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THE POLITICS OF LEGAL REASONING: CONCEPTUAL CONTESTS AND RACIAL SEGREGATION

LAWRENCE E. ROTHSTEIN*

INTRODUCTION

Positivist jurisprudence relies upon an extensive set of particular legal rules, the careful distinguishing of the rules themselves from their political and moral evaluation, and a strict analytic separation between legislation and adjudication. Only in the rare, previously uncontemplated case which can be subsumed under no easily articulable rule do positivists argue that a judge is free to use moral and political considerations, as would a legislature, to "make new law."[1] Recent critics of positivism reject this dualism of binding rules *versus* moral and political discretion. They suggest that there are unarticulated moral and political principles that provide the interpretive background for the system of articulated legal rules and for the decisions in cases where the legal rules are not adequate.[2] Ronald Dworkin, the most thorough of these critics, suggests that judges must make only such "decisions as they can justify within a political theory that also justifies the other decisions they propose to make."[3]

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1. These characteristics are shared by such otherwise diverse jurisprudential thinkers as Jeremy Bentham, J. Austin, H.L.A. Hart, Alf Ross and H. Kelsen. *See, e.g.*, J. AUSTIN, LECTURES ON JURISPRUDENCE (1863); J. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED (1945); H.L.A. HART, THE CONCEPT OF LAW (1961); H. KELSEN, GENERAL THEORY OF LAW AND THE STATE (A. Wedberg, trans. 1961); A. ROSS, ON LAW AND JUSTICE (1958); *cf.* Hart, *Legal Positivism*, in 4 ENCYCLOPEDIA OF PHILOSOPHY 418 (P. Edwards ed. 1967).

2. This criticism has been voiced on several levels. *See* R. UNGER, LAW IN MODERN SOCIETY (1976) (positivist assumptions are linked to a period in history and a social order undergoing conflict and change); J. NOONAN, PERSONS AND MASKS OF THE LAW (1976) (criticizes the positivist regard for rules as "masks" which hides the persons and institutions about whom the law ought to be concerned); Tribe, *Structural Due Process*, 10 HARV. CIV. RIGHTS–CIV. LIB. L. REV. 290 (1975) (suggests that in appropriate situations relying on unarticulated understandings is a more humane mode of legal procedure than promulgating written rules); and R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978) (mounting a general attack on positivism's emphasis on a system of rules and the separation of description and evaluation, and arguing for the importance of principles, policies and other, often unarticulated, standards in judicial decisionmaking).

3. R. DWORKIN, *supra* note 2, at 87.

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This article attempts to develop an alternative to positivism by extending the present criticism. Focusing on desegregation litigation, the article will illustrate the dialectical process within which judicial (and legislative) decisions are constrained in both routine and hard cases.

I shall argue that legal reasoning depends on the comparison and contrasting of complex sets of facts which are organized and understood by means of concepts. The formation of these legal concepts reflects certain social purposes for which the use of the concept is intended. The legal concepts are never neutral, but lead to particular judgments about the facts which they characterize. Each concept also relates to other important concepts, and the relationship between concepts articulates a political theory. Therefore, the formation and use of legal concepts are necessarily political.

The political nature of legal reasoning manifests itself further in conceptual change. Legal concepts have a history which reflects the development of a political community and the legal institutions of that community. The concepts change over time. They may change in an incremental way at the borderline of usage—often they change radically, reflecting a different organization of phenomena and purpose. Characteristic of a concept in the process of change is "essential contestedness." An essentially-contested concept is one whose internal structure and relationships to other concepts is the subject of dispute. The dispute cannot be conclusively settled by any logical test or agreed upon empirical evidence, but can only be settled politically by compromise, or by the gathering of preponderant support for one or another version of the concept. This means that legal decisions are less constrained by formal legal rules than positivists maintain. Also, contrary to positivist theory, legal decisions are always constrained by political ethical perspectives that underlie the life of a community.

Litigation involves disputes over important legal concepts. Legal reasoning and judgment in these matters are political and ought to be self-consciously so. (I use political here in its best sense, i.e., concerning collective decisions about what human life in a community ought to be like). Adjudication properly requires the clear recognition and statement of the political nature of the judicial decision. Legal commentary properly takes two forms. The first or preliminary form is the articulation of the political theories behind legal decisions. The second or advanced form is the criticism of these political theories. In this article, I present this theory and practice of legal commentary in the context of desegregation litigation.

CONCEPTS AND LEGAL REASONING

Modern legal reasoning is a technique for analyzing complex fact situations.[4] Legal rules, so-called "black letter law," are eighteenth century vestiges for public consumption, the unprepared lawyer and the cramming of a first-year law student.[5] Judges and lawyers compare and contrast cases, analyze similarities and dissimilarities, and attempt to articulate a position with the similarities and differences deemed relevant. Finding, evaluating, and articulating the similarities and dissimilarities between cases are done in terms of legal concepts. The concepts direct attention to certain facts and communicate judgments about the relevance of similarities and differences between cases.[6]

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4. *See* Montrose, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 587 (1957); E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); K. LLEWELLYN, THE BRAMBLE BUSH, 45-69 (1951); Llewellyn, *The Status of the Rule of Judicial Precedent*, 14 U. CIN. L. REV. 208 (1940); Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930). These commentators emphasize the analysis and comparison of cases as the focus of legal method. Law teachers have been refining this technique since Christopher Langdell.

5. "Black letter law" is characteristic of the classificatory legal science of the eighteenth century which viewed law, like early biology, as a taxonomy of legal principles deductively derived from fundamental principles. The work of Blackstone in England and Kent in the United States is illustrative of this earlier conception of law. D. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 20 (1941) (an analysis of Blackstone's COMMENTARIES ON THE LAW OF ENGLAND in terms of its relationship to the intellectual currents of its time); P. MILLER, THE LIFE OF THE MIND IN AMERICA 121-34 (1965) (an analysis of the influence of Blackstone on the legal intellects of post-revolutionary America). The work of Holmes is rooted in the modern "inductive" method of case analysis. O. HOLMES, THE COMMON LAW (Howe ed. 1963) ("But we must bear in mind that the law deals only or mainly with manifested facts; . . ." at 185); J. FRANK, LAW AND THE MODERN MIND 133-71 (1970) (Frank attacks the notion that rules of law are the basis of legal decisions and argues that the continuing discussion of rules is to cover up the realities of the highly political and often irrational process of judicial decisionmaking); Rheinstein, *The Case Method of Legal Education: The First One-Hundred Years*, 21 U. CHI. REC. 3 (1975) (noting that the theory of the case method is that the law is a phenomenon unfolding itself through cases in the course of history and that reported cases are the raw data of an empirical science). This change in the method and conception of legal science and training is analogous to the changes in punishment and medical science documented by Michel Foucault in DISCIPLINE AND PUNISH (1979) and BIRTH OF THE CLINIC (1973).

6. E. LEVI, *supra* note 4, at 1-9; K. LLEWELLYN *supra* note 4; R. DWORKIN, *supra* note 2, at 96-100; *cf.* H. PITKIN, WITTGENSTEIN AND JUSTICE 51 (1972) (suggests that legal reasoning by comparing and contrasting cases or examples is supported by the use theory of language developed by Wittgenstein in his later work, PHILOSOPHICAL INVESTIGATIONS (1958)).

Generally, a concept mediates between facts or phenomena and human understanding. A concept is therefore a set of capacities: a) to know the meaning of and to use the word or words that signify the phenomena; b) to recognize instances of

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For example, the legal concept "attractive nuisance" does not merely stand for those situations which have been considered attractive nuisances in the past. This concept also directs the practitioner's attention to those factors which may lead to characterizing a never-before-experienced factual situation as an attractive nuisance. It sets out the crucial dimensions along which relevant phenomena may vary: danger, attractiveness and accessibility to children. The concept "attractive nuisance" requires a certain class of persons to protect children from the dangers of which they are unaware. Cases illustrate factual variations of situations which pose a danger attractive to children. Obviously these cases do not exhaust all the forms such conditions might take.

Lawyers understand elements of previous cases and thus form the concept "attractive nuisance" in order to guide their analysis of other situations which may also be attractive nuisances. No articulated rule or definition adequately covers all possible attractive nuisances and yet excludes all situations which should not be considered attractive nuisances. But comparing and contrasting a new situation with others in which the concept "attractive nuisance" was used leads to a judgment about the application of the concept in the new context. The concept groups otherwise disparate phenomena into a system of relevances which responds to human needs and purposes. In this case the need and purpose is protecting children.[7]

Legal concepts far exceed legal rules in importance because concepts embody legal reasoning. A rule merely sets out formal categories. One must be able to use these categories by identifying relevant phenomena and making required connections between the phenomena. Having the rule does not entail these abilities. A concept such as "attractive nuisance" or "racial segregation," for instance, enables lawyers to recognize fact patterns that constitute an attractive nuisance or an instance of segregation. The lawyer can thus distinguish those situations which are not segregation or attrac-

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the phenomena and to distinguish those instances from other phenomena; and c) to apprehend the properties which make the phenomena what they are. Heath, *Concepts*, in 2 ENCYC. OF PHILOSOPHY 177 (P. Edwards ed. 1967).

7. Edmond Cahn has suggested that "attractive nuisance" is a concept used to protect the special, fresh and wondrous world of childish perception, which does not associate the new and the unknown with danger. E. CAHN, THE MORAL DECISION 73-74 (1955). For a more general treatment of how concepts make sense out of phenomena by grouping them from the perspective of human purposes and needs, see W. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 19-41 (1974), JULIUS KOVESI, MORAL NOTIONS (1967), and Schutz, *Concept and Theory Formation in the Social Sciences*, in SOCIAL THEORY AND PHILOSOPHICAL ANALYSIS 12-13 (Emmet & McIntyre ed. 1970).

tive nuisances and, most importantly, can imagine hypothetical illustrations of these concepts. Concepts are thus the foundation of legal reasoning.[8]

CONCEPTS AND JUDGMENTS

Different groupings of phenomena occur according to different purposes for using legal concepts. Concepts are used in order to make judgments about the desirability and responsibility for changing the states of affairs that the concept characterizes. Concepts, which often appear as descriptions of or shorthand notations for phenomena, conceal judgments about the phenomena.[9]

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8. H. PITKIN, *supra* note 6, at 51. *Compare* works on legal reasoning cited in note 4 *supra*, *with* Heath, *supra* note 6, at 177; S. WOLIN, POLITICS AND VISION 5-6, 21 (1960); and Rothstein, *What about the Fact-Value Dichotomy?: A Belated Reply*, 9 J. VALUE INQUIRY 307 (1975) on conceptual analysis.

9. For example, in order for an observer to say that a group of people who are placing X's on a sheet of paper are voting, he must know that these people have some concept relating to choice of persons for political office or choice of policies, and that they understand that their X's in some way express their choice. It probably also will be important to the observer whether the people understand that the X's will be counted and that the total will be related to the outcome of the choice. Who becomes a leader must be considered of some importance to the people. If, upon questioning, the people observed answer that the important thing is the aesthetic quality of the pattern of X's on each paper, the observer will probably conclude that this is not voting and that voting is not a part of the social world of this group of people.

Taking this example further, suppose that the sheets of paper with X's are taken before a priest of the community. He contemplates the papers, goes into a trance and finally announces the names of the community leaders made known to him through the patterns of X's on the papers. In this extension of the example, suppose the observer is known to the community because of the courage and wisdom he had shown during a recent flood, and he is accorded a great deal of respect. He observes the activities aforementioned and conceptualizes the process as an "election," because it allows for each member of the community to feel that he has participated in the choosing of leaders and it bestows in the popular mind legitimacy on the leaders selected. He explains this conclusion to the people of the community and adds that where he comes from there are also elections which, despite differences in technique, serve the same purposes. Upon hearing this from a person whose views and way of life are highly respected, the people of the observed community are very happy and satisfied with their selection procedure.

On the other hand, the observer might conceptualize the process as a "selection ritual" because of the religious or mystical elements and the fact that no voting, *i.e.*, neither the preferences nor the making of X's, has any calculable bearing upon who becomes a leader. The selection is performed solely by the priest who generally seems to choose the persons who have done the most for him recently. The observer relates his conclusions to the people and adds that where he comes from leaders are selected by an "election" in which people express their preferences between candidates by voting, and the ones who receive the most votes become the leaders. How then might the people regard their selection procedure? If their respect for the

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The Aristocratic Concept of Segregation

The concept "racial segregation" has four important uses that impart differing judgments about the causes, desirability, and remediableness of racial segregation.[10] Holders of the "aristocratic concept" of racial segregation use it to characterize a situation as longstanding, natural and desirable, and therefore subject to legal sanction rather than remedy.[11] Chief Justice Taney's decision in *Dred Scott v. Sanford*[12] rested on such a concept. He approvingly declared:

> They [blacks] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and

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observer and his views is great enough, they may act to change their procedure. At least, they would not be as comforted as they had been by the first conceptualization of the observer.

Both conceptualizations are based on the same observed phenomena. Both are reasonable and could be supported by current theoretical perspectives. Each tends to carry with it a different judgment about the observed institution. Whatever concept the people of the community accept will have a bearing upon the institution by which their leaders are chosen. To an important extent, the concepts by which political life is characterized will constitute that political life. Connolly, *Theoretical Self-Consciousness*, in SOCIAL STRUCTURE AND POLITICAL THEORY 43 (Connolly & Gordon ed. 1974); S. TOULMIN, FORESIGHT AND UNDERSTANDING 101 (1961); Gellner, *Concepts and Society*, in RATIONALITY 18-49 (Wilson ed. 1970); R. DWORKIN, *supra* note 2, at 87.

10. W. CONNOLLY, *supra* note 7; Kiltgaard, *Institutional Racism: An Analytic Approach*, in RACIAL CONFLICT, DISCRIMINATION, & POWER: HISTORICAL AND CONTEMPORARY STUDIES 9 (Barclay, Kumar & Simms ed. 1976); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049 (1978); Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

11. C. WOODWARD, THE STRANGE CAREER OF JIM CROW 48-49 (1966) (also noting that in the South the aristocratic concept could lead to more moderate treatment of blacks by the upper classes than by the lower classes who have a more corrupted version of the concept); THE CIVIL RIGHTS RECORD 11-16 (R. Bardolph ed. 1970) (reviews the writings of the popularizers of the aristocratic concept); E. GENOVESE, ROLL, JORDAN, ROLL (1976); T. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA (1964); L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790-1860 (1961); F. LOGAN, THE NEGRO IN NORTH CAROLINA, 1876-1894 (1964); C. WADE, SLAVERY IN THE CITIES: THE SOUTH 1820-60 (1964); J. WILLIAMSON, AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861-1877 (1965); C. WYNES, RACE RELATIONS IN VIRGINIA, 1870-1907 (1961).

12. 60 U.S. 393 (1857). *See also* Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850) (upholding segregation in Boston city schools and expressing the view that blacks are naturally inferior).

> that the negro might justly be reduced to slavery for his benefit.[13]

Taney cited legislation dating from colonial times intended to maintain segregation.[14] Users of the "aristocratic concept" of segregation presume the natural inferiority of blacks. This presumption explains and justifies their acceptance of the social, political, and economic superiority of whites and the insistence on separation from blacks. The aristocratic concept implies no legal or moral duty to remedy segregation but rather implies a duty to maintain separation.[15] These judgments are hidden in the criteria of the aristocratic concept and flow from the use of the concept.

The Conservative Formalist Concept

The "conservative formalist" concept of racial segregation was reflected in the Civil War Amendments which attempted to end outrageous treatment of blacks. The conservative formalist's condemnation of these practices, however, was purely formal. The purpose of the concept was to maintain racial separation.[16] Thus, the scope of the concept's application, and hence the amendment's application, was severely restricted. Formal recognition of the right to be free from racial segregation, and of a corresponding duty of others not to segregate, was overshadowed by criteria limiting the agents whose acts constituted segregation. Only the officials of a state acting according to the state government's express policy of excluding blacks were considered perpetrators of segregation by the conservative formalists. The state's incidental support of longstanding private customs and attitudes was not considered to be an imputation of in-

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13. Dred Scott v. Sanford, 60 U.S. at 407; *cf.* F. DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 293 (1962) (he characterizes this passage as stating a "historical fact").

14. Dred Scott v. Sanford, 60 U.S. at 408.

15. C. WOODARD, *supra* note 11, at 70 (indicates that the reconciliation of the North and the South and the gutting of the Civil Rights effort, known as the Period of Redemption, was due in part to the widespread acceptance of the inferiority of blacks due to the aristocratic concept in the South and the conservative formalist concept in the North). *Cf.* R. LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877-1901 (1954).

16. State cases upholding school segregation viewed race as a reasonable classification. State laws requiring segregation were mere "regulation" not amounting to an abridgement of any rights granted under the thirteenth and fourteenth amendments. *See* Ward v. Flood, 48 Cal. 36 (1874); Cory v. Carter, 48 Ind. 327 (1874); People ex rel. King v. Gallagher, 93 N.Y. 438 (1883); Lehew v. Brummel, 103 Mo. 546, 15 S.W. 765 (1890); State ex rel. Garnes v. McCann, 21 Ohio St. 198 (1871); Ohio ex rel. Lewis v. Board of Educ., 7 Ohio Dec. Reprint 129 (Dist. Ct. 1876).

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feriority by the state and, therefore, not racial segregation. Only complete exclusion of blacks from a right or benefit specifically protected by the Constitution or federal statute suggested a likelihood of segregation.[17] The gist of the conservative formalist's use of the concept of racial segregation recognized the formal reciprocity of legal right and legal duty and the granting of some rights to blacks by the Civil War Amendments. This recognition was not allowed to disturb an older lifestyle and the attitudes which supported it.[18]

Judicial use of the conservative formalist concept of racial segregation is well-illustrated by the Supreme Court's decisions in the *Civil Rights Cases*[19] and *Plessy v. Ferguson*.[20] The Justice Department in the *Civil Rights Cases* aggressively prosecuted owners of public accomodations under the Civil Rights Act of 1875 for the owners' refusals to serve blacks. The Court dismissed the cases on the grounds that the Act was not passed within the enforcement power granted to Congress by the thirteenth or fourteenth amendments. The Court maintained that the Act struck at private wrongs

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17. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1876). In *Cruickshank*, the Supreme Court overturned the conviction of whites who broke up a political meeting of blacks and conspired to prevent them by force and intimidation from voting. The Court stated:

> The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not . . . add anything to the rights which one citizen has under the Constitution against another. The quality of the rights of citizens is a principle of republicanism. . . . The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty.

Id. at 555. *Cf.* United States v. Reese, 92 U.S. 214 (1876) (also dealing with voting rights); Hall v. DeCuir, 95 U.S. 485 (1878) (striking down a state cause of action against a steamboat owner who excluded a black woman when she refused to accept racially designated accommodations).

18. This development was characterized by President Rutherford B. Hayes:

> The evils which afflict the Southern States can only be removed or remedied by the united and harmonious efforts of both races, actuated by motives of mutual sympathy and regard; and while in duty bound and fully determined to protect the rights of all by every constitutional means at the disposal of my Administration, I am sincerely anxious to use every legitimate influence in favor of honest and efficient local *self*-government as the true resource of those States for the promotion of the contentment and prosperity of their citizens. . . .

Inaugural Address, *quoted in* THE CIVIL RIGHTS RECORD, *supra* note 11, at 30; *cf.* note 15 *supra* and accompanying text.

19. 109 U.S. 3 (1883).

20. 163 U.S. 537 (1896).

which could be redressed only under state law. These wrongs were neither badges of servitude nor acts of the state. By citing with approval the treatment of free blacks under the regime of slavery ("mere discriminations on account of race or color were not regarded as badges of slavery"[21]), the Court made it clear that its concept of segregation did not go beyond prohibiting the formal legal relation of slavery. Justice Harlan, in dissent, pointed out that the majority's concept of segregation assumed that race discrimination in no way asserts the inferiority of those discriminated against or, on the other hand, that the natural inferiority of blacks justifies legalized differential treatment.[22] In either case, the Court found no justification for requiring anyone to remedy the disadvantageous situations in which black patrons found themselves.[23]

In *Plessy v. Ferguson*, the conservative formalist concept of segregation allowed the Court to uphold a state law requiring racially-separate train accommodations. While formally according civil and political rights and equality to blacks, the Court did not condemn state laws requiring separation of whites and blacks in the enjoyment of public facilities.[24] The Court, per Justice Brown, concluded:

> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.[25]

If Jim Crow legislation did not create inferiority, but merely recognized natural inferiority, then under the conservative formalist concept racial segregation had not occurred. If segregation had not occurred, no one could be required to remedy it.[26] Again, a judgment

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21. Civil Rights Cases, 109 U.S. at 25.
22. *Id.* at 48.
23. In Bradley's words:

> It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. . . .

Id. at 44.
24. 163 U.S. at 544.
25. *Id.* at 551-52.
26. *Id.* at 550-51.

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was hidden within, and flowed from, the structure of the concept of racial segregation.

The Liberal Formalist Concept

The liberal formalist concept of racial segregation recognizes that the Civil War Amendments established specific rights and duties with regard to the treatment of black individuals. Under the liberal formalist view, the responsibility for remedying racial segregation arises upon the identification of specific intentional acts,[27] agents and victims.[28] The concept is more liberal than the conservative formalist concept in several ways. The act considered need not be total exclusion of blacks from a benefit. The agents need not be government officials and need not be acting in strict accordance with express governmental policy. The time focus of the inquiry into the segregative character of an act could be extended back to its origin or forward to its likely effects.

The expanded scope of the concept reflects a genuine condemnation of racial discrimination.[29] Even with an expanded scope of application, however, its formalism is manifest in the proof necessary for the imputation of responsibility to remedy conditions of racial separation.[30] The concentration of the concept upon specific acts and

27. Recent cases require a racially discriminatory purpose or intention before a disproportionate racial impact can be used to prove an equal protection violation. *E.g.*, Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). The following three desegregation cases should be read in light of the requirement of discriminatory intent: Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); School Dist. v. United States, 433 U.S. 667 (1977) (per curiam); Brennan v. Armstrong, 433 U.S. 672 (1977) (per curiam). *See also* Comment, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976); Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause*; Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh, 12 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 725 (1977).

28. This view is often characterized as the "anti-discrimination" or "non-discrimination" principle. *See* Brest, 90 HARV. L. REV., *supra* note 10. For an analysis of this view with regard to the position of groups as actors and victims, *see* Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUB. AFF. 107, 168-70 (1976). The requirement of injured victims of discriminatory acts allowed the Supreme Court to look benignly at the closing of facilities to prevent their integration in Palmer v. Thompson, 403 U.S. 217 (1971) (closing of a public swimming pool) and Evans v. Abney, 396 U.S. 435 (1970) (closing of a public park).

29. *See* Fiss, 5 PHILOSOPHY & PUB. AFF., *supra* note 28, at 157-60; Comment, 12 HARV. CIV. RIGHTS—CIV. LIB. L. REV., *supra* note 27.

30. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. REV. 36 (1977) (a full development of the tort no-

individual actors and victims allows correction only of the identified actor's proven acts against the individual victims, whether or not the elimination of the effects of those acts would improve the conditions of the victims or those similarly situated.[31] For example, in *Milliken v. Bradley*,[32] the Supreme Court refused to require consolidation of Detroit's city schools with schools in the surrounding, predominately white suburbs, despite the fact that an integrated school system could not be achieved otherwise. The Court would not impute responsibility for segregation in Detroit to all-white neighboring, but jurisdictionally separate school systems unless those systems were shown to have engaged in intentional discrimination.[33] The Court's liberal formalist concept of segregation did not include as criteria for its application the racial isolation of the suburban and city schools, the tradition of local autonomy that maintained racial isolation, or the land use and housing policies which prevented easy black migration to the suburbs.[34] The concept's requirement of specific acts, individual agents and victims tied together by proof of intentional discrimination prevented placing responsibility on anyone for correcting the conditions under which the black students suffered.

The Liberal Pluralist Concept

Unlike the liberal formalist concept, with its emphasis on individual agents, a "liberal pluralist" concept of racial segregation regards groups as the relevant agents in racial segregation.[35] Pertinent to this concept is the disproportionately low representation of a racial group in a beneficial activity or position and the disproportionately high representation of the group in any disadvantageous

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tion of proximate cause in antidiscrimination litigation); Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 297 (1977) (analyzing and reevaluating the unrealistic barriers the state action requirement places before attempts to reach technically private, but essentially public, actions).

31. *See* Kiltgaard, *supra* note 10, at 36-48, 53; Eisenberg, 52 N.Y.U.L. REV., *supra* note 30, at 42-99; Comment, 12 HARV. CIV. RIGHTS—CIV. LIB. L. REV., *supra* note 27, at 738.

32. 418 U.S. 717 (1974).

33. This decision was made despite the District Court's finding of violation within the City of Detroit. *Id.* at 738 n.18.

34. The District Court had already noted the likelihood of this phenomenon. *Id.* at 735.

35. *See* Fiss, 5 PHILOSOPHY & PUB. AFF., *supra* note 28; Comment, 12 HARV. CIV. RIGHTS—CIV. LIB. L. REV., *supra* note 27.

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status. This conceptualization recognizes the history of a group's disadvantaged position and acknowledges that disproportional representation may create the appearance of inferiority. The concept is used in states of affairs that do not amount to total exclusion from a benefit, that are not directly caused or condoned by the government, and in which no individual segregating or discriminating agent can be identified. Neither individual fault nor intention to discriminate is required for application of the concept.[36] From this concept comes the responsibility of all major groups in the society—the government being one of those groups—to remedy the conditions which have at some time benefitted certain groups at the expense of a victimized group. The remedies the concept implies may be sweeping[37] because of the expanded time focus. This expansion allows inquiry into the history of a group's status to determine whether that status and the property and entitlements claimed by individuals in the group were the product or the cause of racial segregation. If individual entitlements are linked to the historic status of a group and its participation in or benefit from racial discrimination, legal remedies may invade those entitlements under the liberal pluralist concept of segregation.[38]

The concurring opinions of Justices Powell and Douglas in *Keyes v. School District No. 1*,[39] illustrated judicial application of this concept. The justices suggested abandoning the *de jure/de facto* distinction thus making the search for governmental acts and actors obsolete. Powell argued that in our complex urban society there is little question of massive government involvement in creating and sustaining ways of life. Residential living patterns were just one

36. Eisenberg, 52 N.Y.U.L. REV. *supra* note 30; *cf.* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275 (1972); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Action*, 74 COLUM. L. REV. 656 (1974); Note, *De Facto School Segregation and the "State Action" Requirement: A Suggested New Approach*, 48 IND. L.J. 304 (1973); Comment, *School Desegregation After* Swann: *A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421 (1972).

37. For the new role and responsibility of the courts in formulating sweeping remedies for pervasive social problems, *see* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

38. Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism*, 14 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 133 (1979) (suggesting the Constitutional reasonableness and necessity for a legislative finding of widespread and continuing "societal discrmination"). *Cf.* Justice Marshall's tracing of the history of racism in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387-94 (1978).

39. 413 U.S. 189 (1973).

aspect of that involvement.[40] The governmental involvement in racial separation could be taken under judicial notice, thereby obviating the need for proof of governmental responsibility for segregation. Segregation would be racial separation for which the government is always responsible either in its role as referee between competing groups or as a group itself contesting for status and power. Powell further argued that "once the state has assumed responsibility for education, local school boards will operate *integrated school systems* within their respective districts."[41]

The point or purpose of the liberal pluralist concept of segregation was the imputation of responsibility for remedying conditions which derogated blacks as a group. The judgment implied by the concept was that a condition of racial separation disadvantageous to blacks requires the elimination of that disadvantage. In the case of schools, this required racial integration.[42]

This section of the article has shown how different concepts of racial segregation group phenomena in different ways. The grouped phenomena are criteria for the application of the concept. The grouping depends upon the purpose or point for which the concept is formed, with different purposes leading to different groupings. The general purpose of concept formation is to enable the users of the concept to make judgments about the phenomena grouped by the concept. Different conceptual groupings lead to different judgments about the phenomena.

Aristocratic, conservative formalist, liberal formalist and liberal pluralist concepts of racial segregation have different purposes—praising or condemning racial separation, placing or relieving persons and groups from responsibility for remedies—and different groupings of criteria. Judgments that are implied by using the concepts may differ widely in terms of the justification of a situation and the responsibilities and types of remedies allowed. Moral and legal judgments concern important public policies and have important political effects. Indeed, the concepts and the judg-

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40. *Id.* at 240.

41. *Id.* at 252.

42. Similar inferences from the Powell and Douglas concurring opinion were drawn in contemporaneous analyses of the case. *See* Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHILOSOPHY & PUB. AFF. 3 (1974); Comment, Keyes v. School District No. 1: *Unlocking the Northern Schoolhouse Doors*, 9 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 124 (1974).

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ments they contain constitute a major part of the social world in which American politics operates.[43]

CONCEPTS AND POLITICAL THEORIES

A critical understanding of the concepts of racial segregation and the judgments which flow from them requires analysis of the relationship of these concepts to other important concepts. In these relationships the concepts of racial segregation influence and are influenced by more general perspectives on politics and society. Exploring these relationships reveals the full significance of using one concept of racial segregation, as opposed to another. The networks in which the concepts of segregation are linked to other important and basic social concepts are political theories. These theories provide general explanations of political life and suggest the purposes and points from which concepts are formed.[44]

Aristocratic Theory

Each of the concepts of racial segregation is linked by political theories to other key concepts. The aristocratic concept, which characterizes racial separation as longstanding, natural and desirable, relates to concepts of human nature and society through a political theory that stresses the social nature of human beings and their natural fitness for established roles in society. An aristocratic political theory maintains that social structure accommodates the different moral and intellectual natures of human beings with appropriate social roles. Each role or class has its duties and privileges. The duties of the higher class are to rule and protect the lower. The duty of the lower is to serve the higher.[45] Cultural dif-

43. *See* S. SCHEINGOLD, THE POLITICS OF RIGHTS (1974) (an excellent analysis of the political-social context created by the legal concept of rights).

44. *See* W. CONNOLLY, *supra* note 7, at 46-76 (demonstrating the intimate relationships between differing concepts of interest and theories explanatory of political phenomena); Dallmayer, *Empirical Political Theory and the Image of Man*, 2 POLITY 443 (1970) (analyzing the influences of three concepts of man—*homo economicus*, *homo politicus*, and *homo sociologicus*—on empirical theories of politics); *cf.* J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1968) (illustrating the interaction of economic theory and legal concepts).

45. For more detailed descriptions of this view, see K. DOLBEARE & P. DOLBEARE, AMERICAN IDEOLOGIES 216-24 (1971), calling this theory "organic conservatism," and E. DURKHEIM, SUICIDE (1952), where social "equilibrium" is defined as a fixed class structure with each class having known duties and privileges. For an excellent comparing and contrasting of an aristocratic and a conservative formalist view of human nature, society and politics, see Walzer, *Nervous Liberals*, 26 NEW YORK REV. BOOKS 5 (1979).

ferences, military inferiority and economic need are considered evidence of the natural inferiority of blacks.[46] Natural inferiority, in aristocratic theory, justifies a subordinate social role.

While the Civil War, Emancipation and Reconstruction eliminated slavery as a possible form of subordination, aristocratic theory suggests other forms. Aristocratic government provides a public mechanism for affirming and maintaining the duties and privileges of the classes. But the primary means of carrying out the aristocratic duties of governance and protection of the lower classes is through controlling property, particularly landed property, and the division of labor.[47] Blacks could no longer be held as property, but their access to property and economic opportunities could be limited in order to maintain and stigmatize their status as inferior.[48] Thus, an aristocratic political theory incorporates the aristocratic concept of racial segregation in a structure with broad implications for human social life.

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46. *See* note 16 *supra* and accompanying text.

47. K. DOLBEARE & P. DOLBEARE, *supra* note 45, at 222-23; R. UNGER, *supra* note 2, at 224-29.

48. This was the intent of the infamous "Black Codes" passed in the Southern states following the Civil War. *E.g.*, the Black Code of Mississippi contained the following provisions:

> *Be it enacted by the Legislature of the State of Mississippi*, That all freedmen, free negroes and mulattoes may . . . acquire personal property . . . by descent or purchase, and may dispose of the same, in the same manner, . . . that white persons may: Provided that the provisions of this section shall not be so construed as to allow any freedman, free negro or mulatto, to rent or lease any lands or tenements, except in incorporated towns or cities in which places the corporate authorities shall control the same.

1865 Miss. Laws, ch. IV, § 1, *quoted in* THE CIVIL RIGHTS RECORD, *supra* note 11, at 37.

> *Be it enacted by the Legislature of the State of Mississippi*, That it shall be the duty of all sheriffs, justices of the peace, and other civil officers of the several counties in this State, to report to the probate courts of their respective counties, semi-annually, at the January and July terms of said courts, all freedmen, free negroes and mulattoes, under the age of eighteen, within their respective counties, beats or districts, who are orphans, or whose parents have not the means, or who refuse to provide for and support said minors, and thereupon it shall be the duty of said probate court, to order the clerk of said court to apprentice said minors to some competent and suitable person, on such terms as the court may direct. . . . Provided, that the former owner of said minors shall have the preference. . . .

1865 Miss. Laws, ch. IV, § 1, *quoted in* THE CIVIL RIGHTS RECORD, *supra* note 11, at 39 (indicating also how the crop-lien system was an important aspect of this aristocratic program of restoring the *status quo ante bellum*, *id.* at 41-44).

Conservative Formalism

The political theory in which the conservative formalist concept of segregation is embedded, like the aristocratic theory, rests upon the assumed natural inequality of human beings. Natural inequality manifests itself in the competition of individuals for survival and success. Those who succeed in life's competition are natural superiors; those who fail, natural subordinates.[49]

In the late nineteenth and early twentieth centuries, this theory linked Social Darwinism with *laissez-faire* capitalism. The link resulted in great ambivalence toward the roles of law and government in society. On the one hand, the theory emphasized the use of private power to achieve ascendant positions in society. On the other hand, those who held the theory wished law and government to actively protect and insure the positions and holdings acquired. The theory required that government minimize its economic role while increasing the military role and the role of criminal law in furthering dominant national ambitions and popular prejudices. Such ambivalence has often resolved itself in the Thucydidean conclusion that the strong do what they will and the weak suffer what they must.[50]

Under the conservative formalist theory, blacks are entitled only to those rights which they can wring from dominant interests and popular opinion. Their low status indicates their inferiority in the competition for survival and success and their lack of desert for rights accorded to whites. Efforts of the national government to grant rights to blacks are to be construed narrowly because of the limited role accorded to government by conservative theory. Jim Crow laws are to be encouraged because of their accord with popular opinion and dominant local interests. Racial separation, favored by the opinion of whites, is to be encouraged and protected by the government.[51] The concept "racial segregation," as it characterizes

49. The Dolbeares call this "individualist-conservatism." K. DOLBEARE & P. DOLBEARE, *supra* note 45, at 24-25, 209-15; *cf.* R. NOZICK, ANARCHY, STATE, AND UTOPIA 88-119 (1974) (attempting to derive the justice of such an ordering from agreed-upon first principles).

50. K. DOLBEARE & P. DOLBEARE, *supra* note 45, at 209-10; Walzer, *supra* note 45.

51. At the turn of the century, this viewpoint was strongly supported by leading academics: William Graham Sumner in his influential work FOLKWAYS (1907) and Ulrich Bonnell Phillips in his heavily-documented AMERICAN NEGRO SLAVERY (1908). *See also* C. WOODWARD, *supra* note 11, at 94-96; R. KLUGER, SIMPLE JUSTICE 84-86 (1976).

something prohibited by federal law, is to be restrictively applied to minimize the influence of government on dominant local interests. The rights granted to blacks by the Civil War Amendments are not considered earned in conservative theory. To the extent they are recognized by the conservative political theory, they are recognized as extremely limited in application. Where the rights do not apply, no duties exist to improve or protect the position of blacks. While the concept of racial segregation triggers the application of the rights conferred by the Civil War Amendments, the conservative formalist concept of segregation does not allow frequent triggering of these rights.[52]

Liberal Formalism.

The emphasis of the liberal formalist concept of segregation upon the identification of specific acts, agents and victims, fits within a political theory which views a human being as possessing capacities or powers. Each human being controls these powers and exercises them in competition with others. Each not only owns, in a

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52. The formalism of this position lies in two factors. The first is the view that the Civil War Amendments and the acts designed to enforce them did not prescribe any major change in the treatment of blacks, other than the elimination of the legal status of master and slave. Therefore, in maintaining legally the subordinate status of blacks, care must be taken to avoid certain forms of legal expression that characterized the legal relation of slavery. Second, deference to the formal existence of the Amendments and the enforcement legislation must be shown in legal reasoning. The Amendments cannot be ignored, nor their validity denied; they must be formally applied, but with their effect on action distinguished away. For a more detailed analysis of formalism in law, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1690-95 (1976); and R. UNGER, *supra* note 2, at 192-205.

An illustration of the conservative formalist viewpoint and its effect on blacks is the Virginia Constitutional Convention of 1901-1902, which effectively disenfranchised blacks. The following is the statement of Carter Glass on the purpose of that convention:

> Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate. As has been said, we have accomplished our purpose strictly within the limitations of the Federal Constitution by legislating against the characteristics of the black race, and not against the "race, color or previous condition" of the people themselves. It is a fine discrimination, indeed that we have practiced in the fabrication of this plan; . . .

THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF VIRGINIA, JUNE 12, 1901 TO JUNE 26, 1902, at 58 (1906), *quoted in* CIVIL RIGHTS RECORD, *supra* note 12, at 143.

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metaphoric sense, his powers, but owns, in a moral and often legal sense, the fruits of these powers. Property rights are a logical extension of this view of human nature.[53] From this theoretical position, there are no fixed classes or statuses in the society, and one's abilities, exercised according to just rules, are assumed to generate one's position and holdings. One's legal and moral rights to his holdings are determined by one's adherence to the rules governing the acquisition and transfer of the holdings.[54]

Since a disparity exists between the holdings and statuses of blacks as a group in relation to whites, the important issue from the liberal formalistic perspective is whether each individual holding was justly acquired, originally and through transfers. Legal interference with individual holdings may therefore be based only upon fault in the acquisition or maintenance of the holdings. The holdings must have been acquired or maintained at some point through a violation of the just rules of acquisition and transfer before legal action is warranted.

Under legal formalist theories, the Civil War Amendments imply rules with regard to discrimination and differential treatment of blacks. Legal entitlement to an improved position or holding is based upon the extent of damage sustained by a breach of the rules. Legal redress is compensatory to the limit of restoring the person injured to the same position he would have held had the breach of rules not taken place.[55] This political theory rests upon the same individualist concepts of human nature and society associated with the foundations of the modern law of tort and contract. The theory therefore supports a concept of racial segregation that incorporates the formal legal notions of entitlement, fault and compensation found in these areas of legal doctrine. Thus, the liberal formalist concept emphasizes the identification of specific agents, acts and injured victims in applying the concept to any state of affairs.[56]

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53. For excellent statements of this position with a view to critical analysis, see C. MACPHERSON, DEMOCRATIC THEORY 21 (1973); J. RAWLS, A THEORY OF JUSTICE 73 (1971); Schaar, *Equality of Opportunity and Beyond*, in CONTEMPORARY POLITICAL THEORY 133 (De Crespigny & Wertheimer ed. 1970); Dallmayer, 2 POLITY, *supra* note 44, at 455-58.

54. The Dolbeares call this theory merely "liberalism" but distinguish American liberalism from older English forms. K. DOLBEARE, & P. DOLBEARE *supra* note 45, at 50-69. *Cf.* R. NOZICK, *supra* note 49, at 149-82; Kennedy, 89 HARV. L. REV., *supra* note 52, at 1713-16.

55. R. NOZICK, *supra* note 49, at 54-87; K. DOLBEARE & P. DOLBEARE, *supra* note 45, at 69-78.

56. Hazard, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699, 706-11 (1969). For the assumptions underlying the development of the American law of

Liberal Pluralism

Like the political theory that supports the liberal formalist concept of segregation, the political theory in which the liberal pluralist concept is embedded views individuals as the bearers of powers and capacities. The capacities possessed by individuals, however, are only partial. They cannot be fully actualized except in cooperation with others.[57] In pluralist political theory, the development of these capacities occurs in groups—ethnic, neighborhood, family and occupational.[58]

Between groups, competition rather than cooperation is characteristic. This competition, though, is moderated by the fact that an individual is a member of several different kinds of groups. Government and legal systems serve three functions with respect to the competition of groups. They establish the forum and rules for group competition, serve as referees of the competition, and function as groups with interests of their own in the competition.[59]

Within each group, its members' conceptions of successful living may be shaped by the social conditions of the group. For the members of many groups, the individual accumulation of property and other resources is a means to realize their conception of living well. Success depends upon group membership, status within the group and the status that the group has achieved in competition with other groups.[60]

Since, according to pluralist theory, individuals receive the benefits of society and work out their conceptions of success primarily through their group membership, group responsibility and the redress of group grievances are essential elements of the liberal pluralist concept of segregation. Blacks, finding both that their life chances are correlated closely with their ethnic group membership, and that the status of their group is low, apply the liberal pluralist

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tort and contract, see M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 201-10 (1977). A critique of the notion of fault in law can be found in Pashukanis, *The General Theory of Law and Marxism*, in SOVIET LEGAL PHILOSOPHY 216-21 (Babb trans. 1951).

57. R. UNGER, *supra* note 2, at 166-68; Dallmayer, 2 POLITY, *supra* note 44, at 452-53; C. MACPHERSON, *supra* note 53, at 87.

58. W. WILSON, THE DECLINING SIGNIFICANCE OF RACE 144-54 (1978).

59. Dahl, *Critique of the Ruling Elite Model*, 52 AM. POL. SCI. REV. 463 (1958); Connolly, *The Challenge to Pluralist Theory*, in THE BIAS OF PLURALISM 18 (W. Connolly ed. 1969).

60. K. DOLBEARE AND P. DOLBEARE, *supra* note 45, at 54-55; Dallmayer, 2 POLITY, *supra* note 44, at 452-55. For an excellent explanation followed by a critique of pluralism, see Connolly, note 59 *supra*.

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concept of racial segregation in a sweeping manner to place responsibility on groups and institutions which do not improve the blacks' disadvantaged status.[61]

This analysis of the political theories that support the concepts of racial segregation and tie them to other important concepts suggests that there is a close connection between concept and judgment. This closeness implies that a decisionmaker who understands these connections and holds strong and consistent positions is constrained in his or her choice of a judgment, by the concept he or she utilizes.[62] The next section will show that, despite these constraints, there are overlaps and indeterminate borderlines between concepts which may lead to different judgments by holders of the same concept and similar judgments by holders of different concepts. In addition, litigation is characterized by conceptual disputes over the points and criteria of important concepts related to differences in the political theories held by the contestants. Concepts interact dynamically in the legal system as in other political fora, and this interaction changes them and the associated theories and judgments.

CONCEPTUAL CHANGE AND ESSENTIAL CONTESTEDNESS

Conceptual Change

Because of the logical interplay among concepts, theories and judgments, conceptual change has important political ramifications. Changes in concepts lead to changes in both judgments and political theories. These changes are responses to historical forces in the community.

Concepts change in several ways. In the normal course of social life, the change takes place at the edges of the concept. The change

61. *See, e.g.*, the analysis and proposals of H. GANS, MORE EQUALITY 134-48 (1974). *See generally* THE NEGRO AMERICAN (Clark & Parsons ed. 1967).

62. *See* commentaries cited note 2 *supra*. *See generally* Gifford, *Decisions, Decisional Referents, and Administrative Justice*, 37 LAW & CONTEMP. PROB. 3 (1972) (decisionmaking in regulatory agencies utilizes a set of "decisional referents" developed and internalized in the course of participation in the bureaucratic setting); Hughes, *Rules, Policy and Decisionmaking*, 77 YALE L.J. 411 (1968) (judges and lawyers assign meaning to legal precedents and concepts by referring to general, often unarticulated, theories, understandings, standards and techniques of interpretation); and R. KAGAN, REGULATORY JUSTICE 85-97 (1978) (regulatory theory and regulatory decisionmaking have a reciprocal relationship mediated by implicit understandings of the concepts used in written regulations).

results through the application of the concept in a new situation, which is arguably, but not obviously, similar to previous applications. As the concept is used more often in borderline situations, pressure for more radical conceptual revision may arise. This occurs most often with a change in the political theory linked to the concept. The more radical revision may take the form of a change in the requirements for the application of the concept. This change may result in borderline instances of application becoming central examples of application, which in turn would allow for the creation of new borders of application. The point or purpose of the concept may also be revised preserving the criteria in the short run. In the long run, a change in the point of a concept leads to future changes in criteria which take into account the new perspective and new theoretical framework. If the point and criteria remain unchanged despite much borderline application and pressure for revision, the concept may fall into disuse and a totally new concept will develop.[63] The concept "racial segregation" has exhibited all but the last type of change and even the last has been proposed.

That conceptual change is a political process has been central to the argument of this article thus far. The article has maintained that concepts are linked to political theories and political judgments. Historical forces create changes that are worked out in disputes over the use of concepts. Different groups with differing political theories use an apparently similar concept in different ways, giving rise to different judgments. When the concept is an important one, the dispute has great political significance. The process of change is political because it relies upon debate and deliberation which are not logically conclusive but are intended to convince in terms of the desirability of the judgments flowing from one or the other uses of the concept. Support for one or another use of a concept is gathered, and the extent of the support, rather than conclusive proof or ref-

63. W. CONNOLLY, *supra* note 7, at 31-32. Examples with regard to the concept of segregation follow in the text. Other examples include: the criteria of the concept may be revised in order to preserve the function or the point of the concept. The concept "fascism" has been revised in this manner to condemn governments or regimes which are considered oppressive and militaristic, but that do not subscribe to the tenets of German, Italian or Spanish fascism. The point of the concept might be revised in order to preserve the criteria. Such may be the case for the concept "intellectual" which over the last twenty years, particularly in the United States, has often been used as a condemnation. Finally, the point and the criteria may remain unchanged but the concept itself falls into disuse. The concept "alchemy" is only of historical interest.

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utation, determines the dominance of a conceptual usage.[64] Because of the nature of legal reasoning, as outlined above,[65] courts easily lend themselves to this form of political dispute. The use of an important concept is changed through a series of cases in which each party and often the judge proffers a different usage.

Essentially Contested Concepts

When uses of a concept are changed in the context of a dispute the concept is "essentially contested." An essentially contested concept must fulfill four requirements. First, it must be *appraisive* in that it is used to value a state of affairs positively or negatively.[66] Second, it must be *internally complex*; that is, the use of the concept requires reference to several aspects of the state of affairs to which it is applied.[67] Third, despite differences in the usage of the concept, there is a *similarity in the grammar and syntax* of each use which indicates that the conceptual dispute is not merely semantic, *i.e.*, using the same words for totally different phenomena.[68] Finally, the concept is *open* in that it may be applied to new situations not previously contemplated by the users of the concept and may be applied differently in borderline cases.[69] Essential contestedness is the hallmark of an important political concept in the process of change.[70]

THE ESSENTIAL CONTESTEDNESS OF THE CONCEPT "RACIAL SEGREGATION"

The best way to clarify essential contestedness and modes of conceptual change, while emphasizing the political nature of these features, is by an extended example using the concept "racial segregation." This example traces the process of change from the conservative formalist concept to the liberal formalist concept, as it appeared in desegregation litigation from *Plessy* to *Brown v. Board of Education*.[71] Since the Supreme Court's opinion in *Plessy* has been

64. *See generally* Gallie, *Essentially Contested Concepts*, 56 PROC. OF THE ARISTOTELIAN SOC'Y 167 (1956); Perry, *Contested Concepts and Hard Cases*, 88 ETHICS 20 (1977); *cf.* Rothstein, 9 J. OF VALUE INQUIRY, *supra* note 8, at 311.

65. *See* text accompanying notes 4-8 *supra*.

66. Gallie, 56 PROC. OF THE ARISTOTELIAN SOC'Y, *supra* note 64, at 171.

67. *Id.* at 171-72.

68. *Id.* at 175-76.

69. *Id.* at 172.

70. *Id.* at 186-87. *See* W. CONNOLLY, *supra* note 7, at 30-41; Rothstein, 9 J. OF VALUE INQUIRY, *supra* note 8, at 311. For an application of this line of argument to legal reasoning, see E. LEVI, *supra* note 4, at 5-9.

71. 347 U.S. 483 (1954).

explicated above[72] as an example of the use of the conservative formalist concept, this extended example will begin with Justice Har-

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72. *See* text accompanying notes 24-26 *supra*. The full extent of the clash of concepts in *Plessy* is revealed in the briefs on Plessy's behalf. They explicitly adopt the liberal formalist concept of segregation, stressing his entitlements in terms of rights to equal treatment and property. The thirteenth and fourteenth amendments are regarded as the rules by which these entitlements properly may be acquired and maintained. Fault on the part of the railroad and the state is established by their departure from these rules in depriving Plessy of his entitlements. The brief of S.F. Phillips and F.D. McKenney for Plessy maintained: "What we now submit is that for citizens of the United States any State statute is unconstitutional that attempts, because of personal Color to hinder, even if by insult alone, travel along highways, between any points whatever." Brief of Phillips and McKenney for Plaintiff in Error, at 13, Plessy v. Ferguson, 163 U.S. 537 (1896).

In his brief for Plessy, Albion Tourgee suggested that rights or entitlements were the distinction between slavery and freedom. "The slave was one who had no rights—one who differed from the citizen in that he had no *civil or political* rights and from the 'free person of color' in that he had no *personal* rights." Brief of Tourgee and Walker for Plaintiff in Error at 33.

Tourgee goes so far as to meet the inferiority criteria underlying the aristocratic and conservative formalist concepts of racial segregation on their own grounds:

> We shall also contend that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action or of inheritance is *property*; and that the provisions of the act in question which authorize an officer of a railroad company to assign a person to a car set apart for a particular race, enables such officer to deprive him, to a certain extent at least, of this property—this reputation which has an actual pecuniary value—'without due process of law,' and are, therefore, in violation of the Second restrictive clause of the first section of the XIVth Amendment of the Constitution of the United States. . . .
>
> The man who rides in a car set apart for the colored race, will inevitably be regarded as a colored man or at least be suspected of being one. And the officer has undoubtedly the power to entail upon him such suspicion. To do so, is to deprive him of 'property' if such reputation is 'property.' Whether it is or not, is for the court to determine from its knowledge of existing conditions. Perhaps it might not be inappropriate to suggest some questions which may aid in deciding this inquiry. How much would it be *worth* to a young man entering upon the practice of law, to be regarded as a *white* man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business opportunities are in the control of white people. . . . Under these conditions, is it possible to conclude that the *reputation of being white* is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?

Id. at 8-9. Despite a hint of sarcasm, Tourgee goes directly to the quick of the aristocratic and conservative formalist positions—the assumption and acceptance of the natural inferiority of blacks justifies racial separation, exclusion and disadvantage.

lan's dissent, which indicated the essential contestedness of the concept of racial segregation.

The Conceptual Dispute in Plessy

The use of the conservative formalist concept of segregation in *Plessy* allowed the Court to hold that a state law requiring separate accommodations for blacks and whites on trains did not conflict with the civil and political rights and the equal protection of the laws mandated by the Civil War Amendments.[73] "Separate but equal" facilities were held neither to abridge any entitlements that the states must protect, nor to stamp blacks with an unearned badge of inferiority. The scope of the concept "racial segregation" was so limited as to preclude its application to racial separation in public accommodations. Where the state merely enforced longstanding private customs and attitudes, the state was not acting to perpetrate racial segregation. The Court refused to look either at the roots of the attitudes and customs in slavery and the theories of racial supremacy that supported it, or at the effects of upholding Jim Crow legislation.[74]

In dissent Harlan adopted the liberal formalist concept of segregation.[75] He noted at the outset the "apparent injustice" of the separation of the races in passenger train accommodations. He identified the carrier and the state as the responsible actors: "Thus the State regulates the use of a public highway by citizens of the United States solely upon the basis of race . . . . That a railroad is a public highway, and the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed."[76] Harlan tied together the actors and acts with the injury to the victims by finding the true purpose of the statute and the acts of the carrier to be "not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[77] He went on to state the

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At the same time, the bleak statement of the conditions under which blacks must function raises issues with which the liberal formalist concept of segregation is hard pressed to deal. Later in his brief, Tourgee stated his view more succinctly and less metaphorically: "It is an act of race discrimination pure and simple. . . . Its object is to separate the Negroes from the whites in public conveyances for the gratification and recognition of the sentiment of white superiority and white supremacy of right and power." *Id.* at 26.

73. 163 U.S. at 550-51.
74. *See* notes 20-26 *supra* and accompanying text.
75. Plessy v. Ferguson, 163 U.S. at 552.
76. *Id.* at 553.
77. *Id.* at 557.

theoretical premises which support the liberal formalist concept: "[T]here is in this country no superior, dominant, ruling class of citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color. . . ."[78] Prophetically, Harlan concluded that although the Civil War Amendments validly created new entitlements for blacks, the Court's decisions had opened the door for states to reverse the process,[79] a task in which Southern and many Northern states were already engaged.[80]

Both Harlan and the briefs in *Plessy* placed before the Court a dispute over the concept "racial segregation." Even the briefs for Ferguson recognized this dispute and the different implications of the conservative and liberal formalist concepts.[81] The Court's opinion, however, was written as if the conservative formalist concept had not been challenged. The Court's concept of segregation was not changed, but the mechanism for change, a conceptual contest, had been activated.

From Plessy *to* Berea College: *The Strength of Conservative Formalism*

In *Cumming v. Richmond County Board of Education*,[82] decided three years after *Plessy*, Justice Harlan's opinion for the Court accepting the maintenance of a segregated and unequal school system, showed the limitations of the liberal formalist concept in promoting desegregation. The Richmond County Board had for "purely economic reasons"[83] turned a black high school into a grade school to accommodate the large numbers of black grade school students. The parents of the dispossessed high school students applied for an injunction restraining the board from using tax monies for the operation of the white high school until such time as equal facilities for black high school students were available. The schools in Georgia were required by state law to be segregated. The trial court granted the injunction and the Georgia Supreme Court reversed.[84]

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78. *Id.* at 559.

79. *Id.* at 559-60.

80. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 441-43 (1973); C. WOODWARD, *supra* note 11, at 67-109; CIVIL RIGHTS RECORD, *supra* note 11, at 131-43.

81. *See, e.g.*, Brief for Defendant in Error at 8-14, Plessy v. Ferguson, 163 U.S. 537 (1896), which carefully avoided aristocratic overtones in favor of the conservative formalist position that the Court's duty was to recognize that customary "private" attitudes about race relations could be a legitimate basis for enforcing separation whatever the Court thought of the private attitudes.

82. 175 U.S. 528 (1899).

83. *Id.* at 545.

84. *Id.* at 543.

The Supreme Court held, speaking through Justice Harlan, that the plaintiffs were not entitled to the relief requested. Harlan observed that there was no evidence that the defendants had the desire or purpose to discriminate against black students on account of race. Moreover, the remedy requested was not directed at correcting the allegedly injurious act.[85] Harlan avoided the issues of whether the state's segregation law was valid and whether the white high school should have been required to admit the black students. He insisted that these issues had not been raised in the pleadings.[86]

Harlan's liberal formalist concept, by concentrating on specific acts and actors responsible for racial disadvantage, required clear evidence of intention to discriminate for its application to conditions of racial separation and exclusion. The concept only connoted responsibility to remedy the specific acts of intentional discrimination whether or not such a remedy would eliminate the separation or exclusion of blacks.

Harlan's opinion for the Court in *Cumming* illustrated that differing concepts may at times lead to similar judgments. It further illustrated that the process of conceptual change is not smooth. The holders of each concept jockey for position and each may appear dominant for a time and then be subordinated to another position. Often a new concept achieves a dominant position when it seems to support many of the same judgments as the old concept. Only later in a novel situation is the full extent of the change in concepts recognized.[87] The decision in *Cumming* represented this aspect of conceptual change.

In the period following *Plessy* and *Cumming*, the conservative formalist concept and even the aristocratic concept of segregation demonstrated a resurgence. Social Darwinism, Manifest Destiny and the economic and political developments which spawned these doctrines gave impetus to racism and white supremacy. Jim Crow became a fixture in the South and spread further in the North. Blacks were excluded from public places and functions. They were almost completely disenfranchised through registration qualifications, segregated parties and primaries, and violence. In Louisiana, for example, the number of registered black voters dropped from 130,334 in

85. *Id.* at 542.
86. *Id.* at 544.
87. W. CONNOLLY, *supra* note 7, at 5-6.

1896 to 1,342 in 1904.[88] Residential segregation greatly increased.[89] Imperialism forged a new racist link between the North and the South. Southern leaders felt vindicated by American actions in the Phillippines and Cuba. Senator John J. McLaurin of South Carolina publicly thanked Senator George F. Hoar of Massachusetts "for his complete announcement of the divine right of the Caucasian to govern the inferior races."[90]

In this context, the liberal formalist position and its supporters were too weak to counter the resurgence of a concept of segregation based on white supremacy and approving racial separation. As racial separation and exclusion became an increasingly important aspect of domestic and international political and economic developments, the criteria for the application of the conservative formalist concept to any instance of separation or exclusion became more rigid and restrictive. The link between major political and economic institutions and racial separation became so strong as to make racial separation an essential background condition for the institutions. Racial separation could not then be considered the result of an identifiable act, by an identifiable actor, causing identifiable injuries. It had to be considered part of the nature of things. If the institutions themselves could not be dismantled, then the racial separation and disadvantage essential to the institutions would have to be ignored.[91]

The inability of the Court to maintain Harlan's liberal formalist concept of segregation in the face of the doctrine of white supremacy was made manifest in *Berea College v. Kentucky*.[92] The state's brief frankly purveyed racist doctrine with little fear of contradiction by the Court:

> If the progress, advancement and civilization of the twentieth century is to go forward, then it must be left, not only to the unadulterated blood of the Anglo-Saxon-Caucasian race, but to the highest types and geniuses of that race. . . .[93]

The state's expectations were met. The Court upheld the Kentucky

88. C. WOODWARD, *supra* note 11, at 85.

89. *Id.* at 100-01; C. VOSE, CAUCASIANS ONLY 14-16 (1967).

90. C. WOODWARD, *supra* note 11, at 73.

91. *Id.* at 102-09; Reich, *The Economics of Racism*, in PROBLEMS IN POLITICAL ECONOMY 107, 109-10 (D. Gordon ed. 1971); P. BARAN & P. SWEEZY, MONOPOLY CAPITAL 249-80 (1966).

92. 211 U.S. 26 (1908).

93. *Quoted in* R. KLUGER, *supra* note 51, at 87.

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statute subjecting Berea College to a heavy fine for teaching blacks and whites on the same campus at the same time.

While *Berea College* stated the Court's official position on segregation in education through the first third of the twentieth century, political action and litigation on behalf of blacks and on behalf of critical concepts of segregation were proceeding.[94] Some victories were won, chiefly under the guidance of NAACP lawyers, in restoring some aspects of the franchise and in remedying separate but clearly unequal conditions mandated by state law.[95] The effects of mobilization for massive industrial development and of two world wars, as well as the devastation of a depression, did much to limit the acceptability of any aristocratic notions, including those influencing the concept of racial segregation.[96]

Borderline Changes Leading to Conceptual Reorganization

While lawyers for blacks raised the liberal formalist concept of segregation in their arguments, the victories were won within the context of the conservative formalist position and the associated "separate but equal" doctrine. The period from *Berea College* to *Brown* demonstrates the extension of the borderlines of the conservative formalist concept in such a way as to force the reorganization

94. L. FRIEDMAN, *supra* note 80, at 578-79. *See generally* R. KLUGER, *supra* note 51, at 84-213; CIVIL RIGHTS RECORD, *supra* note 11, at 167-229; C. VOSE, *supra* note 89, at 9-22; C. WOODWARD, *supra* note 11, at 111-27.

95. For cases striking down residential segregation by ordinance, see City of Richmond v. Deans, 281 U.S. 704 (1930) (per curiam), *aff'g* 37 F.2d 712 (4th Cir. 1930); Harmon v. Tyler, 273 U.S. 668 (1927) (per curiam); Buchanan v. Warley, 245 U.S. 60 (1917). *But see* Corrigan v. Buckley, 271 U.S. 323 (1926) (upholding racially restrictive covenants, finding no state action). For cases eliminating aspects of discrimination against blacks in criminal jury trials, see Norris v. Alabama, 294 U.S. 587 (1935); Aldridge v. United States, 283 U.S. 308 (1931); Moore v. Dempsey, 261 U.S. 86 (1923). For cases striking down the "white primary," see Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927). *See also* McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 181 (1914) (reaffirming "separate but equal" while insisting that considerations of traffic volume do not allow inequality of facilities); Guinn v. United States, 238 U.S. 347 (1915) (striking down the "grandfather clause" in voter registration).

96. This is not to say that segregation, or arguments for it, were less acceptable. The grounds of those arguments moved away from aristocratic notions and toward the individualist, competitive notions of the conservative formalist concept. *See* C. WOODWARD, *supra* note 11, at 115. This is well-illustrated by the contrast between the Court's treatment of ordinances requiring residential segregation and of private agreements achieving the same end. *See* note 95 *supra*. *Cf.* the history of the Boswell Amendment in Davis v. Schnell, 81 F. Supp. 872 (D. Ala. 1949), *aff'd*, 336 U.S. 933 (1949).

of the criteria in a new concept which placed the previously borderline situations at the center.

Beginning with *Missouri ex rel. Gaines v. Canada*,[97] the Court extended the conservative formalist concept of segregation which had been established in *Plessy*. At the behest of NAACP attorneys urging the liberal formalist concept, the Court looked seriously at racially-separate opportunities in higher education to determine if they were truly equal. The *Gaines* case involved a black student who had been refused admission to the University of Missouri Law School in accordance with statutorily mandated racially-separate education. Missouri law had authorized the payment of tuition for attendance at an out-of-state school by blacks denied admission to in-state schools. Gaines sued. Avoiding any broader discussion of school segregation, the Court found that the tuition program did not provide equal facilities. The Court maintained that the responsibility of the state and the entitlement of the black student was to have equal facilities within the jurisdiction of the state.[98]

The state also was reminded that a limited demand by blacks for a particular facility did not excuse it from its responsibility to provide equal facilities:

> [Gaines'] right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.[99]

The Court used the language of individual entitlement. The extent of entitlement was limited. As racial separation *per se* was not challenged by the Court, the state chose to provide a separate law school for blacks. The opinion did not go undisputed. Justices Reynolds and Butler in dissent stated:

> For a long time Missouri had acted on the view that the best interest of her people demands separation of whites and Negroes in schools. Under the opinion just announced, I presume she may abandon her law school and thereby disadvantage her white citizens without improving petitioner's opportunities for legal instruction; or she may

97. 305 U.S. 337 (1938).
98. *Id.* at 344.
99. *Id.* at 351.

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> break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races. . . .[100]

Thus, the dissent sought the restricted application of the conservative formalist concept.

As the members of the Court saw it, the dispute was over the application of the conservative formalist concept in a borderline case. By applying that concept less restrictively under the influence of arguments based upon a liberal formalist concept, the Court subtly shifted the emphasis of the concept and the centrality of its criteria in the direction of judgments similar to those flowing more obviously from the liberal formalist concept. The significance of the new emphasis was the reversal of a trend of unquestioning acceptance of racial separation in schools.

Three Supreme Court decisions in 1948-50 continued this extension of the conservative formalist concept and prompted a major shift in the concept. While the NAACP briefs in *Sipuel v. Oklahoma State Board of Regents*,[101] *Sweatt v. Painter*[102] and *McLaurin v. Oklahoma State Regents*[103] clearly advocated a shift from the conservative formalist concept of segregation to the liberal formalist concept, the Court moved slowly toward conceptual revision. The brief for Sipuel declared:

> Classifications and distinctions based on race or color have no moral or legal validity in our society. . . . Segregation in public education helps to preserve a caste system which is based upon race and color. . . . [T]he terms 'separate' and 'equal' cannot be used conjunctively in a situation of this kind; *there can be no separate equality.*[104]

The Sweatt brief stated categorically: "It is clear not only that the *Plessy* doctrine . . . has not produced equality, but [it] can never provide the equality required by the Fourteenth Amendment."[105] Using the liberal formalist concept, the NAACP briefs asked that the Court look at the roots and effects of racial separation and hold that the fourteenth amendment created new entitlements for blacks which stood above prevailing attitudes and customs.

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100. *Id.* at 353.
101. 332 U.S. 631 (1948).
102. 339 U.S. 629 (1950).
103. 339 U.S. 637 (1950).
104. *Quoted in* R. KLUGER, *supra* note 51, at 259.
105. *Quoted in* CIVIL RIGHTS RECORD, *supra* note 11, at 273.

In a one-paragraph *per curiam* opinion in the *Sipuel* case, the Court held that Ada Sipuel was "entitled to secure legal education afforded by a state institution" and entitled to receive it as soon as "applicants of any other group."[106] In another case the Court ordered that a black student be admitted to the University of Texas Law School because he was entitled to "legal education equivalent to that offered by the State to students of other races." Such education [was] not available to him in a separate law school. . . ."[107] The Court explained that the law school for blacks "excludes from its student body members of the racial groups which number 85 percent of the population of the State and include most of the lawyers, witnesses, judges, and other officials with whom petitioner will inevitably be dealing. . . ."[108] In a companion case, the Court abolished a separate seating requirement for black graduate students.[109] The Court concluded "that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to equal protection of the laws."[110] "The appellant . . . must receive the same treatment at the hands of the state as students of other races . . . ."[111]

The Court had recognized the realities of the conceptual contest and leaned toward the liberal formalist concept at least with regard to graduate and professional education. Ostensibly the application of the conservative formalist concept was broadened by extending the scope of the criteria. The concept was applied to circumstances exhibiting a greater range of differential distributions, a wider time focus and a broader notion of the imputation of inferiority. This extension of the conservative formalist concept to borderline situations subverted the purpose of the concept to preserve existing attitudes, customs, and social relations by restricting the application of the concept and the consequent responsibility for remedying racial separation. It remained for *Brown* to eliminate the contradiction between the original purpose and the newly extended criteria of the conservative formalist concept by labelling it mistaken and by explicitly adopting a new concept.

The Adoption of the Liberal Formalist Concept in Brown

The briefs and arguments as well as the decision in *Brown v.*

106. 332 U.S. at 631.
107. Sweatt v. Painter, 339 U.S. 629, 635 (1950).
108. *Id.* at 634.
109. McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950).
110. *Id.* at 642.
111. *Id.*

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Board of Education,[112] reflected the process of conceptual revision. The initial brief for the black students was short and to the point as was the later decision. Racially separate facilities imposed by one race upon another could not be equal. Separation implied and promoted the inferiority of blacks. This was the only consistent rationale for *Gaines* through *McLaurin* and the only consistent rationale that could characterize decisions in other public areas. The *Plessy* doctrine was a mistake which departed from the rationale of the Civil War Amendments and earlier cases arising under them. In concluding, the brief for appellants stated:

> In any event the assumptions in the *Gong Lum*[113] case have since been rejected by this Court. In the *Gong Lum* case, without "full argument and consideration," the Court assumed the state had power to make racial distinctions in its public schools without violating the equal protection clause of the Fourteenth Amendment and assumed the state and lower federal courts' cases cited in support of this assumed power had been correctly decided. Language in *Plessy v. Ferguson* was cited in support of these assumptions. These assumptions upon full argument and consideration were rejected in the *McLaurin* and *Sweatt* cases in relation to racial distinctions in state graduate and professional education.[114]

Appellants clearly were seeking conceptual change.

The *amici curiae* briefs supporting school desegregation echoed the theme that *Plessy* and its concept of segregation were an aberration in the judicial interpretation of the fourteenth amendment. The Brief for the United States as *amicus curiae* first argued that the *Plessy* concept was applicable only if racial separation did not imply inferiority or if the inferiority implied were considered unremediable. The brief maintained that such situations, if they existed, were rare.[115] The brief concluded that: "This judicial contraction of the constitutional rights secured by the Amendment is irreconcilable with the body of decisions which preceded and followed *Plessy v. Ferguson*, and is not justified by the considerations ad-

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

113. Gong Lum v. Rice, 275 U.S. 78 (1927) (no equal protection violation resulted from exclusion of a child with some Chinese blood from white schools).

114. Brief for Appellants at 12, Brown v. Board of Educ., 347 U.S. 483 (1954).

115. Brief for the United States as *amicus curiae* at 3, 13, Brown v. Board of Educ.

duced to support it."[116] Not only was the *Plessy* concept of segregation inconsistent with prior and subsequent judicial interpretation, it was also a departure from the concepts which informed the fourteenth amendment:

> In sum, the doctrine of "separate but equal" is an unwarranted departure, based upon dubious assumptions of fact combined with a disregard of the basic purposes of the Fourteenth Amendment, from the fundamental principle that all Americans, whatever their race or color, stand equal and alike before the law.[117]

The Brief of the American Jewish Congress as *amicus curiae* argued similarly that *Plessy's* concept of segregation was at least obsolete, if not originally misconceived:

> Since both white and Negro view segregation as a method of asserting and reenforcing the inferiority of the latter and since in fact segregation statutes have that effect, this Court should not continue to maintain the erroneous proposition enunciated in *Plessy v. Ferguson* that laws requiring separation "do not necessarily imply, the inferiority of either race to the other."[118]

On reargument, the attack on *Plessy* and its concept of segregation heightened. Over three-quarters of the brief for the black students was directed at showing that the separate but equal doctrine was a mistake at the time of its original conception and that this mistake had been implicitly realized in subsequent Supreme Court decisions, culminating in the *McLaurin* case. The *amicus curiae* briefs in support of desegregation showed a similar understanding that the conservative formalist concept of segregation was vulnerable in the Justices' minds and that the time of its demise had arrived.

The purpose of the arguments was not only to demolish the conservative formalist concept of segregation embodied in *Plessy*, but to substitute for it the liberal formalist concept. The initial Brief for Appellants in *Brown* stressed that black students were denied opportunities by the state for obtaining personal "status, power and privilege" solely because of their race. That racial separation in the

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116. *Id.* at 23.

117. *Id.* at 25-26.

118. Brief of the American Jewish Congress as *amicus curiae* at 15-16, Brown v. Board of Educ.

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schools intentionally implied the inferiority of blacks was manifested in the history of segregation and in the present attitudes of the communities involved in segregation.[119] The social science material appended to the brief was offered as evidence that school segregation had caused identifiable injuries. In particular, the social science material suggested that segregation was detrimental to the black child's ability to function effectively in a world characterized by the individualistic, rule-bound, competitive theoretical framework in which the liberal formalist concept of segregation was also embedded. In the social science appendix, segregation was defined in terms of restrictions on opportunities which do not arise "from the free movements of individuals which are neither enforced nor supported by official bodies. . . ."[120] The "segregated group" was the one which explicitly or implicitly had a "lesser social status."

The United States as *amicus curiae* similarly urged that the outlawing of racial segregation was an extension of individual freedom and entitlement, not a restriction upon it. "'Commingling' between white and colored persons [could] then result as the product of voluntary choice, not of legal coercion."[121] The American Jewish Congress urged the liberal formalist concept arguing that the school segregation laws "eliminate the free play of individualism and force all without exception, to conform their conduct to the caste system."[122] The link between the liberal formalist concept of segregation and an individualist, competitive theoretical framework was perhaps best brought out in the *amicus* brief of the American Federation of Teachers:

> In the segregated school system the growing citizen never has the chance to show his equal ability; he never has the "opportunity to secure acceptance by his fellow students on his own merits."
>
> He must wait until he has finished what schooling he gets before he enters the competition. For him "the personal and present right to the equal protection of the laws" is of as great practical importance as for the graduate student.[123]

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119. Brief for Appellants at 9, Brown v. Board of Educ.

120. *Id.* at app. 2.

121. Brief for the United States as *amicus curiae* at 23, Brown v. Board of Educ.

122. Brief for the American Jewish Congress as *amicus curiae* at 8, Brown v. Board of Educ.

123. Brief for the American Federation of Teachers as *amicus curiae* at 8, Brown v. Board of Educ. (citing McLaurin v. Oklahoma State Regents, 339 U.S. at 641).

Thus, the opportunity to compete was a benefit to be achieved by ending segregation.

Kansas and the Topeka Board of Education strove to maintain the conservative formalist concept. Their brief stressed that the Kansas statute merely permitted racial separation at local option in larger Kansas cities. Several cities had already ended such separation. Topeka had voted to do so and was beginning to implement its decision. The brief went so far as to characterize the segregation statute as "the method provided by the legislature of the State of Kansas to achieve the goal of an integrated school system where segregation is not needed."[124] Kansas agreed that black students might be injured by segregation but argued that their injuries did not rise to a violation of the equal protection clause because they had not shown that white students were not also injured by segregation. Neither whites nor blacks had the benefits of integrated education, and neither was constitutionally entitled to them.[125]

Several of the Southern states in their briefs and arguments on implementation of the *Brown* decision argued for the aristocratic concept of racial segregation. Milton Korman, arguing for the District of Columbia in *Bolling v. Sharpe*, stated that racial separation was not a result of race prejudice but of a "kindly feeling" toward black children.[126] Lindsay Almond, Attorney General of Virginia, told the Court that ending segregation in schools would be damaging to the black because "with the help and the sympathy and the love and respect of the white people of the South, the colored man has risen under that educational process to a place of eminence and respect throughout this nation." He continued, "it has served him well. . . ."[127] The Attorney General of Texas ended his argument before the Court with: "Texas loves its Negro people and Texas will solve their problems its own way."[128] At the same time the inferiority of blacks was underlined as a justification for continued segregation. The *amicus curiae* briefs of Florida and North Carolina cited the poor performance on tests and the high incidence of illegitimate births and venereal disease among blacks as reasons for not forcing white students to go to school with them.[129] Archibald Robertson,

124. Brief for Appellees at 31-32, Brown v. Board of Educ.

125. *Id.* at 37-39.

126. *Quoted in* R. KLUGER, *supra* note 51, at 579.

127. *Id.* at 673.

128. *Id.* at 734.

129. Brief of the Attorney General of Florida as *amicus curiae* at 19-21, Brown v. Board of Educ.; Brief of the Attorney General of North Carolina as *amicus curiae* at 37-41.

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representing Virginia, reiterated this position adding that "incidence of disease and illegitimacy were just a drop in the bucket compared to the promiscuity" to which white parents would not submit their children.[130]

The decision in *Brown* showed the Court's acceptance of the liberal formalist concept and the political theory in which it was embedded. Both the decision and the questioning of the justices showed also that they recognized the essential contestedness of the concept of segregation and that they were nudging a new use of that concept into a dominant position. During the oral argument on December 10, 1952, both Justices Burton and Frankfurter pointedly questioned John W. Davis about the recognition of change in important legal and social concepts.[131] The first two questions that the Court ordered to be reargued concerned the history of the concepts of segregation and equality under the fourteenth amendment.[132]

That the central issue upon reargument was which concept of segregation would prevail was best brought out by an exchange between Justice Frankfurter and Spottswood Robinson. Robinson had argued that the history of the fourteenth amendment indicated that it was intended to remove all racial distinctions in law. School segregation, being such a distinction, was prohibited by the amendment:

> Frankfurter: Namely, they wanted this [amendment] to put an end to treating white and colored differently before the law in all its manifestations?
> Robinson: This is correct, sir. . . .

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130. *Quoted in* R. KLUGER, *supra* note 51, at 733.

131. Record at 3, Dec. 10, 1952 (afternoon), Briggs v. Elliot, 347 U.S. 483 (1954) (decided with *Brown*).

132. The questions were as follows:

> 1. What evidence is there that the Congress which submitted and the state legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> 2. If neither the Congress in submitting nor the states in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
>
> (a) that future Congresses might in the exercise of their power under Sec. 5 of the Amendment, abolish segregation, or
>
> (b) that it would be within the judicial power, in light of future conditions, to construe the amendment as abolishing such segregation of its own force?

Order, Brown v. Board of Educ., 345 U.S. 972 (1953).

> Frankfurter: Then the question is whether this is one of its manifestations.[133]

Later, in questioning Thurgood Marshall, who was one of the counsel for appellants, Frankfurter emphatically stated: "But the point is important whether we are to decide that the facilities are equal or whether one says that is an irrelevant question, because you cannot apply that test between white and black."[134]

The decision of the Court in *Brown* recognized the essential contestedness of the concept of segregation. The intentions of the framers and ratifiers of the Civil War Amendments with regard to racially-separate education were inconclusive because they held different positions on the concept of segregation; the amendments' effects on largely undeveloped systems of education were not considered.[135] The question to be answered was which position on the concept of segregation best characterized the checkered history of the judicial interpretation of the fourteenth amendment and best fit important modern concepts and social theory. *Plessy* and its conservative formalist concept of segregation was discarded as a short-lived aberration.[136] It did not fit the Court's recent decisions, *Gaines* through *McLaurin*,[137] and it did not fit with the modern development and importance of education.[138] It also did not fit with modern social theory.[139] The liberal formalist concept was deemed more appropriate:

> 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[140]

In two sentences the Court had noted the entitlement, the responsibility, the injured party, the culpable act and the competitive theory of society in which all were linked.

The Court had completed the process of conceptual revision, my analysis of which began when the conservative formalist concept

133. *Record* at 12, Brown v. Board of Educ., 347 U.S. 483 (1954).
134. *Id.* at 28.
135. 347 U.S. 483, 489-90 (1954). *See also* R. KLUGER, *supra* note 51, at 625-46.
136. Brown v. Board of Educ., 347 U.S. at 494.
137. *Id.* at 491.
138. *Id.* at 492-93.
139. *Id.* at 494, 494 n.11. (The note is the well-known social science footnote.)
140. *Id.* at 493.

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was challenged by Harlan's dissents in *Plessy*. The first step of the process was the conceptual dispute. That was followed by the extension of the dominant concept to borderline situations. This led to a contradiction between a broadened use of the concept and its purpose of restricting the circumstances to which "racial segregation" applied. Then came the revision of the purpose of the concept to place the borderline applications of the conservative formalist concept at the heart of the newly-dominant liberal formalist concept. Linked to these changes were changes in political theory and political judgment whose effects would be broader than the specifics of the *Brown* decision.

POLITICAL THEORIES, CONCEPTUAL CHOICE AND JUDICIAL JUDGMENT

That the *Brown* decision was not just a revision in the concept of racial segregation and a judgment on but one form of racial separation did not become immediately obvious. In the years following, there was much dispute over the significance of *Brown*.[141] Supreme

141. The *Brown* opinion has been the source of much criticism. It has been criticized as being unclear as to what actually was decided. Critics have also argued that the opinion did not rely upon precedent or principle and that it appeared to be judicial legislation. Further criticisms were that it misused non-legal materials, and that by separating implementation from the declaration of rights, it accomplished nothing. Often these criticisms were encapsulated in the charge that the decision was merely symbolic. *See* C. HYNEMAN, THE SUPREME COURT ON TRIAL (1963); S. WASBY, A. D'AMATO & R. METRAILER, DESEGREGATION FROM BROWN TO ALEXANDER 95-107 (1977); Kurland, *Toward a Political Supreme Court*, 37 U. CHI L. REV. 45 (1969); Wechsler, *Toward Neutral Principles of Constitutional Law*, 72 HARV. L. REV. 32 (1959).

These criticisms miss the point of what the Court did in *Brown*. In effect, the Court declared the aristocratic and conservative formalist concepts of segregation invalid. It had opened the door to other concepts and favored the dominance of the liberal formalist concept. It had not foresaken principle and precedent, but had shown how each was inconclusive in a hard case. Principle and precedent, as well as history and social theory, had discredited the *Plessy* doctrine and the aristocratic and conservative formalist concepts of segregation. Because the Court's decision concerned the meaning of a concept in terms of its relation to other important concepts, all of which have a history, and the Court thoroughly considered these histories, it cannot be said that this was legislation as opposed to adjudication. Nor can it be said that the decision was "merely symbolic." Such a characterization implies a view of concepts and their relationship to phenomena that is alien to this analysis. To view the decision as symbolic is to erroneously assume that concepts are symbols which stand for, as a shorthand notation, groups of facts. Such a view cannot account for the way, as suggested in this essay, in which concepts impart judgments and themselves partly constitute social phenomena. From this erroneous perspective, concepts cannot be essentially contested. *See* R. FLATHMAN, CONCEPTS IN SOCIAL AND POLITICAL PHILOSOPHY 5-6, 6 n.20 (1973); *cf.* Rothstein, 9 J. Value Inquiry, *supra* note 8.

Contrary to those who view *Brown* as symbolic, other commentators too op-

timistically characterized the importance of the conceptual change as having "propelled the nation into the modern era of its on-going revolution in race relations." It became the "principal ideological engine of today's civil rights movement." Justice Goldberg commented in the 1960's that the ruling "clarified values and ideals." S. WASBY, A. D'AMATO & R. METRAILER, *supra* note 141, at 93.

While noting the impact of conceptual change, these commentators ignored the nature of conceptual contests and the limitations of the liberal formalist concept. The *Brown* decision had not ended the conceptual dispute. The liberal formalist concept of segregation would be dominant but under attack, and the losing parties and their sympathizers would not immediately give up their concept of segregation. They attempted to modify the criteria of the newly-dominant concept to retain racially-separate schools or at least to limit integration. The concept also came under attack from those who felt that it did not go far enough to eliminate the inferior social and economic position of blacks. A more balanced assessment of the value and the limits of the decision, but one which explores the meaning of a conceptual change, was made by Robert Carter, who had argued the case for the NAACP:

> Thus, the psychological dimensions of America's race relations were completely recast. Blacks were no longer supplicants seeking, pleading, begging to be treated as full-fledged members of the human race; no longer were they appealing to morality, to conscience, to white America's better instincts. They were entitled to equal treatment as a right under the law; when such treatment was denied, they were being deprived—in fact robbed—of what was legally theirs. As a result, the Negro was propelled into a stance of insistent militancy. Now he was demanding—fighting to secure and possess what was rightfully his. The appeal to morality and to conscience still was valid, of course, but in a nation that was wont to describe itself as a society ruled by law, blacks had now perhaps the country's most formidable claim to fulfillment of their desire to become full and equal participants in the mainstream of American life.
>
> Brown's indirect consequences, therefore, have been awesome. It has completely altered the style, the spirit, and the stance of race relations. Yet the pre-existing pattern of white superiority and black subordination remains unchanged; indeed, it is now revealed as a national rather than a regional phenomenon. Thus, Brown has promised more than it could give, and therefore has contributed to black alienation and bitterness, to a loss of confidence in white institutions, and to the growing racial polarization of our society. . . . Few in the country, black or white, understood in 1954 that racial segregation was merely a symptom, not the disease; . . .

Carter, *The Warren Court and Desegregation*, in THE WARREN COURT: A CRITICAL ANALYSIS 57 (R. Sayler, B. Boyer, R. Gooding eds. 1969).

Criticism of the Court for separating the implementation of a remedy from the declaration of the unconstitutionality of segregation also fails to grasp the nature of conceptual contests. The ascendance to legal dominance of one concept of segregation did not mean the disappearance of other concepts. The dispute still raged under different ground rules, and by separating the consideration or right from remedy, the Court did provide a forum for the aristocratic and conservative formalist concepts to reassert themselves in determining the scope of the remedy. On the other hand, the Court also provided, whether or not intentionally, a forum for other concepts of segregation to suggest more sweeping remedies. The Court in Brown v. Board of Education, 349 U.S. 294 (1955) (*Brown II*), in effect subordinated the liberal formalist

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Court decisions in school desegregation litigation since *Brown* have shown the significance of that decision as a choice of the political theory which accompanied the liberal formalist concept of segregation. The choice of this theory and concept had implications for judgments on other matters—*e.g.*, neighborhood schools, housing patterns and the rights of other groups. The history of the period also demonstrates the limitations of the liberal formalist concept of segregation and the theory and judgments associated with it for bringing about an integrated society.[142] Here again it will be useful to illustrate these points by an historical analysis of school desegregation decisions since *Brown*. In this analysis, a continuing conceptual contest is revealed and the importance for conceptual revision of the political theories behind the concepts is made manifest. The political nature of the choice of concepts is confirmed by the Court's eventual rejection of the liberal pluralist concept of segregation because of the radical implications of the political theory which supports it.

Conservative Formalism and Massive Resistance to Desegregation

In the aftermath of *Brown*, the Court still had to deal with massive resistance to desegregation based upon the conservative formalist concept of segregation.[143] *Cooper v. Aaron*[144] and *Griffin v. School Board of Prince Edward County*[145] reiterated the reasoning in *Brown* and disposed of the two most crude forms of resistance to desegregation—hostility among the populace generated and supported by state governmental officials and the closing down of the entire public school system in favor of segregated private schooling. In *Cooper*, the Court emphasized the individual rights and entitlements of the excluded black students, holding that these rights could not be subjected to deprivation because of hostility for which state officials were responsible.[146]

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concept, which demanded an immediate and individual vindication of the declared right, to a concept which recognized the importance of group relations and group status. This resulted in substantial roadblocks being placed in the way of desegregation, as the Court retreated from the controversy after *Brown*. It also resulted in broad desegregation orders when the Court re-entered the field eight years later.

142. *See generally* S. WASBY, A. D'AMATO & R. METRAILER, *supra* note 141; Dimond, *School Segregation in the North: There Is But One Constitution*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1 (1972); Motley, *From Brown to Bakke: The Long Road to Equality*, 14 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 315 (1979).

143. S. WASBY, A D'AMATO & R. METRAILER, *supra* note 141, at 162-205; CIVIL RIGHTS RECORD, *supra* note 11, at 311-26.

144. 358 U.S. 1 (1958).

145. 377 U.S. 218 (1964).

146. Cooper v. Aaron, 358 U.S. at 15.

In *Griffin*, the Court found that while the operation of a public school system was not mandated by the Constitution, closing the Prince Edward schools was intended to perpetuate segregation in the county.[147] With the requisite intention uncovered, the Court easily identified the perpetrator, the discriminatory act and the injured victims. The Court went on to suggest that the responsibility for remedying segregation in the schools included the duty of county supervisors to levy taxes to reopen and maintain the public school system.[148] Both opinions stuck close to the liberal formalist concept of segregation. Because of the passage of time since *Brown* and the obvious bad faith of the respondents, the Court was able to affirm the "personal and present" nature of the black students' rights.

Eight years after *Brown II*, the Court had begun to move on to more sophisticated forms of resistance. In 1963, the Court confronted two tactics that had slowed the implementation of the *Brown* decision. The Court's handling of these two tactics suggested that the Court's concept of segregation had limited implications for racial integration. Both cases concerned policies, neutral on their face, whose implementation resulted in delaying or preventing desegregation. In *McNeese v. Board of Education*,[149] the Court ruled that its traditional doctrine requiring the exhaustion of administrative remedies before judicial relief could be sought did not apply to school desegregation. In *Goss v. Board of Education*,[150] the Court voided a desegregation plan which consisted of an initial assignment on a geographic basis and a voluntary transfer provision allowing students to transfer from a school in which their race was in the minority to a school in which it was in the majority. In both cases the Court relied not only on the result—continued racial separation—but on the intention behind the tactics and the history of school segregation to declare the tactics discriminatory.[151] At a later date, the Court would be faced with the result only.

From Green *to* Wright: *Openings to the Liberal Pluralist Concept*

In *Green v. County School Board*[152] and *Monroe v. Board of Commissioners*[153] the Court confronted facially neutral "freedom of

147. Griffin v. School Bd. of Prince Edward County, 377 U.S. at 229.

148. *Id.* at 233.

149. 373 U.S. 668 (1963).

150. 373 U.S. 683 (1963).

151. *Cf.* Bradley v. School Bd. of Richmond, 382 U.S. 103 (1965) ("Delays in segregating school systems are no longer tolerable." *Id.* at 105).

152. 391 U.S. 430 (1968).

153. 391 U.S. 450 (1968).

choice" plans. In these cases, the intentions of the school boards in proposing the policies were not clearly improper. In *Green*, there were only two schools and no pattern of residential racial separation. Prior to *Brown*, all black children had been assigned to one school and white children to the other. The racial separation had continued under post-*Brown* state pupil placement laws which required pupils to be reassigned to the schools to which they had been assigned the previous year. Pupils were then given the option to transfer out of the schools to which they had been assigned by applying for reassignment to the school of their choice. This plan was the original subject matter in the *Green* case. After the suit was filed, the county school board adopted a plan whereby each student would be allowed to choose his or her school at the beginning of every year.

Under both of these plans, few members of either race asked to be assigned to the school traditionally attended by the other race.[154] In striking down the "freedom of choice" plan, the Court in *Green* did not look to the intention of the Board, nor to any other specific act of the Board. It maintained that the Board had an "affirmative duty" to eliminate the racially-dual system "root and branch" and "convert to a unitary system."[155] The Court required the school board to effectuate immediate integration.

Two aspects of this decision and the accompanying *Monroe* decision stood out as reflecting the liberal pluralist concept of segregation. The first was the Court's suggestion that the history of racial separation in the community was a major factor in imposing upon the community the responsibility for immediate desegregation.[156] The second aspect was the Court's concern for the "light of circumstances" and the factual "context" of the apparently neutral policies. The circumstance which most concerned the Court in both cases was the disproportional representation of the races in the schools.[157] The apparent departure from the language associated with the liberal formalist concept of segregation may be explained as a distortion of that concept caused by the separation of considerations of violation from considerations of remedy. However, the opinions unmistakably de-emphasized the significance of individual

154. Green v. County School Bd., 391 U.S. at 441-42; Monroe v. Board of Comm'rs of Jackson, 391 U.S. at 453-54.

155. Green v. County School Bd., 391 U.S. at 437-38.

156. *Id.* at 437; Monroe Board of Comm'rs of Jackson, 391 U.S. at 453.

157. Green v. County School Bd., 391 U.S. at 441-42; Monroe v. Board of Comm'rs of Jackson, 391 U.S. at 453-54.

choice and entitlement under the "freedom of choice" plans. The Court assumed a condition of disproportional representation was detrimental to the status of blacks as a group. Bolstering this impression was the Court's quotation in *Green* from a United States Commission on Civil Rights report generally deploring the lack of integration in the South under "freedom of choice" plans.[158]

The Court gave further encouragement to the liberal pluralist concept of segregation in the year following *Green* and *Monroe*. In *United States v. Montgomery County School Board*,[159] the Court ordered an Alabama county school board to desegregate teachers according to a strict mathematical ratio. Three elements implicit in this decision lent a more critical cutting edge against segregation than had decisions based on the liberal formalist concept. First, the Court accepted that underrepresentation in respected positions was an important aspect of segregation. Second, the Court recognized the historic effects of segregation on this underrepresentation in important societal positions. Third, the Court accepted the link between school segregation and a number of factors relating to group power and status.

Similarly, in *Gaston County v. United States*,[160] ostensibly a Voting Rights Act case, the Court recognized the connections between school segregation and group underrepresentation in the resources of political power. Invalidating a literacy test requirement for voting which barred a higher percentage of blacks than whites, the Court noted: "It is only reasonable to infer that among black children compelled to endure a segregated and inferior education fewer will achieve any given degree of literacy than will their better-educated white contemporaries."[161] The case arose in the context of Gaston County's effort to reinstate the literacy test requirement; the requirement was suspended pursuant to the Voting Rights Act, subject to being reinstated if it could be shown that neither the purpose or effect of the requirement was racial discrimination.[162] The Court assumed that the manner of administration of the test was neutral and that school segregation in the county had ceased. The decision was based upon the effect of the test on group representation and the history of group status in the community. The Court

158. 391 U.S. at 439-40 n.5.
159. 395 U.S. 225 (1969).
160. 395 U.S. 285 (1969).
161. *Id.* at 295.
162. *Id.* at 287.

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underscored this analysis by a footnote declaring the irrelevance of whether the present residents of the county had actually gone to its own segregated schools.[163]

The Court's apparent acceptance of a concept of segregation with a more critical cutting edge than the liberal formalist concept was not lost on the lower federal courts and on attorneys for plaintiffs in desegregation cases. Many federal courts routinely based findings of segregation and remedies upon percentages of pupils of each race in schools compared to their distribution in the population of the district.[164] Questions of group power and status with respect to school segregation arose in the lower federal courts' consideration of "one-way busing,"[165] faculty desegregation,[166] and school closings.[167]

At issue in these cases were not only the establishment of a unitary school system but the relative status and access of whites and blacks in the decisionmaking of the school system and the community. As one court suggested:

> White pupils, realizing that they are permitted to attend their own neighborhood schools as usual, may come to regard themselves as "natives" and to resent the negro children bussed into the white schools every school day as intruding "foreigners." This undesirable result will not be nearly so likely if the white children themselves realize that some of their number are also required to play the same role at negro neighborhood schools.[168]

In another case, the Fourth Circuit Court of Appeals rejected the desegregation plan accepted by the district court explaining that

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163. *Id.* at 291-93, 293 n.9; *cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976), an employer using an apparently neutral employment test which perpetuates the effects of past discrimination must demonstrate the rationality of the test with respect to the duties of the job for which the test is required). *But see* Washington v. Davis, 426 U.S. 229 (1976).

164. *See, e.g.*, Davis v. School Dist., 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 413 (1971); Chambers v. Iredell County Bd. of Educ., 423 F.2d 613 (4th Cir. 1970); Kemp v. Beasley, 423 F.2d 851 (8th Cir. 1970).

165. *See, e.g.*, Moss v. Stamford Bd. of Educ., 350 F. Supp. 879 (D. Conn. 1972).

166. *See, e.g.* Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir. 1970); *cf.* Rogers v. Paul, 382 U.S. 198 (1965).

167. *See, e.g.*, Norwalk CORE v. Norwalk Bd. of Educ., 423 F.2d 121 (2d Cir. 1970); Brice v. Landis, 314 F. Supp. 974 (W.D. Cal. 1969).

168. Brice v. Landis, 314 F. Supp. at 974.

"there was no explantion offered as to how the school board determined upon particular schools for extinction."[169] In the context of a tri-racial community, pluralism and group status considerations were determinative despite a specific finding of lack of legal injury:

> The district court said that it would "consider the effect upon [Mexican-Americans] . . . of any plan submitted by the parties." This was not sufficient. The Mexican-American students must be specifically included in the plan and its operation. The district court apparently chose to include Mexican-American students in the elementary school plan despite the finding of no "de jure" segregation of Mexican-Americans.[170]

Such a decision would be impossible under the liberal formalist concept of segregation.

At least as often as the liberal pluralist concept of segregation was successfully raised, it was raised and rejected in favor of the liberal formalist concept. The Eighth Circuit, while finding that black students were entitled to desegregated education, declared "we do not find constitutional error in ordering the larger, more populous former white school district to annex that smaller, less populous former black school district if that annexation does in fact accomplish a unitary non-racial school system."[171]

In Southern school cases, the courts were able to flirt with the liberal pluralist concept of segregation without abandoning the liberal formalist concept. Separating the violation from the remedy allowed the courts to find identifiable, intentional acts, actors and injured victims by referring to the previous *de jure* status of, and delay in remedying, segregation in the South.[172] Once a violation had been determined consonant with the liberal formalist concept, the dismantling of the segregated system could be implemented through sweeping prospective orders embodying the liberal pluralist concept. Those who wished to maintain racially-separate schooling in the South engaged in the conceptual contest largely by attempting to limit the application of the liberal formalist concepts and by

169. Felder v. Harnett County Bd. of Educ., 409 F.2d 1070, 1074 (4th Cir. 1969).

170. United States v. Texas Educ. Agency, 467 F.2d 848, 870 (5th Cir. 1972).

171. Haney v. County Bd. of Educ., 429 F.2d 364 (8th Cir. 1970).

172. *See, e.g.*, Carter v. West Feliciana Parish School Bd., 396 U.S. 290 (1970); Northcross v. Memphis City Schools Bd. of Educ., 397 U.S. 232 (1970); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Dowell v. Board of Educ., 396 U.S. 269 (1969).

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preventing the acceptance of the liberal pluralist concepts of segregation. They were unsuccessful in these tactics with respect to the courts, although they found a sympathetic ear in President Nixon's Justice Department.[173] They also established a conceptual position to which they could return after the initial dismantling of a segregated system had been reversed by newly-emerging patterns of residential racial separation. This position might serve as well to protect racial separation in school systems, primarily in the North, which had not been segregated by state law at the time of the *Brown* decision.

The Supreme Court's ambivalent position on the concept of segregation in Southern school cases was summed up in *Swann v. Charlotte-Mecklenburg Board of Education*[174] and *Wright v. Council of Emporia*.[175] Chief Justice Burger, writing for the Court in *Swann*, despite his professed intention "of defining in more precise terms than heretofore" the Court's concept of segregation,[176] reaffirmed the ambivalent position: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad. . . ."[177] He noted that the quality of school buildings and the racial composition of administrative staff and faculty are important indications of segregation.[178] He also noted the reciprocal effect of racial separation of schools and residential racial separation.[179] Despite his deprecation of a "fixed mathematical racial balance reflecting the pupil constituency of the system," he upheld the district court's requirement of such a balance as "a starting point in the process of shaping a remedy."[180] After reiterating the separation of violation and remedy, he concluded by opening the door to a return to the strict application of the liberal formalist concept of segregation:

> It does not follow that the communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school

173. In response to increasing white opposition to HEW desegregation efforts, the Secretary of HEW and the Attorney General issued a joint statement on July 3, 1969, to the effect that too much emphasis had been placed on time limits, coercion and sanctions, and that some delay in the completion of desegregation might, in appropriate cases, be justified. D. BELL, RACE, RACISM AND AMERICAN LAW 467-68 (1973).

174. 402 U.S. 1 (1971).

175. 407 U.S. 451 (1972).

176. 402 U.S. at 15.

177. *Id.* at 17.

178. *Id.* at 18.

179. *Id.* at 20-21.

180. *Id.* at 25.

> authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.[181]

In *Wright*, the city of Emporia, whose student population was approximately one-half blacks and one-half whites, withdrew from a previously segregated, consolidated school system when that system was ordered desegregated. The outlying county with which the city had participated in the system had a much higher percentage of black students. The city neatly placed the choice of concepts before the Court by claiming:

> [The action of the city] may be enjoined only upon a finding either that the state law under which it acted is invalid, that the boundaries of the city are drawn so as to exclude Negroes, or that the disparity of the racial balance of the city and county schools of itself violates the Constitution.[182]

The Court made no such findings and yet held that the withdrawal of the city from the consolidated system would not be allowed.

The Court noted that the timing of the city's action might give rise to a finding of a purpose or intention to segregate, but discarded that view, stating: "Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect."[183] Noting the percentage disparities in racial composition between the city and the county, the Court declared: "We need not and do not hold that this disparity in the racial composition of the two systems would be a sufficient reason, standing alone, to enjoin the creation of a new school district."[184] If, however, the purpose were irrelevant, and if there were a substantial number of blacks in both school districts, and the withdrawal from the consolidated district was supported by other non-racial considerations, then the numerical balance of the races seems the only possible basis for the decision. The Court, per Justice Stewart, concluded, as in *Swann*, that the withdrawal of the city was not indefi-

181. *Id.* at 22.
182. Wright v. Council of Emporia, 407 U.S. at 459.
183. *Id.* at 465.
184. *Id.* at 467.

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nitely precluded, but only precluded until a unitary system was established.[185] The Court further manifested its ambivalence by stating, contrary to its opinion in *Swann*, that future white flight from the county system was a ground for preventing the city's withdrawal.[186]

Chief Justice Burger did not increase clarity in his dissent. He called the Court's "racial balancing" pointless because of the effects of population shifts, and concluded that the likelihood of white flight was "highly speculative."[187] This confusion and the heightening of the conceptual dispute was also related to the shift of the Court's focus to school districts which had not been segregated by state law at the time of the *Brown* decision.

Northern School Desegregation: The Retrenchment of Liberal Formalism

Keyes v. School District No. 1,[188] arising in Denver, Colorado, provided a situation in which the Court could resolve the ambivalence over its concept of segregation or at least lean more toward the concept which would inform its future decisions. The school district had not been segregated by state law but minority students had been generally confined to specific schools serving a residential section in which minority population was high. The lower court found that schools in this residential section had been segregated partly as a result of the siting of new schools, the placement of mobile classrooms, the changing of boundary lines, the assignment of staff and faculty, and the granting of transfers to white students. There was no such finding with regard to schools in other residential sections of the school district.

The petition for certiorari noted the conceptual dispute between the parties to the case and between conflicting lower court opinions:

> Where this Court and the lower courts require desegregation throughout a southern school district where segregation was imposed by law (even though it persists only in certain portions of that district), the lower courts here (and in some other places) have confined desegregation to

185. *Id.* at 470.
186. *Id.* at 473.
187. *Id.* at 475.
188. 413 U.S. 189 (1973).

> discrete areas where particular segregating deeds have been uncovered and identified.[189]

These courts had applied a strict liberal formalist concept of segregation to racial separation in Northern schools, thereby limiting the responsibility for remedy to just that necessary to eliminate the specific acts identified and their direct effects. As respondents stated flatly: "This case does not involve a racially-segregated school system created or aggravated by the defendants."[190]

Both the district court and the court of appeals concluded that "the Constitution allows separate facilities for races when their existence is not state imposed" and when they provide equal educational opportunity.[191] The Brief for Petitioners urged the Court to look to the reality of racial antagonism and the condition of racial separation as establishing a *prima facie* case of segregation and rule that "the board should bear the burden of justifying racially-disproportionate schools" with compelling reasons.[192] The briefs made clear that Petitioners were asking the Court to move toward the liberal pluralist concept of segregation while the Respondents were requesting a strict adherence to the liberal formalist concept.

The Court sided with the petitioners, attempting at the same time to keep their toehold on the liberal formalist concept. The Court held that proof of specific discriminatory acts with respect to one part of the system, and disproportionate racial concentrations in other parts of the system, permitted the evidentiary inference that the disproportionate concentrations were the result of prior discriminatory acts or the indirect result of the proven acts.[193] This established a *prima facie* case of system-wide segregation which obligated the school board to show compelling non-discriminatory reasons for their decisions on school policy. A policy of neighborhood school assignment was not in itself compelling where a different application of that policy or other reasonable policies could have eliminated or lessened the disproportionate racial concentrations in the schools.[194] This represented a clear move closer to the liberal pluralist concept of segregation with its emphasis on conditions of disproportionate concentration rather than specific actors

189. Petition for Writ of Certiorari at 16, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

190. Brief of Respondents in Opposition at 6, Keyes v. School Dist. No. 1.

191. *Id.* at 10.

192. Brief for Petitioners at 91, Keyes v. School Dist. No. 1.

193. Keyes v. School Dist. No. 1, 413 U.S. at 193.

194. *Id.* at 195.

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and acts.[195] The criteria of the liberal formalist concept had been broadened to the point where only remote and partial connections to specific governmental acts were required for segregation. The link which had been provided by discriminatory intent was provided by foreseeability, *i.e.*, merely that continued (not necessarily newly-created) or increased racial separation in schools could have been foreseen as the result of governmental policies in a context of residential racial separation.[196]

There seemed to be only a short distance between this broadened version of the liberal formalist concept and the forthright embrace of the liberal pluralist concept. Indeed, two members of the *Keyes* Court took this step.[197] Had this step been taken by the full Court, it may have pushed the concept "racial segregation" some distance toward obsolescence. The central concept in dealing with racial representation in schools and other institutions or positions would have become "integration." At the very least, policy makers would have been placed on notice that they were responsible for, and must justify, the effects of any policy on school integration.[198]

The Supreme Court did not cross the seemingly short space which separated it from embracing the liberal pluralist concept of segregation. In fact, it began to restrict the criteria for applying the concept of segregation. The first such restriction was in the spatial or geographical dimension of application.[199]

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially-discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus an inter-district remedy might be in order where the racially-discriminatory acts of one or more school districts caused racial segregation in an adjacent

195. *See* notes 39-42 *supra* and accompanying text.

196. For a discussion of foreseeability in segregation cases, see Comment, 12 HARV. CIV. RIGHTS—CIV LIB. L. REV., *supra* note 27, at 731-33.

197. *See* notes 39-42 *supra* and accompanying text.

198. W. CONNOLLY, *supra* note 7, at 198-205.

199. *See* notes 32-34 *supra* and accompanying text.

> district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an inter-district remedy would be appropriate to eliminate the inter-district segregation directly caused by the constitutional violation.[200]

The suburban communities were not to be held responsible for, and need not justify, segregation without the showing of some act on their part pertaining directly to education and having both a racially-isolating effect and racially-discriminatory purpose. The burden of proof was placed upon those who urged inter-district desegregation and was not to be shifted because of the obvious racial isolation of both the suburban and city schools.[201]

Pasadena City Board of Education v. Spangler[202] further limited the application of the concept of segregation. This limitation related to the time aspects of the concept. The Court refused to apply the concept to racial separation in the school system which occurred after a desegregation order had been implemented. The new racial separation was the result of population shifts within the district which the Court termed a "normal pattern of human migration."[203] No one, particularly not government, was to be held responsible for this, although it was certainly not an unforeseeable consequence of the earlier segregation and the later desegregation order.

The dominance of a strict liberal formalist concept of segregation in school cases was confirmed in a series of cases remanded to the lower federal courts for reconsideration in the light of *Washington v. Davis*.[204] *Davis*, an employment case, had revived proof of a racially-discriminatory intent or purpose as a requirement for a fourteenth amendment violation and had markedly reduced the weight of racially-disproportionate impact as evidence of discrimination. In *Austin Independent School District v. United States*,[205] Justices Powell, Burger and Rehnquist, concurring in the remand, completely ignored the history of racial separation and quoted favorably from

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200. Milliken v. Bradley, 418 U.S. 717, 744-45 (1974).

201. *See* Note, *Interdistrict Desegregation: The Remaining Options*, 28 STAN. L. REV. 521 (1976).

202. 427 U.S. 424 (1976).

203. *Id.* at 436. For an excellent analysis of the contrary position, see Comment, *Housing Remedies in School Desegregation Cases: The View from Indianapolis*, 12 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 649 (1977).

204. 426 U.S. 229 (1976).

205. 429 U.S. 990, *vacating and remanding per curiam*, United States v. Texas Educ. Agency, 532 F.2d 280 (5th Cir. 1976).

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the Government's brief: "there is nothing inherently inferior about all-black schools, any more than all-white schools are inferior, when the separation is not caused by state action."[206] Such a statement opens the way for a further retreat to the conservative formalist position.

In *Dayton Board of Education v. Brinkman*,[207] the Court vacated and remanded a court of appeals decision which had mandated system-wide desegregation based upon the district court's finding that three specific incidents of discrimination by the Board resulted in a "cumulative violation."[208] The court of appeals had affirmed the findings of violation but had expressed disapproval of the district court's limited remedy. The Supreme Court rejected the system-wide desegregation mandated by the court of appeals, and held that such a remedy would be justified only by a finding of a systemwide discriminatory purpose.[209] With regard to remedy, the Court stated:

> [I]nstead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope.
>
> . . . [T]he Court of Appeals . . . was vaguely dissatisfied with the limited character of the remedy which the District Court had afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the District Court's findings of fact or reversing its conclusions of law.[210]

Thus, the Court maintained that the remedy must match the proven constitutional violations.

Two days after the *Dayton* remand, the Court reaffirmed its return to liberal formalism in *School District v. United States*,[211] known as *Omaha II*. This was the latest stage in a complex desegregation case. In *Omaha I*,[212] the Eighth Circuit adopted a test for systemwide discrimination, later called the "*Omaha* presumption," which followed the *Keyes* decision. Plaintiffs were held to have established a *prima facie* case of segregation by showing that a

206. Austin Independent School Dist. v. United States, 429 U.S. at 992 n.2 (quoting Brief for the United States at 8 n.5).

207. 433 U.S. 406 (1977).

208. *Id.* at 413-17.

209. *Id.* at 419-20.

210. *Id.* at 417-18.

211. 433 U.S. 667 (1977) (per curiam).

212. School Dist. v. United States, 521 F.2d 530 (8th Cir. 1975), *cert. denied*, 423 U.S. 946 (1976).

challenged policy for school enrollment had a foreseeable result of disproportionate racial concentration. The school board then had the burden to show that the policy was instituted entirely for legitimate reasons and free of any taint of discriminatory motivation. After the Supreme Court's decision in *Washington v. Davis*, the Court of Appeals in *Omaha II*[213] reaffirmed its decision in *Omaha I*, finding it consistent with *Davis* and ordering a systemwide remedy. In a *per curiam* decision, the Supreme Court vacated and remanded *Omaha II*:

> [T]he District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.[214]

With these decisions, the Court has accepted a strict liberal formalist concept of segregation, likening it to traditional torts and applying the "but for" and "proximate cause" tests.[215] Identifiable actors, acts and injuries had to be determined so as to determine who was at fault and who was entitled to relief. The Court had prepared the way for accepting findings of no segregation in instances where an enclave of schools in which all of the students are black are surrounded by schools in which all of the students are white.

CONCLUSION

The Dangers of Liberal Pluralism

The Court's retreat from the liberal pluralist concept of segregation cannot simply be explained as the result of the appointment by Nixon and Ford of racist Justices to the Supreme Court or

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213. 541 F.2d 708 (8th Cir. 1976) (en banc, per curiam), *vacated and remanded*, 433 U.S. 667 (1977).

214. 433 U.S. at 668-69 (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977)).

215. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41 (4th ed. 1971). *See generally* Eisenberg, 42 N.Y.U.L. REV., *supra* note 30; Comment, 12 HARV. CIV. RIGHTS—CIV. LIB. L. REV., *supra* note 28. For tort-like tests of causation in other civil rights matters, see Rizzo v. Goode, 423 U.S. 362, 376-77 (1976) (police violations of rights); Warth v. Seldin, 422 U.S. 490, 502-07 (1975) (exclusionary zoning).

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even the appointment of Justices willing to accept the racism of others. The retreat is more symptomatic of economic and political conservatism and a touch of political cynicism than it is of racist attitudes. Neither may it be explained by assuming that at least a majority of the Court finds the liberal formalist concept to "fit" best with the concepts and values which characterize American society. Americans have a strong sense of entitlement to their holdings, but also a strong sense of corrective justice where it can be shown that someone has been unfairly disadvantaged.

Government in liberal formalist theory is merely a tool by which one is assured that legitimate expectations, based on one's inherent capacities and prior holdings, will be met. This simple explanation conflicts in part with the Court's rulings granting the government substantial power to revoke individual entitlements and disappoint settled expectations in matters other than racial segregation.[216] It discounts the willingness of the justices prior to *Milliken* to flirt with the liberal pluralist concept before decisively rejecting it. The contrast between Justice Powell's concurrence in *Keyes* and his approving quote from the Government's brief in *Austin* is difficult to explain in terms of a simple acceptance of liberal formalism as most fitting.[217] It would be an insult to the intelligence of the Justices to suggest that they are ignorant of the history of race relations in this country that led to the disproportionate racial concentrations in schools. They could not accept these concentrations as products of the legitimate entitlements of all concerned. Neither could they be unaware that, at least since *Brown*, blacks have been led to expect that they are entitled to integrated schools.

Given these anomalies, a more successful, but less simple, explanation might look to the rejection of the political theory supporting the liberal pluralist concept of segregation.[218] The danger of the liberal pluralist theory from the Court's viewpoint is that it implies the importance and justification of collective political and economic grievances and collective action. The theoretical framework does not preclude a class analysis of these grievances, as classes are them-

216. *See, e.g.*, cases with regard to expectations of continued employment. Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974). Also worth noting are cases with regard to protection from release of erroneous and confidential information. Codd v. Velger, 429 U.S. 624 (1977); Paul v. Davis, 424 U.S. 693 (1976).

217. *Compare* notes 40-41 *supra* and accompanying text *with* note 206 *supra* and accompanying text.

218. For the liberal pluralist theory, see notes 60-61 *supra* and accompanying text.

selves groups.[219] Finally, the situation of blacks tends to destroy the moderating assumptions of the liberal pluralist framework—that one is a member of several important groups each of which contributes to his status. Blacks find their life chances dictated by their membership in two groups, the first based on their race and the second based on their economic class. The sweeping remedies for the disproportionate disadvantage of blacks implied by the liberal pluralist concept would have profound effects on economic processes. Merit-based advancement, differential reward based upon "functional importance," management prerogatives, property and the division of labor itself could be called into question when decisions previously characterized as "private economic" are subjected to criteria which are clearly "sociopolitical."[220] These are exactly the issues which have been recently raised in the *Bakke* and *Weber* cases.[221]

Legal Criticism as Political Criticism

The Court may no longer desire to be the forum in which important political issues are raised and provisionally settled. The problem is, of course, that it cannot avoid doing this. The Court can merely choose to conceal the moral and political importance of its conceptual choices and the theories which inform them; it cannot diminish their importance. The Court functions politically when it performs its most characteristic tasks—using legal concepts, analyzing, comparing and contrasting cases. These tasks are intimately linked to political theories. The political theories, and the conceptual choices to which they are joined, must be exposed to public view and comment, for political theories represent views about what the lives of people in a community ought to be like. This is the quintessential political question. In this sense, the role of the judge and the legislator is similar. Both are engaged in the public process of understanding these views and making decisions which embody them. To perform his task properly, the judge must articulate in his decision the political theory, concept, judgment and their relationships as developed in the history of his community. He must also ex-

219. This is the general trend of "post-liberal" social analysis. *See, e.g.*, R. Unger, *supra* note 2; W. CONNOLLY, *supra* note 9; *cf.* Rothstein, *The Myth of Sisyphus: Legal Services Efforts on Behalf of the Poor*, U. MICH. J. L. REFORM 493 (1974); P. BARAN & P. SWEEZY, *supra* note 91; S. ARONOWITZ, FALSE PROMISES 185-98 (1973).

220. *See* commentaries cited in note 53 *supra*.

221. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (challenging preferential admissions program for minority students); United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

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plain his rejection of alternatives to the extent that he perceives them. The latter is the essential difference between the formal tasks of judge and legislator.

The mode of analysis suggested in this article as an alternative to positivist jurisprudence has two levels. The preliminary level concerns the failure of court decisions to meet the requirement of articulation. The article has shown how in the context of racial discrimination the Court has not fully articulated the pertinent concepts, theories and judgments. Only after the preliminary articulation is done, either by an informed court or a commentator, may the criticism move to the advanced level. At this level, criticism is directed to the political theory behind a court's decision. The theory is tested for its power to detect and explain important phenomena. Its implications for concepts and judgments beyond the subject matter of the case at bar are explored. It is confronted by arguments from alternative theories and compared with the concepts, judgments and explanatory powers of the alternatives. By engaging in both preliminary and advanced analysis of court opinions, legal commentators must show the way for judges to achieve an awareness of the full political import of their actions—an import which positivist jurisprudence hides.[222]

222. *See generally* authorities cited in note 2 *supra*; W. CONNOLLY, *supra* note 9, at 57-65; d'Errico, *A Critique of "Critical Social Thought About Law" and Some Comments on Decoding Capitalist Culture*, 4 A.L.S.A. FORUM 39 (1969); Goldberg, *Political Lawyering in "Non-Political" Cases: Some Theoretical Considerations*, 4 A.L.S.A. FORUM 57 (1969); d'Errico, Arons, & Rifkin, *Humanistic Legal Studies at the University of Massachusetts at Amherst*, 28 J. LEGAL EDUC. 1, 32-34 (1976); Villmoare, *The Judiciary in the Context of the State: Liberal, Radical and Technocratic Perspectives*, 4 A.L.S.A. FORUM 7 (1979).