Essay

Reconstruction in Legal Theory

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INTRODUCTION

Reconstruction did not make a significant appearance in legal theory until the eve of *Brown v. Board of Education*,[1] and even then it was "incompletely theorized,"[2] if it was theorized at all. "Reconstruction," as it was of interest to legal theory, was internal to legal theory itself. Methods of judicial review and processes of legal reasoning came in for criticism and revision. Legal theory took a turn towards legal positivism and legal realism, neither of which had much patience for the normative claims underlying the revisionist history and advocacy of civil rights. Nor did philosophy in general as it fell under the influence of logical positivism and its skepticism of normative claims.[3]

This essay describes the neglect of civil rights in legal theory, which paralleled its neglect in constitutional theory. Civil rights became a subject of some urgency only when *Brown* was met with massive resistance in the South. Civil rights suddenly went from being the neglected stepchild of legal theory to the heir apparent in efforts to justify judicial review. Legal theorists could no longer neglect principles of racial equality but instead had to take them as axiomatic. Why

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

2. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995) ("Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes.").

3. Even American pragmatism turned inward. John Dewey in his book from 1920, "Reconstruction in Philosophy," did not look at all at Reconstruction as a period in American history, but instead concerned itself with "intellectual reconstruction" within philosophy itself. JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 29 (1920).

did they take so long, delaying their contribution to understanding Reconstruction and the Civil Rights Era until it was almost too late?

The answer partly has to do with the stop-and-start development of civil rights over the period from 1875 to 1950 and partly with the preoccupation of legal theorists with other issues over the same period. They seem to have regarded the absence of attention to civil rights as a consequence of the absence of anything to attend to. Facts rather than values set the agenda for theory, just as legal positivism, legal realism, and logical positivism would have recommended. Consequently, legal history took the lead instead of legal theory in revising our understanding of Reconstruction. The historians' accounts of what happened in the past became the basis for the theorists' accounts of what should happen in the future.

Part I sketches the sparse scholarship on judicial review in the late nineteenth and early twentieth century against the background of the constitutional transformation accomplished by the Reconstruction amendments. Part II recounts how these developments led to general skepticism of judicial review through the emergence of legal positivism and legal realism as dominant movements in American law. Part III then analyzes how and when this skepticism suddenly turned into the need to adapt legal theory to the Civil Rights Era. This essay concludes with a brief reflection on the belatedness of this transformation of legal theory.

I. NINETEENTH CENTURY JUDICIAL REVIEW UNDER THE RECONSTRUCTION AMENDMENTS

The structural change in the Constitution made by the Reconstruction amendments naturally led to increased judicial review. The power of Congress to enforce these amendments by "appropriate legislation" had to be worked out,[4] as did the restraints on state legislation contained in the first section of each amendment. Judicial decisions were needed to sort out what the amendments meant for the balance between federal and state power and for the protection of individual rights. The initial wave of constitutional decisions after the Civil War focused on the power of Congress, culminating in the disappointing decision in *The Civil Rights Cases*[5] in 1883 declaring the public accommodations provisions of the Civil Rights Act of 1875 unconstitutional. Another wave of decisions then altered the emphasis of the Due Process and Equal Protection Clauses to restrictions on state

4. U.S. CONST. amends. XIII, § 2, XIV, § 5, XV, § 2.
5. 109 U.S. 3 (1883).

regulation of business rather than to state discrimination against African Americans. The reluctance of the Court to review economic regulation in *The Slaughterhouse Cases*[6] because the focus of the Reconstruction amendments was on racial discrimination yielded to *Plessy v. Ferguson*[7] ratifying the regime of "separate but equal," and eventually to *Lochner v. New York*[8] invalidating a state maximum-hour law as "class legislation." Both waves of decisions raised questions about the proper scope of judicial review, which developed into skepticism about the entire enterprise in the early twentieth century. This skepticism came too late to save the civil rights legislation earlier invalidated or limited by the Supreme Court. The damage to civil rights had already been done and would not be undone until well into the Civil Rights Era.

This vacuum left unchallenged the writings of former Confederates criticizing the constitutionality of Reconstruction itself. Notable among them was the former vice-president of the Confederacy, Alexander H. Stephens, who argued at length for the legality of secession despite the verdict of the Civil War and the new constitutional settlement based on the failure of secession. His two-volume treatise, *A Constitutional View of the Late War Between the States: Its Causes, Character, Conduct and Results*,[9] constituted an extended brief for the legality of secession under the "compact theory" of the Constitution and against Reconstruction and the constitutional amendments and legislation enacted pursuant to it.[10] The compact theory held that the original Constitution was essentially a treaty among the states, from which they were free to withdraw. Coercing them to remain violated the Constitution, as did military Reconstruction and the conditions imposed upon the former Confederate states to regain their representation in Congress. Chief among the latter was ratification of the Reconstruction amendments. Stephens' arguments became the standard critique of the validity of the Reconstruction amendments in the first half of the twentieth century.[11] On the uneven terms set by the judicial decisions limiting the effect of those amendments, southern legal theorists

6. 83 U.S. 36 (1873).

7. 163 U.S. 537 (1896).

8. 198 U.S. 45 (1905).

9. (1870, reprint 1970).

10. For the latter conclusion, *see* G. EDWARD WHITE, II LAW IN AMERICAN HISTORY: FROM RECONSTRUCTION THROUGH THE 1920'S 631-52 (2016).

11. *See* Bruce Ackerman, II WE THE PEOPLE: TRANSFORMATIONS 117-18 (1998); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 377 (2001).

could refight the constitutional battles of the Civil War and Reconstruction without fear of judicial review of racially unequal laws.

Even among progressives, limited judicial review was the order of the day, as set forth in James Bradley Thayer's influential article, *The Origin and Scope of the American Doctrine of Constitutional Law*.[12] His declared principle, which stands in stark contrast to the intricacy of judicial review of economic legislation at the time, was that judges "can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."[13] Where courts in the *Lochner* era were consumed with classifying legislation as within the police power or as regulation of businesses affecting the public interest or outside these sources of authority as "class legislation," Thayer would have put in place a nearly irrebuttable presumption in favor of all legislation supported by a rational interpretation of the Constitution. In the same spirit, and in nearly the same words, Justice Holmes formulated a similar approach to judicial review in his celebrated dissent in *Lochner* itself:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[14]

From our vantage point more than a century later, the Holmesian endorsement of judicial restraint proved to be a fateful choice in two respects. First, he became the titular head of the movements for both legal positivism and legal realism. The same could not be said for his attitude to civil rights, which could at best be described as studied indifference. Holmes accepted judicial innovation mainly in the field of private law and mainly as it was done by state courts.[15] His widely noted book, *The Common Law*,[16] recounted and reconsidered doctrinal developments in torts, contracts, property, and succession, with a single chapter on criminal law as the only subject from public law. So,

12. 7 HARV. L. REV. 129 (1893).

13. *Id*. at 144.

14. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

15. He was, for instance, a fierce critic of federal common law, which he denounced as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

16. OLIVER WENDELL HOLMES, THE COMMON LAW (1881).

too, his notable opinions on federalism[17] all counseled against judicial activism in displacing state law. These contributions offered neither a focus on civil rights nor a basis for federal intervention to displace discriminatory state laws. It therefore comes as no surprise that Holmes simply threw up his hands when confronted with state efforts to nullify the Fifteenth Amendment and deny African Americans the vote.[18]

The jurisprudential trends with which Holmes was identified also did not offer an auspicious basis for a program of protecting civil rights. A form of incipient legal realism could be found in Holmes' "predictive theory of law," which he framed in these terms: "The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by law."[19] His predictive theory has an element of passivity that counsels against profound reform, let alone by judges in constitutional cases, rather than acceptance of the status quo. Likewise, the strand of Holmes' thought derived from legal positivism showed greater interest in what the law is—as a pronouncement from "the articulate voice of some sovereign or quasi-sovereign"—rather than in what it should be.[20]

This preference for facts over norms became characteristic of legal realism, although the realists seldom followed through with thorough empirical studies themselves.[21] Constitutional theory remained content to criticize pre-existing doctrine that supported enhanced judicial review, mainly of economic regulation, on the ground that it rested on conceptual and formalist reasoning that had been called into question by the emerging social sciences. As the factual basis for judicial review fell away, it revealed that the normative basis was little more than question-begging. The legal realists, as discussed in the next part, were only too eager to point out this logical fallacy, but they did little to replace it with sound reasoning. They offered a negative doctrine suited mainly for negative purposes.

II. TWENTIETH CENTURY SKEPTICISM

The legal realists exhausted most of their efforts on discrediting laissez faire as a foundational principle of constitutional law and the law of contracts. To the extent that they offered a more general

17. Such as his dissent in *Southern Pacific v. Jensen*. 244 U.S. 205, 217–18 (1917) (Holmes, J., dissenting).

18. G. EDWARD WHITE, *supra* note 10, at 482, 549–50.

19. Oliver Wendell Holmes, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 173 (1921).

20. *Jensen*, 244 U.S. at 221.

21. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 146 (1995).

critique of traditional legal thought, they concentrated on the behavior of judges: both what they actually did in deciding cases and how they should have decided cases. Robert Hale picked up on Holmes' ambivalence toward social theory, expressed in his dissent in *Lochner*, and expanded it into a general theory of coercion in economic transactions.[22] That theory naturally applied to the law of contracts, where Christopher Columbus Langdell, the principal target of the realists, and Karl Llewellyn, one of the principal realists, both were leading scholars.

The connection between this view of laissez faire and the legacy of slavery could be drawn, and in fact it was, by way of criticism of free labor as "wage slavery."[23] This connection, anchored as it was in the antebellum defense of slavery in the South, as compared to at-will employment in the North, hardly helped the cause of civil rights. Even apart from this unfortunate association, the focus on contracts went to the private law side of the divide from public law, away from civil rights and well within the subjects discussed by Holmes in *The Common Law*. Even as it served as criticism of judicial review of economic legislation, it diminished the scope of constitutional law, leaving reform mainly to the legislative process.

Realists who took on the nature of judging in general also preserved a focus on private law and the development of the common law. The title of Llewellyn's book, *The Common Law Tradition: Deciding Appeals*,[24] speaks for itself. Felix Cohen featured the nature of the corporation in his famous article, *Transcendental Nonsense and the Functional Approach*.[25] He emphasized description as the hallmark of the "functional approach," relegating "legal criticism" in terms of values to an afterthought.[26] It had to be postponed until an adequate description of the consequences of legal rules could be established.[27] Jerome Frank, in *Law & the Modern Mind*,[28] adopted a psychoanalytic approach that now appears to be hopeless, but even at the time, it appeared to cast doubt on any attempt to find principled regularity in judicial decisions.[29]

22. *Id*. at 109–11.

23. AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 19–20 (1998).

24. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

25. 35 COLUM. L. REV. 809 (1935).

26. *Id*. at 847–49.

27. *Id*. at 847–48.

28. JEROME FRANK, LAW AND THE MODERN MIND (1930).

29. DUXBURY, *supra* note 21, at 133–35.

The descriptive approach to the judicial role, going back to Holmes' predictive theory of law, had the appeal of fitting legal theory to the role of practicing lawyers in advising clients of the likely legal consequences of their actions. It was adopted by Karl Llewellyn in his primer on legal reasoning, *The Bramble Bush*, published in 1930.[30] After widespread criticism for apparently conceding the authority of immoral legal systems like the Nazi regime, Llewellyn issued an abject apology in the second edition, correcting the observation in the first edition that "[w]hat these officials do about disputes is, to my mind, the law itself." He now added "one inherent drive" of any legal system is "to make the system, its detail and its officials more closely realize an ideal of justice."[31]

The limitation of the descriptive approach to "is" rather than "ought" reinforced its affinities with legal positivism, and even more so, with logical positivism. The two, of course, are quite distinct philosophical movements, but each pushed normative principles outside the focus of their concerns. In his reformulation of legal positivism, H.L.A. Hart demoted moral principles from any necessary role in the validity of legal rules. Instead, the fundamental rule of recognition of a legal system was a matter of social fact which might, or might not, include a reference to moral principles.[32] Logical positivists had no such qualms about the status of moral principles. They were "scientific" only insofar as they constituted reports of what people felt and "that so far as they are not scientific, they are not in the literal sense significant, but are simply expressions of emotion which can be neither true nor false."[33] Whatever the ultimate persuasiveness of these views, to the extent they were accepted, they undermined any reasoning based on moral principles that judges could rely on to engage in judicial review. Legal positivists denied such principles any necessary role in a legal system. Only if, say, principles of racial justice were already accepted as part of the law could they play any role in dismantling the regime of Jim Crow. Logical positivists went even further and denied any role to moral principles as a basis for rational argument.

The currents of legal theory in the first half of the twentieth century were not hospitable to transformation of race relations through litigation and judicial decisions. At best, legal theorists were

30. KARL LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL (1930).

31. KARL LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL xxxviii–xxxix (reissued ed. 2008).

32. H.L.A. HART, THE CONCEPT OF LAW 181 (1st ed. 1961).

33. ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC 103 (2d ed. 1946).

preoccupied with other matters, such as the nature of legal reasoning in the abstract. At worst, they were indifferent to concerns beyond their agenda of reform of the common law and establishing the foundations of the regulatory state. The prospect of and the need for the civil rights revolution did not make it onto their agenda. Far from being "result oriented" in endorsing a particular program of reform through constitutional adjudication, and reverse engineering their theories to support this program, legal theorists were result oblivious, waiting for the civil rights movement and the Supreme Court to put the revival of Reconstruction on their agenda.

Reinforcing this narrow vision of the aims and methods was an equally blinkered view among historians of the course and consequences of Reconstruction. The Dunning School of American history viewed Reconstruction as an unfortunate and corrupt occupation of the South without any lasting benefit to that region or the nation.[34] Leading African American historians, such as W.E.B. DuBois[35] and John Hope Franklin,[36] decried this picture of the South as victim and called attention to the voluminous historical record that demonstrated pervasive southern resistance and terrorism in response to efforts to achieve racial equality. A new generation of historians started to pay attention to what DuBois and Franklin had found only later, at the height of the Civil Rights Era.[37] Legal theorists took even longer to shake off the perverse implications of the Dunning School. As late as 1963, *proponents* of the Civil Rights Act of 1964—not those opposed to it—advised against basing the legislation on the enforcement clauses of the Reconstruction amendments, given their divisive history.[38]

In this scholarly climate, it therefore comes as no surprise that a leading legal theorist Herbert Wechsler could criticize *Brown* for its

34. Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1589–96 (2012).

35. W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 582–97 (1935).

36. JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 211–19 (3d ed. 2013, 1st ed. 1961).

37. DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 303–06 (2006) (recounting the dramatic changes in the historiography of Reconstruction); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 xix–xxv (1988) (same); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1957).

38. Brief of Paul A. Freund, Public Accommodations: Hearing before the House Committee on Commerce on S. 1732, a Bill to eliminate Discrimination in Public Accommodations affecting Interstate Commerce, 88th Cong. 1st Sess. 1183–90 (1963).

failure to adhere to "neutral principles."[39] In his view, forced association of blacks and whites vindicated the rights of the former at the expense of the latter, who were entitled to their freedom to associate only with members of their own race. On a sympathetic interpretation, Wechsler only called attention to the inadequate resources of legal theory at the time. Progressive legal theorists had to execute an abrupt about-face. They had grown accustomed to denouncing enhanced judicial review of economic legislation. They now had to reverse course and justify enhanced judicial review of discriminatory government action.

The argument against judicial review was nowhere better articulated than in Wechsler's own brilliant and influential article, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*.[40] This piece famously argued against any form of judicial review of federal legislation on federalism grounds that it infringed on state power. The states, according to this argument, had adequate means to protect their interests in Congress by blocking legislation at any of several steps in the legislative process. This article appeared just five years before Wechsler's critique of the opinion in *Brown* and subsequent desegregation decisions.[41] It left Wechsler perfectly situated to argue for the power of Congress to abolish segregation but with few resources to argue for the power of the Supreme Court to do so. As an adherent of the "legal process" school which relied on orderly institutional procedures to solve social problems, he found himself in the uncomfortable position after *Brown* of suddenly moving from the progressive to the conservative side of legal thought.[42]

Yet if his critique of *Brown* accomplished nothing else, it threw down the gauntlet for the next generation of legal scholars: to offer a rationale for the decision that reconciled it with limited judicial review of economic legislation. This problem had been foreshadowed in the famous footnote 4 in *United States v. Carolene Products*,[43] where specific prohibitions in the Constitution preserving representative democracy and protecting "discrete and insular minorities" were all thrown together as justifications for enhanced judicial review. As John Hart Ely would point out a generation later, a footnote does not make

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

40. 54 COLUM. L. REV. 543 (1954).

41. Wechsler, *supra* note 39, at 31–34.

42. G. EDWARD WHITE, III LAW IN AMERICAN HISTORY 1930–2000 360–63 (2019).

43. 304 U.S. 144, 152–53 n.4 (1988).

a constitutional theory, let alone one that recognized but failed to reconcile such disparate grounds for judicial review.[44] In the 1950's, *Brown* suddenly went from being unprecedented to being axiomatic in constitutional law. The dilemma legal theorists faced was how to reconcile a defense of *Brown* with the skepticism of normative arguments advanced by realists and positivists.

III. LEGAL THEORY IN THE CIVIL RIGHTS ERA

Most law professors disagreed with Wechsler about *Brown*. This is not surprising. Disagreement is part of their (or our) job description, especially when it comes to disagreement with the scholarship of a preceding generation. What is surprising is that Wechsler had so little previous scholarship to disagree with. The pioneering efforts of Jacobus tenBroek stand out as an exception,[45] all the more so for Wechsler's neglect of his arguments for taking the Reconstruction amendments seriously. TenBroek emphasized the same congressional investigation of the resistance to Reconstruction as had DuBois and Franklin.[46] He took the documentary record they generated and made it into an argument for the development of constitutional doctrine. Yet tenBroek does not get so much as a citation in Wechsler's article, even though his arguments prefigured what would soon become legal orthodoxy: that the Reconstruction amendments required strict scrutiny of government discrimination on the basis of race.

Legal theory remained in thrall to the Dunning School and its endorsement of precedents narrowly interpreting the Reconstruction amendments and civil rights legislation. A good example is the dissent in *Screws v. United States*,[47] written in 1945 by Justice Roberts and joined by Justices Jackson and Frankfurter. The decision upheld a prosecution under section 242,[48] originally enacted in the Civil Rights Act of 1866,[49] for deprivation of civil rights. The dissent urged a narrow construction of the statute partly because "much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era."[50] Justice Frankfurter later wrote a

44. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75–77 (1980).

45. JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

46. *Id*. at 163–217.

47. 325 U.S. 91, 138–61 (1945) (Roberts, J., dissenting).

48. 18 U.S.C. § 242 (1996).

49. 14 Stat. 27 (1866).

50. 325 U.S. at 140.

plurality opinion reaching the same conclusion, commenting that "[t]he dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation."[51] And a decade later he dissented from the expanded interpretation of the corresponding civil remedy in section 1983 in *Monroe v. Pape*,[52] based on "the fierce debate" that accompanied enactment of this statute.[53]

In this intellectual climate, the initial defense of *Brown* fell back on a kind of inconclusive originalism which looked to the intent of the drafters of the Fourteenth Amendment but then interpreted the amendment's provisions according to "the line of their growth."[54] This style of reasoning had all of the detail of originalism but none of its decisiveness, since evidence of contemporary intent could always be overcome by the generality of constitutional language. The search for any specific intent on the part of the Reconstruction Congresses to outlaw segregation in public schools foundered on the failure of those same Congresses to enact a prohibition to this effect, and more tellingly, to dismantle segregation in the public schools in Washington, D.C.[55] The clouded and contentious history of Reconstruction, on which the Supreme Court requested briefing on reargument in *Brown*, proved inadequate when the opinion was issued. It only "cast some light, [but] not enough to resolve the problem with which we are faced."[56] The history of Reconstruction did not contain the unequivocal facts that would have satisfied legal realists and legal positivists as a source. Some appeal to values was necessary.

The lawyers for the plaintiffs in *Brown* saw this problem and in their brief on reargument included a long supplement offering "An Analysis of the Political, Social, and Legal Theories Underlying the Fourteenth Amendment."[57] This supplement appealed to "[p]rimitive

51. United States v. Williams, 341 U.S. 70, 74 (1951) (Frankfurter, J.).

52. 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting in part). Section 1983 was enacted in the Civil Rights Act of 1871, § 1, 17 Stat. 13, and is codified in 42 U.S.C. § 1983.

53. *Monroe*, 365 U.S. at 249.

54. Alexander M. Bickel, *The Original Understanding of the Segregation Decision*, 69 HARV. L. REV. 1, 6 (1955); Paul Freund, *Storm Over the American Supreme Court*, 21 MODERN L. REV. 345, 350 (1958).

55. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 19 (2004).

56. Brown v. Bd. of Educ., 347 U.S. 483, 483 (1954).

57. Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument at 199–235, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), 1953 WL 48699.

natural rights theory and earlier constitutional forms" as the origins of the Equal Protection, Due Process, and Privileges or Immunities Clauses in the amendment.[58] It concluded: "To the opponents of slavery, equality was an absolute, not a relative, concept which comprehended that no legal recognition be given to racial distinctions of any kind."[59] Left unaddressed was exactly why the views of abolitionists before the Civil War were sufficient to dispel all the controversies over constitutional amendments adopted after the war. That question could be answered only by the appeal to "natural rights," not as understood by antebellum abolitionists but by judges, lawyers, and legal theorists in the twentieth century. They had been predisposed by legal realism and legal positivism, however, to be deeply suspicious of any appeal to natural rights.

A new generation of legal theorists soon turned to the revisionist history of Reconstruction to document the evils of Jim Crow.[60] Like the lawyers for the plaintiffs in *Brown*, they needed a normative theory that conferred significance on the facts found by the revisionist historians. They could not just rely, as Charles Black did in his response to Wechsler, on "one of the sovereign prerogatives of philosopher—that of laughter."[61] Louis Pollak turned to footnote 4 of *United States v. Carolene Products*,[62] but that just raised the question of how footnote 4 could itself be justified.[63] The mainstream defenses of *Brown* eventually culminated in John Hart Ely's *Democracy and Distrust: Selective Sympathy and Indifference*, which anchored heightened judicial review in the selective sympathy and indifference that deprived racial minorities of effective representation in the political process.[64] That book came out only in 1980, when the Civil Rights Era was coming to a close and controversies over affirmative action had begun to

58. *Id*. at 199.

59. *Id*. at 234.

60. E.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 424–25 (1960).

61. *Id*. at 424.

62. 304 U.S. 144, 152 n.4 (1938); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 27 (1959) (offering a reconstructed opinion in *Brown*). Like the Court itself, Pollak was left with the embarrassing alternative of relying upon the Japanese exclusion cases. *Id.*; Bolling v. Sharpe, 347 U.S. 497, 499 n.3 (1954).

63. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 264 (2007).

64. JOHN HART ELY, supra note 44, at 158–60.

dominate the constitutional law of discrimination.[65] Right on schedule, the "owl Minerva spread its wings" only at the end of the era.[66]

As this phrase from Hegel suggests, the belated formulation of a rationale for *Brown* could be a general feature of political theory, not unique to the postwar development of civil rights. The inadequacy of legal theory at the time *Brown* was decided suggests the opposite, however. Legal realism counseled a turn towards the social sciences without offering reliable social science in the service of legal argument. This tendency resulted in the reference in *Brown* to psychological studies concluding that segregation had an adverse effect on black school children.[67] Subsequent evaluation showed these studies to be dubious at best.[68] Whether or not one accepts this conclusion, it also shows the poverty of resources available to legal theory at the time.

Resort to legal positivism fared no better as a response to *Brown*. A common reaction, shared by eminent judges and law professors, distinguished sharply between legal and moral arguments for the decision. Learned Hand framed the question raised by the decision in these terms: "did the Court mean to 'overrule' the 'legislative judgment' of states by its own reappraisal of the relative values at stake?"[69] To which he answered "yes," but that it could only rest on "a *coup de main*"—on a surprising assertion of judicial power.[70] Herbert Wechsler characterized the issue in *Brown* as one that involved "a conflict in human claims of high dimension."[71] Paul Freund expressed ambivalence and resignation: "Whether with the Positivists one finds the moral criterion outside the law, or with the natural-law jurists immanent in the law, so that law is not merely order but good order, the moral norm ought not to be lost."[72] As the rhetorical appeal to morality became more flowery, its lack of foundation in legal theory became more apparent.

On a first approximation, legal positivism required an inquiry into what was settled law in *Brown*, and then, if there were no settled

65. *See id*. at 170–72.

66. HEGEL'S PHILOSOPHY OF RIGHT 13 (T.M. Knox transl. 1952).

67. 347 U.S. 483, 494–45 n.11 (1954).

68. JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 177–89 (8th ed. 2014).

69. LEARNED HAND, THE BILL OF RIGHTS 54 (1958).

70. *Id*. at 54.

71. Wechsler, *supra* note 40, at 34. For an account of Wechsler's argument as an implicit appeal to white self-interest, *see* DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 101–03 (6th ed. 2008).

72. Freund, *supra* note 54, at 35–58.

law, into what the law should be.[73] For reasons elaborated by Ronald Dworkin,[74] both of these inquiries turn out to be more problematic than they initially appear to be. In *Brown*, in particular, the permissibility of segregation under *Plessy* could be identified as settled law. Indeed, that is one way to frame the basic question in *Brown*: should *Plessy* be overruled? But even if it were answered against the authority of *Plessy*, the further question remained of how the Supreme Court could be performing a judicial, rather than a legislative, function in overruling *Plessy* and then filling the gap that was left behind.

Gesturing in the direction of the intent of the framers of the Fourteenth Amendment could not answer these questions. Relying on history focused narrowly on the intent of the framers tended to confirm rather than to undermine *Plessy*. As noted earlier, the search for conclusive historical facts remained, as the Court said in *Brown*, at best "inconclusive."[75] A broader perspective on history, examining the efforts in the South to defeat Reconstruction, to establish Jim Crow, and to subordinate African Americans in a status as close to slavery as possible, told a different story: that the entire project of achieving equal citizenship through the Reconstruction amendments had failed. This was the lesson that a new generation of historians absorbed from Dubois and Franklin.[76] This revisionist history could not repair the deficiencies of legal theory derived from realist and positivist premises, but it gave new urgency to the search for a substitute.

The natural law tradition did not provide a persuasive alternative, despite its incorporation of moral principles directly into the canon of legal sources and reasoning. The natural law derived from Thomas Aquinas, with its theological origins, did not fit the perceived needs in a secular society to generate acceptance beyond the limits of religious belief. It also fell out with the separation of law and morals characteristic of legal positivism.[77] And the new natural law, based on Lockean principles of property and contract, had been discredited by its association in the eyes of legal realists with judicial review of economic legislation.[78] As Lon Fuller observed, "the term 'natural law' has been so misused on all sides that it is difficult to recapture a

73. H.L.A. HART, THE CONCEPT OF LAW 141–42 (1st ed. 1961).

74. RONALD DWORKIN, LAW'S EMPIRE 37–44 (1986).

75. 347 U.S. 483, 489 (1954).

76. Foner, *supra* note 34, at 1596–97.

77. For a summary of and response to positivist criticisms, *see* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 25–33 (1980).

78. DUXBURY, *supra* note 21, at 107–11.

dispassionate attitude toward it."[79] Resort to natural law, in short, raised more problems than it solved.

Legal theory faced a quandary that it could not resolve with the resources readily available to it.[80] Casebooks on constitutional law reproduced the opinion in *Brown* with little, if any, commentary.[81] These casebooks at the time faced a crisis of capacity, as they had extensive coverage of federal courts, criminal procedure, and free expression, subjects that are now covered mainly in separate courses. They might not have had room, literally, for extensive coverage of civil rights. They certainly lacked adequate coverage of civil rights as they are understood today. It took at least a decade for legal scholars to furnish a compelling rationale for *Brown*. Even now, the decision remains open to sporadic criticism, but primarily on the political ground that it generated unnecessary opposition to integration rather than on legal grounds.[82]

CONCLUSION

Whatever the contributions of legal theory today, in the decades before and after *Brown* it seemed woefully unprepared for and, to a degree, inhospitable to the decision. It could not offer a convincing justification for the decision and therefore tended to view it as a moral imperative rather than a legitimate exercise of judicial authority. It took several decades for legal theory to repair this lapse of imagination and reasoning. In retrospect, the principal defect seemed to be the isolation of legal theory from the emerging issues of civil rights. The isolation of legal theory could be attributed to its focus on its own problems—whether to side with legal realism or legal positivism—

79. LON L. FULLER, THE MORALITY OF LAW 102 (1964). He preferred himself an appeal to what he called "the internal morality of law." *Id*.

80. Perhaps for that reason, any discussion of *Brown* was entirely omitted from the materials, widely circulated beginning in the 1950's. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW cvi–cxiii (1958 tenth ed. and 1994 printed ed. by William N. Eskridge, Jr. & Philip P. Frickey, eds.).

81. NOEL T. DOWLING & RICHARD A. EDWARDS, AMERICAN CONSTITUTIONAL LAW 364–74 (1954) ("Thus the problem under the Equal Protection Clauses is one of classification, of drawing lines."); PAUL A. FREUND, ARTHUR E. SUTHERLAND, MARK DE WOLFE HOWE & ERNEST J. BROWN, II CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1509–19 (1954) (adding an excerpt from an article on possible closure of public schools as a response to *Brown*); PAUL G. KAUPER, CONSTITUTIONAL LAW: CASES AND MATERIALS 1075–78 (1954) (short note only on companion case on segregation in schools in the District of Columbia).

82. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 389–421 (2004).

and with its obsession with constitutional decisions from the *Lochner* era.

The unwanted side effect of specialization was to lead scholars to know more and more about less and less and to neglect emerging issues in favor of concentrating on what was already familiar to them. With respect to civil rights, this tendency took on a sharper edge. Disputes between African Americans and white Southerners seemed to be relegated to the status of a largely regional controversy—of concern primarily to those oppressed by the regime of Jim Crow and those who staunchly supported it. Desegregation only slowly emerged as a national issue worthy of consideration at the highest levels of legal theory.

To be sure, this observation runs the risk of hindsight and anachronism. It indulges the flattering conceit that we are better legal scholars today than legal and constitutional theorists were then. A more sobering thought, however, is that we might be no better at anticipating the challenges currently demanded of legal theory. Arguments in constitutional theory over the scope and content of individual rights and the constraints of federalism on judicial review, which we have inherited from the Civil Rights Era, have little purchase today when we face questions raised by a presidency that continually challenges the limits of executive power, if not the rule of law itself. We have yet to see whether legal theory, as it has developed in recent decades, is adequate to this task.