.

In this Essay, we argue that an ignored, and equally vital, axis is horizontal.⁸ To understand *Brown's* role, and that of law reform cases generally, one must attend to contemporaneous events in society at the time *Brown* was decided. Focusing on this other dimension enables us to understand why *Brown v. Board of Education* was seen as a breakthrough case, even though it failed to have much effect outside the narrow area of

5. See DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 3, 111 (1987); Klarman, *supra* note 2, at 85 (discussing the way *Brown* inspired a wave of southern resistance).

6. See, e.g., BELL, *supra* note 5; RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION (1994).

7. See, e.g., WILLIAMS, *supra* note 2.

8. That is to say, an axis that examines events contemporaneous with a key event, rather than ones that came earlier or later.

school desegregation.⁹ It enables us to understand why even in that area, *Brown* had less effect than one might have hoped.¹⁰ Moreover, focusing on this horizontal dimension allows us to understand law's limitations in propelling social change in general.

We begin by summarizing what *Brown* was and was not able to accomplish, doctrinally and conceptually, employing as our principal illustration the debate over campus hate speech rules.¹¹ We argue that society's resistance to reform in this area is just one example of a backward drift in matters of race, and the decisions whose narratives more aptly characterize our time are not *Brown* but the nineteenth century Supreme Court cases—*Plessy v. Ferguson*,¹² the *Civil Rights Cases*,¹³ and *Dred Scott v. Sandford*.¹⁴ Finally, we put forward a *reconstructive paradox* that names and explains why, despite evidence to the contrary, we continue to believe the legal system can bring about significant change in areas such as race when it is in fact capable of bringing about very little.¹⁵

I. HOW *BROWN* FAILED TO GENERALIZE

Many critics have pointed out that *Brown* accomplished relatively little in the way of school desegregation, except in the Deep South, and that black children are as likely today as they were forty years ago to attend predominantly black schools.¹⁶

9. See *infra* notes 16-44 and accompanying text.

10. See *infra* notes 16-24 and accompanying text.

11. See *infra* notes 30-44 and accompanying text. For writing on the issue of hate speech, see, for example, MARI MATSUDA ET AL., *WORDS THAT WOUND* (1993); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484.

12. 163 U.S. 537 (1896).

13. 109 U.S. 3 (1883).

14. 60 U.S. 393 (1856).

15. For an earlier treatment of a related mechanism, the *empathic fallacy*, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

16. See, e.g., Klarman, *supra* note 2, at 11-12, 76-86; see also ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992); THE WORDS OF MARTIN LUTHER KING, JR. (Coretta S. King ed., 1987) [hereinafter *MLK*]; Jerome M. Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial*

To this, one could add doctrinal retrenchment in closely related areas. Although subsequent courts have left *Brown* standing, in the sense that they did not expressly overrule it, they have done much to cut back its effect. School districts may not enact metropolitan desegregation plans, at least in the absence of a showing of prior discrimination.¹⁷ Education is not a fundamental interest,¹⁸ nor poverty a suspect class.¹⁹ States have no obligation to fund property-rich and property-poor districts similarly.²⁰ Segregation that results from white flight is essentially irremediable.²¹ Black male academies are unconstitutional,²² minority scholarships under fire,²³ and affirmative action that takes the form of reserving slots in state-funded professional schools is illegal.²⁴

Why did *Brown* end up having so little effect, even in the area of school reform? Elsewhere, we have put forward the thesis that social reform through law is relatively ineffective because law's scope is so narrow.²⁵ Because every social practice is part of an interlocking system of other practices, meanings, and interpretations, changing just one element (for example, school assignment rules) leaves the rest unchanged.²⁶ Thus, when the Supreme

Discourse, 26 CONN. L. REV. 209, 246-47 (1993) (discussing the situation in law schools).

17. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977).

18. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

19. *James v. Valtierra*, 402 U.S. 137 (1971).

20. *Rodriguez*, 411 U.S. 1; see also *Valtierra*, 402 U.S. 137 (upholding state constitutional provision requiring low-rent housing projects to be approved by a majority of qualified electors).

21. Metropolitan desegregation plans are permissible only if the segregation results from official action, not the aggregate of individual decisions by white families to move to the suburbs. See *Milliken*, 433 U.S. 267.

22. On the difficulties of establishing such schools with public funds, see Jacqueline Conciatore, *Detroit Must Admit Girls to Public All-Male Academies*, *Judge Says*, BLACK ISSUES IN HIGHER EDUC., Aug. 29, 1991, at 8; *Whites in Detroit Teach Students at Black School a Fourth R: Racism*, N.Y. TIMES, Dec. 2, 1992, at B6.

23. See, e.g., Michael A. Olivas, *Federal Law and Scholarship Policy: An Essay on the Office for Civil Rights, Title VI and Racial Restrictions*, 18 J.C. & U.L. 21 (1991) (articulating the position of the recent Republican administration on this issue).

24. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

25. See DELGADO & STEFANCIC, *supra* note 6; see also MLK, *supra* note 16.

26. E.g., DELGADO & STEFANCIC, *supra* note 6; Delgado & Stefancic, *supra* note 15.

Court decided *Brown*, its principle was soon robbed of much effect when, in a myriad of decisions, school officials, lower courts, sheriffs, and others interpreted *Brown* against the familiar background.²⁷ "Of course, the Supreme Court didn't mean *that*," they would reason in close cases. It is as though legal decisions take place against a gravitational field, with the pull being toward the familiar, toward stasis.²⁸ Because *Brown* set out to change just one element, leaving the force-field itself intact, its effect quickly eroded. For social reform to happen, "everything must change at once," but in the law, doctrines such as stare decisis, standing, mootness, ripeness, and political question mean that the law cannot change everything at once.²⁹ It can only decide the case before it.

Disbelieving or obstructionist officials are not the only forces that act to rob landmark decisions of much of their effect. If that were true, all that would be necessary would be vigilance and determined enforcement. Rather, such decisions fail to establish themselves in the wider legal culture, so that even those who are generally sympathetic to reform fail to see their applications in closely related areas.

Consider, for example, the debate over campus hate-speech rules.³⁰ Beginning about a decade ago, college and university administrators began noticing an upsurge in the number of racist insults, graffiti, and namecalling taking place on their campuses.³¹ At some institutions, the number of students of color began to drop as parents decided to send their sons and daughters elsewhere.³² Many campuses responded by enacting

27. See *infra* notes 51-55 and accompanying text.

28. See BELL, *supra* note 5, at 3 (discussing the way racial breakthroughs erode soon thereafter); see also Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988) (elaborating on this process); MLK, *supra* note 16, at 118-19 (on resistance to civil rights decrees).

29. On these doctrines and the way they limit the range of cases and issues courts may consider, see RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW* 1026-73 (3d ed. 1989).

30. On the problem of hate speech in general, see sources cited *supra* note 11; on campus hate speech, see Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991).

31. *Id.* at 348-58.

32. *Id.* at 376, 386 n.354.

anti-hate-speech rules that punished certain forms of racial or sexual taunting or namecalling.³³ The rules sparked immediate resistance.

Brown at least had some effect. Today, a school official who might be tempted to assign all the black children to one school and the white ones to another, would likely think, "I had better not do that, at least unless I disguise what I am doing." Today's opponents of hate-speech rules, however, show little such hesitation; they proceed as though *Brown* had not taken place at all.³⁴ Hate-speech rules are in many respects like student-assignment rules.³⁵ Yet, opponents make the same arguments against them, the same rhetorical moves, that we witnessed with the classic resistance to school desegregation.

Under *Plessy v. Ferguson*,³⁶ schemes that allocated benefits along racial lines were upheld, so long as the benefit blacks received was roughly comparable to that received by whites. In *Plessy*, blacks were forced to ride in one railroad car, whites in another.³⁷ The Supreme Court upheld the railroad's rule: separate but equal. Whites and blacks were equally disadvantaged: neither could ride in the other's car. A similar situation prevailed in the schools of Topeka, Kansas, at the time *Brown* was decided. Indeed, shortly after the decision was announced, a famous constitutional scholar was prompted to wonder if the decision was principled: Why should the rights of blacks to associate with whites trump that of whites *not* to associate with blacks?³⁸ One right balanced another, one claim against its perfect reciprocal.

In the debate about hate-speech, we find a strikingly similar

33. For a discussion of some campuses where rules have been enacted, see *id.* at 358-61.

34. See *infra* notes 40-43 and accompanying text.

35. For a discussion of these parallels, see Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Richard Delgado & Jean Stefancic, *Overcoming Legal Barriers to Regulating Hate Speech on Campuses*, CHRON. HIGHER EDUC., Aug. 11, 1993, at B1; *infra* notes 38-44 and accompanying text.

36. 163 U.S. 537 (1896).

37. *Id.* at 537-39.

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

structure. The white insists on a right to say whatever is on his mind. The black demands protection when what is on the white's mind is a direct face-to-face racial insult. One claims a right to do *X*, the other the right not to have *X* done to him. One right emanates from one part of the Constitution—the First Amendment—one, from another—the Fourteenth Amendment.³⁹ As with separate but equal, today's debate over hate speech features commentators insisting that the black's injury is all in his head.⁴⁰ This perspective parallels early cases in which the Supreme Court told Negroes that the indignity of being herded into separate railroad cars is offensive only if they put that construction on it.⁴¹ Today's opponents of hate-speech rules dismiss the black's injury as merely dignitary, and not a real harm.⁴² One well-regarded constitutional scholar recently rejected the "silencing" argument by pointing out that it requires mental mediation—the victim decides to remain silent.⁴³ As with *Brown*, the opposition to hate-speech rules portrays itself as highly principled. It is not in favor of hate-speech (heaven forbid). Rather, there are other, higher principles at stake here.⁴⁴

II. WHY *BROWN* FAILED TO GENERALIZE

Brown effected little change in terms of doctrine, consciousness, or the realities of life for black schoolchildren. Yet, society has constructed the decision as a breakthrough of momentous proportions. We believe the two observations are related. *Brown's* sharp departure from the past caused it to stand out, to seem a breathtaking advance. This departure also assured that

39. For a discussion of these and other similarities, see Delgado, *supra* note 30, at 345-48; Lawrence, *supra* note 35, at 438-40.

40. See DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 132-36, 156 (1991); NAT HENTOFF, *FREE SPEECH FOR ME BUT NOT FOR THEE* (1992) (stating that minorities are ready to complain of imagined or exaggerated slights).

41. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

42. See, e.g., Strossen, *supra* note 11, at 498 (characterizing the injury to minorities as merely suffering an unpleasant environment).

43. Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795 (1993).

44. Strossen, *supra* note 11 (observing that debate implicates our grand national commitment to free speech, academic freedom, the *true* interests of minorities, and other high-sounding values).

it would fail to "take"—would succumb to what we called earlier a kind of social gravity.⁴⁵ In this Part, we spell out in greater detail what that gravity is. We conclude by describing a "reconstructive paradox" that affects all reform movements, especially those that rely heavily on law and litigation.

A. The Forces That Swallow Social Reform Decisions Like Brown

What we have described as a kind of social gravity that affects all novel social claims, especially legal ones, has at least three components. As we previously mentioned, it includes the system of meanings and interpretations against which the new rule must operate.⁴⁶ It also includes a set of narratives, or "stock stories," with which the new ruling is required to harmonize.⁴⁷ Lastly, it includes a set of social practices with which the new command must contend.⁴⁸ Each of these components mitigates the new decision's effect. Each is an aspect of what we called the horizontal dimension⁴⁹ of a case, that which was taking place in society at the time the case was adjudicated.

1. Meanings and Social Interpretations.

Any text, including legal ones, is interpreted against a background of meanings, presumptions, and preexisting understandings.⁵⁰ If a parent tells a child, "Clean up your room," the terms "clean" and "room" have relatively well agreed-upon meanings: The child knows he or she is not expected to launder the drapes

45. See *supra* note 28 and accompanying text.

46. See *supra* notes 28-29 and accompanying text.

47. See Delgado & Stefancic, *supra* note 15; Gerald Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (discussing the role of narratives and stock stories in constructing social reality and guiding what we do and do not see).

48. See, e.g., Girardeau Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990) (discussing the role of social practices in confining the effect of legal decrees).

49. For an explanation of our use of this term, see *supra* note 8 and accompanying text.

50. These background elements often reflect the operation of social power and tradition. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980); Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992).

or vacuum the attic space above the room. If an adolescent tells the parent, "I'll be back by midnight," both understand that "midnight" means tonight, not next week, and that "back" means inside the house. The same is true of legal commands. Thus, when *Brown* ordered school districts to desegregate "with all deliberate speed,"⁵¹ southern officials interpreted the decree in terms of their common sense. In hundreds of close cases, they construed *Brown* to mean the only thing it could mean, consistent with their experience: integration that went not too far, not too fast, and that left the school system as intact as possible.⁵²

Operators of public beaches, restaurants, colleges, and other facilities interpreted *Brown* as a case affecting only schools. Some school officials even took the position that it bound only the districts before the court.⁵³ To recalcitrant officials, *Brown* looked like an exception, an improbable edict that should naturally be interpreted in that light. The only way to harmonize it with common sense was to construe it narrowly. "Of course, the Supreme Court did not mean that blacks and whites are strictly equal," they told themselves. "They surely didn't mean that we would have to do *this*" (assign black principals to white schools; provide college counseling to all; adopt due process protections in school discipline cases affecting black children facing expulsion, and so on). Because *Brown* was interpreted against the background of a myriad of such understandings, traditions, and expectations, and because, unlike a parent, the Supreme Court was not instantly available to clarify what it meant, the case had relatively little impact. It did change one thing, pupil assignment rules, but the rest of society remained essentially the same.⁵⁴ The gain in this one area was quickly swallowed up by interpretive effects emanating from all the others.⁵⁵

51. *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955) (*Brown II*).

52. See, e.g., DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 552-54, 565-607 (3d ed. 1992) (discussing the process of interpretation); Klarman, *supra* note 2, at 12, 76-85.

53. BELL, *supra* note 52, at 118-20, 565-607.

54. See *supra* notes 17-26 and accompanying text; *infra* notes 78-81, 84-92 and accompanying text.

55. BELL, *supra* note 52; see also sources cited *supra* note 3 (discussing revisionist interpretations of *Brown*).

2. *Social Practices.*

A second component of what we have called the gravitational field against which new legal rules must operate is the set of preexisting social practices, most of which the Supreme Court is powerless to change. These include friendship patterns, the way a teacher looks at or responds to a black child, and that child's own self-concept and expectations with respect to treatment from whites. These practices include the ways in which librarians, bus drivers, shop owners, and landlords deal with the young black schoolchild and his or her family. They include who is chosen for student body president, the debate team, and the cheerleading squad. If all of these practices remain the same while only school assignment rules change, a black child's life will not be greatly improved after *Brown* (and may be considerably worse).⁵⁶

Of course, a forced change in one social practice theoretically could prompt reconsideration of all the others. Because white schoolchildren now are required to attend school in a building that will house some blacks, the other social practices we have mentioned might begin to change. But everything we know about cognitive dissonance and resistance to the unfamiliar suggests the opposite.⁵⁷ New practices that are discordant with old ones are resisted and adopted, if at all, slowly and grudgingly.⁵⁸ New reasons are found to justify now disputed social practices.⁵⁹

3. *The Role of Narratives.*

A final component of the social milieu that affects the reception of a legal decision or rule is the backdrop of narratives or stories against which the new element will be forced to operate.⁶⁰ Narratives are the simple, script-like interpretive struc-

56. See MLK, *supra* note 16, at 6 (observing that the costs of racial remedies generally are exacted from blacks); Spann, *supra* note 48.

57. See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1962).

58. *Id.*

59. *Id.*

60. See, e.g., Delgado & Stefancic, *supra* note 15 (discussing the role of narratives in shaping how we see the world); Delgado, *supra* note 30.

tures—"he hit first," "I didn't know it was yours," "majority rules," or "I've been here longer"—that we use in ordering our understanding of the world.⁶¹

In the school desegregation setting, court decrees confront a whole host of narratives and social perceptions that generate resistance. Such narratives include: "Neighborhood schools are best"; "who are these outsiders trying to tell us what to do?"; "our Negroes were happy until "; "black people just want to push into where they are not wanted"; "they want things they don't deserve and haven't earned"; "integration might be okay, but the schools should remain predominantly white, and the curriculum, teachers, and so on, roughly as they are now"; etc.⁶²

As with meanings and social practices, these and other narratives could theoretically change. A person who holds a stock of hundreds of such narratives regarding minority people, neighborhood schools, and "the way things are" could radically revise his or her worldview when confronted by the image of a surprisingly nice, intelligent, reasonable black individual at a school or work place. But narratives change very slowly, in part because we interpret new experiences and new narratives in terms of the old ones—the ones we hold.⁶³ These old narratives, indeed, form the basis for understanding new experiences, including that of our first close black associate. It is far easier to pronounce the black an "exception" than to revise one's entire stock of beliefs.

Eventually, of course, social stories and practices change. But they do much more slowly than we like to think.⁶⁴ And when they do, courts and decrees play little role in bringing about the change.⁶⁵ Courts are usually distant institutions. Unlike flesh-and-blood persons, they cannot follow up an exchange by saying, for example: "No, he is not an exception; most of them are like that if you take the trouble to get to know them." Courts are not

61. See, e.g., Delgado & Stefancic, *supra* note 15.

62. See Klarman, *supra* note 2 (discussing this resistance).

63. See Delgado & Stefancic, *supra* note 15, at 1259-60 (defining "empathic fallacy" as the belief that we can change our own, and each other's, belief systems quickly and easily by presenting new arguments, stories, or accounts).

64. *Id.*

65. See ROSENBERG, *supra* note 3; DELGADO & STEFANCIC, *supra* note 6.

in a position to engage society in the kind of continuing dialogue that could in theory change meanings and practices.⁶⁶ They can only change one practice at a time. Everything else—the entire system of practices, traditions, and meanings—remains the same, exerting its gravitational tug toward the familiar. In giving obedience to the new decree—something the courts *are* in a position to enforce—hundreds of lower-level bureaucrats, state officials, and lower court judges will interpret the ringing words according to their common sense understandings about persons, about relations, and about what is just and deserved.⁶⁷

B. *The Reconstructive Paradox*

The combined effect of the forces just mentioned means that any reform measure other than the smallest and most incremental will meet predictable resistance, reinterpretation, and obstruction in ways that the legal system is ill equipped to manage and counter.⁶⁸ One perspective from which to view these horizontal forces is in terms of what we call the “reconstructive paradox.” After defining the paradox,⁶⁹ we illustrate its operation by demonstrating that the current approach to race and race remedies shows the influence of the nineteenth-century cases, especially *Plessy v. Ferguson*, more than that of their more famous twentieth-century rival, *Brown v. Board of Education*.⁷⁰

1. *Defining the Reconstructive Paradox*

Much of what we have said so far can be summarized in the following six steps, constituting what we call the reconstructive

66. Communities (large collectivities) by contrast, are essential to the process of forming and sharing meanings. See, e.g., Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); see also FISH, *supra* note 50, at 278-81 (illustrating one court's limited ability to communicate the meaning of statutory language). Federal judges are situated too distantly and remotely to effect rapid change in social meanings.

67. See *supra* notes 27-29, 50-53 and accompanying text.

68. See Delgado & Stefancic, *supra* note 15, at 1258-59 (observing that speech and dialogue can effectively correct small, clearly bounded, but not systemic, error).

69. See *infra* text accompanying notes 71-77.

70. See *infra* text accompanying notes 78-130.

paradox:

(1) The greater a social evil (for example black subordination) the more it is apt to be entrenched in our national life.⁷¹

(2) The more entrenched the evil, the more massive the social effort that will be necessary to eradicate it.⁷²

(3) The harm of an entrenched evil will be invisible to many because it is embedded and ordinary.⁷³

(4) The massive social effort will inevitably collide with other social values and things we hold dear (for example, settled expectations, religion, the family, privacy, the southern way of life, etc.). It will entail dislocations, shifts in spending priorities, new taxes, and changes in the way we speak and relate to each other.⁷⁴

(5) These efforts, by contrast, will be highly visible and will spark resistance and accusations that the backers are engaging in totalitarian tactics, siding with big government, dislodging innocent whites, operating in derogation of the merit principle, elevating group over individual relief, reviving old grudges, whipping up division where none existed before, and so on.⁷⁵

(6) Resisting these latter complaints will feel right and proper, for the other side will appear to be callously sacrificing real liberty, real security, and real resources for a nebulous goal.⁷⁶

Therefore, reconstruction will always strike many in a society as unprincipled, unwarranted, and wrong. Little surprise, then, that few take up its cause, persist for long in the face of the resistance it calls forth, or even frame their programs and objec-

71. See, e.g., Delgado, *supra* note 50; Delgado & Stefancic, *supra* note 15.

72. Racism, for example, is generally agreed to consist of a complex of attitudes and practices that permeate institutions and individuals. See, e.g., THE SOCIOLOGY OF RACE RELATIONS: REFLECTION AND REFORM (Thomas F. Pettigrew ed., 1980); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (reconsidering the doctrine of discriminatory purpose).

73. See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (suggesting that racial equality is unobtainable because of the entrenched racism of Americans).

74. *Id.*, see also BELL, *supra* note 5 (doubting that society will ever undertake such an effort).

75. Bell, *supra* note 73; Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992).

76. Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025 (1994).

tives broadly enough so that if they are adopted, they have a chance of remaining in place and achieving some real effects.

2. *Back to Plessy: Present-Day Rhetoric and Evidence of the Reconstructive Paradox Operating in Our Time*

Reform through *law alone*, as we mentioned, is apt to have little effect, because legal decrees succumb silently and painlessly to interpretation and other forms of cultural weight.⁷⁷ Even when, as happened with the civil rights revolution of the 1960s, legal reform operates in concert with broader social forces to produce undeniable and much-needed gains, resistance is apt to set in at some point. Consider how today we no longer talk in terms of separateness as an inherent injury, of black schoolchildren as victims, or of racism as a harm whose injury "is unlikely ever to be undone." Instead, we speak of the need for formal neutrality, of the dangers affirmative action poses for innocent whites, and of the need for black Americans to look to their own resources.⁷⁸ Moderates and conservatives alike have rolled back affirmative action⁷⁹ and challenged university and college theme houses, special curricula, and ethnic studies departments,⁸⁰ which they see as violations of the merit principle and fair and equal treatment policies. Courts are quick to strike down set-aside programs and affirmative action plans as "quota systems" likely to discriminate against "innocent whites."⁸¹ The narrative of *Plessy v. Ferguson*⁸² more aptly characterizes our

77. See *supra* notes 50-67 and accompanying text.

78. Delgado & Stefancic, *supra* note 76 (collecting and evaluating examples of judicial and social rhetoric regarding blacks and other minorities); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990).

79. See, e.g., *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (holding that admissions program which reserved positions in medical school class for disadvantaged minority students was unconstitutional). For a discussion of this retrenchment, see JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* (1979).

80. See, e.g., D'SOUZA, *supra* note 40 (discussing the academic and cultural revolution at American universities).

81. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down plan requiring city construction contracts to subcontract 30% of each contract to minority-owned businesses); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989).

82. 163 U.S. 537 (1896).

attitudes with respect to race than do the stirring words of *Brown*.

In *Plessy*, United States Supreme Court Justice Brown could not see anything wrong with a system that required blacks to sit in separate railroad cars, overlooking the unmistakable damage inflicted on blacks' sense of dignity by such a discriminatory system. Indeed, he wrote:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.⁸³

In a recent case, *City of Memphis v. Greene*,⁸⁴ Justice Stevens declared that a municipal decision to separate a white neighborhood from a black one by allowing the construction of a wall between them to regulate traffic flow was fair and not motivated by an intention to discriminate against blacks, but rather by an "interest in protecting the safety and tranquillity of a residential neighborhood."⁸⁵ Echoing the earlier opinion of Justice Brown in *Plessy*, Stevens wrote:

Because urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group. To regard an inevitable consequence of that kind as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom.⁸⁶

In both cases, separated by nearly a century, during which much progress in race relations was said to have been made, blacks have been presented with a rhetorical legerdemain that tests both their ability to participate in societal self-deception and their inclination to prevail in the face of it.

83. *Id.* at 551.

84. 451 U.S. 100 (1981).

85. *Id.* at 119-20.

86. *Id.* at 128.

Other modern-era cases show the same tendency to disregard blacks' long-standing predicament or whites' contribution to it. Because *Brown* only addressed the effects of segregated education on black schoolchildren, remaining silent on the issue of white responsibility, it was perhaps inevitable that the question of fault would become the next hurdle to blacks struggling to achieve social gains. *Washington v. Davis*⁸⁷ is perhaps the most well-known example, but there have been a number of others. In *Arlington Heights v. Metropolitan Housing Development Corp.*,⁸⁸ the Court held that certain zoning regulations that had the effect of excluding blacks were constitutionally valid because they were not enacted with that purpose in mind.⁸⁹ In *San Antonio Independent School District v. Rodriguez*,⁹⁰ a school finance scheme that caused a great disparity in funding tax-rich and tax-poor schools was upheld despite its serious impact on poor and minority children.⁹¹ And, as mentioned earlier, a traffic control measure that took the form of a wall between white and black neighbors in Memphis was deemed just that, a traffic control measure, despite the way in which it physically and symbolically separated the races.⁹²

Each of these cases foreshadows a retreat from the ringing words of *Brown*; each in many ways is reminiscent of the crabbed neutrality and unrealistic refusal to see discrimination that characterized *Plessy*. Not only has our time implicitly resurrected *Plessy* in its approach to racial justice, but a second notorious nineteenth century case's star is rising: the *Civil Rights Cases*.⁹³ In the *Civil Rights Cases*, the Supreme Court wrote that blacks who were demanding equal access to various types of public accommodation were seriously overstepping and in effect demanding to be afforded special treatment. The Court wrote:

87. 426 U.S. 229 (1976) (holding that a test administered to black applicants for employment as police officers was not unconstitutional because the purpose was not discriminatory even though the impact may have been).

88. 429 U.S. 252 (1977).

89. *Id.* at 268-70.

90. 411 U.S. 1 (1973).

91. *Id.* at 54-55.

92. See *supra* notes 84-86 and accompanying text (discussing *City of Memphis v. Greene*, 451 U.S. 100 (1981)).

93. 109 U.S. 3 (1883).

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.⁹⁴

Cases in our time show much the same attitude. Blacks' demands for justice are themselves unjust, because they are a form of asking for special treatment and because they encroach on white privilege and settled expectations. One example is *Regents of the University of California v. Bakke*.⁹⁵ There, the Supreme Court upheld the challenge of a white applicant to a state-sponsored medical school.⁹⁶ The plurality opinion cast him in the role of victim. The medical school's affirmative action program, which reserved a small number of slots for African Americans, unconstitutionally violated the rights of applicants such as Bakke.⁹⁷ The University's program operated unfairly against "innocent persons in respondent's position."⁹⁸ The state's interest in remedying past discrimination was not sufficiently compelling to justify the "special treatment" black candidates received. In language reminiscent of Justice Bradley's in the *Civil Rights Cases*, the plurality opinion painted the university's affirmative action program to increase the number of black doctors as coddling and favoritism.⁹⁹ Other recent affirmative action cases have taken a similar position and employed rhetoric nearly as unsympathetic as that of *Bakke*.¹⁰⁰

The most startling parallel is found in *City of Richmond v.*

94. *Id.* at 24-25.

95. 438 U.S. 265 (1978).

96. *Id.*

97. *Id.* at 320.

98. *Id.* at 298 (plurality opinion of Powell, J.).

99. *Id.* at 295, 298-99.

100. *E.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (rejecting role-model argument for affirmative action as dangerous, unproven, and potentially unbounded).

J.A. Croson Co.,¹⁰¹ where the Court struck down a minority set-aside program in the construction industry that had been adopted by the Richmond city council.¹⁰² The majority opinion found the council's action a potential case of "simple racial politics."¹⁰³ A concurring opinion went even further, warning that society should be watchful against those who might attempt to "even the score" at the expense of whites.¹⁰⁴

Societal rhetoric follows suit. A host of commentators today rail against multicultural programs on university campuses,¹⁰⁵ minority-only scholarships are under fire;¹⁰⁶ welfare programs are under sustained attack as disguised give-aways to undeserving, unambitious, and oversexed blacks; and the use of code-words, like "political correctness" indicates that many in our society believe that blacks have gone too far.¹⁰⁷ They are now receiving special, not just equal treatment. It is time to put a stop to it, just as it is time to begin closing our borders to immigration from Mexico, Haiti, Cuba, and other societies of color.¹⁰⁸

We believe, then, that dispassionate examination of today's dominant narratives shows that the themes of *Plessy* and the *Civil Rights Cases* are in ascension. We put forward an even more somber prediction: Unless there is concerted action or a sharp change in national circumstances, one final step will be taken. Just as the clock of time seems to be rolling backward, a final narrative may soon regain prominence: that of *Dred Scott v. Sandford*.¹⁰⁹

101. 488 U.S. 469 (1989).

102. *Id.*

103. *Id.* at 493.

104. *Id.* at 527-28 (Scalia J., concurring).

105. *E.g.*, D'SOUZA, *supra* note 40.

106. *See supra* note 23 and accompanying text.

107. For examples of various social texts, ranging from editorials to conservative treatises, see Delgado & Stefancic, *supra* note 76.

108. *Id.* at 1032 (discussing immigration issues); Gerald L. Neuman, *Back to Dred Scott*, 24 SAN DIEGO L. REV. 485 (1987) (reviewing PETER SHUCK & ROGER SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985)).

109. 60 U.S. 393 (1856). For other discussions of the rhetorical parallels between *Dred Scott*, other nineteenth century cases, and today's cases, see Ross, *supra* note 78; Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990).

In *Dred Scott*, the Supreme Court, in a case concerning a runaway slave, held that African Americans have "no rights which the white person is bound to respect."¹¹⁰ The claim of an African American to citizenship was absurd, both historically and legally. Blacks simply were not citizens because they never were such and the framers of the Constitution, "great men," never regarded them that way.¹¹¹ *Dred Scott* constitutes, certainly, the nadir of American law's treatment of African Americans, a blot on the record of the American legal conscience. Yet, its narrative retains vitality today. We see growing evidence of it in Supreme Court opinions and in popular culture.¹¹²

Justice Taney's opinion depicted blacks as subhumans.¹¹³ Is this shocking portrayal of other beings so far from today's range of possibilities? Is the story of the primitive bestial black or Mexican completely missing in today's narratives, both in popular culture and in judicial opinions? Unfortunately, we believe not. Indeed, we believe this account of groups of color is undergoing a resurgence.

Consider, for example, the revival of race-IQ theories, some seconded by well-regarded scientists and writers such as Charles Murray, Richard Herrnstein,¹¹⁴ Arthur Jensen¹¹⁵ and William Shockley.¹¹⁶ Consider the number of books, such as Ben Wattenberg's *The Birth Dearth*,¹¹⁷ and reports that have urged renewed attention to the question of selective breeding: Our "best" citizens have too few children; minorities and the poor, too many, so that the gene pool in the United States is declining. Consider the resurgence of nativism and movements to close the

110. *Id.* at 404-07.

111. *Id.* at 410.

112. See *infra* notes 122-128 and accompanying text.

113. *Dred Scott*, 60 U.S. at 405-10 (depicting history of blacks as chattels).

114. RICHARD J. HERRNSTEIN, *IQ IN THE MERITOCRACY* (1973); RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* (1994).

115. Arthur Jensen, *How Much Can We Boost IQ and Scholastic Achievement?* 39 HARV. EDUC. REV. 1 (1969).

116. For a discussion of the Nobel prize-winning scientist's controversial views on race and IQ, see Richard Delgado et al., *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 UCLA L. REV. 128 (1983).

117. BEN J. WATTENBERG, *THE BIRTH DEARTH* (1987).

nation's borders particularly to brown-skinned immigrants.¹¹⁸ Consider also the English-Only movement.¹¹⁹ Much of this attitude is fueled by the conviction that "those people" are not fit to reside here, that their language, customs, and morals are inferior, and that they are and always will be second-class citizens. All of these cultural strands converge around the idea that this is a white country and that nonwhite persons, genes, ideas, languages, and culture are inferior to European ones, a principal theme in *Dred Scott*.

Nor has the legal system been totally divorced from the return of the *Dred Scott* mentality. In the Rodney King case, a Los Angeles-area jury acquitted police officers who were videotaped beating a black motorist while he lay unresisting on the ground.¹²⁰ Testimony by the police and later interviews with the jurors showed that the motorist, King, was *seen* as the kind of being who might resist, who might at any moment strike out with tremendous force, and who, because he was caught speeding, deserved whatever penalty the police chose to inflict.¹²¹

Supreme Court decisions also contain hints of *Dred Scott* and its brusque dismissal of African American humanity. In *McCleskey v. Kemp*,¹²² the Supreme Court considered a challenge to Georgia's infliction of the death penalty, which fell disproportionately heavily on blacks, particularly ones whose victims were white.¹²³ The Court rejected McCleskey's claim, at the same time reprimanding him and his lawyers for even having brought it.¹²⁴ Such claims, based on statistical disparities,

118. *E.g.*, Neuman, *supra* note 108. On the history of U.S. nativism, see NATIVISM, DISCRIMINATION, AND IMAGES OF IMMIGRANTS (George Pozzetta ed., 1991).

119. For a discussion of this and similar language-purification efforts, see Delgado & Stefancic, *supra* note 76, at 1035; Juan Perea, *Demography and Distrust: An Essay on American Language, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992).

120. For a collection of essays on the Rodney King case and the L.A. disturbances that followed, see Symposium, *Los Angeles, April 29, 1992 and Beyond: the Law, Issues and Perspectives*, 66 S. CAL. L. REV. 1313 (1993).

121. *Id.*, see Jerome M. Culp, Jr., *Notes From California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199 (1993).

122. 481 U.S. 279 (1987).

123. *Id.*

124. *Id.* at 319 ("McCleskey's arguments are best presented to the legislative bodies.").

might be raised in virtually any setting, the Court reasoned, resulting in repetitive demands "based upon any arbitrary variable."¹²⁵ Cases brought by poor women—*Wyman v. James*¹²⁶ (the welfare-search case), *Maher v. Roe*,¹²⁷ and other abortion-funding cases—show the same thinly veiled exasperation on the part of the Court. These decisions stop barely short of telling poor women that they do not know their places and what is expected of them—to be as quiet, prudent, nondemanding, and nonsexual as possible. The demand for privacy in the face of a welfare inspection, or for an abortion from a state-funded clinic, appears outrageous. The women are chastised for the effrontery of wanting to live life on their own terms.¹²⁸

Many earlier eras, of course, witnessed similar patterns of advance followed by retrenchment. During Reconstruction, African Americans made great gains, but these were followed by an era of lynching and Jim Crow laws.¹²⁹ *Brown v. Board of Education* was followed by new resistance in the South.¹³⁰ In Europe, the broadened vistas and relaxed worker-migration policies of the early European Community years soon were followed by xenophobia, a resurgence of Nazism, and tightened controls on immigration.¹³¹ We believe the United States is in the middle of such a retrenchment today. Indeed, it is as though the arrow of time has reversed. We see the nineteenth-century cases appearing in modern guise before our eyes—first the *Plessy* line of cases, then the notorious *Civil Rights Cases*, and finally, in the wings, *Dred Scott v. Sandford*.

125. *Id.* at 317.

126. 400 U.S. 309 (1971).

127. 432 U.S. 464 (1977).

128. Delgado & Stefancic, *supra* note 77, at 1033.

129. BELL, *supra* note 52, at 39-46; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION (1988).

130. *E.g.*, Klarman, *supra* note 2, at 12-13, 76.

131. *E.g.*, European Parliament Committee of Inquiry on Racism and Xenophobia, Report on the Findings of the Inquiry (1991); Commission of the European Communities, Legal Instruments to Combat Racism and Xenophobia (1992); *Italians Examine Fascist History*, DEN. POST, Apr. 9, 1994, at 21A.

III. WHAT *BROWN* AND THE RECONSTRUCTIVE PARADOX MEAN FOR ACTIVISTS AND REFORMERS: SUMMARY AND SUGGESTIONS

Brown, like all law reform cases, confronted built-in resistances that deprived it of the efficacy its supporters hoped for it. Social reform proceeds, if at all, in small increments; the pendulum swing is as apt to be backward at any given time as forward. *Brown's* relatively slight effect is part of a broader form of social response—the reconstructive paradox—which holds that the greater the evil, the greater the need for reform; the greater the reform effort, the more unprincipled and unjust the effort will seem, and the greater the resistance it will call up. Even more than other avenues for reform, law is handicapped by its inability to engage in dialogue with the group whose values and practices need changing. Except in criminal law, where it can put violators in jail, law has little ability to provide the constant reinforcement necessary to change attitudes or behavior. Indeed, law is always outnumbered; doctrines such as standing ensure that any wide-ranging legal edict appears incomprehensible and wrong, evoking the reaction: Surely the court didn't mean *that*.

If we are right, reformers should hesitate to place much faith in the legal system as the primary instrument for their agendas.¹³² Law is relatively powerless to effect social revolutions as both theory and history, including the case of *Brown*, demonstrate. Everything must change at once, so that a far greater focus than the merely legal is necessary before reform begins to be possible. Because the reconstructive paradox has greatest force with respect to courts, reformers ought to reserve judicial activism for the later stages of a revolution, using courts for the final mopping up steps to secure a social advance that society has already begun to accept.

Litigation is expensive and frustrating if resorted to at the wrong time. We urge that reformers reconsider the appropriate time to use it. If employed too early, as it arguably may have

132. Compare our conclusion with similar ones drawn by GIRARDEAU A. SPANN, *RACE AGAINST THE COURT* (1993) (observing that Supreme Court litigation is of limited use as an instrument of racial reform) and BELL, *supra* note 5, at 26-50; see also MLK, *supra* note 16, at 5 (similar observation about romantic view of law and law's efficacy).

been with *Brown*, it leads to false celebration, then disillusionment by persons who, like African Americans, have waited too long to see their just demands met—then betrayed.

CONCLUSION

Society has constructed *Brown v. Board of Education* as a great case. Yet, as we have seen, the opinion failed to generalize and accordingly exercised little influence outside the area of school desegregation. Even within that arena, it brought about relatively few improvements in the lives of black schoolchildren, most of whom today attend schools that are just as segregated and in even greater disarray than the ones they attended in *Brown's* time.

We believe the two observations are related, indeed dependent on one another. We saw *Brown* as a startling, extraordinary decision—which it was—for the very reasons that brought about its demise—namely, the way in which it challenged and departed from current culture and orthodoxy. Every law-reform decision, we pointed out, takes place against a background of beliefs, narratives, meanings, and social practices that constitute a kind of social gravitational field. This field causes the exceptional case to erode quickly, to be resisted, interpreted away, and increasingly ignored. This dissipation has visited *Brown v. Board of Education*. Although we afford it lip service and pay attention to its ringing, aspirational message on celebratory occasions, other narratives have turned out to have greater vitality. These more lasting narratives are those of the nineteenth century cases, ones that celebrate white superiority, that depict blacks as inferior, subhuman, demanding, and unjustified. As a culture, and as a legal profession, we are rapidly returning to the regime of *Plessy v. Ferguson's* separate but equal doctrine and the *Civil Rights Cases* view of blacks as imposers and whiners because they desire to live in American society on the same terms as whites. Moreover, we find some frightening straws in the wind—indications that ought to give pause to any defender of freedom and minority rights. We have reviewed evidence that society generally, and the legal system in particular, are beginning to regress in one final, decisive quantum jump. American society, without the spur of Cold War competition or the need for

minority labor or soldiers, is in serious danger of quietly, implicitly readopting a familiar standard from another era: *Dred Scott v. Sandford*, in which blacks and other minorities of color have no rights that white Americans are bound to respect.