Race Relations and Supreme Court Decisionmaking: Jurisprudential Reflections

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NOTES

RACE RELATIONS AND SUPREME COURT DECISION-MAKING: JURISPRUDENTIAL REFLECTIONS

I. Introduction

On July 25, 1974, the Supreme Court decided *Milliken v. Bradley*. The district court had previously held that the Detroit public school system was racially segregated because of various practices and policies pursued by the Detroit Board of Education and the State of Michigan. The court ordered the Detroit Board of Education to submit several desegregation plans for the tricounty metropolitan Detroit area. After considering the submitted desegregation plans, the district court rejected the Detroit-only plan as ineffectual. Effective desegregation of the school system required suburban school districts in the metropolitan area to be included in the proposed desegregation plan. The decision of the district court was affirmed by the court of appeals. But in a 5-4 decision, the Supreme Court concluded that the relief deemed appropriate by these two courts was based on an erroneous standard and not supported by evidence of any discriminatory acts by the included suburban school districts.

This momentous decision was purportedly decided on the neutral principle of law that lower federal courts have only limited equitable powers to impose a multidistrict metropolitan remedy where there is no showing of de jure segregation by the surrounding suburban school districts. According to the Supreme Court, the formula to be followed is a simple one: Since the Detroit Board of Education committed acts of de jure segregation, the city's public school system must be desegregated. Conversely, the lack of evidence showing the suburban school districts included in the metropolitan school desegregation plan to have committed acts of de jure segregation removes the districts from inclusion in any desegregation plan ordered by the federal courts. Thus, this supposedly neutral principle of law precludes the use of metropolitan desegregation plans, one of the few effective remedies available to eliminate school segregation in Northern cities.

The majority of the Court ignored the fact that segregation in Northern cities and schools is not accidental. Many Northern states once mandated segregation in public schools by law. Moreover, Northern states were directly implicated in policies establishing segregated housing patterns. Segregation has been perpetuated by racially restrictive ordinances and covenants, by the planning decisions of state and local governments, and by the policies and practices of state and city school boards. Accordingly, government at every level has contributed to this pattern of segregation. Not surprisingly, then, governmental involvement is also present in the *Milliken* case. The record of the case clearly

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3 484 F.2d 215 (6th Cir. 1973).
4 1 U.S. COMM’N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 21-22 (1967).
5 Id. at 25.
demonstrates that the State of Michigan, through its officers and agencies, engaged in calculated and purposeful acts which directly contributed to the segregation of the Detroit public school system. It was the State of Michigan, not the Detroit Board of Education, that bore the responsibility for remedying the segregation found in the Detroit public schools. That the Court did not take a more comprehensive and realistic view is surely a tragedy.

The Milliken decision is not only a disappointing step backward in the struggle to achieve school desegregation, but, in a broader sense, it is also a disillusioning decision for those who believe that human dignity inheres in all men. Human dignity is not served by inadequate city schools preparing black students for their “inferior” status in society. While the Court in Milliken purports to apply a morally neutral formula, its decision is not neutral for either blacks or whites. The failure of the Milliken decision is not that the majority took a value position, but that the value position taken is indefensible. Bradley v. Milliken exemplifies the inescapable nonneutrality of Supreme Court decision-making. Although cast in the mold of impartial and disinterested legal discourse, it has, in the area of race relations, significant political and moral underpinnings.

The concept of neutral principles is vulnerable and objectionable on three grounds. First, neutral principles as a tool of objective analysis is suspect when viewed in light of the physical and social sciences’ experience with objectivity. The problem of objectivity in the physical and social sciences is more complex than was initially anticipated. Second, political science and American constitutional history cast additional suspicion on the concept of neutral principles. These disciplines suggest that the quest for neutral principles of constitutional adjudication, especially in the area of race relations, is misleading and futile. Third, the concept of neutral principles is vulnerable and objectionable on moral grounds because it does not consider the range of human rights that the law should guarantee to all persons. The concept is not a useful tool with which to secure political, economic, and social rights—rights which must be secured if human dignity is ever to be more than an ideal. We need a teleological jurisprudence, a jurisprudence that has as its central value an active and vigorous concern with human dignity. The implementation of such a jurisprudence should be a major function of the Supreme Court. The Court, in a variety of

7 “The Court today takes a giant step backwards. Notwithstanding a record showing widespread and pervasive racial segregation in the educational system provided by the State of Michigan for children in Detroit, this Court holds that the District Court was powerless to require the State to remedy its constitutional violation in any meaningful fashion. Ironically purporting to base its result on the principle that the scope of the remedy in a desegregation case should be determined by the nature and the extent of the constitutional violation, the Court’s answer is to provide no remedy at all for the violation proved in this case, thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past.” Id. at 782.
8 See, e.g., M. Shapiro, Law and Politics in the Supreme Court (1964).
9 See, e.g., C. Swisher, American Constitutional Development (1943).
contexts, has relied on the concept of human dignity in making decisions. There is, therefore, some precedent for a jurisprudence of human dignity, a jurisprudence that defies neutrality in an effort to approximate the best interests of justice.

II. Neutral Principles, Political Jurisprudence, and Constitutional History

A. Neutral Principles

One of the consistent themes in modern physical and social science is that man's value preferences invariably guide his choice. The critical treatment of objectivity found in the literature of modern physical and social science suggests that the concept of neutral principles be treated with grave suspicion and intense concern. If objectivity is elusive in the physical and social sciences, the inference is that it is the same in constitutional law. An examination of the concept of neutral principles in the context of political jurisprudence and constitutional history provides a test of this inference.

Professor Herbert Wechsler has viewed the ad hoc evaluation of Supreme Court cases as "the deepest problem of our constitutionalism." Wechsler contends that the Court has a duty to reach its decision according to standards that transcend the case at hand. He finds this duty both in the language of the Constitution and in history. The Court functions effectively, he argues, by reaching principled decisions.

A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of Government or of a state, those choices must, of course, survive. Advocacy of neutral principles is essentially an attack on result-oriented jurisprudence. It is an attack on those who judge Supreme Court decisions in terms of social and economic results, contending that the Court should not be swayed by possible consequences of its decisions since reason and consistency are more important than results. It would have the Justices approach their task of adjudication with a predilection for reason and consistency, ignoring social and political ramifications. Conflicting social interests must be dealt with in a neutral, impartial manner.

14 Id. at 17.
15 Id. at 19.
This analysis ignores the fact that choices between competing interests are impossible without employing value preferences. Difficult social and legal problems simply do not lend themselves to any one accepted standard or measure. The Justices are guided by their values and preferences as they choose between the competing values represented by litigants. The Court’s use of these values as a touchstone in its political and governmental function is the basis of political jurisprudence.

B. Political Jurisprudence

Political jurisprudence vigorously denies the existence of judicial neutrality when the Supreme Court decides a momentous social issue. The central tenet of political jurisprudence is that the Supreme Court is one of the many integrated agencies of American Government. The tendency to view the Court in isolation stems from the Court’s power of judicial review. Political jurisprudence is an attempt to move away from this narrow and restrictive view. It is an amalgam of sociological jurisprudence and legal realism combined with the substantive knowledge and methodology of political science.

Sociological jurisprudence views law as a social instrument and the legal process as a balancing mechanism capable of reconciling potentially conflicting interests. It marks a departure from the orthodox theory of the judicial function because it views the judge as a social engineer, balancing competing social interests. Legal realism views judges and courts with considerable skepticism. The legal realists criticized declaratory theories of law which asserted that judges “had no choice but to reach one decision, or that they were coerced by rules which they were powerless to modify.” In attacking the judicial myth of objective, neutral decision-making by logical deductions from established principles, the realists focused on what the Court did rather than on what it said.

Political jurisprudence views the Court as a political institution and the Justices as political actors. The Court becomes an integral part of the structure of American government, similar to other political institutions. The Justices

17 The plea for neutral principles is more than faintly reminiscent of the hoary theory that judges find law rather than make it. See, e.g., D. Boorstin, The Mysterious Science of the Law (1941).
18 Shapiro, supra note 28, at 596.
20 “[O]ur fascination with the Supreme Court as a unique phenomenon of American history, and with the constitutional format that establishes it as one of the three separate and coequal branches of national government, tends to thrust the Court out of the context of interrelated committees and commissions, services and bureaus in which we examine most problems of American government.” M. Shapiro, Law and Politics in the Supreme Court 2 (1964) [hereinafter cited as Law and Politics].
21 M. Cappelletti, Judicial Review in the Contemporary World 25 (1971).
22 Law and Politics, supra note 20, at 15.
24 F. Cahill, Judicial Legislation 94 (1952).
25 See, e.g., J. Frank, Courts on Trial (1949); K. Llewellyn, Bramble Bush (1960); F. Rodell, Woe Unto You Lawyers (1939).
26 W. Rumble, American Legal Realism 105 (1968).
27 Law and Politics, supra note 20, at 15.
take their places with the Congressmen, bureaucrats, and technicians who make the political decisions of government.\footnote{28}

Obviously, political jurisprudence and neutral principles are in direct conflict. The quest for neutral principles of constitutional law, advocated by Professor Wechsler and his followers, is an attempt to take the Court out of the "shabby" business of politics. The concept of neutral principles appeals to those individuals who believe in the ancient notion of a "government of laws and not of men," and who tenaciously maintain that law can rule without the intervention of the human element.\footnote{29} A discussion of American constitutional history, however, dispels this fallacious contention, for much of American constitutional history illustrates the political nature of Supreme Court decision-making.

C. Constitutional History

1. Marbury, Fletcher, and the Marshall Court: Early Political Decisions of the Supreme Court

In 1801, with the first change of administration under the new Constitution, there was a bitter struggle for control of the federal courts. Historians have viewed this struggle as essentially political.\footnote{30} Early in 1801 the Federalists passed a bill authorizing President Adams to create a number of judicial positions for the District of Columbia. During the last days of his administration, Adams filled these posts with Federalist Party faithfuls. When the new Democratic-Republican administration came into power, however, it discovered that a number of the commissions were undelivered. When administration officials refused to deliver William Marbury's commission, he sought judicial relief, requesting that the Supreme Court issue a writ of mandamus ordering the Secretary of State to deliver his commission. In \textit{Marbury v. Madison},\footnote{31} the Supreme Court held that the plaintiff had a right to his commission and that the law afforded him a remedy, but the proper remedy was not mandamus.

In the course of this deceptively simple opinion, Chief Justice Marshall chastised his bitter enemy, Jefferson, while establishing the principle of judicial supremacy. The genius of the decision lies in its political nature, for the reasoning of the decision has been thoroughly repudiated.\footnote{32} By emphasizing an insignificant point of legal procedure, Marshall outmaneuvered his political opponents. Surely there was a significant political relationship between Marshall's enunciation of the doctrine of judicial supremacy and his Federalist political philosophy. There are, therefore, no neutral principles of constitutional law in \textit{Marbury}.

\textit{Fletcher v. Peck}\footnote{33} is another example of the political nature of Supreme Court decision-making. It is "vintage Marshall" on the subject of property

\begin{thebibliography}{9}
\footnoteline{29} Miller, \textit{Some Pervasive Myths About the United States Supreme Court}, 10 St. Louis U. L.J. 153, 171 (1965).
\footnoteline{30} See, e.g., R. Ellis, \textit{The Jeffersonian Crisis: Courts and Politics in the Young Republic} (1971).
\footnoteline{31} 5 U.S. (1 Cranch) 137 (1803).
\footnoteline{33} 10 U.S. (6 Cranch) 87 (1810).
\end{thebibliography}
Indeed, it stands as a lasting example of Marshall’s intense devotion to vested property rights. In 1795, the Georgia legislature granted 35 million acres to several private land companies for less than two cents an acre. All but one of the Georgia state legislators who voted for the bill had been bribed. In 1796, a new state legislature repealed the earlier grant to the land companies, voiding all property rights attached to it. In the interim the land companies had been selling tracts of land to third parties. After a sham sale of land by one of the land companies, and a sham lawsuit over the title, the constitutionality of the Georgia Legislature’s repeal act came before the Supreme Court.

In *Fletcher*, Marshall voided the Georgia repeal act, despite the blatant corruption of the previous legislature and the obviously contrived nature of the suit, because it conflicted with the Constitution’s contract clause forbidding state impairment of contract obligations. Marshall’s opinion in *Fletcher v. Peck* made the contract clause a leading bulwark for private property interests for over half a century. His decision elevated vested property rights to a position of primacy in the hierarchy of constitutional values. This was clearly consistent with Marshall’s Federalist political philosophy. The decision reflected not only his personal beliefs, but those of his party. Federalist political philosophy emphasized property rights, and with this decision property rights were read into the contract clause. Clearly the decision did not result from the use of neutral principles of constitutional law, for there was nothing neutral about Marshall’s strong concern for property rights. This zealous regard for property rights also can be seen in many of Marshall’s proslavery decisions.

Under Marshall’s leadership the Court began its long and pathetic history of condoning the inhuman treatment of blacks in the South. Marshall’s tolerance of slavery flowed from his belief that the property rights of slaveholders were preeminent. One searches in vain for some neutral principle of constitutional law to explain Marshall’s proslavery decisions. The belief in the primacy of property rights over human rights may be a principle, but surely it is not a neutral principle. When property rights are unduly emphasized, as they have been throughout much of American history, human rights are often relegated to a lower level in the hierarchy of constitutional values. Unfortunately, the Court’s sensitivity toward property rights and insensitivity toward human rights were continued by the Taney Court.

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35 Id. at 7.
36 Id. at 13.
37 Id. at 54.
38 “The post-Civil War period saw the high point of Contract Clause jurisprudence. The principles developed under Marshall were applied to the new factual situations presented by the accelerated industrial expansion that characterized the latter part of the century . . . . In Marshall’s hands . . . the Contract Clause was to become a protection for property rights comparable to that furnished by the Due-Process Clause itself in the post-1890 period.” B. SCHWARTZ, THE RIGHTS OF PROPERTY 268-69 (1965).
40 Id.
41 See, e.g., R. TWISS, LAWYERS AND THE CONSTITUTION (1942).
2. Political Decisions of the Supreme Court in Race Relation Cases

Just as the decisions in the Marbury and Fletcher cases were political decisions, so also was the decision in Dred Scott v. Sandford. In his majority opinion, Chief Justice Taney concluded that the writers of the Declaration of Independence and the framers of the Constitution never intended blacks to be citizens. Taney sought to justify his decision by drawing a distinction between national and state citizenship, which was of no consequence for whites but had grave implications for blacks. His doctrine of dual citizenship was a clever conceptual scheme designed to give the states complete control over blacks. Under the doctrine of dual citizenship, blacks could have no political or civil rights unless they were granted by a state government, and these rights would be operative only within that state's borders. It was impossible under Taney's doctrine for a black to obtain national citizenship. In effect, Taney was stripping Congress of all power to control the growth of slavery in the territories. Surely there was nothing neutral about this purely political decision. There were no neutral principles of constitutional law at work here. "Politics flooded into the case from every direction, just as politics has always flooded, seeped, or trickled into every important Supreme Court case."

After the Civil War new guarantees were written into the Constitution. The Civil War amendments made blacks citizens of the United States and of the states in which they resided. The framers of these amendments intended that blacks be part of the body politic enjoying equally with whites the privileges and immunities conferred by the Constitution. This dream of an egalitarian society was soon shattered by the Supreme Court. The Court began emasculating the Civil War amendments in the Slaughter House Cases. The issue there was whether a property right—the right to make a living—was one of the privileges and immunities guaranteed to citizens of the United States by the fourteenth amendment. The Court, drawing upon Taney's discredited doctrine of dual citizenship, held that there were still two categories of citizenship. The privileges and immunities clause of the fourteenth amendment protected those rights which flowed from national citizenship. The rights which were derived from national citizenship were narrowly defined; state citizenship, however, included all civil rights. The Court was aware that the states would not protect the civil rights of blacks, yet the Court effectively precluded Congress from doing so. The Court's

held that a black could be taken by a bounty hunter from a nonslave state to a slave state with the nonslave state having no power to require a judicial hearing to determine whether or not the black was a slave.

43 60 U.S. (19 How.) 393 (1857).
44 Blacks were "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." 60 U.S. (19 How.) 393, 404-405 (1857).
46 Id. at 79.
48 Miller, supra note 45, at 101.
49 83 U.S. (16 Wall.) 36 (1873).
50 For an example of how the revived dual citizenship concept was used to render nugatory the rights granted to blacks by the Civil War amendments, see United States v. Cruikshank, 92 U.S. 542 (1875).
deliberate weakening of the Civil War amendments was not based on any neutral principle of constitutional law. The purpose of the decision was to nullify the intention of the radical Republicans to protect blacks from discriminatory state laws.

The Court completed its deliberate destruction of the egalitarian Reconstruction amendments in the Civil Rights Cases. The Civil Rights Act of 1875 prohibited discrimination against blacks in places of public accommodations. The Court held that Congress had no authority to pass this legislation because the fourteenth amendment prohibited discrimination only by the states, not by private persons. This decision permitted individuals and corporations to discriminate against blacks; it intentionally sanctioned caste lines. The Civil Rights Cases virtually assured the subsequent development of Jim Crow laws. In 1877, federal troops were withdrawn from the South as part of a political compromise. The decision in the Civil Rights Cases seemed a validation of that compromise.

In Plessy v. Ferguson, the Court again exhibited its political nature. The Court held that state-sanctioned racial separation of passengers on a railroad car was not repugnant to the equal protection clause of the fourteenth amendment, which merely required that equal facilities be provided for both whites and blacks. By approving Jim Crow laws, the Court encouraged the further growth of segregation. Again one searches in vain for a neutral principle of constitutional law in Plessy, or for objective standards that transcend the issue decided.

Plessy and the other previously examined cases clearly depict the Court in its typical value-laden, political role. They clearly refute the concept of neutral principles in Supreme Court decision-making. All major constitutional decisions, whether they be moral, immoral, or amoral, are value-oriented political decisions. To criticize the Court because it has abandoned its "proper" role as an apolitical institution, or because it does not articulate neutral principles as the basis for its decisions, is meaningless. Even a cursory reading of the cases previously examined demonstrates that the Court espouses certain values. The task of constitutional scholarship, then, is one of attempting to determine those values which the Court should openly espouse.

51 109 U.S. 3 (1883).
52 The immediate consequence of this decision "was that racial discrimination increased by leaps and bounds. Americans tend to regard as moral and permissible that which is said to be constitutional. Private persons and corporations . . . drew increasingly rigid color lines in the exercise of what they came to regard as their constitutionally protected right to discriminate at will." Miller, supra note 45, at 147.
54 G. Vann Woodward, Reunion and Reaction 245 (1951).
55 163 U.S. 537 (1896).
56 Jim Crow laws "put the authority of the state or city in the voice of the streetcar conductor, the railway brakeman, the bus driver, the theater usher, and also in the voice of the hoodlum of the public parks and playgrounds. They gave free rein and the majesty of the law to mass aggressions that might otherwise have been curbed, blunted or deflected." G. Vann Woodward, The Strange Career of Jim Crow 107 (3d ed. 1974).
57 "At no time in American constitutional history can it be said that the demand for 'principled decision-making' has been fulfilled. This should not be taken to mean that such an ideal should not be striven for, but simply that here, as otherwise, a man's reach inevitably exceeds his grasp." Miller & Scheflin, The Power of the Supreme Court in the Age of the Positive State, 1967 Duke L.J. 273, 282.
III. The Supreme Court and Human Dignity

A. The Idea of Human Dignity

One of the values which the Supreme Court should openly espouse is that of human dignity. In a variety of constitutional contexts, the Court has come close to justifying its decisions on the basis of human dignity. One of the reasons for the Court's hesitancy is the considerable difficulty involved in translating human dignity into a legal concept. Arguably, however, the Court has judicially sanctioned a concern for the value and quality of human life. There are several contexts in which the Court has breathed the concept of human dignity into various provisions of the Constitution and thereby given life to otherwise abstract legal principles.58

B. The Supreme Court's Implementation of a Human Dignity Standard

1. Cruel and Unusual Punishment

In Weems v. United States,59 the defendant was convicted by a Philippine court of falsifying an official public document. He was sentenced, under the Spanish Penal Code, to 15 years of cadena. Those sentenced to cadena labored for the benefit of the state a minimum of 12 years and a day. Chains were attached to the ankles and wrists of the individual and he was to work at "hard and painful labor."60 Additional penalties also were imposed: civil interdiction and subjection to surveillance for life.61 The Supreme Court reversed the conviction and declared the statute unconstitutional. The legal basis for the Court's decision was the eighth amendment prohibition against cruel and unusual punishment.

Notwithstanding the technical legal basis underlying the Weems decision, it is explainable in terms of human dignity. The Court was troubled by the extremely harsh nature of cadena. The Court viewed cadena as cruel and unusual punishment not only because of the physical cruelty of chains and deliberately inflicted pain, but also because of the political and civil disabilities that followed.62 After serving his sentence, the individual confronted crippling civil incapacities that relegated him to an inferior social status.63 It is not surprising, then, that the Court found the penalty of cadena "repugnant to the bill of rights."64 The eighth amendment prohibition against cruel and unusual punishment did not necessarily compel the Court's decision. It was the Court's concern for human dignity that led it to read this value into the otherwise meaningless phrase "cruel and unusual punishment."

58 Schwartz, supra note 38, at 710-884.
59 217 U.S. 349 (1910).
60 Id. at 364.
61 Id.
62 Id. at 366.
63 Id.
64 Id. at 382.
2. Involuntary Servitude

In *United States v. Reynolds*, the Supreme Court declared an Alabama convict-labor statute unconstitutional under the thirteenth amendment. Reynolds, an employer, paid the fine and court costs of an individual convicted of larceny, whereupon the convicted prisoner signed a labor contract with Reynolds. The Alabama statute in question made it a crime for a convict working under such an arrangement to refuse to work for the employer during the term of the labor contract. When the laborer refused to continue working for him, Reynolds procured his arrest for violating the labor contract. Under the Alabama statute, then, the employer could cause the arrest of the laborer for violation of the labor contract. The laborer would then be sentenced and punished for this new offense and would undertake to liquidate his penalty by signing a new contract of a similar nature. Consequently, the laborer was "kept chained to an ever-turning wheel of servitude to discharge the obligation which he has incurred to his surety, who has entered into an undertaking with the State . . . ."

*Reynolds* also may be explained in terms of human dignity. Under the scheme in *Reynolds*, the laborer was kept in a condition of peonage, for he was coerced into compulsory service for the discharge of a debt. There was no voluntary performance of labor here, for if the laborer broke the labor contract he was subject to imprisonment, not to an action for damages for breach of contract. The Court read into the thirteenth amendment the consideration of human dignity, and struck down the unconscionable arrangement employers enjoyed with the State of Alabama for cheap convict labor.

3. Due Process

In *Rochin v. California*, three deputy sheriffs forcibly entered Rochin's home. Inside his bedroom, one of the deputies saw two capsules on a nightstand. When asked about the capsules, Rochin quickly swallowed them. The three officers unsuccessfully attempted to extract the capsules. Rochin was then taken to a hospital where his stomach was pumped, against his will. Two morphine capsules were discovered, and Rochin was convicted under California's Health and Safety Code.

The Supreme Court reversed the conviction because it violated the due process clause of the fourteenth amendment. The due process clause, however, like many other constitutional provisions, is an abstraction capable of many interpretations. *Rochin* is more than a due process case; the due process clause was simply the vehicle used by the Court to implement the principle of human dignity. Such action by police officials was not compatible with human dignity. "[T]he proceedings by which the conviction was obtained do more than offend

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65 235 U.S. 133 (1914).
66 Id. at 140.
67 Id. at 146-47.
69 Id. at 166.
some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Such brutality would "discredit law and thereby . . . brutalize the temper of society." As in Weems and Reynolds, it was the Court's concern with human dignity that dictated its use of the due process clause to vindicate this value.

4. The Right to Travel

In Edwards v. California, the defendant, a United States citizen and California resident, persuaded his brother-in-law to come to California. Edwards knew that his brother-in-law was on relief in Texas, and he was consequently convicted of violating a California statute which prohibited knowingly bringing a nonresident indigent into the state.

A majority of the Court found the California statute unconstitutional under the commerce clause. Justice Douglas, on the other hand, in a concurring opinion, emphasized that such a statute would introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a state as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship.

Justice Jackson was likewise unpersuaded by the majority's position. To hold that the measure of an individual's rights is the commerce clause "is likely to result eventually either in distorting the commercial law or in denaturing human rights."

Human dignity actually lies at the heart of the Edwards decision. The majority in Edwards used the commerce clause as the instrument by which it read human dignity into the law. The remainder of the Court more candidly relied on the right of national citizenship to protect the dignity of the individual and his right to travel. Restrictions on the free movement of individuals, in such circumstances, would limit the opportunity of the individual and separate people on the basis of class. Both the majority and concurring opinions determined that such a result would be at loggerheads with the basic value of human dignity.

Clearly, then, the Supreme Court's concern with the value of human dignity is reflected through the use of a variety of constitutional provisions. Constitutional principles of "cruel and unusual punishment," "involuntary servitude," "due process," and "interstate commerce" have and should continue to be avenues for implementing a jurisprudence of human dignity. There is precedent in Supreme Court decision-making which legally sanctions such a jurisprudence.

70 Id. at 172.
71 Id. at 174.
73 314 U.S. 160 (1941).
74 Id. at 171.
75 Id. at 173.
76 Id. at 181.
77 Id. at 182.
The Court, then, was not without precedent in utilizing considerations of human dignity when it made its momentous decision on school segregation in 1954.

C. Brown and the Findings of the Federal District Court in Milliken

1. Brown v. Board of Education: The Breakthrough

_Plessy v. Ferguson_ was the constitutional cornerstone of racial discrimination in this country. The underlying premise of _Plessy_ was that racial classification was a neutral principle based on fact and therefore not contrary to the Constitution. The "separate but equal" doctrine established the constitutional rule that segregation of the races, as such, was not discriminatory and therefore not in violation of the equal protection clause of the fourteenth amendment. From 1896 to 1954, the doctrine of _Plessy_ was left unquestioned by the Supreme Court. In 1954, however, the Supreme Court held in _Brown v. Board of Education_ that segregation in the public schools was a violation of the equal protection clause. In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.

The Court emphasized the crucial place of education in contemporary American society.

Today, education is the most important function of state and local governments. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

_Brown_ was a breakthrough, for it explicitly overruled _Plessy_ and sounded the constitutional death knell for de jure racial segregation in this country. After _Brown_, the only question now remaining in cases involving racial segregation is whether the segregation complained of meets the "state action" requirement of the fourteenth amendment. Once this requirement is met, the segregation complained should be ruled an unconstitutional violation of the equal protection clause.

In _Brown_, then, the Court discarded the "separate but equal" test of _Plessy_ and ruled that segregation as such was inherently discriminatory and contrary to the constitutional command of equality; the equal protection clause was given a new meaning. The Court was concerned with the effect of segregation on black schoolchildren.

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79 163 U.S. 537 (1896).
81 Id. at 493.
82 Id. at 495.
83 Id. at 493.
84 Id. at 495.
of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. 85

The Court was acutely aware of the gross injustices inherent in racially segregated schools. The black children in those schools were receiving an inferior education and were thereby irreversibly disadvantaged. In Brown, the Court read human dignity into the equal protection clause which changed the meaning given that clause by Plessy. The Brown Court could have relied on the neutral principle of "separate but equal," but instead it overturned the principle and read its concern for the quality of human life into the law.


The Supreme Court's decision in Milliken conflicts with Brown's concern with human dignity. While Brown created the hope that school segregation, and segregation generally, would eventually come to an end, Milliken, by precluding the use of a metropolitan busing plan, helps perpetuate school segregation. Milliken flies in the face of Brown's sweeping constitutional command that all forms of racial segregation which find their source in governmental action be categorically condemned by the Constitution. The Brown decision emphasized the values of dignity and equality; the Milliken decision emphasizes legal technicality and the status quo.

The federal district court in Bradley v. Milliken86 spent 41 trial days examining the issues of segregation in Detroit's public schools and governmental involvement in that segregation.87 The district court found that Detroit's residential segregation was primarily "the result of past and present practices and customs of racial discrimination, both public and private, which have and do restrict the housing opportunities of black people. On the record there can be no other finding."88 The district court found that governmental action at the federal, state, and local levels, combined with the actions of private lending institutions and real estate associations, established and maintained a pattern of residential segregation throughout the Detroit metropolitan area.89 The court further noted the cause and effect relationship between the residential patterns and the racial composition of the schools.90 The district court then carefully scrutinized the history of the Detroit school system as it involved both local and state authorities.91 The Detroit Board of Education engaged in numerous practices which contributed to the segregation of the city's public schools.92 School authorities of the State of Michigan were also implicated. "The State and its agencies, in addition to their general responsibility for and supervision of public

85 Id. at 494.
87 Id. at 584.
88 Id. at 587.
89 Id.
90 Id.
91 Id.
92 Id.
education, have acted directly to control and maintain the pattern of segregation in the Detroit schools. The State of Michigan for years refused to provide funds for the transportation of pupils, regardless of their poverty or distance from their assigned school. At the same time, mostly white suburban school districts were receiving funds from the state to support the transportation of pupils. The state also imposed financial limitations on the Detroit public school system through the use of a school-aid formula. Michigan's state-aid formula allowed suburban school districts to make far larger per-pupil expenditures despite less tax effort; thus the state's school-aid formula had "created and perpetuated systematic educational inequalities." In addition, the Michigan Legislature passed legislation "to impede, delay, and minimize racial integration in Detroit schools." Act 48 of the Michigan Legislature nurtured a general scheme of segregation.

The district court concluded that both the State of Michigan and the Detroit Board of Education committed acts which were "causal factors" in the segregation of Detroit's public schools. In short, the district court found de jure segregation.

In light of Brown's sweeping decision that segregation involves discrimination, in addition to the detailed findings of fact by the district court, the Supreme Court's decision in Milliken is a legal and moral failure. It is a legal failure because it ignores the actual causes of residential and school segregation in Detroit. It fails to follow the principle laid down in Brown: Segregation means discrimination whenever there is governmental involvement in the segregation. Milliken is a moral failure because it deprives many thousands of black school-children the opportunity for a better education and a more hopeful future. It ignores the value of human dignity which was sanctioned in the civil rights area by the Supreme Court in Brown.

In Weems the Court protected the individual from excessive and continuing cruelty; the Reynolds Court shielded the individual from forced labor for debt; in Rochin the Court shielded the individual from police brutality; and the Edwards Court vindicated the individual's right to interstate travel. The Brown Court protected blacks from state-mandated segregation, a segregation so pervasive that it inevitably led to massive disadvantages for blacks. Milliken, then, cannot be reconciled with the Supreme Court's prior concern with human dignity. In fact, it is a retreat from the fundamental principle of Brown—that governmental implication in segregation means unconstitutional discrimination. The Milliken decision is more than faintly reminiscent of the Civil Rights Cases and Plessy; once again, purportedly neutral decisions ignored the human needs of those appealing to the Court. The decisions in these cases emasculated the egalitarian and humanitarian goals of the fourteenth amendment. Milliken, more
particularly, is nothing less than an emasculation of the egalitarian and humanistic goals of Brown.

IV. The Possibility of a Jurisprudence of Human Dignity

The pervasive theme of the Declaration of Independence is the equality of man. From the very beginning of the nation’s history, equality has been a fundamental tenet of political faith. Of course, the men who wrote the Declaration of Independence and who framed the Constitution gave equality a narrower meaning than it is given today. To eighteenth century aristocrats, equality was only available to those of equal status. While it is true that they had a narrow conception of equality, their handiwork served as a catalyst in spreading the ideal of equality throughout American society.99

It was not until after the Civil War that the concept of political equality was elevated to a constitutional plane by the radical Republican Congressmen who sponsored the fourteenth amendment. While the adoption of the fourteenth amendment represented a step forward, the concept of equality still had not reached its apex. Equality before the law is scarcely the ultimate stage of an egalitarian revolution. Today it is becoming increasingly obvious that an emphasis on mere legal equality is hopelessly inadequate.100 It is imperative that we broaden our vision. The law must be used not only to protect the political and civil rights of the individual, but also to establish economic, educational and social conditions through which the individual’s human dignity is realized.101 An expanded concept of equality becomes virtually synonymous with the concept of human dignity. Whether the ideal is called human dignity or equality is unimportant; what matters is the progress the Supreme Court makes in using this ideal.

The Supreme Court should use the concept of human dignity as a guide in race relations cases. By reading into the Constitution values similar to those expressed in the Universal Declaration of Human Rights, which include economic and social rights in addition to civil and political rights,102 the Court could lead American society toward a more humane goal. By expanding the scope of equality, and by moving beyond the traditional concern for political and civil rights, the Court could make the concept of human dignity a meaningful reality. The role of the Supreme Court “must be that of an active participant in government, assisting in furthering the democratic ideal. Acting . . . as a ‘national conscience,’ the Court should help articulate in broad principle the goals of

100 2 B. Schwartz, The Rights of the Person 488 (1968).
101 “The rights of individuals in this country have been largely a collection of political and civil liberties rooted in a centuries old tradition. More is required than political and civil rights to secure the dignity of human beings. We must move beyond political and civil rights and afford protection to economic and social rights as well.” T. Hesburgh, The Humane Imperative 33 (1974).
102 Some of the rights recognized by the Universal Declaration of Human Rights are the right to work, the right to an adequate standard of living, and the right to an adequate education. U.N. Universal Declaration of Human Rights art. 23, paras. 1, 3; art. 26, para. 1.
American society. Throughout its history, the Court has played an active part in the affairs of government. Unfortunately, one of the Court's active roles led to the relegation of blacks to second-class citizenship after the adoption of the fourteenth amendment. It was the Court that wrote the misguided doctrine of "separate but equal" into the Constitution; it was the Court that wrote Jim Crow into the law of the land.

There is now an urgent need for a jurisprudence of human dignity. Such a jurisprudence would openly espouse the economic and social rights of the right to work, the right to an adequate standard of living, and the right to an adequate education. Human dignity would consider the gross injustices found in the nation's urban centers, where blacks are the victims of employment and housing discrimination, as well as inadequate educational systems. Moreover, it would mandate affirmative action on the part of government to alleviate the human suffering caused by decades of prejudice and neglect. Neutral principles of constitutional law and other forms of pseudo-objectivity will not help solve these problems. A Court concerned with human dignity, however, could make a difference. Although the Supreme Court by itself cannot bring about the realization of those rights which make human dignity a meaningful reality, it can perform a leadership role that prods the Congress and the President to take appropriate action.

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