

AALS CONSTITUTIONAL LAW PANEL ON *BROWN*, ANOTHER COUNCIL OF NICAEA?

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[The “stupidest housemaid” is speaking and she says, speaking about herself] “. . .It scare the stupidest housemaid, but she can look at the Fourteenth Amendment and read *Plessy v. Ferguson* and think that opinion is rightly decided. It seems correct. The rationale makes sense. Hell, Chief Justice Rehnquist said the same thing when he was a law clerk. But then to the relief of the stupidest housemaid, the *Brown v. Board of Education* opinion makes sense too. It seems right also. So much for the rule of law. And that scare her too.”²

I. INTRODUCTION

A. *Summary of Thesis*

1. The AALS Panel on Brown

When considering the product of the AALS Constitutional Law Panel, entitled “What *Brown* Should Have Said,” held in January 2000, in Washington, D.C., we have experienced considerable disorientation.³

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2. David L. Shapiro, *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1834, 1922 (1999) (citations omitted).

3. See Section on Constitutional Law, What Brown Should Have Said, in *A Recommitment to Diversity*, Annual Meeting, AALS Program Jan. 5-9, 2000 (2000). The proceedings were published in book form in the summer of 2001, WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID, (Jack M. Balkin ed. 2001). We are not concerned with any differences there may be between the Panelists’ oral opinions at the AALS panel and their written opinions in the book; our concern is

We therefore ask the question asked by Lucretia in Machievelli's play, *The Mandragola*, "Do you mean it or are you laughing at me?"⁴

We fear that the Panelists may be laughing at us.⁵ Because, in short, their writings criticize the formalism that they use in the panel court opinions. In this article, we pick four of the Panelists, more or less at random, and confront the question of whether their writings before and after *Brown*⁶ square with their panel *Brown* opinions. Those four are: Professors John Balkin, Catharine MacKinnon, Michael McConnell, and John Hart Ely. Details of the claims made in this article are confined to these four Panelists. Strong suspicions, only alluded to in passing here, have been raised with respect to the other Panelists.⁷

After Part I, Summary of Thesis, this article will proceed by discussing a parallel between the AALS Constitutional Law Panel and the Council of Nicaea in 325 CE that both authorities were dealing with a social crisis. In Part III, we refer to the dissonance of the Panel's internal conflicts. In Part IV, we suggest that four Panelists' formalist opinions in *Brown* conflict with the jurisprudence of their previous writings. In Part V, we speculate on how it could occur that these distinguished Panelists could find themselves in such a contradiction.

only with their oral opinions.

4. In that play, our young protagonist covets a young married woman named Lucretia. She is married to an older man who is having difficulty procreating an heir. Our protagonist enlists the help of Lucretia's confessor, Father Timothy, in a complicated Machiavellian plan. The plotters will tell her husband that if Lucretia will take the Mandragola potion, and lie with a stranger picked off the street, her husband will then be able to produce an heir by her. The confessor sides with the plotters and advises her to go ahead with the plan. Father Timothy states that he has been pouring over the books and the authorities, and that "there are numerous considerations on our side both general and particular." Lucretia replies with the above quoted lines: "Do you mean it or are you laughing at me?" *Nicolo Machiavelli, Mandragola, in Eight Great Comedies* 60-90 (Barnet, Berman Burto eds.).

5. Before going to the AALS Panel on *Brown*, co-author Van Doren was having second thoughts about research. He was churning out yet another unreconstructed legal realist or even critical legal studies story line, this time on contracts. (For doubts on research enterprises, see John W. Teeter Jr., *The Daishonin's Path: Applying Nichiren's Buddhist Principles to American Legal Education*, 30 *MCGEORGE L. REV.* 271, 276 (1999) (questioning whether we really should be "grinding out yet another article" when we could be, for example, making ourselves more available to students?)). *Id.* So in that mood, he was wondering if this was really necessary. After all, are not we "all realists now"? The panel convinced him that we are not all realists now, so this article was written.

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

7. There were Derrick Bell, Cass Sunstein, Bruce Ackerman, Drew S. Days, III and Frank Michaelman. Professor Patricia Williams was scheduled to attend the panel meeting, but did not.

2. History of *Brown*

But first a bit of legal history. The United States Supreme Court in *Brown v. Board of Education* held that the Equal Protection Clause of the Fourteenth Amendment forbade discrimination inherent in separate but equal educational facilities for African Americans and white persons.⁸ This case created a terrific controversy and crisis in U.S. society,⁹ which had ramifications in U.S. law and jurisprudence circles. The controversy over *Brown* fueled the fire of the movement to impeach Earl Warren,¹⁰ the Chief Justice who was instrumental in bringing forth the unanimous decision. Congress, debating whether to divest the Supreme Court of jurisdiction in cases involving admission to the bar, loyalty security matters, and other McCarthy era matters got support from Southern segregationists who added their voices to that movement.¹¹ And later, in Little Rock, President Eisenhower used federal troops to desegregate the schools there.¹² However, *Brown*, at least today, is accepted across a wide political spectrum.¹³ It is accepted as a morally correct decision, though the legal foundation on which it is based is deemed rather shaky.¹⁴

Brown, created in the teeth of precedent, overruled while purporting to distinguish a leading precedent, *Plessy v. Ferguson*,¹⁵ and ignored the state legislatures, which had decreed and reinforced segregation one way or another. Segregated schools also existed in the District of Columbia, where Congress had turned a blind eye to such segregation in schools. These popularly elected bodies were complicitous or passively acquiescent in segregation. Now here comes the elite, appointed, and not popu-

8. *Brown*, 347 U.S. at 495.

9. See MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 247-72 (Oxford Univ. Press 1994) [hereinafter "CIVIL RIGHTS"] (discussing active and violent resistance to *Brown*).

10. See ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 389-92 (Simon & Schuster 1997) [hereinafter "CHIEF"] (desegregation decision fuels impeachment move).

11. See GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 660 (Alfred A. Knopf 1994) [hereinafter "HAND"] (Senate considers eliminating Court's jurisdiction in bar admission, loyalty-security, and other matters). Southern segregationists join in this jurisdiction stripping bill. *Id.* at 660.

12. See CIVIL RIGHTS, *supra* note 9, at 258-59 (Eisenhower ordered federal troops to Little Rock); CHIEF, *supra* note 10, at 343 (Eisenhower had waited and evaded crises by denying they existed).

13. See, e.g., Audio tape: AALS 2000 Constitutional Meeting: What *Brown* Should Have Said (Jan. 5-9, 2000) (Recorded Resources Corp.).

14. See, e.g., WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 1334-38 (4th ed. 1975) (raising numerous questions about the basis of the *Brown* holding).

15. 163 U.S. 537 (1896). *Brown* overruled a part of *Plessy* that was essential to it, though actually *Brown* did not quite overrule *Plessy*. See DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW 54 (2d ed. 1998) [hereinafter "FARBER"].

larly elected United State Supreme Court, declaring that the law stands against all these august legislatures.¹⁶

The moderator and apparently the originator of the idea for the panel, Professor Balkin, said *Brown* created a jurisprudential crisis.¹⁷ The nature of this crisis was not disclosed, but we would venture, *Brown* was a case that seemed to be decided correctly morally (after all to openly defend apartheid is not a lot of fun) but was out of synch with the jurisprudential theories then in vogue. For example, it proved hard to reconcile with the Harvard Legal Process theory,¹⁸ which preached reliance on the popularly elected officials instead of a strong role for the Supreme Court.¹⁹ *Brown* dealt a substantial blow to the Harvard-based Legal Process School.²⁰

3. Guidelines of the Panel

The AALS Panel was composed of distinguished academic participants charged with the task of rewriting the *Brown* opinion, as it should have been written. The Panel was directed to rethink the premises of *Brown*, and in that process the Panelists could consider current theories of interpretation (whatever those are). And the Panelists could refer to current ideas about constitutional equality (maybe our ideas about equality have improved, who knows?) with the view in mind of casting *Brown* in a more felicitous light.²¹

This is at first blush confusing. The Panelists cannot use any cases or statutes written after 1954, but can consider what we have learned about interpretation and about equality since then (!). Well, all right, learning does not stop, and perhaps the note of optimism about “theories of interpretation” and “knowledge” about equality is the best way to go.²² No Panelist obeyed the instructions concerning a current theory of interpretation and current developments in equality theory.²³ For exam-

16. FARBER, *supra* note 15, at 55 (Congress could have overruled de jure segregation at the District of Columbia level).

17. See Professor Balkin, Address at the 2000 AALS Constitutional Annual Meeting (Jan. 5-9, 2000) in AALS 2000 Constitutional Annual Meeting: What Brown Should Have Said, Tape 195 (Recorded Resources Corp.).

18. This Process theory was already fairly well established in the 1950's. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 207 (1995) [hereinafter DUXBURY].

19. See *infra* note 38.

20. The Harvard Legal Process School was unable to come to terms with Warren Court activism but attitudes of that School lived on. See DUXBURY, *supra* note 18, at 208.

21. See *supra* note 13.

22. See *id.*

23. See *id.*

ple, a current theory of interpretation might be postmodernism, but no one referred to that.²⁴ Nor did anyone refer, specifically at least, to a theory of equality that was not present in 1954. The Panelists talked a lot about equality but it was not related to post-*Brown* knowledge.²⁵

4. Summary Critique of the Panel

The law professors instructed to play Supreme Court Justices were very competent in their enterprise. Constitutional provisions were cited, including ones that the Court did not refer to, precedents were assembled; even the thrust of the famous social psychology footnote was salvaged and reaffirmed.²⁶ There were also references to policy arguments citing in some instances to the briefs that made them.²⁷

Dissonance arises, however, between previous jurisprudential writings and the Panelists' mode of delivery, which was formalism or positivism; the Panel's implicit or explicit affirmation of a formalist methodological orthodoxy stands in stark tension with Panelists' former writings.²⁸ We use the terms formalism and positivism interchangeably to refer to a rule or standard oriented approach. The basic idea is that legal decisions are controlled by, and answers found, in preexisting rules and standards.²⁹ We use the term methodological orthodoxy to refer to the idea that legal disputes can indeed be appropriately decided by reference to answers found in an agreed upon set of materials, usually written, which contain those answers. In Christian theological disputes this methodological orthodoxy would be illustrated where reference by officials would be to the Scripture and clerical comment on the Scripture. In other words, the Panelists affirmed the basic premise that the canon, with the help of reason, resolves the controversy.³⁰ Canon, here, we would define, as a reference to what sources is appropriate for the reso-

24. *See id.*

25. *See id.*

26. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 n.11 (1954). This footnote, number 11, cited psychologists to the effect that state imposed segregation led to a feeling of inferiority of Blacks, which retards their ability to learn. *See Brown*, 347 U.S. at 494. For reaffirmation of this footnote, *see* Professor Ely, Address at the 2000 AALS Annual Constitutional Meeting (Jan. 5-9, 2000) in *AALS 2000 Constitutional Annual Meeting: What Brown Should Have Said*, Tape 196 (Recorded Resources Corp.) and *infra* Ely section III D.

27. *See* Professor Bell, Address at the 2000 AALS Constitutional Annual Meeting (Jan. 5-9, 2000) in *AALS 2000 Constitutional Annual Meeting: What Brown Should Have Said*, Tape 196 (Recorded Resources Corp.).

28. *See infra* section III.

29. *See, e.g.*, John W. Van Doren, An Attack on a *Defense of Modern Positivism*, 25 *NEW ENG. L. REV.* 813, 815 (1991).

30. For examples of the canon referred to, *see infra* section III.

lution of legal disputes.

That *Brown* could be resolved so easily is inconsistent with the strong reactions inspired by *Brown* from the participants in the Harvard Law School Holmes Lectures. Lecturers in that series were preoccupied with *Brown*, and the Warren Court, which produced it. Professor Herbert Wechsler,³¹ Judge Learned Hand,³² and Professor Alexander Bickel,³³ struggled mightily, but even these luminaries were unable to prevent the downward drift of the Legal Process School.³⁴ Herbert Wechsler attacked *Brown*, arguing that the Court decided the case without reference to neutral principles.³⁵ Learned Hand criticized *Brown* also on a similar basis, and suggested that judicial review should, with some exceptions, be at an end.³⁶ Finally, Professor Alexander Bickel found that in some cases, such as racial segregation cases, there is tension between principle and expediency, and therefore the only appropriate choice for the Court was to practice prudence and refrain from judicial review.³⁷ In sum, as illustrated by the above lecturers, the prevailing jurisprudence of the *Brown* era was based on positivism or formalism, with its attendant *stare decisis* prop, and a faith in reasoned elaboration premised explicitly or implicitly on an assertion of the primacy of elected bodies over a non-elected court.³⁸

The drift of the AALS Panel, with very few exceptions, was that resort to the canon and legal analogical reasoning, formalism and legal positivism were up to the task of justifying legal decisions, presumably of any type or nature.³⁹ It was a surprise to see most of the participants adopt the formalist mode, *e.g.*, Professor Catharine MacKinnon, Professor Derrick Bell, even Professors Bruce Ackerman and Frank Michaelman. Professor Bell, who distanced himself from positivism the most, at

31. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15, 34 (1959) [hereinafter "WECHSLER"].

32. See LEARNED HAND, *THE BILL OF RIGHTS* (Harvard Univ. Press 1958).

33. See DUXBURY, *supra* note 18, at 283 (Bickel lectured in 1969).

34. See DUXBURY, *supra* note 18, at 282 (erosion began with Warren Court).

35. See WECHSLER, *supra* note 31. Such neutral principles transcend the immediate result and therefore are not just fashioned to obtain a particular result. See *id.* at 15 (neutral principles stand in contrast to ad hoc use of principle to achieve a particular result).

36. See HAND, *supra* note 11, at 652-72.

37. See DUXBURY, *supra* note 18, at 279 (1995) (there is no neat dividing line between principle and expediency therefore where there is this conflict potential, courts (as in *Brown*), should refrain from acting). *Id.* at 279-80.

38. See DUXBURY, *supra* note 18, at 288 (Bickel referred to this problem as one of the counter-majoritarianism: unconstitutional ruling reverses policy of elected representatives). *Stare decisis* is a legal concept that past decisions should be honored and determine the results in future cases.

39. Cf. *supra* note 13.

one point, invoked “the Constitution” as an important standard supporting his argument.⁴⁰

In attempting to come to terms with the significance of the Panel, we look to parallels in the realm of theological controversy. One of us has pursued such broad parallels before,⁴¹ and Professor Balkin and other commentators have followed this course in other legal contexts.⁴² To pursue this analogy, we look to the Council of Nicaea in 325 CE, where bishops assembled to determine orthodoxy in religious doctrine. For at Nicaea, there was an endorsement of a legitimacy of a methodological orthodoxy. The methodological orthodoxy arose from the use of Scripture, and the integration of material from bishops and other clerical commentators.⁴³

In other words, the Panel used traditional sources, *e.g.*, the Constitution and cases, and thereby endorsed them in the form of a rule of recognition, to use the term of H.L.A. Hart’s legal positivism. The rule of recognition is a rule derived from observation of what sources decision makers refer to in resolving controversies.⁴⁴ The methodological orthodoxy centered on a universal emphasis on the Constitution, cases construing it, and other formal sources selectively chosen including State and Supreme Court cases, and by surprise, even the Declaration of Independence.⁴⁵ Just as at Nicaea, we can see the secular bishops of our day, perhaps striving consciously or unconsciously, for a validation of appropriate sources or a canon for the determination of controversy. The politics of legitimation, status, prestige and power are at stake now as in 325 CE. Also in tandem with Nicaea, the *Brown* panelists reached a consensus on the result.⁴⁶

But there are other stories that come out of this exercise by the panel of secular bishops. One is disarray and contradiction arising out of the cacophony of panel opinions, proceeding from the canon, leading the

40. See Bell, *supra* note 27.

41. See John W. Van Doren, *Contradiction and Legitimacy in Christianity and United States Constitutionalism*, 10 WHITTIER L. REV. 637 (1989).

42. See Balkin, *infra* section III A.

43. See LEO DONALD DAVIS, S.J., *THE FIRST SEVEN ECUMENICAL COUNCILS 69-77* (1987) (gospels and apostolic writing used at Nicaea as a basis for dogma which evolved) [hereinafter “COUNCILS”].

44. See John W. Van Doren, *An Attack on a Defense of Modern Positivism*, 25 NEW ENG. L. REV. 813, 815 (1991) (discussing Hart’s Rule of Recognition). The comparison could be made of cases to clerical commentary and apostolic writings, though for our purpose it is more important to find some rule of recognition of appropriate sources, rather than worry about exact parallels between cases and clerical commentary.

45. See discussion of panelists *infra* section II.

46. See *supra* note 13.

panel toward self-destruction.⁴⁷ Since there are no records of the meeting at Nicaea, the bishops were spared this exercise in contradiction.⁴⁸ Secondly, as mentioned above, there is substantial conflict between the formalism or positivism implicit in the opinions and the previous written positions of the panelists we discuss, which refute and question severely the positivist frame.⁴⁹ We now proceed to our parallel with the Council of Nicaea.

II. PARALLEL TO THE COUNCIL OF NICAEA

A. *History of the Council*

In 325 CE, the Council of Nicaea, summoned by the Emperor Constantine I, met in Nicaea to deal with a crisis in another community, this time, overtly at least, traceable to religious controversy over the nature of the Godhead.⁵⁰ What is the relationship between God and Jesus? Was there a time when Jesus did not exist? Was Jesus of a different substance than God or the same substance? Relatedly, was Jesus subordinate to God? And where does the Emperor fit in? Is he bound by law set by the Church, or is he the source of all law so that his law would prevail over contrary Church law? It was this latter controversy that contributed to the later repudiation of the *homoousios* doctrine, which stated that God and Jesus were of the same substance, because it limited the power and authority of the Emperor.⁵¹ This dispute, stirred up in the Scriptural context, was settled by reference to an extra-Scriptural source, the Greek language idea of *homoousios*. There was resistance to this term for several reasons. Some eastern bishops did not like the uncertainty that *homoousios* might generate. Conservatives did not like importing terms from outside the sacred text.⁵² This controversy prefigures the originalist vs. non-interpretivist debates in jurisprudence. At Nicaea, the Council found God and Jesus were of one substance, so that it was then possible to identify as heresies the claim that Jesus was subordinate to God, and the Arian claim that there was a time when Jesus did not exist. Since God and Jesus were of the same substance, there was no time when Jesus “was not.” But the decision did not come without extreme

47. See IB, *infra*.

48. COUNCILS, *supra* note 43, at 59 (official minutes did not survive, if they were taken).

49. See *infra* section III.

50. See COUNCILS, *supra* note 43, at 51-56.

51. See *id.*, *supra* note 43, at 74-77.

52. *Id.* at 62.

controversy.⁵³

The final resolution at Nicaea, based on *homoousios*, had sufficient ambiguity to gain assent, but at the same time involved a contradiction, which later accommodated substantial controversy.⁵⁴ There are broad significant parallels between the Council of Nicaea and the AALS Panel. Both sought to be ecumenical, that is, sought to have the appearance of representing diverse regional and political components. The Council meeting at Nicaea had delegate bishops from the western and eastern sections of the Church.

In the AALS Panel on *Brown*, we encountered the ruling “secular bishops” of this day, the law professors, largely from the Harvard, Yale, Columbia axis, yet another Trinity. For there they were, addressing a leading controversy of our lifetime, apartheid in America, spinning out their legal scripture from the Constitution and its commentators and legalists in cases. They had the same problems as the bishops at Nicaea. To what extent can an ancient text bear the crucial job of exegesis to solve problems of the day which find their way into the legal sphere? And to what extent must the secular bishops (law professors and Supreme Court Justices) give way to forces outside the text, such as policy, morals, and politics to resolve those crises?

53. See generally, supporting this paragraph, *id.* at 33-80. “The word *homoousios* had a long history. . . even though accepted in the creed, it was objectionable to the majority of the bishops for at least four reasons. First, the term, despite Constantine’s statement, had strong materialist overtones which would connote that Father and Son are parts or separable portions of the same “stuff”. Secondly, if Father and Son were of one numerically identical substance, then the doctrine of the creed could well be Sabellian, Father and Son being identical and indistinguishable. Thirdly, the term was associated with heresies since it had been coined by the Gnostics and had, in fact, been condemned at the Council of Antioch in 268 as used by the Adoptionist Paul of Samosata. Fourthly and importantly for many of the more conservative bishops, the term was not scriptural.

Despite the misgivings of perhaps the majority of the attending bishops the term was added to the creed. It seems clear that the authority of Constantine was the main motivating force. Yet behind Constantine was his long-time chief ecclesiastical advisor, Ossius of Cordoba, a bishop immersed in the theology of the western church. Though the Latin equivalent of *homoousios*, consubstantial, was not yet a fully accepted term in the western theological vocabulary, it was suited to describe the type of Trinitarian theology fashionable in the West with its strong insistence on the divine monarchy. It is likely that in pre-consiliar discussions Ossius had gained the support of Alexander of Alexandria and cooperation of Constantine to urge the term on the assembled bishops. The very ambiguity of the word would possibly have appealed to the politician Constantine was. Within limits the bishops could read their own meaning into the term which still had the merit of scotching the Arian view. So *homoousios*, coined by Gnostic heretics, proposed by an unbaptized emperor, jeopardized by naïve defenders, but eventually vindicated by the orthodox, was added to the Creed of Nicaea to become a sign of contradiction for the next half-century.” *Id.* at 61-62.

54. See *id.* at 94-100 (Nicene Creed with *homoousios* repudiated in a later council; Nicene Creed seems to go down to defeat). See also HENRY CHADWICK, *THE EARLY CHURCH* 130-31 (Dorset Press ed., Penguin Books Ltd. 1986) (crucial terms of the Nicene Creed did not mean the same thing to all the Bishops because of the ambiguity of *homoousios*).

Whether it is appropriate to use policy as a determinant of legal cases today is controversial. The modern legal positivists indicate that policy may play a limited role.⁵⁵ But the positivists stress rules with a core of certainty and a presumably small penumbra of doubt. These rules do not require a fresh judgment from case to case.⁵⁶ The positivists could probably fit *Brown* into the “open-textured” area, where policy could bring resolution.⁵⁷ This view contrasts with that of Dworkin who argues that in hard cases political morality must be invoked, and there are preexisting rights determinable from preexisting legal principles.⁵⁸ Dworkin deprecates the use of policies, finding reliance on it by courts to be wrong.⁵⁹ Others, such as adherents to Professor Myres MacDougal’s Policy Science would use policies that they consider determinant in deciding cases.⁶⁰ Many jurists are reluctant to include policy in the equation because that smacks too much of politics and affirms legal realism and relativity. Whether there is a clear distinction between law and policy, or law and politics, and if not, if this can be acknowledged openly in 2002, is an open question.

There were some tensions on this even in 325 CE. The bishops disputed the inclusion of the *homoousios* doctrine because, in part, it was not in the text. The parallel between Nicaea and the Panel can be exemplified in another comparison. Professor McConnell is basically an originalist in orientation, and Professor Ely also has originalist leanings. By “originalism” we mean a tendency to stress the original text of the Constitution as it was understood at the time of enactment. Originalists are wary of the Supreme Court and wish to restrict the scope of the court, at least on a substantive basis. Perforce, Professors MacKinnon and Balkin are not originalists. In any event, the parallel is with the use of the term *homoousios*, which the Scriptural originalists opposed be-

55. See Peter Mirfield, *In Defense of Modern Legal Positivism*, 16 FLA. ST. U.L. REV. 985, 989 (1989) (raising the question as to whether Hart’s system does or can be made to include “principles,” and whether in open textured cases courts engage in a rule producing function). See also H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream* 11 GA. L. REV. 969 (1977) [hereinafter “*Eyes*”].

56. See Mirfield, *supra* note 55, at 989; See also *Eyes*, *supra* note 55.

57. See *Eyes*, *supra* note 55, at 978-987 (alluding to the “open textured” area with a criticism of Dworkin for arguing that there are right answers in that “hard case” area).

58. See generally Ronald A. Dworkin, “*Natural*” *Law Revisited*, 34 U. FLA. L. REV. 165 (1982). See also DUXBURY, *supra* note 18 at 293-94 (Dworkin decries use of policy, favoring the discovery of rights based on principle).

59. *Eyes*, *supra* note 55, at 982-83 (criticizing Dworkin’s emphasis on policy, which Dworkin finds to be a legislative not a judicial concern).

60. See generally W. REISMAN AND A. SCHREIBER, *UNDERSTANDING AND SHAPING LAW: CASES, READINGS, COMMENTARY* (1987).

cause it was not in the Scriptural text. That the *homoousios* or “same substance” doctrine was not in the Scriptures was used as an important argument to reject it and the Nicene Creed at a later council.⁶¹ At Nicaea, Constantine had to use suasion and exile to obtain unity.⁶² If there is discord, instability, and dissent, one way to achieve unity is to expel the dissenters.

There may be a parallel between the use of political power and court decisions and political power and the Council of Nicaea. Constantine coerced reluctant bishops presumably to obtain a unity that was important to his empire-building. Professor Bell points out that the government brief written to overturn *Plessy*, stated that apartheid was an albatross on a post World War II United States, emerging as a major World Power. For the new American Empire needed to influence the hearts and minds of the Third World, most of who were not white. Is this a gentle nudge from the Constantine of our time, to go ahead with *Brown* desegregation?⁶³

B. *The AALS Secular Bishops*

In the AALS Panel, the secular bishops dealing with *Brown* came forth with all manner of secular doctrine: equal protection, privileges and immunities, the Citizenship Clause, the power of Congress to enforce the Fourteenth Amendment, the Fifth Amendment, incorporation of this in that, and that in this.⁶⁴ The artillery was wheeled out and put in place. Some members of the Panel, however, then displayed conflict about the appropriate canon for resolution. Similarly, the bishops at Nicaea dealt with a swelter of possible interpretations of Scripture in the first three centuries.⁶⁵ Could an audience member listening to the Panel not wonder if by chance she had gone to the wrong hotel and gotten into a conference of bickering prelates trying to declare unity and resolve a societal crisis?⁶⁶

It may be objected that the Panelists did not specifically adopt any “methodological orthodoxy,” as we suggest in section IA4, *infra*. Put another way, what other choice did the Panelists have when they ac-

61. See COUNCILS, *supra* note 43, at 97-100 (Nicene Creed seems to be defeated).

62. See *id.* at 63 (bishops exiled who failed to sign).

63. See *supra* note 13.

64. See *id.*

65. See COUNCILS, *supra* note 43, at 33-58.

66. The political pressure of Constantine, which resulted in the Nicene Creed, is an important lesson in how truth is established. Those not accepting the Nicene Creed were threatened with exile or actually exiled. See *id.* at 63.

cepted Professor Balkin's invitation to sit as a Supreme Court on *Brown*?⁶⁷ We say that by the act of participation, the Panelists at least implicitly affirmed the methodological orthodoxy of the canon as the source of resolution. The Panelists could have refused to participate. There must be some panel to which they or we would not lend our presence as panelists with the concomitant legitimation that may result. What about a panel in praise of Nazism, did the holocaust really occur, what *Dred Scott*, *Korematsu*, or *Bradwell v. Illinois*, should have said, anti-Semitism, "the final solution," or advocacy of physical abuse of children or women so as not to spare the rod, or incest 2002, take your pick.

The values asserted by the Panel were those of formalism of the H.L.A. Hart variety, reinforcing the value of the canon and methodological orthodoxy in its use. Moreover, the value of reason as a determinant was reinforced: better reason produces better results (What *Brown Should Have Said*). This position stands in contradiction to the previous writings of the representative scholars we discuss with respect to legal methodology or jurisprudence,⁶⁸ and leaves one proclaiming with Lucretia, are you serious, or are you laughing at me?

C. *The Panel's Internal Conflicts*

The value of methodological orthodoxy affirmed by the Panel was undermined by the tendency of the Panel to self-destruct. While there was reference to the canon for resolution, the composition of the relevant canon and choices of doctrine from it were highly controversial. For example, Balkin found an equality principal in the Declaration of Independence.⁶⁹ Michaelman thought there might be an equality principle there, but indicated that harvesting such a principle could only be done with a moral decision.⁷⁰ Michaelman noted that such an equality provision was ignored for 75 years.⁷¹

67. Conversation with Professor Tahirih Lee, Associate Professor of Law, Florida State University College of Law (on or about February 12, 2001).

68. Professor McConnell may provide an exception. His panel presentation is consistent with his previous writings. However in expanding the canon to include Congressional votes on issues related to the Fourteenth Amendment, and by choosing to derive the meaning of the Constitution from Congressional votes, he appears to engage in the shell game, result oriented tactic for which he condemns others. See McConnell section, *infra* IIIC.

69. See Balkin, *supra* note 17.

70. See Professor Michaelman, Address at the 2000 AALS Constitutional Annual Meeting (Jan. 5-9, 2000) in AALS 2000 Constitutional Annual Meeting: What Brown Should Have Said, Tape 195 (Recorded Resources Corp.).

71. See *id.*

There was also disarray concerning which clause of the Fourteenth Amendment should govern. Should it be the Citizenship Clause,⁷² or the Equal Protection Clause, the Privileges and Immunities Clause, or the clause empowering Congress to implement the Amendment, or more than one of those clauses?⁷³ McConnell and Ely argued that the Fourteenth Amendment Equal Protection applied only to the states.⁷⁴ Ely denied that the Fifth Amendment incorporated the Fourteenth, and Sunstein held the same, but found the Fifth Amendment applied to reach the Federal control of the District of Columbia. Sunstein relied on the Fifth Amendment without reference to any incorporation of the Fourteenth Amendment. This created dissonance with the *Brown* Court's holding that the Fifth Amendment incorporated the Fourteenth Amendment.

Ackerman found the Citizenship Clause could be used to find and enforce rights of national citizenship. Not to be outdone, Days agreed that the Amendments were not quite congruent (the Fifth Amendment Due Process Clause and the Fourteenth Amendment) but he supported an equality principle in the Citizenship Clause, which meant talent and achievement were the only aristocracy.⁷⁵ This equality principle served to affirm the *Brown* result and the *Bolling v. Sharpe* extension to federal action. Balkin also argued that the Citizenship Clause applies to delimit the Federal Government from segregation of the races. The reasoning here was similar to the above arguments that making persons citizens creates rights of national citizenship, including a right to education for all citizens. Sunstein dismissed such considerations because they were not argued or briefed.⁷⁶ The appropriate remedy in the *Brown* Panel was controversial, all the way from one with extreme teeth (Bell) to "immediate compliance."

Dispute continued with disagreement over whether the intent of the Fourteenth Amendment could be known. Days had no trouble finding that the intent of the Fourteenth Amendment meant that schools could

72. *See id.*

73. *See* Michaelman, *supra* note 70.

74. *See id.* Michaelman states that the terms of the Fourteenth Amendment apply to the states only. *See id.*

75. For these statements, *see supra* note 13.

76. *See id.* Michaelman was not as sure, but may be arguing that the federal government could make the people citizens of both the state and federal government. But Michaelman notes two problems: the Citizenship Clause does not apply directly against the states, and if the Citizenship Clause gave the recipients the rights of white citizens, what were those rights? On balance, it was doubtful to him that the Citizenship Clause could yield a national right to education. Ackerman and Days differed with some of their colleagues on whether the Court has a duty to override legislatures in appropriate cases. Ackerman and Days thought yes, while Ely and McConnell stressed deference. *See id.*

not be segregated. MacKinnon found the intent from an equality principle, which she obtained, perhaps, from Aristotle. She seemed critical, however, of the way the principle had worked out. She was also critical of the interpretation of the equality principle in Aristotle's time, a time in which the equality principle was found consistent with prostitution and slavery. Balkin found the intent behind the Fourteenth Amendment uncertain. McConnell found the debates surrounding the Fourteenth Amendment inconclusive, but fleshed out the intent of the Fourteenth Amendment from Congressional votes on related issues close to the time of ratification of the Fourteenth Amendment.⁷⁷

Moreover, those Panelists who used cases to firm up the intent of the Fourteenth Amendment had some disagreement on what those cases were. Some thought older state cases unhelpful, while others found them helpful. When it came to United States Supreme Court cases, it was difficult to keep up with the variety, *e.g.*, *Shelley v. Kraemer*, *Burnette*, *Korematsu*, and a host of others.⁷⁸ The kind of unity we might have hoped for from the Panel was belied by disagreement over what cases were relevant. There was also conflict over the importance of the feelings of Blacks about inferiority deriving from segregation. Ely thought this was important, regardless of the conflict that existed in the literature or which occurred at the time over the sociological footnote.⁷⁹ Law that engendered these inferiority feelings seemed crucial to MacKinnon,⁸⁰ but to Days this was not relevant.⁸¹

As mentioned before, another sticky point would have been, had the issue been raised, whether policy was relevant, and once we find ourselves in the policy arena, what policies are relevant? The observer must remain puzzled over the difference if any between "law" and policy. Is the question of whether "separate but equal" is inherently unequal a policy question or an issue of positive law or both? Seemingly, it is a policy question. This Panel, for its part, displayed varying approaches to whether policy was relevant, and if so, what policies. Sunstein studiously avoided any reference to policy, while Bell argues almost solely on the basis of policy.⁸²

We may wonder what the formalist panel would say about Bell's very policy-oriented approach. Would Sunstein, for example, agree with

77. *See id.* for these statements.

78. *See id.*

79. *See Ely, infra* III D.

80. *See MacKinnon, infra* III B.

81. *See supra* note 13.

82. *See id.*

Bell that the United States was embarrassed in world affairs with its apartheid policy and that this is an important consideration in the case?⁸³ Bell relies on the Justice Department's brief, which made this point;⁸⁴ the question is thus raised of whether this sort of political or policy argument is properly made in court. Would Sunstein or the other Panelists agree with Bell's argument in his opinion, that there was a tacit agreement between the lower socio-economic classes and the ruling powers: you allow the elite managerial and owning class to maintain wage slavery (Bell's term), and we will agree to preserve your position relative to the subordinate position of African Americans?⁸⁵ Would they rule such an argument "out of bounds" improperly raised in a Supreme Court opinion?

Thus, the move to policy showed the Panel's disarray further. Professors Ackerman, Balkin, and Michaelman relied on the "unthinkable" rationale of *Brown*, but Ely, who found the "unthinkable" argument gives too much power to the courts, opposed them.⁸⁶ The "unthinkable" argument used by the *Brown* court was that it would be unthinkable if the federal government in the District of Columbia could do what the state governments were forbidden to do, namely segregate the races in education. Ely argued that some theory should be found to hold the federal government to the *Brown* standard. He just thought that the "unthinkable argument" went too far, and criticized Michaelman for using that argument. However, Ely did find that the federal government is bound, but was conclusionary and uninformative as to why.⁸⁷

The extent to which the canon could bear the interpretive task, and its composition were controversial. Some thought the Constitution could bear the burden of this decision, but others doubted this. Michaelman thought the Constitution might not be able to bear the burden, but let us get as much out of it as we can.⁸⁸ Even jurisdiction was controversial. McConnell thought, at least concerning the desegregation decision in the District of Columbia, Congress intended to reserve jurisdiction to itself to the exclusion of the Court.

In sum, similar to Nicaea, the Panel exhibited disarray in determining the canon and considerable dispute as to what was appropriately de-

83. See Bell, *supra* note 27.

84. See *id.*

85. See *id.*

86. See *id.*

87. See Ely section, *infra* III D. Ely thought that Michaelman came "dangerously close" to buying the "unthinkable" argument. See Ely, *supra* note 26.

88. See *id.*

rivable from it. The use of methodological orthodoxy to resolve controversy was thus seriously undermined.

III. THE VIEWS OF THE PANELISTS

Not only is the methodological orthodoxy as a determinant of the result in *Brown* undermined by Panel conflict, but there is further dissonance because the Panel's opinions on *Brown* do not square with most of the writings of the Panelists we selected for study. The formalism involving the implicit claim that the canon produces the *Brown* result is at odds with our selected Panelists' jurisprudence as revealed in their pre-panel writings. In what follows, we consider the contrast between the four representative Panelists and their writings.

A. Professor John Balkin

As we see it, Balkin's basic problem is that his Panel opinion is very formalistic, or as he might say, syncretic (pointing to one truth), but his previous writings display a "diachronic," or to use his words, "multiple perspective postmodern" stance. Professor John Balkin was the moderator and apparently the originator of the Constitutional Law Panel, "How Brown Should Have Been Decided."

1. What He Wrote Before

Balkin has concerned himself with *Brown* frequently in elaborating his theories and responding to others.⁸⁹ Balkin appears, at other times, in the discussion circles of postmodernism. Those who espouse postmodernism often indicate that the concept resists description. Balkin describes it as a perception that the times in which we live are sufficiently unique so that different interpretations of the Constitution may be required.⁹⁰

The idea that changing times may require different Constitutional directions will meet with opposition from the traditionally conservative originalists and others, who maintain that interpretation must be limited to the intent of the Framers and Ratifiers, and must relate to conditions and mindsets at the time of making. This could be described as a tradi-

89. See, e.g., *The Constitution of Status*, 106 YALE L.J. 2313, 2315 n.2 (1997) [hereinafter "*Status*"]; J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 999 (1998) [hereinafter "*Canon*"]; *Constitutional Interpretation and the Problem of History* (book review), 63 N.Y.U. L. REV. 911, 944 (1988) [hereinafter "*History*"]; *What is Postmodern Constitutionalism*, 90 MICH. L. REV. 1966, 1977 (1992) [hereinafter "*Constitutionalism*"].

90. See *Constitutionalism*, *supra* note 89, at 1977.

tion snapshot theory. Take a picture of tradition at the relevant time, and that is the tradition adopted. So it is not surprising that, in accordance with his postmodernist perspective, Balkin has also zealously denounced originalism. Balkin's criticism of originalism is that there can be no one intent to follow because the Ratifiers' intentions were mixed, in that the Constitution was a compromise of divergent interests and intentions,⁹¹ and accompanying moral and political viewpoints. Furthermore, Balkin points out that there was no one group of Framers, since the Constitution has been amended, such as in 1868,⁹² with, importantly here, the Fourteenth Amendment.

It is extremely difficult to reconcile Balkin's postmodernism with the formalism of his panel presentation. Consistent with his postmodern direction, Balkin has concluded that the Constitution is capable of multiple interpretations and thus inherently iterable, that is, it can be read in different ways, depending on who the reader is.⁹³ Balkin's written views on the Constitutional tradition smack of Legal Realism, which encourages us to look at law as manipulable by interpretive theory or attuned to conflicting policies rather than rules. Balkin writes: "[Our] theories of the Constitution are makeshift attempts, reflecting the concerns of our era, but dressed up as timeless claims about interpretation."⁹⁴ Curiously, (since he comes from a different political camp), Professor McConnell makes a similar point.⁹⁵

According to Balkin, originalism and formalism (positivism) are further untenable because the constitutional canon is not just contained in the Constitutional document itself and Supreme Court opinions, but within sociological developments, such as skills, approaches, standard examples, forms of argument, and even stock stories.⁹⁶ Balkin's expansive view, compatible with Legal Realism, if not its incarnation, is that public opinion more often than not leads the Supreme Court so that judges then "discover" new rights in the Constitution.⁹⁷

The legal system must then, according to Balkin, by its very nature,

91. See *History*, *supra* note 89, at 924, where Balkin criticizes originalist Raoul Berger for not taking into consideration that the ratifiers had divergent interests with regard to federal and state power.

92. See *id.* at 942, 949 (legal system diachronic).

93. *Id.* at 933.

94. J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1719 (1997) [hereinafter "Agreements"].

95. See Professor McConnell, Address at the 2000 AALS Constitutional Annual Meeting (Jan. 5-9, 2000) in *AALS 2000 Constitutional Annual Meeting: What Brown Should Have Said*, Tape 195 (Recorded Resources Corp.), and McConnell, section III C, *infra*.

96. See generally, *Canon*, *supra* note 89.

97. *Id.* at 1022-23 (public opinion leads the Court, at times).

be viewed from a diachronic perspective.⁹⁸ A “diachronic perspective” stands for the proposition that the meaning of the Constitution is required to change over time, as legislation is created and then interpreted by courts. The canon is used as a vehicle “for the normalization of beliefs and interpretive assumptions, and hence as instruments for social control by the relevant interpretive community.”⁹⁹ The correct interpretive process, or arriving at proper law, is not easy, however, because the Supreme Court, warns Balkin, has done “wicked things” purporting to follow the Constitution, such as promulgate racism and sexism.¹⁰⁰

The wickedness, however, about which Balkin cautions his readers does not stop at the Supreme Court interpretations in that the Constitutional document is indictable also.¹⁰¹ There may be limits to the use of the Constitution to find appropriate law, because the Constitution itself may be deeply flawed. Thus, Balkin questions whether the Constitution itself may be “evil.”¹⁰² What Balkin means by “evil” is that the Constitution contains written clauses, which provide for things that in today’s society are strictly taboo, for one, slavery.¹⁰³ In short, the original Constitution and its ratifiers supported the institution of slavery, as well as such “evils” as sexism. The slave trade was, in fact, so important to the ratifiers that it could not be constitutionally abolished until 1808. Balkin still queries if William Lloyd Garrison might not be correct in maintaining that the Constitution is “a covenant with death, and an agreement with hell.”¹⁰⁴

98. *History*, *supra* note 89, at 930-33; Balkin contrasts the diachronic perspective with the conservatives’ synchronic perspective, which asserts that there is one rule of law and that rule was created by the Framers. Balkin’s opinion is that the synchronic and diachronic perspectives are not only in tension, but must go hand in hand; *stare decisis* flows from the simultaneous creation of new law. *See id.* This is puzzling, however, and appears to involve a departure from the general understanding of the words *stare decisis*. *Stare decisis* must be conceived as highly flexible and “diachronic” itself.

99. *Canon*, *supra* note 89, at 1019.

100. *Id.* at 1017.

101. *Id.* at 1024.

102. *Id.* at 1023. “What shall we do if we discover that the Constitution itself might be an evil document that keeps evil in place. . . .” *Id.*; *See also, Agreements*, *supra* note 94, at 1704. “[T]he Constitution exists in a political system that is certainly not completely just and may in fact be very unjust . . . the Constitution we are faithful to might be an evil Constitution. . . .” *Id.*

103. *See Agreements*, *supra* note 94, at 1707-08. One of the two unamendable provisions according to Article V is that slave trade could not be abolished before 1808. *Id.* There is also the Fugitive Slave Clause. *Id.* at 1708.

104. *Id.* Balkin also states that the Constitutional tradition causes social and psychological pressures of “fidelity” which have three adverse effects: we tend to see the Constitution for whatever we see fit; we conform our ideas of justice to our sense of what the Constitution means; and, the practice of constitutional interpretation skews and limits our understanding of justice because not all claims are equally easy to state in the language of that tradition. *Id.* at 1704.

Balkin's painting of the Constitutional picture does not get significantly prettier, or less "evil." He further alerts his readers that "[w]e cannot avoid having constitutional doctrines simply because they may turn out to be inadequate or imperfect. But we can avoid believing that the truth about society is described within them."¹⁰⁵ Balkin gave as an example, the Fourteenth Amendment:¹⁰⁶ it may conflict with the view of Lincoln himself, who once said that if he could have preserved the Union with slavery, he would have.¹⁰⁷ The truth about society, which this example reveals, is that even though the Fourteenth Amendment may have been written in order to abolish slavery and create [formal] equality for Blacks, the reality is that even the President of the United States did not agree with it. The Fourteenth Amendment, like the original Constitutional document, was a compromise.

Further difficulties arise for originalists who favor the result in *Brown*. The Ratifiers, not only of the original Constitution, but also of the reconstruction amendments, supported slavery or subordination of Blacks. Thus an originalist favoring *Brown* cannot realistically (or morally) be strict because he/she would have to go back and reverse *Brown* in that desegregation does not align with original intent.¹⁰⁸

Balkin has not given up, though. He has to expand the canon to keep going. He has maintained that the underlying truth about our Constitutional government is not actually to be found in the Constitution of 1787, but rather in the Declaration of Independence of 1776. According to Balkin, the Declaration of Independence, rejected social hierarchy and embraced social equality.¹⁰⁹ A small problem arises however when Balkin admits that in 1776 social equality did not include women, slaves, and white men without property.¹¹⁰

Unimpeded, Balkin heads for the stratosphere, and states that his conception of democracy is simply a form of social organization, which has not yet been fully realized.¹¹¹ The American Revolution was about an "egalitarian urge" which was then "enshrined in the Declaration of Independence and forms the underlying spirit of our constitutional tradi-

105. *Status*, *supra* note 89, at 2374.

106. Ratified as one of the reconstruction amendments following the Civil War.

107. *Declaration and the Promise of a Democratic Culture*, 4-SPG Widener L. Symp. J. 167, 168 (1999) [hereinafter "*Declaration*"] (citing Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), *reprinted in* THE PORTABLE ABRAHAM LINCOLN 234 (Andrew Delbanco ed., 1992)).

108. *See History*, *supra* note 89, at 944.

109. *Declaration*, *supra* note 107, at 171-72.

110. *Id.* at 172.

111. *Status*, *supra* note 89, at 2314-15.

tion.”¹¹² Therefore, according to Balkin, the Constitution must not be read by its individual clauses, but as a “respon[s]e to social movements demanding changes in social structure.”¹¹³

Balkin persists. The Fourteenth Amendment’s Citizenship Clause is understood to reflect an overarching democratic goal of eliminating social hierarchy.¹¹⁴ In effect, Balkin is able to cite it in support of his thesis that we should strive for “Ideal Constitutionalism.” That is, “we must try to see the true and good things in it.”¹¹⁵ From that, presumably, comes good constitutional law.

Balkin’s ideas of an underlying democratic plan and Ideal Constitutionalism may perhaps appear to flow nicely into his postmodernist perspective. He finds that there is a choice and we must look at constitutional law in light of the realities of society today. But Balkin actually creates a sticky Cartesian Circle, which might otherwise be referred to as a loop, for himself. He has stated that certain constitutional cases have been wrongly interpreted.¹¹⁶ Here we have to pause and ask ourselves, when someone says, “this case is wrong,” what standards are they using? Balkin may be telling us that the original Constitutional document or, constitutional tradition does contain a specific answer and judges in the past got it wrong. Or, it may be that all this hype about a diachronic perspective and appreciating history is just hype; it’s really synchronic. Finally, he may be telling us that his views are “true and good” while others are “wicked” or “evil.”

Though Balkin is admittedly left-liberal,¹¹⁷ he does not seem to have any trouble using the traditionally conservative order of morality; i.e., there is fundamentally a “good” versus “evil.” Balkin has specifically compared differences in legal reasoning to religion.¹¹⁸ The religion

112. *Id.* at 2316.

113. *Id.*

114. *Id.* at 2347.

115. *Agreements, supra* note 94, at 1709.

116. *See, e.g. id.*, where Balkin states that *Dred Scott* (holding that Blacks are not citizens) was decided wrongly.

117. *See, e.g.,* J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 *YALE L.J.* 1935, 1944 (1995) (book review), “. . . I want to focus primarily on the discourse of left-liberals, because it is the ideological community in which both Sunstein and I (and a great many other legal academics) are located.” *Id.*

118. J.M. Balkin & Sanford Levinson, *Getting Serious about “Taking Legal Reasoning Seriously,”* 74 *CHL-KENT L. REV.* 543, 556 (1999). Balkin discusses lawyer-economists and doctrinalists with an analogy to religious groups. *Id.* at 556-58. Syncretic religions, like the lawyer-economists, accept alien influences. The syncretic religions think they are correct because they embrace the other religion, while the religion which is not syncretic believes it is correct for the opposite reason. *Id.*

analogy was intended to show that there are simply different ways to perceive what is correct legal reasoning, like there are different ways to perceive what is correct religious faith. Yet, in the end, it is unavoidable and indeed necessary that each group will maintain that its system is the true one.¹¹⁹ An example is the Council of Nicaea; once the Nicene Creed was established, the “Arian heresy” group split off, each group thinking they were correct. In other words, there are two fundamentally different legal theorist groups of constitutional interpretation, and neither will ever come to terms with the other. The originalists and the noninterpretivists cannot accept the other.

Balkin does not appear to have a problem, philosophically, with this split. His writings purport to encourage self-reflection of ideological differences. He knows that there are originalists, and that he is not one of them. He has, in fact, played his faithful “religious” role and decried the opposing religion, originalism, as heresy. In his writings, Balkin has affirmed the importance of the internal point of view, but unlike some others, he problematizes internal perspective.¹²⁰ Yet at the same time, Balkin invites us to view all interpretations as subjectively based, and therefore subject to critical perspective: “In both what we call legal understanding and what we assign to legal misunderstanding, the subject has already intruded and brought her fore-understandings, prejudgments and psychological needs to bear. The subject is already part of the constructed object of interpretation; her invisibility is already reflected in the object’s nature.”¹²¹

So, before Balkin arrives at the *Brown* panel, where does that leave him? It appears to leave him philosophically content with his own “internal experience of the law,” for it is not “wicked” or “evil” (he does not support such evils as racism and sexism). It leaves him in the “religion” of the nonoriginalists or noninterpretivists whose postmodern purpose it is to take the diachronical law handed to them from history and apply it to today’s society. Apparently, the only mandatory constitutional or precedential authority is an amorphous democratic ideal and goal of rejecting social hierarchy. Balkin wants us to remember that what the Supreme Court has said in the past is never unequivocally important. Judges have made mistakes, because they generally only answer to the demands of the public, not the constitutional governmental

119. *Id.*

120. See J.M. Balkin, *Understanding Legal Understanding: The Legalist Subject and the Problem of Legal Coherence*, 103 YALE L. J. 105, 110-11 (1993) (contrasting his view with Hart and Dworkin who do not make problematic the internal viewer).

121. *Id.* at 111.

framework. In fact, it is in many cases better to ignore what the actual Constitution or the Supreme Court (or the originalists) have said, because they have been known to inculcate "evil." And even if the constitutional provisions are not actually evil, many of them are, at least, for sure, stupid.¹²²

2. And What He Says Now

Sitting as the Chief Justice on the Panel, Professor Balkin weighs in at the podium announcing that segregation is unlawful. He described *Brown* as a "legal classic" and an "icon," which was a Rorschach test for institutional theory, an interesting point not pursued directly by him or any other panelist. He further stated that *Brown* meant different things to different people. It was appropriate, he continued, to consider *Brown's* effectiveness since the results are mixed and the public schools remain largely segregated today. No one seriously pursued that topic either. The Panelists were to look at contemporary theories and contemporary concerns, but subject to the rule of the game that you knew then in 1954, what you know now about the "course of history of this country."

First, in his panel offering, Professor Balkin indicated that he considers the actual intent of those responsible for the Fourteenth Amendment to be inconclusive, acknowledging that others on the Panel did not agree. Professors Mackinnon, Days, Bell and Ely for starters, he might have added, had no problem with this intent situation. If the intent is unclear, we are then apparently free to find an intent "out there." So, there is a bit of tension here between Balkin's assertion that the Framers and Ratifiers did not wish to outlaw segregation, and his claim that the intent was unclear.

But Balkin finds the intent unclear, so we may initially think that must be because segregation violates the democratic ideal and goal of social equality. For, after all, that is what Balkin had always asserted was the most (or only) important and reliable feature of the Constitutional tradition. But, no. Balkin now tells us that segregation is unconstitutional based not only on the Framers' intent behind the Fourteenth Amendment, but also on substantive, structural, and textual grounds. Suddenly, Balkin is reaching outside his postmodernistic, diachronical world to find that the Framers' intent did not support segregation. Though Balkin concedes that it is at best, inconclusive whether the Rati-

122. See generally J.M. Balkin, *The Constitution as a Box of Chocolates*, 12 CONST. COMMENT. 147 (1995).

fiers' of the Fourteenth Amendment intended segregation to be constitutional, he goes on to argue that the basic principle behind the Amendment is equal citizenship. To the Ratifiers, however, equal citizenship for Blacks meant civic equality (e.g., testifying in court), but not political (e.g., voting) or social equality. Social equality certainly could not have been intended, Balkin tells us, because many of the Ratifiers wanted Blacks to remain inferior for all time. Despite their prejudice, however, Balkin reassures us they had the foresight to use language that "conveyed full and unalloyed equality."¹²³

Balkin then informs us that even though the Ratifiers may have only intended Blacks to have civic equality, they soon were given, at least formally, political and social equality by courts.¹²⁴ Under *Plessy*, however, social equality meant "separate but equal" was the order of the day. The states, up to that point and especially thereafter, continued to support and enforce social subordination of the Blacks. Nonetheless, the Ratifiers' intent that Blacks would only be allowed civic, but not political and social, equality was becoming unworkable and, ultimately, exploded. (Presumably this explosion was only coincidental to the "foresight" of the Ratifiers' language because it was factors other than that language that gave rise to the realization. In other words, the law changed not based on any clear "foresight" of the Constitution's language but because of social factors. It would thus seem that the Constitution was not so clear after all, or if changes were in line with the Constitution it was not because anyone had cared how clear the language was.).

Then Balkin introduces the Declaration of Independence and Jacksonian principles against class legislation to support the idea that equality of citizenship is inherent to our constitutional government. The Framers were not only against privileges for special groups, but against disadvantages for certain groups. This, apparently, trumps any equivocation in the Fourteenth Amendment itself. Education, moreover, is a fundamental interest, and states have an affirmative duty to provide equal education for all citizens when they subsidize public education. Balkin does not refer to the word "education" in the Constitution. The finding of education as a fundamental interest nicely takes care of *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which denied that school districts had to achieve some parity in educa-

123. See Balkin, *supra* note 17.

124. *Id.* Balkin cites *Strauder v. West Virginia*, 100 U.S. 303 (1879) and *Plessy v. Ferguson*, 163 U.S. 537 (1896).

tion resource allocation. *Rodriquez* would be reversed because education resources should be equalized because of a nebulous Constitutional.

On *Bolling v. Sharp*, the case involving federal discrimination in schooling in the District of Columbia, Balkin then had one structural and three textual arguments to support the assertion that the federal government cannot segregate any more than the states can. His structural argument was that “it means little” and “makes no sense” if the states cannot segregate, but the federal government can. For this he cites the First Amendment, which states that Congress shall make no law abridging the freedom of speech, which, according to written material from the University of Minnesota, means that the Executive and Judicial branches cannot make such law, either. He does not tell us what special authority the University of Minnesota had.¹²⁵

Then he starts reading the constitutional text, something which he has warned his readers against doing because, let us recall, it may be evil, or if not, plainly stupid. First, he argues that the Privileges and Immunities Clause’s reference to all persons are citizens creates a national citizenship and implies equality. Second, he announces that the first sentence of the Fourteenth Amendment states that “all persons born or naturalized in the United States are citizens of the United States” has major significance. This, apparently, is another obvious clue about national citizenship and its implied equal citizenship. It does not permit two classes of citizenship. (It also does not prohibit it, but Balkin ignores this). Third, the Fifth Amendment’s due process clause, “as we all know,” includes the concept of equal protection. (Professor Ely does not “know this” and strenuously resisted it during the Panel discussion). This was done to “make explicit to the Southern states what was already implicit”——they cannot treat Blacks as second-class citizens. Balkin gives us no cite for this, either.

Setting aside the question of whether Balkin should or could actually believe any of these arguments, the larger issue is, given his paper trail and what it says, whether Balkin is acting like his enemies——the originalist, the positivist, or the formalist. He has always warned his readers that this form of legal reasoning is illogical, evil, stupid, or just plain wrong. He has told us that the Ratifiers embraced slavery and social subordination of Blacks, so be wary of them. He has told us that the Supreme Court makes mistakes and generally follows public opinion, not the Constitution. He has told us that the rule of law is diachronical, and changes with time, so do not look too far into the past for a syn-

125. See Balkin, *supra* note 17.

chronic answer. And yet, what is he doing now? He is reading Supreme Court cases, and citing to them, even favorably.¹²⁶ He is telling us, on the one hand, that the intent of the Ratifiers was to promote equality of citizenship, but on the other hand that many of them wanted Blacks to be forever subordinate (?!). He is reading the text of the Constitution, verbatim, and telling us that it supports that intention.

What is Balkin doing? One would find it hard to believe that he could go so far as to contradict everything he has ever written as true about the rule of law, legal reasoning, and society. His former writings remain antithetical to his panel opinion. Perhaps the answer is that Balkin is trying to set an example for us, showing us how Supreme Courts, “with their peculiar brand of justice,”¹²⁷ “discover”¹²⁸ constitutionality to support what their surrounding society demands.

Perhaps, we are invited to take home the message that today, even though when *Brown* was actually decided the opposite was true, it is uniformly (or at least formally) strictly taboo, immoral, even evil, to advocate segregation or racial discrimination. Therefore, the *Brown* Panel (and the Supreme Court) had to find segregation unconstitutional. There was no choice, other than what would come down to virtual banishment. It is reminiscent of what the Council of Nicaea may well have been thinking: Our society demands that we stand together on this one, so we must do so, no matter what the text actually says, no matter what we ourselves have said or believed before.

Perhaps an important lesson here is the fragile nature of orthodoxy. *Brown* was not bathed in orthodoxy when it was rendered. It was highly controversial. In the parallel arena of religion, Borges reminds us of the fragile nature of orthodoxy. In controversies precedent to the Council of Nicaea in 325 CE over the relation of Jesus to God, Borges tells us the story of an original orthodoxy which Bishops John and Aurelian had embraced. They were rivals and Aurelian wrote a better defense of the current orthodoxy than John, according to the ruling church authorities. In writing the attack on heresy, Aurelian stated the orthodoxy and his refutation became the Church's official one. Later, orthodoxy completely changed, and John used Aurelian's statement of the dd ortho-

126. Such as *Strauder*, 100 U.S. 303 (1879), which gave blacks the right to sit on juries, and *Plessy*, 163 U.S. 537 (1896), which said Blacks had social equality. He cites these as evidence that the distinction between civic and political equality became untenable, and ultimately exploded.

127. See Introduction, 2000 AALS Constitutional Annual Meeting (Jan. 5-9, 2000) in AALS 2000 Constitutional Annual Meeting: What *Brown* Should Have Said, Tape 195 (Recorded Resources Corp.).

128. See *Canon*, *supra* note 89, at 1023.

doxy in his (John's) refutation. This cost Aurelian his life when John was asked to disclose where he got the statement of the old orthodoxy, (which was now heresy) and he identified his rival, Aurelian.¹²⁹

Perhaps also the Panelists were reflecting a need to stand together on an important societal issue. Could there be a similarity between the legitimacy of religion to the bishops at Nicaea and the legitimacy of "our lady the common law" to the Panelists? Otherwise our ability to slide in our own values could be jeopardized if that legitimacy is undermined.

B. Professor Catherine MacKinnon

Professor MacKinnon's conflicted positions are illustrated by the following in capsule form. On the one hand, her Panel opinion adopts formalism to approve *Brown*, finding objective harm to Blacks from desegregation. But to do so, she smuggles in her own equality principle taken supposedly from Aristotle, though her writings distance herself from the working out of that principle in Aristotle's time and presently. Further, her writings suggest that law is manipulated by dominant males to make that world comfortable for them, and whatever the powerless (like Blacks and women) get is offhand, and designed to keep them hoping for more, which is not likely to be forthcoming under the current dispensation. MacKinnon stands delicately poised between the contradiction of accepting the fruits of Court action (*Brown*) and rejecting it because it is male dominated and can be used by the dominant class to keep women hoping for good results thereby legitimating it.

1. What She Wrote Before

Catharine MacKinnon's candidacy as a *Brown* Panelist may stem from the frequency with which she has compared women's situation to that of Blacks, often citing *Brown* and the problem of racial discrimination in her previous writings,¹³⁰ which have predominantly been in the

129. See JORGE LUIS BORGES, *The Theologians*, in COLLECTED FICTIONS (1998).

130. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 44, 167 (Harvard Univ. Press 1987) [hereinafter *FEMINISM UNMODIFIED*]. "The best attempt at grasping women's situation in order to change it by law has centered on an analogy between sex and race in the discrimination context."; *Id.* at 167, "Consider this analogy with race: if you see Black people as different, there is no harm to segregation; it is merely a recognition of that difference. . . . Similarly, if you see women as just different, even or especially if you don't know that you do, subordination will not look like subordination at all, much less like harm. It will merely look like an appropriate recognition of the sex difference" (attacking neutral principles); *Id.* at 178, "In [*Brown*], it took one study to show that the harm of segregation was that it affected the hearts and minds of Black children, gave them a sense of their inferiority, and affected their feeling of status in the community in a way that

feminist field. She has based her arguments for sex equality on the same premises which have been used for race equality: “The primary point of reference for antidiscrimination law has not been the social situation and experience of women, but that of black Americans, or at least of black men.”¹³¹ While this analogy with blacks may have seemingly made her an opportune Panelist, her *Brown* opinion resonates of originalism and formalism, spawning a tension with her understanding of history, society, law, and the legal system. In her writings, she has maintained that throughout U.S. history, society and its law have always been, and still are, intrinsically unequal because only white (property-holding) males have made, and essentially still do make, the rules. Our Constitutional tradition has never been one of equality.¹³² Throughout her writings, the

was unlikely ever to be undone. How do you suppose it affects the hearts and minds of women. . . .” (arguing that as done for Blacks in *Brown*, studies need to be done for women in pornography); *Id.* at 202; CATHERINE A. MACKINNON TOWARD A FEMINIST THEORY OF THE STATE. (Harvard Univ. Press 1989) [hereinafter “TOWARD”], 153, “[P]erhaps it would help to think of women’s sexuality as women’s like Black culture is Blacks’”; 240 (discussing how law occasionally sides with the powerless, citing *Brown*); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION. (Yale Univ. Press 1979) [hereinafter “HARASSMENT”], “*Segregation* is more or less accepted as a dirty word when applied to separation on the basis of race. . . . But there seems to be a social sense that it is somehow appropriate, or at least not without some just foundation, to divide labor according to sex.”; *Id.* at 17. “A parallel with race illustrates the difficulty with the distinction between the personal and the social implicit in these cases. . . . The assumption that relations between women and men occur in a personal sphere is directly analogous to the assumption once held by whites who lived in intimate daily contact with blacks. . . . By analogy to race, the fact that a sexual relation between a woman and a man is felt to be personal does not exempt it from helping to perpetuate women’s subordinate place in the workplace and in society as a whole.”; *Id.* at 88-89. “Often when courts are confronted with a massive social problem which has been ignored, the first response is ‘administrative’ concern for the legal system. . . . The same can be said for women’s legal rights as a whole and of the rights of racial and national minorities.” *Id.* at 97; *See supra* note 122. “The candid admission that women are regarded as inferior parallels the assessment in *Plessy* of skin color as property. . . . To apply Blackstone’s analysis in a racial context, a property interest in an inferior defines the institution of slavery.” HARASSMENT, *supra* note 130, at 169. “[Attitudes towards women and women in the workplace] resembl[e] the white supremacist logic of depriving blacks of the tools of an education” *Id.* at 196. (arguing race equality law should be the basis of sex equality law) *Id.* at 137; (comparing women, as blacks, to white men) *Id.* at 273 n.87 (citations omitted).

131. HARASSMENT, *supra* note 130, at 127 (citations omitted).

132. *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS 71 (Harvard Univ. Press 1993) [hereinafter ONLY WORDS], (“Originally, of course, the Constitution contained no equality guarantee. . . . [T]he First Amendment has grown as if a commitment to speech were no part of a commitment to equality and as if a commitment to equality had no implications for the law of speech—as if the upheaval that produced the Reconstruction Amendments did not move the ground. . . .” *Id.*; Catharine A. MacKinnon, *Reflections on Sex Equality Under Law* [hereinafter “*Reflections*”], 100 YALE L. J. 1281 (1991). “Equality was not mentioned in the Constitution or the Bill of Rights.” *Id.* at 1282. “No woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men, live.” *Id.* at 1281. “In the United States, many men were also excluded from the official founding process. African American men and women were

elemental cry has been: Equality for women is inequality.¹³³

MacKinnon has heralded that the liberal state is founded upon (white) male supremacy,¹³⁴ which has been jurisprudentially reinforced.¹³⁵ “Male power is systemic. Coercive, legitimated, and epistemic, it *is* the regime.”¹³⁶ Laws are by and for men. Those with power, usually men, write Constitutions and laws which become precedent; courts cannot and do not go beyond their designated scope, unable to scrutinize the underlying substance of legislation.¹³⁷ The world, MacKinnon has informed us, “actually arranges itself to affirm what the powerful want to see.”¹³⁸ The powerful, of course, are male. The law those males make are only words.¹³⁹

The male point of view is adopted as the “gender equality” stan-

considered property. Indigenous peoples were to be subdued rather than consulted. Non-property owners were not qualified to participate in most states.” *Id.* at 1281 n. 2. (citing C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 64-72 (1913)) FEMINISM UNMODIFIED, *supra* note 130, at 36 (discussing that what is male defines everything in society and history); *Id.* “[T]he principle of equality has been interpreted to affirm specific white and male cultural values as ‘the standard’ Equality has come to mean a right to be treated like the white man when you can show you *are* like him.” *Id.* at 63. “[P]resumptions [that] underlie the First Amendment do not apply to women. . . .” *Id.* at 129. (discussing pornography); “[T]he obscenity standard—in this it is not unique—is built on what the male standpoint sees.” *Id.* at 148; “[W]e can’t tell much about the intent of the framers with regard to the question of women’s speech, because I don’t think we crossed their minds.” *Id.* at 195. “The First Amendment was written by those who already had the speech; they also had slaves, many of them, and owned women.” FEMINISM UNMODIFIED, *supra* note 130, at 204. “[Women] were let into [the legal] profession on the implicit condition that we would enforce the real rules: women kept out and down, sexual access to women enforced.” *Id.* at 205. “For women [the ‘negative liberty’ posture which is ‘a cornerstone of the liberal state’] means that those domains in which women are distinctively subordinated are assumed by the Constitution to be the domain of freedom Equality, in the words of Andrea Dworkin, was tacked on to the Constitution with spit and a prayer. And, let me also say, late.” *Id.* at 207; TOWARD, *supra* note 130, at 182 (discussing that rape law is defined as how men see it, not women); HARASSMENT, *supra* note 130, at 131 “Women’s specific historical forms of subordination . . . have yet to be the subject of a constitutional prohibition.” *Id.*

133. See, e.g., FEMINISM UNMODIFIED, *supra* note 130, at 171 “[T]he view that basically the sexes are equal in this society remains unchallenged and unchanged. The day I got this was the day I understood its real message, its real coherence: *This is equality for us.*” *Id.*

134. TOWARD, *supra* note 130, at 162 (“The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender—through its legitimating norms, forms, relation to society, and substantive policies.”).

135. *Id.* at 163 (“The state is male jurisprudentially, meaning that it adopts the standpoint of male power on the relation between law and society. This stance is especially vivid in constitutional adjudication, thought legitimate to the degree it is neutral on the policy content of legislation.”).

136. *Id.* at 170.

137. *Id.* at 238.

138. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 3 (1985) [hereinafter “*Pornography*”].

139. *Id.* at 65. See generally ONLY WORDS, *supra* note 132.

dard.¹⁴⁰ Male dominance is kept “invisible and legitimate” through adopting this male standard, and is maintained and upheld via the medium of “liberal legalism” which simultaneously “enforces that view on society.”¹⁴¹ Both society and the judiciary have failed to recognize the true disposition of gender classifications, and courts have remained relatively “backward and entrenched.”¹⁴² According to MacKinnon, the liberal view underlying this “neutrality” approach is that abstract categories such as equality or speech define systems, and when you strengthen equality or speech in one place in society, you strengthen it everywhere. The problem with this neutrality approach is that it fails to recognize that substantive systems like male supremacy are just as much systems as abstract systems.¹⁴³

Sex discrimination law is not “real” and does not “work”; it is men who think it does.¹⁴⁴ MacKinnon would attest that this is partly because most of the cases shaping sex discrimination doctrine that have reached the U.S. Supreme Court since 1971 have been brought (and won) by white men “seeking access to the few benefits women had.”¹⁴⁵ For example, when it comes to pornography, it is only when male children came before the Supreme Court that it “understood that before the pornography became the pornographer’s speech, it was somebody’s life.”¹⁴⁶ Only then was child pornography illegalized.

MacKinnon has repeatedly attacked courts for not giving women in pornography the same legal protection children have been given. Courts have held that the harm pornography does is not as important as the free speech associated with the materials.¹⁴⁷ She attacks female judges for upholding pornography, yet apparently waters down that attack by claiming that women who achieve male forms of power will behave like

140. TOWARD, *supra* note 130, at 221. MacKinnon opposes Weschler’s neutral principles. *See, e.g., Pornography, supra* note 138, at 6.

141. TOWARD, *supra* note 130, at 237.

142. HARASSMENT, *supra* note 130, at 129.

143. FEMINISM UNMODIFIED, *supra* note 130, at 164-65.

144. *See* PORNOGRAPHY, *supra* note 138, at 10-11.

145. TOWARD, *supra* note 130, at 227. *See also, FEMINISM UNMODIFIED, supra* note 130, at 64 (if no white male is present it is just a fact if you are poorly paid or educated—not discrimination).

146. FEMINISM UNMODIFIED, *supra* note 130, at 179 (discussing *New York v. Ferber*, 458 U.S. 747 (1982)).

147. *See, e.g., id.* “I take it seriously when Justice Douglas speaking on pornography and others preaching absolutism say that pornography has to be protected speech or else free expression will not mean what it has always meant in this country.” *Id.* at 209. attacking Judge Easterbrook in the 7th Circuit for holding pornography is free speech. *Id.* at 210.

men, and that women in power are usually accountable to men.¹⁴⁸ She has attacked courts for telling us that materials that contain defamatory ideas are protected speech, even though those materials “discriminate against women from objectification to murder.”¹⁴⁹ She has gone so far as to assert, “Sometimes I think that what is ultimately found obscene is what does *not* turn on the Supreme Court”¹⁵⁰

MacKinnon argues that the “differences” approach to sex discrimination, which courts usually take, does not work. The problem is that the standard for determining discrimination is male. The quintessential example is pregnancy; because men cannot get pregnant (cannot be similarly situated) it is not discrimination to treat women differently. This approach ignores that the male is still the standard against which the woman is judged; the differences are then allowed to be “relevant,” and courts can easily get around equality by rationalizing the social subordination of women.¹⁵¹ The measuring stick for equality as male is neutral in its mainstream interpretation: “it gives little to women that it cannot also give to men, maintaining sex inequality while appearing to address it.”¹⁵² The reality is that sex discrimination law prohibits almost nothing that socially disadvantages only women.¹⁵³ The liberal neutrality approach is a mirage.

MacKinnon has denounced liberalism as elitist and anti-feminist.¹⁵⁴ She has maintained that liberalism accomplishes little in the way of sex equality because liberalism’s methodological and “magical” approach is to create laws and then pretend they are reality. Her perception of liber-

148. *Id.* at 219-20. MacKinnon has elsewhere watered-down (insulted?) conservative women’s responsibility for their actions or thoughts, “. . . ERA [Equal Rights Amendment] activists blamed conservative women for failing to support their version of sex equality more than they blamed what such women were up against for undermining the ERA’s appeal to them. . . . dispossessed can be maneuvered into doing themselves in, a feature proponents and opponents of ERA share.” Catharine A. MacKinnon, *Unthinking ERA Thinking*, 54 U. CHI. L. REV. 759, 763 (1987).

149. ONLY WORDS, *supra* note 132, at 38.

150. FEMINISM UNMODIFIED, *supra* note 130, at 153. She has also attacked the Supreme Court of Minnesota for holding pornography as an “idea” and hence speech while simultaneously observing that “even the most liberal construction would be strained to find an ‘idea’ in it.” ONLY WORDS, *supra* note 132, at 14 (citation omitted). She has frequently attacked the *Hudnut* Court for upholding pornography as free speech, saying that its effects depend upon “mental intermediation”. See, e.g., ONLY WORDS, *supra* note 132, at 18 (citing *American Booksellers Ass’n Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985)).

151. HARASSMENT, *supra* note 130, at 119, 121. She attacks the *Gilbert* court for holding that a company is not prevented on sex discrimination grounds from not covering pregnancy and other female-related ailments on its insurance policy while that policy did cover certain ailments which only affect men. *Id.* at 187-88.

152. TOWARD, *supra* note 130, at 168.

153. *Id.* at 222.

154. FEMINISM UNMODIFIED, *supra* note 130, at 205.

alism is that it assumes equality exists already when it does not, making it “almost impossible to produce equality by law.”¹⁵⁵ This, MacKinnon asserts, is nothing but an illusion.¹⁵⁶ “Both the liberal and the left view rationalize male power by presuming that it does not exist, that equality between the sexes . . . is society’s basic norm. . . .”¹⁵⁷ The solution offered by liberalism has been tolerance, which MacKinnon finds just another means by which those in power keep what they want.¹⁵⁸ Liberal equality offers women whatever men have always had, and what men have always had is access to women. Therefore, abstract equality undermines and reinforces substantive inequality.¹⁵⁹ “[S]ex equality is conceptually designed in law never to be achieved.”¹⁶⁰

When it comes to rape and women’s sexuality, “[t]o be property would be an improvement” for women.¹⁶¹ The crime of rape is defined from the male point of view, and men are systematically conditioned to not recognize what women want.¹⁶² The social standard is stacked against women because if women cannot prove rape in court, they were not raped. The state may perpetuate rape victims’ experiences by forcing them to relive the rape again in court.¹⁶³ MacKinnon has implied that rape laws do not work, because it generally takes three women testifying to the same or similar treatment to overcome one man saying that a woman consented.¹⁶⁴

Similarly, with respect to pornography, women’s only protection is obscenity laws, and the obscenity standard is built on what is seen from the male standpoint.¹⁶⁵ “[T]he fight over a definition of obscenity is a

155. TOWARD, *supra* note 130, at 231.

156. FEMINISM UNMODIFIED, *supra* note 130, at 219. “The procedure is: imagine the future you want, construct actions or legal rules or social practices *as if* we were already there, and that will get us from here to there. This magical approach to social change, which is methodologically liberal, lives entirely in the head, a head that is more determined by present reality than it is taking seriously, yet it is not sufficiently grounded in that reality to do anything about it.” *Id.*

157. TOWARD, *supra* note 130, at 249.

158. FEMINISM UNMODIFIED, *supra* note 130, at 15.

159. *Id.* at 14.

160. TOWARD, *supra* note 130, at 233.

161. *Id.* at 172. *See also id.* at 242 (“Sex equality in law has not been meaningfully defined for women, but has been defined and limited from the male point of view to correspond with the existing social reality of sex inequality.”).

162. *Id.* at 180-81. *See also*, HARASSMENT, *supra* note 130, at 163 (“[M]en are responsible only if they know they are sexually offensive, and nothing in the law requires (or even strongly encourages) them to know what their conduct means to women.”).

163. TOWARD, *supra* note 130, at 179-80. MacKinnon also notes that women do not report rapes (or sexual harassment) because they are not legal injuries, or women are not in a social position to complain. HARASSMENT, *supra* note 30 at 160.

164. FEMINISM UNMODIFIED, *supra* note 130, at 293-94, n.107.

165. *Id.* at 148.

fight among men over the best means to guarantee male power as a system."¹⁶⁶ Obscenity law is only words;¹⁶⁷ it actually helps perpetuate pornography because "[o]bscenity is the legal device through which it is legally repudiated but legally permitted."¹⁶⁸ What is obscene is set by social standards, and what is standard is set by pornography.

The legality of abortion is another example MacKinnon has given of a law written by and for men; the availability of abortion "enhances the availability of intercourse."¹⁶⁹ According to MacKinnon, laws concerning sexual assault and harassment are consistent with a dominant male's sexual pleasure.¹⁷⁰ The privacy doctrine used to uphold the abortion right is perfect for the liberal state, MacKinnon informs us, because the right to privacy is actually about men's right "to be let alone" and to oppress women individually.¹⁷¹ MacKinnon has also attacked the right to privacy doctrine as allowing wife-beating,¹⁷² prostitution and sexual abuse, because one meaning of privacy is, effectively, "the right to dominate free of public scrutiny."¹⁷³ When abuse is done to women in private it is termed consensual and thus acceptable, and when it is done through pornography it is termed speech and thus constitutional.¹⁷⁴

Women can fight, and have fought, male supremacy, but have never been able to conquer it.¹⁷⁵ MacKinnon has illustrated these opinions with analogies to chickens and rats. In some old behavioral ex-

166. *Id.* at 153.

167. ONLY WORDS, *supra* note 132, at 88-89. "Equally difficult in practice has been the requirement in the obscenity test that community standards be proven violated. The more pornography there is, the more it sets de facto community standards, conforming views of what is acceptable to what is arousing. . . . In other words, inequality is allowed to set community standards for the treatment of women. . . . This irrelevant and unworkable tool is then placed in the hands of the state, most of whose actors have little interest in stopping [the abuse to women in pornography] but a substantial interest in avoiding prosecutions they cannot win. The American law of obscenity, as a result, is only words." *Id.*

168. TOWARD, *supra* note 130, at 201.

169. *Id.* at 188 ("In this context it becomes clear why the struggle for reproductive freedom has never included a woman's right to refuse sex.")

170. *Reflections*, *supra* note 132, at 1300-01.

171. TOWARD, *supra* note 130, at 190, 194 (citations omitted).

172. HARRASSMENT, *supra* note 130, at 160, "Women's attempts to gain legal redress and protection from domestic victimization are infamously ineffectual. This suggests that intimate assaults on women by men are ignored even when they are reported. . . ." *Id.*

173. Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 14 (1993). "The private is then defined as a place of freedom by effectively rendering consensual what women and children are forced to do out of the public eye. Prostitution is thus often referred to as occurring in private between consenting adults, as is marriage and family. The result is to extend the aura of privacy and protection from public intervention from sex to sexual abuse." *Id.* at 14-15.

174. See FEMINISM UNMODIFIED, *supra* note 130, at 15.

175. TOWARD, *supra* note 130, at 138 ("Women often find ways to resist male supremacy and to expand their spheres of action. But they are never free of it.")

periments, chickens were divided into three groups: the first got fed every time they pecked; the second, every other time; the third, at random. The first group stopped trying to peck immediately when the food was cut off; the second stopped soon after; but the third never stopped trying. In a different experiment, rats received shocks every time they tried to leave their cage. Women, MacKinnon analogizes, are rewarded like the third group of chickens and punished like the rats: “[W]e peck forever for the occasional crumb that seems to reward our efforts and reinforces our hopes out of all proportion to reality, and we spend the rest of our time skulking in the corners of the cages we no longer try to leave.”¹⁷⁶

Those performing the experiments, so to speak, come from both the left and the right. For example, MacKinnon has noted that the posture that women’s abuse in pornography is the “thought” or “emotion” of the pornographer (the pornographer’s constitutionally protected speech) unites “libertarian economist and judge Frank Easterbrook,” “liberal philosopher-king Ronald Dworkin,” “conservative scholar and judge Richard Posner,” and “pornographers’ lawyer Edward DeGrazia.”¹⁷⁷ According to MacKinnon, when it comes to pornography, at least, the left and the right are two roads to the same goal: male dominance. Judges in the U.S., on the left and the right, “together with politicians, journalists, and pornographers” also have a single goal: making injury through pornography actionable as sex discrimination a violation of the First Amendment.¹⁷⁸ The strategies: the conservatives cover up pornography with obscenity law, while the liberals parade it as tolerance and free speech.¹⁷⁹

It is not only men on the left and the right in the U.S. which have come together in the male dominance goal—it is men globally. Under international human rights laws, systemic and systematic violations to women do not apply.¹⁸⁰ MacKinnon has told how U.N. and Serbian soldiers together raped Muslim and Croatian women,¹⁸¹ how men internationally condone violent behavior towards women in war, and how although these acts flagrantly violate women’s rights, far too often,

176. FEMINISM UNMODIFIED, *supra* note 130, at 226-27.

177. ONLY WORDS, *supra* note 132, at 10.

178. Catharine A. MacKinnon, *Pornography Left and Right*, 30 HARV. C.R. - C.L. L. REV. 143, 147-48 (1995).

179. *Id.* at 161. MacKinnon also attacks the liberals for attacking the conservatives’ obscenity law and then siding with them when pornography comes along. *Id.* at 145-46.

180. Catharine A. MacKinnon, *Crimes of War, Crimes of Peace* 4 UCLA WOMEN’S L. J. 59, 60-61 (1993) [hereinafter “*Crimes*”].

181. *Id.* at 67-68.

nothing is done.¹⁸² Raped women are told to go to the state for help, but men run the states, make the laws, and enforce them at will. State sovereign immunity protects each state's lack of protection for women. MacKinnon sees this as what looks like a global fraternity pact: "When men sit in rooms being states, they are largely being men. They protect each other; they identify with each other; they try not to limit each other in ways they themselves do not want to be limited."¹⁸³ The inference is she questions if there is hope for the system because the guardian/protectors (the U.N. soldiers) are in cahoots with the Serbs and their rape/death camps.¹⁸⁴

However, MacKinnon does not appear too shocked by this international conspiracy, so to speak. She sees male dominance as a trend that began at least with Aristotle's "likes and unlikes" philosophy,¹⁸⁵ continuing through the Enlightenment, the Nazi Regime, mainstream U.S. equality jurisprudence, and then on to international human rights.¹⁸⁶ She has elsewhere stated that most sexism is "unconscious" or "well-meant;" that men are "systematically conditioned" not to recognize women's wants or feelings.¹⁸⁷ So, although men see women as second-class citizens,¹⁸⁸ MacKinnon has almost given an apology for this treatment. One may infer that a fundamental reason why she questions whether there is hope for "the system" is that the sexism is not only so pervasive, but so unconscious.¹⁸⁹

From this discussion of the pervasiveness, unconsciousness, and universality of sexism, it is not difficult to trust in MacKinnon's veracity when she solidly maintains that the Constitution was not originally, and

182. Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 6-7 (1994).

183. *Id.* at 15.

184. *Crimes*, *supra* note 180, at 67-68 (women have no rights in the war context).

185. Aristotle maintained that things which are like should be treated alike and things which are unlike should be treated unlike. MacKinnon has written, "That women were apparently so different to Aristotle as not to be treated unequally under his principle when excluded from citizenship has not been regarded as a drawback or an indication that something is amiss." *Id.* at 72.

186. *Id.* at 81.

187. TOWARDS, *supra* note 130, at 230; 181 ("systematically conditioned", discussing rape).

188. *See, e.g.*, FEMINISM UNMODIFIED, *supra* note 130, at 118-19.

189. *See generally id.* The pervasiveness may also be illustrated by what MacKinnon calls the "institution" of heterosexuality, which is suggested as functioning as yet another form of the widespread oppression of women. *Id.* at 60-61. Further, even men who are homosexually assaulted are actually assaulted as women, because they are feminized and "stripped of their social status of men." *Oncale v. Sundower Offshoreservices, Inc.*, 96-568, Amici Curiae Brief In support of Petitioner, 8 UCLA WOMEN'S L. J. 9, 15, 19 (1997). This, according to MacKinnon is another act reflecting a male dominant heterosexual culture. 8 UCLA WOMEN'S L. J. at 19.

still is not, founded upon equality.¹⁹⁰ That is, because the sociological and psychological¹⁹¹ roots of sexism run so deep, discernible at least since the days of Aristotle, it is only natural that the U.S. Constitution's "We the People" actually included only certain, privileged white males.

MacKinnon seems conflicted on the Constitution. She is not bothered by the notion of constitutional evil as Balkin is, because the Constitution as interpreted does not deserve fidelity. She has gone one step further than Balkin and disassociated herself with the Constitution, at least as it is presently interpreted.¹⁹² She has also rejected Ronald Dworkin's "moral reading" of the Constitution as elitist and exclusionary. She claims her own "aggressive" reading of the Constitution is not founded upon her own pontification of what she feels is right or wrong and thus should be law. She has explicitly denied that her project is to engage in "theorizing morally" when answering the question of how the Constitution can be made legitimate.¹⁹³

Her basic strategy, on the surface, is to presume that the Constitution provides for equality, and must now only be made to live up to it. Yet her argument is flawed and circular from the beginning. She concedes that the Constitution may be forced to live up to its "equality promise" for the first time in history, and that holding the Constitution to its "equality promise" does not stem from belief in the Constitution itself but belief in people's equality. She announces that we should not allow the Constitution to make people less than equal.¹⁹⁴ But the Constitution prohibits the unequal.¹⁹⁵ Does the Equal Protection Clause contain *her* equality principle or not? If not, she says it should.

This reasoning is perplexing. It is contradictory. If the Constitution prohibits inequality, how does it simultaneously make people less than equal? Bad interpretations? If holding the Constitution to its equal-

190. *Supra* note 132.

191. MacKinnon is also vehemently against Freudianism. *See, e.g.,* FEMINISM UNMODIFIED, *supra* note 130, at 51, 205.

192. Catharine A. MacKinnon, "Freedom from Unreal Loyalties": *On Fidelity in Constitutional Interpretation*", 65 FORDHAM L. REV. 1773, 1773-74 (1997) [hereinafter "Loyalties"]. *See also* Balkin section, *supra*, for discussion of constitutional evil.

193. *Loyalties*, *supra* note 192, at 1773.

194. *See id.* at 1775. "Do you give up on the Constitution. . . [o]r do you decide to hold the Constitution up to its promise, for the first time if necessary? If you take this 'bottom up' approach, it is not because you believe in the Constitution, although you might, but because you believe in the equality of your people, and you are not going to let the Constitution make them less." *Id.*

195. *Id.* at 1776-77. Presumably this is a reference to the Fourteenth Amendment, which she mentions specifically. *Id.* at 1776. She argues that whether one group is treated equally is an equal protection concern, at least when interpreted from the point of view of women and others treated unequally. *Id.* Whether this treatment is morally wrong is another question. *Id.*

ity promise does not stem from the Constitution itself where does it come from? From experiences of people, e.g., women? Does the Constitution hold such a promise, or not? She claims that “if” the Constitution had no equality promise, she would “be trying to get one in.”¹⁹⁶ It sure sounds like this is what she is doing already, despite her claims against “theorizing morally,” against moral readings of the Constitution. Her insistence upon her equality principle is a moral judgment.

2. And What She Says Now

In every sense, MacKinnon’s concurring Panel opinion does not elucidate the above Constitutional contradictions, but confounds them. Early in her opinion she cites to the “equality rule,” which is presumably synonymous with her previously discussed “equality promise”—the Fourteenth Amendment’s “purpose and promise” of equality.¹⁹⁷ Yet, in her familiar manner of discorded logic, she also announces that Constitutional equality guarantee has no definition.¹⁹⁸ Yet, she concedes that segregation on the basis of race was seen as Constitutionally equal, and that *Plessy* and its progeny were wrong. Is she not then saying that equality indeed *does* have a definition after all, but that it is wrong? Perhaps she means to say: “we need to *redefine* this definition”—not *define* it?

To support her concurrence that *Plessy* was wrong, she cites to the lower courts’ findings regarding the infamous psychology study that found that segregation does harm to black children. She makes much of the point of damages—that the black children are objectively and not simply subjectively harmed by the segregation officially imposed upon them.¹⁹⁹ She demands that we assume that blacks and whites’ intellectual capacity is the same.²⁰⁰ She holds white supremacy responsible for the creation and perpetuation of caste. She finds this castism “inimical to an equality rule.” There it is again, the infamous equality rule.

She cites *Shelley v. Kramer* as supporting the idea that the Fourteenth Amendment was passed to “dismantle precisely the substantive

196. *Id.* at 1779.

197. See Professor MacKinnon, Address at the 2000 Annual Constitutional Meeting (Jan. 5-9, 2000) in AALS 2000 Constitutional Annual Meeting: What Brown Should Have Said, Tape 196 (Recorded Resources Corp.).

198. She says, “This case requires us to define no less than what equality as guaranteed by the Constitution means.” See *id.*

199. This was the *Plessy* Courts’ reasoning. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

200. This assumption has been rejected by some. See generally CHARLES MURRAY AND RICHARD HERRNSTEIN, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

reality of imposed systematic inferiority of black to white.” She quotes Justice Harlan’s dissent from *Plessy*, which stated that the statute then in question was really about keeping blacks away from whites; it had nothing to do with equality.²⁰¹ As done in her previous writings, she attacks segregation and the similarly situated rule as nothing but the inequality we have inherited from Aristotle and his likes/dislikes philosophy. She proceeds to make the analogy with the Nuremburg laws of the Third Reich. This spattering of selected precedent, for what it may be worth in supporting her concurrence, is difficult to square with her claim that the Framers’ purpose is “clear:” “to promote equality.” (Again, presumably she is referring to the Fourteenth Amendment Framers, not the original Framers.) How can one tell, no less determine that, from a “Constitution that reflects an unequal society” a “clear” equality purpose is to be found? How can a society historically hierarchically stratified—and let’s remember her talk of pervasive unconscious sexism—reflect a “clear” purpose of an equality promise, unless one is willing to admit that equality simply meant something different to the Framers (any set of them) than it does to some today?

In the end, the equality promise is not so “clear.” MacKinnon admits that it stems from a “contextualized historical determination.” She admits that resistance to change makes change slow. One can only conclude from this statement that the “equality promise” she would like to read in the Constitution, *Plessy’s* dissent, *Shelley*, or elsewhere, is not the same as what the Framers and society have historically understood equality to mean. If it were the same equality, it would not need to be changed. In sum, MacKinnon’s panel opinion starts with the nebulous “equality promise,” and is supported by a few selective pieces of precedent. She makes the bold assertion that the Framers’ purpose is clearly to promote this equality, but consistently diffuses her own argument. The consistency lies in the discorded logic which is found from her previous writings and continues into her panel opinion.²⁰²

201. Regarding *Plessy*, she also says, “The upshot of *Plessy’s* reasonable test is to promote what might be called rational discrimination, that basically when enough social equality has been achieved over inequalities that have been systematically imposed, official segregation will no longer be reasonable.” The meaning of this is very unclear. See MacKinnon, *supra* note 197.

202. It may also be noted that her sentences and thoughts are often hard to follow and decipher. This is similar to confusion that can be found in her writings. For example, in HARASSMENT, *supra* note 130, at 110 she wrote the following confusing paragraph: “What changed between *Plessy* and *Brown* was the implicit standard for what would be seen to be a *reasonable* difference in the social position of the races. In the *Plessy* perspective, the poignant evidence of the damage segregation does to children which supported the *Brown* result could have supported the opposite legal result—that blacks were different, thus deserving of different, that is, separate, educational treatment. In *Brown*, only racial differences which were not based on racial inequality were ‘reasonable’—hence,

C. Professor Michael McConnell

In a nutshell, our reading of McConnell is as follows. His basic position is one of originalism, paralleling the Nicaean dispute over text and inclusion of facts outside the text. McConnell rightly criticizes Ackerman and company for what he (McConnell) called bait-and-switch. Bait and switch for McConnell is doctrinal manipulation to achieve ad hoc policy, expediency, or political results which are therefore low on the scale of principled decisions. But McConnell himself is perhaps guilty of a shell game himself. In his originalist zeal, he manipulates the canon to include Congressional votes on desegregation type legislation. McConnell also posits an implicit Congressional divesting of Supreme Court jurisdiction on the basis of the clause empowering Congress to implement the Fourteenth Amendment. He manipulates Congressional silence in the District of Columbia to obtain a result which he argues precludes segregation there. Based upon an unarticulated reliance on the Fourteenth Amendment, finally McConnell contradicts himself by using the forum of the forbidden Supreme Court for his Panel opinion, which argues that only Congress and not the Court has jurisdiction.

1. What He Wrote Before

Professor Balkin's invitation to Professor Michael McConnell was understandable, because it served ecumenical objectives. McConnell has written several articles justifying *Brown's* desegregation holding on conservative originalist grounds.²⁰³ More credibility for the result in *Brown* could be obtained because McConnell has vehemently attacked the left-liberal, postmodernist jurisprudential world in which Balkin and many of the other panelists have been known to reside.²⁰⁴ Balkin granted

there were no reasonable racial differences." HARASSMENT, *supra* note 130, at 110 (citations omitted). It is also interesting to note that she has written, "We purport to want to change things, but we talk in ways that no one understands. . . . [discusses that most women are illiterate]. . . . I'm not exempting myself from this criticism, I'm saying that I see it as fundamental to developing a politics of language that will be constructive as well as deconstructive." FEMINISM UNMODIFIED, *supra* note 130, at 47. (One author of this article is not an illiterate female, and she does not understand what that means.)

203. See generally *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) [hereinafter "*Originalism*"]; *The Originalist Case for Brown v. Board of Education*, 19 HARV. J. L. & PUB. POL'Y 457 (1996) [hereinafter "*Originalist Case*"]; *Segregation and the Original Understanding: A Reply to Professor Maltz*, 13 CONST. COMMENT. 233 (1996) [hereinafter "*Maltz*"]; *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995) [hereinafter "*Klarman*"].

204. See, e.g., *The Importance of Humility in Judicial Review: A Comment to Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997) [hereinafter

this ideological opponent the honor of speaking second at the Panel, following only Balkin himself. For, it could be impressive that even the conservative McConnell concurs in the panel opinion favoring *Brown* desegregation, for reasons with which even the most traditional listener might have to agree. The trouble is that McConnell who had criticized others for “bait and switch,” played quite a few shell games to obtain the traditionalist rules he offered as standards.

The bulk of McConnell’s writings have centered on a call for separation of powers, particularly judicial restraint, based on traditional (conservative) notions of the federalist and democratic governmental structure set forth by the Constitution’s founders. McConnell applauds Justice Scalia’s “originalism, traditionalism, and restraint” approach to judicial review, because all three methods reflect the will of the People, “We the People,” if you will, not the will of the Supreme Court.²⁰⁵ Predictably Justice Brennan draws McConnell’s fire for his lack of positivism: “[Casting away all traditional constraints on decision-making places] into the hands of judges the power to turn their own views of good social policy into law without any credible basis in constitutional text, history, precedent, constitutional tradition, or contemporary democratic warrant.”²⁰⁶ In short, however, on the face of it, *Brown v. Board of Education*-type decisions would seemingly qualify with the other cases condemned by McConnell as examples in which the role of the judiciary has been unconstitutionally wrent asunder. Why not?

Reciting the usual originalist litany, McConnell traces the judiciary’s proper function back to the Framers of the Constitution and their original intent. McConnell tells us that the early Americans’ understanding of fundamental rights was directly influenced by England’s

“Dworkin”]; *The New Establishmentarianism*, 75 CHI-KENT L. REV. 453 (2000) [hereinafter “*Establishmentarianism*”]; *Brennan’s Approach to Reading and Interpreting the Constitution*, 43 N.Y.L. SCH. L. REV. 41 (1999) [hereinafter “*Brennan*”]; Michael J. Perry, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501 (1989) (book review) [hereinafter “*Perry*”]; *On Reading the Constitution*, 73 CORNELL L. REV. 359 (1988) [hereinafter “*Reading*”]; “*God is Dead and We Have Killed Him!*”: *Freedom of Religion in the Post-modern Age*, 1993 B.Y.U.L. REV. 163 (1993) [hereinafter “*God is Dead*”].

205. *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136-37 (1998) [hereinafter “*Dead Hand*”]. McConnell notes that he, and not Scalia, makes the connection that these three approaches all reflect the will of the People. *Id.* at 1133. McConnell further notes that Scalia does not specify when it is appropriate to use which approach. *Id.* “Traditionalism” as a methodology is a term McConnell apparently claims to have coined: “[T]he Constitution should be interpreted in accordance with the long-standing and evolving practices, experiences, and tradition of the nation. I refer to this Constitutional methodology as ‘traditionalism’”. *Id.*

206. *Brennan*, *supra* note 204, at 58. McConnell adds that he was a clerk for Justice Brennan, and that he is not being disloyal or unappreciative; McConnell notes that he and Brennan often used to disagree, and Brennan appreciated their discourse. *Id.* at 57, 58.

Coke and Hale, who both disagreed with Hobbes' view that law is nothing more than the sovereign's command.²⁰⁷ To the founders, therefore, the essence of constitutionalism was protection of rights, which were already long established, in the common law legal tradition, not rights attributable to legislative or furnished by parliamentary supremacy.²⁰⁸ Thus, the government created by the Constitution was designed to preserve preexisting rights, not to create new rights.²⁰⁹ The role of the judiciary then is to protect rights, which the people have established for themselves over time. Neglect of the authority of tradition, McConnell tells us, "has produced a constitutional theory that is untrue to our constitutional heritage and unable to understand our constitutional practice."²¹⁰ The court's place was not originally, as it is not now, to judicially legislate.

Repeatedly, McConnell has also alerted his readers that there is nothing special about judges that places them in an advantaged position to prophesize.²¹¹ McConnell has attacked the doctrine of unenumerated rights, promulgated under the rubric of substantive due process, as open-ended judicial review which threatens to undermine and cut short the democratic process of "open-minded and public-spirited deliberation,"²¹² presumably a reference to what occurs in the legislative branch.

Further, McConnell has informed his readers that *Roe v. Wade's* substantive due process methodology has indeed (finally) been ended: *Washington v. Glucksberg*²¹³ held that federal courts have no authority "to resolve contentious questions of social policy on the basis of their own normative judgment."²¹⁴ The *Washington* court declared that unenumerated due process rights must be based on the Constitutional text,

207. See Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 183-89 (1998). Coke, trying to remain within his religious tradition, argued that law came from the changeless "mists of time". *Id.* at 184. His successor, Hale, argued that law evolved from the changing and adopting of customs and traditions of the people. *Id.* at 188.

208. *Id.* at 190. The early Americans were not represented by Parliament, but by colonial assemblies, so they argued they were exempt from Parliamentary Supremacy. *Id.* at 190.

209. *Id.* at 196

210. *Id.* at 174-75

211. See, e.g., *Perry*, *supra* note 204, at 1534, "there is nothing unique about judges themselves that places them 'in an institutionally advantaged position to play a prophetic role'." (citation omitted).

212. See, e.g., Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89,108 (1988) [hereinafter "Moral Realist"]. The most commonly cited negative example of this doctrine is the *Lochner* period cases.

213. 521 U.S. 702 (1997) (holding that terminally ill adults do not have a constitutionally protected liberty interest under the due process clause to have their physicians aid them in dying).

214. Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 666 (1997).

in conjunction with the nation's tradition and experience.²¹⁵ According to McConnell, *Washington's* significance rests predominantly in its restoration of the proper balance of power between courts and the legislature under the Fourteenth Amendment.²¹⁶

McConnell elsewhere infers that rebalancing was much needed, because “[t]he appearance of debate and deliberation created by the [court] opinions is largely a sham.”²¹⁷ The judiciary's analysis, McConnell enlightens us, particularly that of the Supreme Court, is “typically long on manipulation of precedent and low on intelligible principle.”²¹⁸ “All the apparatus of Supreme Court opinions is designed to create the appearance that the Justices are following the law, not making it up.”²¹⁹ It is only in Constitutional law, McConnell observes, that people want to “give up on the enterprise as impossible” if the Constitution is unclear.²²⁰ In other words, by giving up on the enterprise, McConnell means moving from some form of originalism to a policy or a political morality interpretive stance (e.g. Dworkin). McConnell analogizes: No one would be willing to say that judges can write contracts out of the law just because they are unclearly written. They can write clauses based on the parties' probable intent. Since judges cannot write new terms into contracts without probable intent, why, McConnell asks, is judicial re-writing often readily accepted when it comes to the Constitution?²²¹ Here McConnell suggests that jurists take the stance to produce a particular outcome.²²²

The particular outcome that troubles McConnell may be more clearly understood by what McConnell calls establishmentarianism. Establishmentarianism is what liberalism strives to break away from. It is

215. *See id.*

216. *See id.* at 665-66, 708 (probably the most important case in last twenty years on unenumerated rights). McConnell infers that the magnitude of the *Washington* decision is as earthshaking as *Lochner*, *Brown*, and *Roe* were. *See id.*

217. *Perry*, *supra* note 204, at 1537.

218. *See id.* (referring to the Court's decisions in “affirmative action, parochial school aid, children's rights, educational funding, capital punishment, pornography, property rights, and others.”).

219. *Dead Hand*, *supra* note 205, at 1129.

220. *Reading*, *supra* note 204, at 361.

221. *See id.* But McConnell's premise is wrong. Judges rewrite contracts all the time for policy reasons, implying this provision and that, not to mention use of the objective theory of contracts to do what they want.

222. McConnell has not inferred that it is only liberal judges who seek substantive outcomes regardless of constitutional precedent: “For most people most of the time, issues of federalism take second seat to particular substantive outcomes” (quote made with reference to Rehnquist's upholding of the drinking age of 21). *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design* 54 U. CHI. L. REV. 1484, 1488 (1987) (book review) [hereinafter *Evaluating*].

“[t]he idea that a nation should be animated by a set of common values and beliefs, backed by governmental authority.”²²³ Liberalism, on the other hand, champions varied and individual political, religious, and moral associations. In liberal states, such as the United States, it is theoretically difficult or impossible for the state to engage in the promotion of public virtues without compromising its commitment to neutrality. The private sector, therefore, is the principle inculcator of individual as well as public values.²²⁴

Theoretically. McConnell has thus offered a theory that our liberal state is not so liberal after all because it offers a set of “politically correct values.” He argues that establishmentarianism has insinuated its way into our society, and has recently surfaced with a “new” set of values. Establishmentarianism makes its way into a liberal society not on the ancient traditional ground that it is for the spiritual good of the people, but on the political ground that “certain common values are necessary to the unity and republican character of the state.”²²⁵

This search for common values, McConnell posits, is likely only an “excuse for imposition of majoritarian norms.” The initial era of establishmentarianism reared its head during the height of immigration, when “nativists, anti-Catholics, and common school reformers” united in the formation of public schools, which were designed to inculcate “Protestant, capitalist, and patriotic virtue.”²²⁶ Recently, the new establishmentarianism, McConnell explains, has manifested under the guise of “pluralism, diversity, and tolerance.” This time, however, the extolled public virtues are not Protestantism, capitalism, and patriotism, but rather the “eradication of racism, sexism, and heterosexism,”²²⁷ and the encouragement of environmentalism, safe sex, and a critical attitude towards global Westernization.²²⁸ But McConnell advises us that we are being misled, because the new establishmentarianism is no less hostile towards pluralism, diversity, and tolerance than the prior era was,²²⁹ in that it a-

223. *Establishmentarianism*, *supra* note 204, at 453. McConnell notes that establishmentarianism comes in both religious and secular varieties; it is but need not be associated with persecution, for sanctions can range from highly coercive to tolerant, for not adhering to the views backed by the polis. *Id.* at 453-54.

224. *See id.* at 455.

225. *Id.* at 458 (Reference to Benjamin Rush’s reasoning for public schools and their curriculums.)

226. *Id.* at 458-59 (containing the above quotes).

227. *Id.* at 461-62 (supporting this and previous quote).

228. *God is Dead*, *supra* note 204, at 179 (explaining that education today is used to promulgate a new set of values).

229. *Establishmentarianism*, *supra* note 204, at 461-62. An example McConnell provides is the cases involving Chicago and Yale law schools, which would not allow the Christian Legal Soci-

lows little tolerance for those who do not join the “politically correct.” When citizens are coerced²³⁰ into displaying majoritarian beliefs, McConnell warns, liberalism is, for all intents and purposes, smothered.

McConnell blames the postmodernists, attacking them as hypocrites. McConnell reminds us that the postmodernists have taught that liberalism’s purported neutrality is really only a cover-up for centuries of “patriarchal, white, male, European, and bourgeois interests and values,” and that objectivity is therefore a mirage since our perception and the perception of those who established those values, were clouded by our individual perspectives.²³¹ The postmodernists invariably select their favorite (political) topic; it may be racism, feminism, environmentalism, welfare, etc. The postmodernists then call on their secular ideologies and “use political muscle to advance their causes, including using the public schools to inculcate their ideals.”²³²

McConnell may be arguing, indirectly, that postmodernists back more expansive roles for the judiciary in constitutional cases, because that is one of the most efficient ways to advance their ideological goals. For example, McConnell attacks Ronald Dworkin for advocating that judges should read the Constitution based on their “own views about political morality” rather than “purporting” to decide cases based on “tradition” or “constitutional structure.”²³³ The idea of judges substituting their own conceptions of what is best for those of representative bodies is, McConnell has repeatedly informed us, the antithesis of what the founding statesmen understood constitutional rights to mean.²³⁴ In any event, McConnell finds that this violates the heart of a democratic society. “Judges act legitimately under the Constitution only when they are faithfully enforcing [collective decisions of the people]. To enforce

ety to utilize the job placement offices because the Society only hires students who share in the groups’ religious beliefs. *Id.* at 464-65. Chicago and Yale banned the Society on grounds of discrimination. *Id.* Though federal civil rights laws exempt religious organizations from religious antidiscrimination laws, see *Presiding Bishop v. Amos*, 483 U.S. 327, 328 (1987), and Chicago and Yale as private organizations are not obliged to abide by the First Amendment, McConnell asks why these schools do not do so anyway. *Id.* at 464-65

230. The coercion often is “gentle”, such as through taxation and selective funding. *Id.* at 468

231. *God is Dead*, *supra* note 204, at 182. See also *Perry*, *supra* note 202, at 1506: “Perry’s insistence on self-critical rationality contradicts his own position that ‘[t]here is no evaluative perspective outside self or tradition’.” *Id.*

232. *God is Dead*, *supra* note 204 at 188.

233. *Dworkin*, *supra* note 204, at 1272-73 (citing RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 3-4 (Harvard Univ. Press 1996)). Actually Dworkin denies that his judges should decide on the basis of their own political morality, and McConnell recognizes this. *Id.* at 1272.

234. See *id.* at 1272-73, 1287.

something else (on the claim that it would do more ‘credit to the nation’) separates the text from the source of its authority.”²³⁵ Thus, McConnell considers Dworkin and those in his camp to be laboring under false premises. Dworkin and his acolytes maintain that judges decide “fairly and wisely,” when in actuality, “all judges fall short of the judicial ideal” due to bias, unintelligence, or the difficulty of transcending one’s own interests and values.²³⁶

It is not clear to us why *Brown* would not fall into that category. McConnell attacks the Court’s ability to engage in meaningful moral deliberation because of class bias, and lack of time to read and deliberate.²³⁷ He holds that “representative bodies are institutionally better able to reach solutions to contentious issues of this sort. . . .”²³⁸ So losers feel they have had their say; and an “unprincipled” compromise [quotes are McConnell’s] can be adopted. When judges are unsure whether a governmental action is unconstitutional, they should leave the determination to elected bodies, and not make their own opinions law.²³⁹

He also attacks Professor Michael Perry’s approach. McConnell further elaborates his views in his book review of Professor Michael Perry’s book *Morality, Politics and Law*. Professor McConnell, criticizing Perry’s approach, says: it is my experience and conviction that “the Constitution is an elegant and profound statement of a highly attractive conception of government.”²⁴⁰ He rejects the idea that the Constitution is “a mishmash of political compromises or a congeries of inscrutable phrases.”²⁴¹

McConnell does distance himself from a positivistic originalism, however.²⁴² He criticizes Perry’s theory for being too open ended and doubts Perry’s claim that his theory has sufficiently circumscribed limits.²⁴³ McConnell is disturbed that Perry seems to allow judges to pick and choose among Constitutional principles based on their own political moral preconceptions and reject those they do not like.²⁴⁴

It is not that the Constitution prevents social change; it only slows it

235. *Id.* at 1278 n.45.

236. *Id.* at 1291.

237. *Perry, supra* note 204, at 1537 (most judges reflect a bias in favor of upper middle class).

238. *Id.* at 1540.

239. *Reading, supra* note 204, at 361.

240. *Perry, supra* note 204, at 1525.

241. *Id.* at 1525. This could be a slap at Professor Balkin.

242. *Id.* (the discretion element remains).

243. *Id.* at 1526 (Perry’s approach is problematic).

244. *Id.* at 1529 (criticizing Perry for providing no examples of how his theory might work in practice).

down to ensure that change is made by the people. “[T]he originalist method leaves ample scope for judgment and disagreement.”²⁴⁵ Even when attitudes are in the midst of change, courts should not “prematurely” resolve issues or “accelerate the pace of change.” The several states are laboratories of democracy, and through experimentation, the people will find the appropriate solution to problems.²⁴⁶ McConnell is even willing to allow that sometimes community decisions will be wrong; that wrong is better than the “risk posed by alternatives”—namely, judicial legislation—which “are worse.”²⁴⁷

It is interesting (and ironic) that with that background, McConnell has been able simultaneously to defend the *Brown v. Board of Education* decision on originalist grounds. The majority scholarly opinion has been that the Ratifiers of the Fourteenth Amendment did not intend to outlaw segregation, and hence, *Brown* did not follow the Ratifiers’ intent.²⁴⁸ McConnell has maintained that the majority is wrong. To elaborate this argument, McConnell argues that the Reconstruction Amendments were the “extension”²⁴⁹ or “culmination”²⁵⁰ of the “fundamental principles of the Founding” which “because of slavery, had never been fully achieved.”²⁵¹ (May one then assume by analogy that the founders’ sexism did not obstruct “culmination of fundamental principles of founding, leading to a society without gender bias?”)

McConnell supports his argument with proof founded on legislative

245. *Id.* at 1533, 1535.

246. *Right to Die*, *supra* note 214, at 687.

247. *Moral Realist*, *supra* note 212, at 90. “Perhaps most importantly, judges are irresponsible in the most fundamental sense: they are not accountable for the consequences of their decisions and ordinarily are not even aware of them.” *Id.* at 106. So is McConnell suggesting that Justice Brennan, for whom McConnell clerked, did not, or was it could not understand the ramifications of his decisions. Is the same true of Justice Rehnquist? “Power without responsibility is not a happy combination.” *Id.*

248. The majority of scholars believe that the ratifiers of the Fourteenth Amendment didn’t intend to outlaw segregation because “[t]he evidence is ‘obvious’ and ‘[un]ambiguous’, the conclusion is ‘inevitable’ and ‘inescapable’ and ‘[v]irtually nothing’ supports the opposite claim, which is said to be ‘fanciful’.” *Originalism*, *supra* note 203, at 951. Of course, the majority of scholars do not ultimately hold that against the validity of the holding. McConnell’s central article on this subject, *Originalism and the Desegregation Decisions*, “relied heavily” on prior work done by Maltz. Maltz disagrees with McConnell and contends that the Fourteenth Amendment does not forbid segregation on its face, and does not, by its original understanding, support *Brown’s* holding. *Maltz*, *supra* note 203, at 233.

249. Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 142 n.93 (1994) [hereinafter “*Moment*”].

250. Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L. A. L. REV. 1159, 1160 (1992) [hereinafter “*The Fourteenth Amendment*”].

251. *Moment*, *supra* note 249, at 142 n.93.

activity during the Reconstruction period. He concedes that the legislative history surrounding the ratification of the Fourteenth Amendment is unhelpful as to whether it intended to maintain or abrogate segregation.²⁵² Despite his concession that the “principle purpose” of the Fourteenth Amendment was to constitutionalize the Civil Rights Act of 1866, and that the 1866 Act was not understood to forbid school segregation, McConnell nonetheless maintains that the Fourteenth Amendment, being “more” than the 1866 Act, does not necessarily have the same intention regarding segregation.²⁵³ Although he further admits that the Fourteenth Amendment was not about granting blacks social equality, McConnell avers that the legislative history from 1868-1875, the “best available evidence,” points to the conclusion that the Fourteenth Amendment did intend to eradicate school segregation.²⁵⁴

First, McConnell points to proposed House and Senate bills during the early 1870’s which by majority votes (over 50%) would have outlawed segregation in schools, common carriers and other institutions, but were unable to meet the required two-thirds override due in part to democratic filibusters. The “Sumner-Butler bill” on desegregation was ultimately passed in 1874, after it had been watered-down and the school desegregation part had been removed. The watered-down provisions became the Civil Rights Act of 1875. McConnell concludes that because those legislators who voted on the desegregation bills were the same as those who supported the Fourteenth Amendment’s ratification, and because those votes constituted a majority of the total votes, the mainstream view during Reconstruction was that the Fourteenth Amendment requires desegregation.²⁵⁵

Second, McConnell points to an 1873 case in which the Supreme Court, interpreting an 1863 Congressional law, unanimously held that a “nondiscrimination” requirement meant no segregation because segregation is inherently unequal.²⁵⁶ Even though this was not a Fourteenth Amendment case, but a statutory interpretation case, McConnell stresses the Court’s language regarding the railroad company’s separate-but-equal argument: “an ingenious attempt to evade a compliance with the obvious meaning of the requirement.”²⁵⁷ This is apparently

252. *Originalism*, *supra* note 203, at 984.

253. *Id.* at 960-62.

254. *Id.* at 1017, 984.

255. *See generally id.* at 1060, 1105.

256. *Id.* at 1117 (discussing *Railroad Co. v. Brown*, 84 U.S. (17 Wall.) 445 (1873)); *See also Originalist Case*, *supra* note 203, at 457-58.

257. *Originalism*, *supra* note 203, at 1118 (citing *Brown*, 84 U.S. at 452).

proof of “mainstream” views on segregation.

However, as McConnell himself points out, the Reconstruction agenda diffused.²⁵⁸ The Hayes-Tilden Compromise of 1877 gave the southern states back their autonomy from the federal government as long as the states promised to protect blacks’ rights.²⁵⁹ In 1883, the Supreme Court invalidated the 1875 Civil Rights Act as unconstitutional, because “it constituted ‘direct and primary’ legislation of private conduct, whereas the Fourteenth Amendment refers to the state provision of equal protection of the law.”²⁶⁰ In 1896, the Supreme Court handed down *Plessy v. Ferguson*, which, according to McConnell, “marked the effective repeal of the Fourteenth Amendment.”²⁶¹

Now comes the muddying of the waters. The manner by which McConnell deals with the diffusion of the Reconstruction period’s enactments and ideals bears perhaps a little too close resemblance to what McConnell calls the “bait-and switch” game, of which he has accused his left of center foes.²⁶² That is, McConnell appears to be operating selectively so as to use that which favors his desired outcome, disregarding the history, legislation, and cases which he finds unhelpful or simply “wrong.”

There is tension between his two positions. First, the contention is that courts should, on the one hand, follow the example of the original founders and defer to the will of the people (traditionalism) rather than creating new law. On the other hand, his assertion is that the original Constitution was not even “fulfilled” until the Fourteenth Amendment.²⁶³ By that reasoning, one may deduce that: 1) The original four-

258. McConnell contends that Bruce Ackerman’s theory that there were three “constitutional moments” which created our constitutional rules (the Founding, Reconstruction, and the New Deal) is incomplete: There was also the “forgotten” moment when Reconstruction ended. McConnell illustrates in *The Forgotten Constitutional Moment* that according to Ackerman’s criteria for what can constitute a “moment”, the end of reconstruction fits. McConnell, however, criticises Ackerman’s theory that only at particular “moments” our constitutional tradition was created. *See Moment*, *supra* note 249, at 140-44.

259. Thereafter, of course, the southern states did not quite live up to the standards the Union had wanted. One example is the segregation laws which started to be passed in the 1880’s. *Id.* at 132.

260. *Id.* at 137 (citing Civil Rights Cases, 109 U.S. 3, 20 (1883)).

261. *Id.* at 140 (effective repeal of Fourteenth Amendment).

262. *See, e.g., Reading*, *supra* note 224, at 360: “Judicial review is not an intergenerational game of bait-and switch”. *See also* McConnell, *supra* note 95, *infra* 155, where he accuses other panelists, particularly Ackerman of this ignoble practice.

263. While McConnell has used the term “extension”, *see, e.g., Moment*, *supra* note 249, at 142 n.93, to describe the Reconstruction Amendments (which includes the Fourteenth, he has also stated that the Fourteenth was the “culmination”, *see, e.g., The Fourteenth Amendment*, *supra* note 250, at 1160, and “fulfillment” of the Madisonian Constitution which could not pass in 1787, *see,*

ders did not actually follow the will of the people, since their Constitution was unable to be “fulfilled” due to slavery (this reminds us of what Balkin said about the Constitution being a compromise²⁶⁴); or, 2) Only the Madisonian founders (who urged a federal veto over state laws to protect rights²⁶⁵) had it “right,” and the Constitution up to the Reconstruction was in a sense “wrong” or at least incomplete. This would imply that a priori there are intrinsically (moral) “right and wrong” answers; or, 3) The original Constitution did reflect the will of the people (who did not want a powerful federal government), but that the people were “wrong” because the Constitution could not be “fulfilled” until there was a federal veto over state laws; or, 4) Sometimes it is alright to break traditionalist rules when something such as slavery is at issue.

McConnell appears to especially favor number four.²⁶⁶ He has written that “[s]ome issues are so fundamental to basic justice that they must be taken out of majoritarian control altogether.”²⁶⁷ This is because democracy itself cannot be trusted with some matters.²⁶⁸ He may be arguing that the view at the founding regarding state versus federal power was “much more divided and ambivalent” than today (after *Brown*). For today the federal government is understood “to be our system’s primary protector of individual liberties.”²⁶⁹ However, this leaves us wondering if “We the People” changed our minds about the role of the federal government, or did someone decide to take things out of our majoritarian control and insinuate some establishmentarianism into the system?

Perhaps the tension can be answered by focusing on McConnell’s moral realism: “I am . . . a moral realist: one who believes in rights as in some sense real or natural, not just conventional; rights as connected in some way with what our most reflective and dedicated thinking proposes about the truth concerning simple justice or human nature.”²⁷⁰ McConnell has told us repeatedly that his moral realism does not allow judi-

e.g., *id.* at 1167.

264. McConnell expressly has rejected the idea that the Constitution is “a mishmash of political compromises or a congeries of inscrutable phrases,” *Perry*, *supra* note 204, at 1525.

265. See generally *The Fourteenth Amendment*, *supra* note 250, at 1165-66 (Madison urged a federal veto over state law).

266. Though one could probably draw the conclusion that he agrees with any one of the above deductions.

267. Evaluating, *supra* note 222, at 1506 (giving as an example that both state and federal governments cannot pass ex post facto laws and bills of attainder).

268. *Id.* at 1507.

269. *Id.* at 1501.

270. *Moral Realist*, *supra* note 212, at 90 (reacting to and quoting Sotirios Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67, 70 (1988)).

cially enforceable unenumerated rights.²⁷¹ He has also told us that democracy itself cannot be trusted with some issues. So then, if in some matters the federal lawmakers, the state lawmakers, and the judiciary cannot be trusted, what is left to turn to? The executive? Unlikely.

McConnell must mean that the Constitution itself holds the answers. He has, after all, stated quite clearly that some court opinions upheld laws, which were “unconstitutional” (such as *Plessy* and *Minersville*) while other courts struck down laws that were “constitutional” (such as *Dred Scott* and *Lochner*).²⁷² The *Plessy* court, for example, was apparently incorrect in claiming to base its decision on “established usages, customs and traditions of the people” when the Jim Crow laws were only “of very recent vintage” because tradition, apparently, is not always enough.²⁷³ And in any case, discrimination is one of those exceptions in which the Constitution holds the key but “We the People” got it wrong.

Some of the people. Others, apparently, had it “right.” McConnell applauds the Reconstruction period as an era when majoritarian opinion was stamped unconstitutional. Put another way, minority opinions were constitutionalized. For instance, the Fifteenth Amendment gave blacks the right to vote, when the majority opposed it.²⁷⁴ “This was a time when a political minority, armed with the prestige of victory in the Civil War and with military control over the political apparatus of the rebel states, imposed constitutional change on the Nation as the price of reunion, with little regard for popular opinion.”²⁷⁵ The Reconstruction period and its goals is an exception to the traditionalism and “no judicial legislation” rules because the judiciary should engage in political morality to support a desired outcome, even if that outcome does stem from a minorities’ opinion.

So, sometimes McConnell attacks court opinions for “making” law rather than following traditionalism. However, on occasion, he embraces court opinions, like *Brown*, for “getting it right.” On the other hand, judges should not follow their own political morality because that violates federalism, democracy, and the founders’ intent. However, in

271. See, e.g., *id.*

272. See *Right to Die*, *supra* note 214, at 688-89.

273. *Originalism*, *supra* note 203, at 984 (citation omitted).

274. *Klarman*, *supra* note 203, at 1939. McConnell used this example to refute today’s majoritarian opinion that the Fourteenth Amendment did not intend to eradicate segregation just because segregation was popular when it was ratified; the Fifteenth clearly gave blacks the right to vote despite tradition of the time. Of course, by 1900 the Fifteenth Amendment was also a “dead letter”, see *Moment*, *supra* note 249, at 131

275. *Klarman*, *supra* note 203, at 1939.

the exception cases, judges should side with the political minorities and take control into their own hands, even if it means abandoning the federalist system and majority opinion. Sometimes it is all right to rewrite the federalist system,²⁷⁶ because sometimes the Constitution holds the keys which, apparently, have been misplaced, and because sometimes the Constitution is “unfulfilled.” Because it can also happen that some people had it “right” (like Madison) while others (like the people) had it “wrong.” In the final analysis, is McConnell not just insinuating his own brand of “establishmentarianism” into the system?

2. And What He Says Now

Unlike other Panelists, McConnell’s panel opinion itself does not so much stand in stark contrast to what he has written prior to it, because it is little more than a summary of his previous articles on the subject. A major problem is that McConnell gave a court-type legal decision in the first place - particularly one which concurs with the majority. A second problem is that McConnell engages in the kind of selectivity of sources of law with an eye on outcome, which he criticizes others for doing.

There seems also to be a tension between McConnell’s position on *Brown* and *Bolling*. In his analysis of *Bolling v. Sharpe*, McConnell maintains that Congress intended to divest the Court of power to enforce the Fourteenth Amendment and reserve the power of primary enforcer for Congress, because Congress was not pleased with the Court’s history (i.e., *Dred Scott*). If Congress intended to divest the Court of power to decide cases seeking enforcement of Fourteenth Amendment issues, is it not inconsistent then for the Court to decide *Brown* at all on the basis of the intent of Congress? Should McConnell not be writing a dissenting opinion which states that the Court has no jurisdiction here?²⁷⁷

Other problems arise. We may recall that the purpose of the Panel was to rewrite *Brown*, knowing what you do about the course of history. Now recall that McConnell has previously told us that in 1997, the *Washington* Court cleaned up the substantive due process/unenumerated rights problem created by *Roe* in 1973. Therefore, we now know that judges cannot make decisions based on their own political morality. Judges must defer to traditionalist factors. Was McConnell keeping that important lesson of history in mind when rewriting *Brown*?

276. Such as what the Fourteenth Amendment did, giving the federal government what had been in the states’ hands for over a hundred years.

277. Maybe he could have said that, alas, jurisdiction existed to decide that there was no proper jurisdiction, and that jurisdiction to decide the case had been granted improvidently.

McConnell finds the Fifth Amendment Due Process Clause, which the *Brown* Court found incorporated equal protection, irrelevant to the District of Columbia. McConnell might distinguish *Bolling*, saying that unlike *Brown*, *Bolling* is not a constitutional question, but one of a statutory interpretation. That is, the school boards in the District of Columbia lacked statutory authority to segregate because Congress has never passed any law authorizing or requiring segregation. Unless Congress explicitly says so, “federal agencies [cannot] depart from general principles of equal protection of the laws.”²⁷⁸ However, seemingly in contradiction, McConnell has admitted that the Court is viewing it as a Fourteenth Amendment issue by bringing in the “equal protection of the laws” issue in his Panel opinion.²⁷⁹ McConnell also holds in his opinion that the Equal Protection Clause as well as the Privileges and Immunities Clause “prohibit de jure segregation of schools.” McConnell can get no help from the intent of the Framers. For, McConnell’s opinion then argues that the Privileges and Immunities Clause was passed upon the assurance that the political rights of *all* citizens were not protected.²⁸⁰ McConnell is a little less clear on the intent of the Citizenship Clause, stating that there is virtually no discussion by the Framers of the Citizenship Clause.

But there is an even larger problem than McConnell claiming *Bolling* is not a Constitutional question when in reality he is treating it as one. If the Fourteenth Amendment gave enforcement powers to Congress, and not to the Court, then what is wrong with Congress’s decision *not* to prohibit segregation? Does it not follow that, because Congress failed to prohibit segregation, it therefore intended to allow segregation? McConnell goes on to explain we should “avoid anomalous conflicts” between citizens within the state and federal spheres. This sounds like the “unthinkable” argument in reverse for which McConnell attacked another Panelist. What the Panel has done is strip Congress of powers, just like the Court did in *Dred Scott*. Just like it is not supposed to be doing, or, at least like McConnell says it is not supposed to be doing. There must be something out there that prevents this. Could it be the Fourteenth Amendment?

McConnell takes refuge in humility. Playing a Supreme Court Justice, McConnell attempts to portray humility, stating at the beginning of

278. See McConnell, *supra* note 95.

279. See *id.*

280. But see Michaelman and Ackerman arguing that this fact, if true, is irrelevant. They assert that there are national rights of citizenship including desegregated education to be derived from these provisions. See *supra* note 13.

his opinion that this Court has no more foresight than past courts which made immoral decisions, and accordingly been “deknighted.” He tells us that the Court can only “enforce rules imposed by others” and interpret the Constitution, which is written in “understandable English” with “discernible purposes.” But, of course, not all precedent must be followed, since some courts and its decisions have been deknighted. So we must ignore such cases as *Dred Scott*, which read the Constitution “fan- cifully,” *Plessy*, which “turned its back on the original promise of the Fourteenth Amendment,” and *Slaughterhouse*, which had a “dubious inter- pretation of the Privileges and Immunities Clause.” Yes, it is “impos- sible to tell” whether the language of the Fourteenth Amendment [writ- ten, recall, in understandable English with discernible purposes] required segregation. But McConnell is quite confident in saying that “segrega- tion is in violation of the Fourteenth Amendment.”

McConnell states that he is only reminding us of the deknighted former courts in order to warn against hubris. He wants to exhibit the unconstitutional and immoral wrongs, which can be and unfortunately have been committed when the Supreme Court grants itself too much power to judicially legislate. He apparently wants to reassure us that this Court (or at least himself) is doing everything possible to avoid such ca- lamities from reoccurring, because after all, this Court recognizes hubris.

Should we be as confident that McConnell has eliminated hubris when he announces that the Privileges and Immunities Clause of the Fourteenth Amendment “prohibits de jure segregation of schools” de- spite *Slaughterhouse* and the fact that no court has relied on the clause for this purpose since then? Can we rest easily when he states that the Sumner-Butler bill votes enact the “mainstream view” of the Recon- struction period against the constitutionality of school segregation, not- withstanding a declaration that the Reconstruction party itself was a mi- nority?²⁸¹ Is everyone comfortable with McConnell’s presumption that the minority Reconstruction party was “right” even though its efforts were relatively quickly diffused? Can we easily ignore the opinion of the people throughout centuries and their representative legislative bod- ies, especially those in the South, because they were “wrong,” and the democratic process cannot be trusted in some circumstances?²⁸² If we can do that in these circumstances, why not do it in others? Is there really no problem with allowing the Court to place the decision-making

281. *Klarman, supra* note 203, at 1939.

282. Recall that one of the biggest problems with Dworkin and his follo wers is that Dworkin allowed judges to decide what is right for the nation and utterly disregard the fact that the legislature speaking in majority cloak had passed laws to the contrary. *Dworkin, supra* note 204, at 1273.

power on that issue of enforcing the Fourteenth Amendment upon itself even though Section 5 of the Amendment grants that power to Congress? To “bait-and-switch” is prohibited, but is it acceptable to choose which parts of history one likes, even if it is a “minority” Reconstruction party which “We the People” decided to diffuse? And is there no hubris in bringing back to life in the year 1954 an Amendment, which was “effectively repealed” in 1896?²⁸³

McConnell apparently thinks not. On the other hand, there is a rather uncanny resemblance to “selective postmodernism” and its entanglements with establishmentarianism. Is it not selectivity run rampant, and the use of state power to do the forbidden establishmentarianism that is all right if he is doing the “establishing?” Would it not be better if McConnell simply listened to his own advice and “resigned” from the Court?

McConnell was borrowing from Legal Realism when he accused the Court of manipulation to delegitimize the role of the Supreme Court in the legal process. This was the essence of his heated exchange with Ackerman. McConnell preferred to do his own manipulation of the Fourteenth Amendment, declaring it the exclusive province of Congress. Having done that, he preferred to manipulate the importance of Congressional silence by analogy to some Commerce Clause rhetoric. Sometimes where Congress is silent on Commerce Clause issues the states may not act because Congressional silence precludes state action.

Does he take all this seriously? When Professor McConnell was confronted with the challenge that his position isolated him on the Panel, he chuckled and said there had to be some controversy on the Panel. In the question session, McConnell critiqued Ackerman’s presentation by pointing out that the Supreme Court could not just send out a decree and expect everyone to salute. The legal process required a process of reasoned elaboration that was not bait-and-switch.

McConnell objected strenuously to Ackerman’s use of the Privileges and Immunity Clause and the Citizenship Clause in his argument. The essence was that it was manipulation, for the Court and its academic apologists could not say that *Brown* was about education one day, and that it was about public golf courses and swimming pools the next. He also found it reprehensible to hold that *Brown* was based on the citizenship right of American nationals because of the Citizenship Clause on Monday, and on Tuesday, *Brown* meant that immigrants had a right to an education, even though they were not citizens. Ackerman was visibly

283. *Moment*, *supra* note 249, at 140.

disturbed at McConnell's attack. Ackerman believed what he was doing was in line with precedent and McConnell was wrong to question this. What McConnell is offering is a cry for limiting the Court in favor of the decrees of Congress and other elected bodies or so he may like to be heard.

The problem is that McConnell has manipulated the canon, introducing a loose cannon on the deck. That loose cannon is the reference to selected legislative acts (e.g., Sumner-Butler) and selected legislative behavior (e.g., votes on segregation of transportation). He has not successfully explained away the significance of the diffusion of the Reconstructionist program after the Hayes-Tilden Compromise in his argument about the "forgotten Constitutional moment." Problems in his analysis continue when he finds that Congress meant to reserve jurisdiction for itself in racial matters, because he then plays a Supreme Court Justice and writes an opinion exercising the very jurisdiction that he said was reserved for the legislature. Finally, he accuses others of manipulation, but does a fine job himself of injecting his moralism into the *Brown* opinion after criticizing others for making moral judgments in the form of law.

D. Professor John Ely

Professor Ely displays abiding contradiction because he attacks the Court for substantive due process type arguments, while affirming the *Brown* opinion. This is mind-boggling. He has the audacity to argue for a process-oriented jurisprudence based on allowing access to minorities to the legislative and executive process, attack a morally based "substantive" Court decision process, and at the same time affirm *Brown* because separate is not equal! As if this is not enough for a good day's work, Ely trashes the legislative and executive branches' failure to live up to separation of powers dictates. This might be all in a day's work, except he restricts the Supreme Court to process decisions, meaning the legislature gets deference, which Ely argues it does not deserve because legislatures are not concerned with policy, only re-election.

As a self-proclaimed moderate,²⁸⁴ advocate of "activist" legal process,²⁸⁵ and a long-standing fan of the Warren Court,²⁸⁶ Professor

284. JOHN HART ELY, *ON CONSTITUTIONAL GROUND* 475 n.16 (1996) [hereinafter *ON CONSTITUTIONAL GROUND*], "Of course I confess to being a moderate myself. . . ." (This book is cited with some hesitancy, since Ely specifically requested it be cited, *id.* at 363.)

285. *See, e.g., id.* at 361.

286. Aside from the fact that Ely clerked for Warren, Ely has also applauded the Warren Court for its approach to the democratic process: "Other Courts had recognized the connection be-

John Hart Ely fit well as an ecumenical panelist. Ely was given the honor of speaking last at the *Brown* panel. As “batting clean-up,”²⁸⁷ his speech was short, but not necessarily sweet. He may have been well-advised to have chosen those relatively few words more carefully. His Panel argument not only did not internally support itself, but it lacked support from what he had previously written.

In summary, Professor Ely presents a puzzling analysis which: 1) attacks Congress for having abdicated its role as a policy-maker but at the same time affirms it as better suited than the Supreme Court to decide policy matters; 2) advocates a process approach which stresses the access of discrete and insular minorities to voting rights and similar access problems; 3) at the same time attacks the Court for *Lochner*-type substantive due process value judgments; 4) despite 2 and 3 manages to affirm *Brown*, which is clearly not an access to the political process case! Ely attacks *Brown*'s sociological footnote in his writings, but decides *ex cathedra* that it was correct in its finding of inherent harm in his Panel opinion. So, Ely managed a difficult feat in affirming *Brown*.²⁸⁸

1. What He Wrote Before

According to Ely's argument, essentially one of separation of powers, the Constitution's overwhelming purpose was to outline governmental procedure and to ensure citizens' access to it and not to select substantive values.²⁸⁹ Substantive values are the jurisdiction of the legislative and executive branches—the political process.²⁹⁰ Therefore,

tween . . . political activity and the proper functioning of the democratic process; the Warren Court was the first seriously to act upon it.” John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 452-3 (1978).

287. See Ely, *supra* note 26.

288. Ely may have anticipated problems in his approach. Having clerked for Justice Warren, he is able to quote an oral statement of Warren: if *Reynolds v. Sims* had been decided before *Brown*, *Brown* would have been unnecessary. See *The Chief*, 88 HARV. L. REV. 11, 12 (1974). Ely wanted to argue that process and access are the key, and substantive rights are not the proper object of the Court's concern. Unfortunately for Ely, this gets him nowhere in affirming the substantive rights decision in *Brown*.

289. Ely maintains that the original Constitution's substantive provisions are few, and protect only very limited values: corruption of blood is forbidden (one cannot be punished for one's parents' transgressions), the federal and state governments cannot tax exported articles, and slavery was protected at least up to 1808. Ely maintains that the Bill of Rights is about separation of powers, not substantive rights. The Eighteenth Amendment did add temperance, but was repealed by the Twenty-first Amendment—another example that substantive values just don't work in the Constitution. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 92-101 (Harvard Univ. Press 1980) [hereinafter *DEMOCRACY AND DISTRUST*]. See also DUXBURY, *supra* note 18, at 291, where it is pointed out that so-called process rights involve substantive value choices.

290. See, e.g., *DEMOCRACY AND DISTRUST*, *supra* note 289, at 87:

“preserving fundamental values is not an appropriate constitutional task.”²⁹¹ The courts’ job is to actively enforce “every clause in the Constitution,” but not to enforce clauses absent from it, regardless of the apparent distaste for the legislation in question.²⁹² Though some critical Constitutional phrases need external sources to be given shape,²⁹³ open-ended clauses are not blank checks for courts; otherwise, as Ely wrote, “we might as well stop pretending we are in any significant respect a democracy.”²⁹⁴ The backbone of this separation of powers structure is the evasion of power accumulation in one governmental branch²⁹⁵—which would be the tyranny that the Framers’ were escaping through the Declaration of Independence from England. When it comes to separation of powers, there can be no adverse possession arguments.²⁹⁶

So courts, as laid out under Article III’s cases and controversies requirement, cannot create broad rules. Courts may only apply Constitutional or statutory law.²⁹⁷ The important exception is when it comes to the protection of minorities—or, as *Carolene Products* footnote 4 puts it, “discrete and insular minorities.”²⁹⁸ In other words, courts may step in and undo legislation (substantive values) that in some way discriminate against those who are politically powerless. The reason for this exception, Ely informs us, is that the Constitution and our forbearers considered equality very important (leaving slavery aside).²⁹⁹ Article IV’s

“contrary to the standard characterization of the Constitution as ‘an enduring but evolving statement of general values’, is that in fact the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes . . . and on the other . . . with ensuring broad participation in the processes and distributions of government.”

291. *Id.* at 88.

292. ON CONSTITUTIONAL GROUND, *supra* note 284, at 280.

293. John Hart Ely, *Foreward: On Discovering Fundamental Values*, in *The Supreme Court 1977 Term* 92 HARV. L. REV. 5, 5 (1978) [hereinafter “*Fundamental Values*”].

294. ON CONSTITUTIONAL GROUND, *supra* note 284, at 297.

295. “We would do well to heed [the framers’] warning that, in calm and anxious ages alike, the ‘accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.’” *Id.* at 135 (citing THE FEDERALIST NO. 47 (James Madison)).

296. John Hart Ely, *Suppose Congress Wanted A War Powers Act that Worked* 88 COLUM. L. REV. 1379, 1390-91 (1988) [hereinafter “*War Powers Act*”].

297. *See, e.g.*, ON CONSTITUTIONAL GROUND, *supra* note 284, at 122, “Roughly, Article III, by limiting federal courts to cases and controversies, tells them, at least in theory, two things. First, they—unlike the legislature—may not create broad rules; they must content themselves with applying the law, either statutory or constitutional, to the particular disputes before them. And second, because they are restricted to adjudicating the rights of litigants before them, they can act only retrospectively.”

298. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

299. *See, e.g.*, DEMOCRACY AND DISTRUST, *supra* note 289, at 79, 122 (“many among the framers stressed the importance to the system they were forging of the equal representation of equal

Privileges and Immunities Clause and the Commerce Clause operate as equality provisions, “guaranteeing virtual representation to the politically powerless.”³⁰⁰ And of course there is the Equal Protection Clause, but that was not intended to be about specific applications, either; it was a general rule to be worked out by posterity.³⁰¹

Ely has maintained that *Carolene Products*’ footnote 4 foreshadowed the Warren Court.³⁰² The Warren Court was concerned with ensuring that all have access to the political process and correcting certain forms of discrimination, not with vindicating any particular substantive values.³⁰³ Ely tells us that Warren allegedly once said, “A concern with process, seriously pursued, can lead in some quite ‘activist’ directions.”³⁰⁴ The hallmark ruling being, of course, *Brown*.

The logic starts becoming fuzzy at this point. Ely has written that the Equal Protection Clause “is largely to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves.”³⁰⁵ The Fourteenth Amendment’s central concern was eradicating prejudicial thinking which creates “racial classifications that disadvantage minorities.”³⁰⁶ Yet none of these descriptions of Equal Protection a priori mandate school segregation’s illegitimacy or unconstitutionality. Desegregation may have hurt blacks by giving them insecurities in that environment, but experts on the side of anti-desegregation in *Brown* had good credentials and intentions, too.³⁰⁷ But let’s consider Ely’s views a little further. Ely has long been clear that he does not believe in substantive due process.³⁰⁸ The Constitution is not

population groups.” Interestingly, Ely does not leave aside our forbearers’ sexism).

300. *Id.* at 90-91.

301. “[T]he overriding intention of those who wrote and ratified the Equal Protection Clause was apparently to state a general ideal whose specific applications would be supplied by posterity. They surely entertained no specific intention that the Equal Protection Clause would cover antimiscegenation laws, or for that matter segregated schooling either.” *Id.* at 119.

302. *See, e.g., id.* at 75. *See also Fundamental Values, supra* note 293, at 5-6. “Generally speaking, the Warren Court was a *Carolene Products* Court, centrally concerned with assuring broad participation, not simply in the processes of government but in the benefits generated by those processes as well.”

303. *See, e.g., DEMOCRACY AND DISTRUST, supra* note 289, at 74.

304. *See, e.g., Ely, 88 HARV. L. REV.* at 12.

305. *DEMOCRACY AND DISTRUST, supra* note 289, at 170.

306. *Id.* at 137, n.11 (citing *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256 (1979)).

307. John Hart Ely, *If at First You Don’t Succeed, Ignore the Question Next Time? Group Harm in Brown v. Board of Education and Loving v. Virginia*, 15 CONST. COMMENT. 215, 216 (1998) [hereinafter “*Loving*”].

308. *See, e.g., John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis.* 88 HARV. L. REV. 1482, 1483 n.5 (1975) [hereinafter “*Flag Desecration*”].

and was not intended to be about fundamental substantive values.³⁰⁹ Values are not “out there” for courts to find.³¹⁰ Ely has inferred that the closer the Court has come to overt substantive rights, the worse the Court’s performance has been.³¹¹ He has termed *Lochner* the “blasphemy of blasphemies.”³¹² Furthermore, Ely has pointed out that although part of the Fourteenth Amendment’s purpose was to overturn *Dred Scott*’s holding that blacks are not citizens, that does not tell us anything about “the framers’ views on the decision’s invocation (as opposed to its application) of the concept of substantive due process.”³¹³ In other words, *Dred Scott* is not precedent for substantive due process advocates.

Ely has also been clear that he favors “a more rule-oriented approach” to courts’ application of Constitutional law. Rules carry advantages such as predictability, economy, and equality of treatment. Rules are even worth, Ely concedes, the “occasional doubtful result.”³¹⁴ Ely has complained that courts “do not often enough make “coherent and applicable tests.”³¹⁵ Yet, Ely has denounced just about every significant Constitutional law test the Court has handed down. He has called Balancing Tests “simply not the stuff on which assurance can confidently be built.”³¹⁶ Dominant Purpose Tests are “simply vague and manipulative”

309. See *supra* note 289.

310. ON CONSTITUTIONAL GROUND, *supra* note 284, at 21.

311. DEMOCRACY AND DISTRUST, *supra* note 289, at 57 n.66, “Indeed, a case can be made that the closer the Court has come to overt fundamental-values reasoning the less impressively it has performed.” (citing *Scott v. Sanford*, 60 How. 393 (1857); *Lochner v. New York*, 198 U.S. 45 (1905); *Roe v. Wade*, 410 U.S. 113 (1973).

312. Ely, *supra* note 286, at 474 n.88 (1970).

313. DEMOCRACY AND DISTRUST, *supra* note 289, at 16 n.19.

314. ON CONSTITUTIONAL GROUND, *supra* note 284, at 85:

“Unsurprisingly, I am with those who counsel a return of a more rule-oriented approach. Of course the return should be a careful one: there is little point in formulating a rule unless and until the courts’ experience and past analysis of the area in question can give them confidence that they will get it about right. Where they are possible, though, rules seems as preferable here as they do in other areas of law. The advantages they bring—advantages of predictability, economy, and equality of treatment as between one case and another—seem ‘worth the price of the occasional doubtful result.’” (citing Willis L. M. Reese, “*Choice of Law: Rules or Approach*,” 57 CORNELL L. REV. 315, 326-27 (1972). See also John Hart Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 212-13 (1981) (citing Reese, 57 CORNELL L. REV. at 322)). An example of an occasional doubtful result: Ely has insinuated that O.J. Simpson was guilty but went free because the reasonable doubt standard gave him an edge—O.J.’s wealth gave him an advantage which is the exception, but O.J.’s walking free is the price we must pay for giving ordinary—poor—defendants a “fighting chance.” ON CONSTITUTIONAL GROUND, *supra* note 284, at 230-31.

315. ON CONSTITUTIONAL GROUND, *supra* note 284, at 174. See also *Flag Desecration*, *supra* note 307, at 1484.

316. ON CONSTITUTIONAL GROUND, *supra* note 284, at 185. See also *Flag Desecration*, *supra*

and “incoherent.”³¹⁷ Rationality Tests “should be abandoned.”³¹⁸

The defects Ely finds in the system run much deeper than the judicial branch and its substantive due process, favorite Constitutional Tests, and general lack of rules. Ely’s writings display a much broader concern with the governmental separation of powers structure,³¹⁹ and each branch’s exercise of authority within it, or lack thereof. He has extensively and consistently criticized each branch of government—the legislative, the executive, and the judicial—for straying far outside their Constitutionally sanctioned bounds.

According to Ely, Congress not only has no problem with hesitating to “involve itself in controversies it retains the legal discretion to avoid,”³²⁰ but, as will be discussed shortly, it also avoids many of the controversies it does not have the legal discretion to avoid. Congress is basically worried about being reelected and keeping important constituents happy, not about big national issues having difficult to detect results.³²¹ Ely has noted that 97% of Congress are reelected, while state judges get kicked out of office, “because both ‘branches’ have evolved to the point where [Congress has] less to do with difficult and conspicuous political choices.”³²² There is a virtual consensus in recent decades among political scientists and other observers, Ely has pointed out, that Congress has essentially lost its policy-making ability.³²³ (Nonetheless, and confusingly, Ely has elsewhere written that “most of the important policy decisions are made by our elected representatives (or by people accountable to them).”³²⁴) Congress’ preferred policy-making method is to follow the New Deal plan of establishing new executive bureaucracies

note 307, at 1506.

317. John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 611 (1998).

318. John Hart Ely, *Another Spin on Allegheny Pittsburgh*, 38 UCLA L. REV. 107, 110 n.10 (1990). See also, DEMOCRACY AND DISTRUST, *supra* note 289, at 121 (“The usual demand of the Equal Protection Clause is simply that the discrimination in question be rationally explainable.”)

319. See, e.g., John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures* 77 VA. L. REV. 833, 863 (1991) [hereinafter “*Another Such Victory*”]. “There’s enough of a trend. . . to suggest that we have a problem with respect to the separation of powers.”

320. *Id.* at 867 n.104.

321. *Id.* at 856-57. “Congressmen know that the specific impact of broad national policies on their districts is difficult to see, that effects are hidden, so to speak Thus, in order to attain reelection, congressmen focus on things that are both more recognizable in their impact and more credible indicators of the individual congressman’s power—federal projects and individual favors for constituents. As the mix has shifted, the reelection rate has gone up enormously.”

322. ON CONSTITUTIONAL GROUND, *supra* note 284, at 488 n.99.

323. *Another Such Victory*, *supra* note 319, at 855.

324. DEMOCRACY AND DISTRUST, *supra* note 289, at 4.

to deal with things.³²⁵ The executive, in effect, ends up doing a bulk of the legislating: much law is actually “made by the legions of unelected administrators whose duty it becomes to give operative meaning to the broad delegations the statutes contain.”³²⁶ The bureaucracies then carry responsibility and blame rather than legislatures.

Further, Congress disfavors Supreme Court nominees who, like Bork, want Congress to make decisions. It’s easier on Congress if they can place the blame on the Court.³²⁷ “Thus, legislators can express sympathy with individual constituents of all persuasions without incurring heavy costs at the next election.”³²⁸ Congress has not exercised its ability to limit the courts’ jurisdiction in over 100 years.³²⁹ In effect, the Senate’s “sole appropriate test of judicial performance,” Ely has informed his readers, is “the political desirability of the outcomes reached.”³³⁰ Naturally, Congress’ checks on the Court have not proved to be of much consequence.³³¹

Congress has also been dodging its important Constitutional responsibility of deciding on war and peace since 1950.³³² This time Congress has handed over its responsibilities to the executive, rather than the judicial branch. (Incidentally, the courts have been avoiding the war and peace issue, too.³³³) Again, the Senate’s principle priorities in this area have been “keeping (a) out of the line of fire, and (b) their jobs.”³³⁴

In 1950, the Truman Administration “not only claimed unprecedented unilateral authority to commit our troops to combat” in Korea, but it “even went so far as to suggest that Congress lacked authority to stop it!”³³⁵ Congress, of course, in time was voting special appropriations and draft extensions, which amounted to consent.³³⁶

325. *Another Such Victory*, *supra* note 319, at 857-58.

326. *DEMOCRACY AND DISTRUST*, *supra* note 289, at 131.

327. *See Another Such Victory*, *supra* note 319, at 860-61.

328. *Id.* at 861.

329. *Fundamental Values*, *supra* note 293, at 19.

330. *Another Such Victory*, *supra* note 319, at 849 (discussing Reagan).

331. *Fundamental Values*, *supra* note 293, at 19.

332. *ON CONSTITUTIONAL GROUND*, *supra* note 284, at 145-46, 149. The power to declare war is Constitutionally vested in Congress. *See, e.g.*, JOHN HART ELY, *WAR AND RESPONSIBILITY* 3 (Princeton Univ. Press 1993) [hereinafter *WAR AND RESPONSIBILITY*].

333. *ON CONSTITUTIONAL GROUND*, *supra* note 284, at 151. Ely elsewhere wrote that the Court has “every business insisting that the officials the Constitution entrusts with [the war making] decision be the ones who make it.” *WAR AND RESPONSIBILITY*, *supra* note 332, at 54.

334. *ON CONSTITUTIONAL GROUND*, *supra* note 284, at 359-60.

335. *WAR AND RESPONSIBILITY*, *supra* note 332, at 10 (citing *Hearings on Assignment of Ground Forces of the U.S. to Duty in the European Area before the Senate Comms. on Foreign Relations and Armed Services*, 82d Cong., 1st Sess. 88-93 (1951) (testimony of Secretary Acheson)).

336. *WAR AND RESPONSIBILITY*, *supra* note 332, at 11.

In 1964, Congress passed the Southeast Asia (Tonkin Gulf) Resolution, granting the Johnson Administration full authority “to take all necessary measures to repel any armed attack against forces of the United States and prevent further aggression” in Vietnam.³³⁷ Congress had been misled by the executive about the state of affairs in the Tonkin Gulf prior to and during the war,³³⁸ however, even such apparent fraud does not nullify Congress’ responsibility for what happened during the Vietnam War. It was Congress’ job to investigate the Tonkin Gulf situation prior to, or at least during the extended war. “That’s why we have separate branches. That’s why the war power is vested in Congress.”³³⁹ Congress also ignored its responsibilities when it came to the “secret” war in Laos. Enough Congressmen, Ely maintains, knew that something was going on to have launched an investigation.³⁴⁰

In 1971, Congress repealed the Tonkin Gulf Resolution. “To a legislature unwilling either to stop the war or to take responsibility for it, the prospect of getting that incriminating Tonkin Gulf Resolution off the books must have seemed a godsend.”³⁴¹ Bombing in Cambodia continued until August 1973.³⁴² Ely claims that Nixon should have been impeached for waging war in Cambodia, not for tapping phones. Again, Congress was not doing its job.³⁴³

The 1973 War Powers Resolution, engineered to force Congress to live up to its Constitutional duties, has failed. Presidents have evaded their duties under it, and Congress and the courts have done nothing to stop them.³⁴⁴ President Bush did get approval for Desert Storm, but Ely asserts that this is only because he knew in advance that he would get approval, and because Bush would have invaded regardless.³⁴⁵ More recently, President Clinton went into Bosnia without getting Congressional

337. *Id.* at 15-16 (citing 78 Stat. 384 (1964)) (italics omitted).

338. *Id.* at 19.

339. *Id.* at 20.

340. *Id.* at 95, “Various members of Congress knew various things about various aspects of it—surely enough to have triggered a further investigation if they’d been doing their job.”

341. John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 907 (1990).

342. *Id.* at 908.

343. WAR AND RESPONSIBILITY, *supra* note 332, at 104.

344. *Id.* at 48-49. The Resolution mandates that the President inform Congress within 48 hours of introducing troops “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” Within 60 days, extendable to 90 days, the President must withdraw troops unless Congress declares war. Presidents have repeatedly either failed to file a report, or have filed a “vague statement pointedly refusing to identify itself as a [Resolution] “hostilities” report (with the result that the sixty-day clock was not deemed to have been started).” Congress has essentially done nothing about this.

345. *Id.* at 50-51.

approval first.³⁴⁶ Ely terms the War Powers Resolution a “tale of Congressional spinelessness.”³⁴⁷

Ely explains that a tacit agreement has been in effect between the executive and legislative branches during post-World War II history. This agreement covers not just foreign policy. The agreement is that the President can make most of the decisions as long as Congress does not have to be held accountable, and can even scold the President if something goes wrong.³⁴⁸ Congress likes the situation of being able to “play hide-and-complain.”³⁴⁹ The President gets what he wants, and Congress can spend its time with the (more important) business of reelection without worrying too much about responsibility.

More recently, Ely has attacked the Congress for its partisan behavior. Ely has noted that during the Clinton impeachment proceedings, the Senate and the House both voted in “disturbingly partisan ways.”³⁵⁰ Ely commented, “I don’t know about you, but when Chief Justice Rehnquist entered the Senate Chamber, I felt much as I did at the end of William Golding’s *Lord of the Flies*: Thank God, everything’s going to be all right. A grown up has arrived.”³⁵¹

However, Ely’s description of the Court’s behavior does not sound like he considers it particularly “grown up.” Throughout history, Ely has told us, the Court has been warned to “stick to its knitting or risk destruction”—but the Court continues to acquire power and nothing has ever changed, even in the Warren years.³⁵² In 1978 Ely noted that since the Warren years, the Court’s power had continually grown to the strongest it had probably ever been.³⁵³ Despite Hamilton’s vision in the Federalist 78 that the judiciary would have no influence over sword or purse, formal checks on the Court have not been consequential.³⁵⁴ In short, the Court has been getting away with intervening in legislative functions.³⁵⁵ This is wrong because, as Ely has asserted, legislatures are

346. See ON CONSTITUTIONAL GROUND, *supra* note 284, at 150.

347. *War Powers Act*, *supra* note 296, at 1419. In Ely’s revised draft (proposal) of the War Powers Resolution, he requires courts to come into the process when the President or Congress are not playing by the rules. WAR AND RESPONSIBILITY, *supra* note 332, at 125, 130-31, 135.

348. WAR AND RESPONSIBILITY, *supra* note 332, at 54.

349. ON CONSTITUTIONAL GROUND, *supra* note 284, at 150.

350. John Hart Ely, *The Apparent Inevitability of Mixed Government*, 16 CONST. COMMENT. 283, 288 n.28 (1999).

351. *Id.* at 289.

352. See *Fundamental Values*, *supra* note 293, at 21. See also DEMOCRACY AND DISTRUST, *supra* note 289, at 47-48.

353. *Fundamental Values*, *supra* note 293, at 21.

354. *Id.* at 19.

355. *Id.* at 22.

clearly better situated to reflect popular consensus³⁵⁶ and courts are not constructed to measure popular morality.³⁵⁷ (Does this reflect a Court that can prevail because it is “grown up”?)

Perhaps it makes sense why judges today are chosen primarily for how they will vote on particular issues.³⁵⁸ This is dangerous because judges, like legislators, are human and “it is sometimes difficult for them to avoid unconsciously importing their personal loyalties and political convictions into their work.”³⁵⁹ Ely notes that, however, such transgressions in the judiciary are “rare.”³⁶⁰ Perhaps.

On the other hand, he has elsewhere noted that “[it] takes an unusually strong or apolitical judge to avoid being discernibly affected by her assessment of the politically desirable outcome.”³⁶¹ Ely has used Justice Souter’s appointment as evidence that judicial appointments in recent decades are not about the legal process but about politics, and further notes things are unlikely to change. Souter, unlike Bork, portrayed himself as a moderate.³⁶² Hence, he received Congressional approval. Ely is unwilling to accept completely Souter’s claims of moderacy, however. Ely has inferred that Souter *must* have had an opinion on *Roe*, despite Souter’s claims to the contrary.³⁶³ Ely apparently does not believe Supreme Court justices can be truly impartial.

Ely certainly has offered plenty of examples which demonstrate such impartiality. After the “blasphemy of blasphemies” *Lochner*,³⁶⁴ and its some 200-case progeny, came *Roe*. As Justice Stewart’s concurrence in that case concedes, and Ely agrees with, *Roe* is the product of *Lochner*—in other words, substantive due process.³⁶⁵ *Roe*’s most “frightening” aspect is that its “super-protected right” (privacy right to abort) is not inferable from the Constitution’s language, the Framers’ thinking on the subject, any derivable Constitutional general values, or

356. *Id.* at 49.

357. ON CONSTITUTIONAL GROUND, *supra* note 284, at 23.

358. *Another Such Victory*, *supra* note 319, at 843.

359. ON CONSTITUTIONAL GROUND, *supra* note 284, at 161.

360. *Id.*

361. *Another Such Victory*, *supra* note 319, at 835-36 n.8.

362. *Id.* at 850-52.

363. *See* ON CONSTITUTIONAL GROUND, *supra* note 284, at 492 n. 129.

364. Ely, *supra* note 286, at 474 n.88.

365. *See, e.g.*, ON CONSTITUTIONAL GROUND, *supra* note 284, at 291. “The Court continues to disavow the philosophy of *Lochner*. Yet as Justice Stewart’s concurrence admits, it is impossible candidly to regard *Roe* as the product of anything else.” Ely claims to be a long time supporter of abortion. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*”, 82 YALE L.J. 920, 924 n.40 (1973) [hereinafter “*Wages*”].

the nation's governmental structure.³⁶⁶ The *Roe* Court, according to some members of the profession was "indulging in sheer acts of will, ramming its personal preferences down the country's throat."³⁶⁷ *Roe* is not Constitutional law, nor does it make much of an effort to be.³⁶⁸ *Roe* "amended" the Constitution, and the wrong tribunal did the amending.³⁶⁹

There are many other examples, outside the substantive due process field. For example, in 1971, writing on the Court's decision in *Harris v. New York*,³⁷⁰ Ely commented that though reasonable persons can disagree on the proper role of the Court, no one could disagree on the undesirability of the Court's "at best, gross negligence concerning the state of the record and the controlling precedents."³⁷¹ That opinion was "little more than a vote—a reflection of numerical power."³⁷² Ely tossed this "vote" up to the fact that Nixon's judicial appointees wanted to reverse many of the holdings of the Warren Court.³⁷³ Leaving aside the number of 5-4 opinions we have seen, Ely attempts to reassure his readers that "decisions that fail to persuade often do not long outlast the men who wrote them."³⁷⁴ Does that mean *Roe* will be overturned? After all, the 'Roe opinion was "simply not adequate."³⁷⁵ No, Ely has told us that *Roe* is probably a steadfast decision.³⁷⁶ He has also told us that 5-4 decisions are (at least at times) the creatures of Presidential appointments and "chaos."³⁷⁷

Then there was *Erie*. *Erie Railroad v. Tompkins*³⁷⁸ is the famous 1938 case which outlines the rule of when to use state or federal law in a diversity case; *Erie* is—in Ely's words—the "very essence" of federal-

366. ON CONSTITUTIONAL GROUND, *supra* note 284, at 289.

367. *Id.* at 294.

368. *Wages*, *supra* note 365, at 947.

369. ON CONSTITUTIONAL GROUND, *supra* note 284, at 299.

370. *Harris v. New York*, 401 U.S. 222 (1971) (holding that statements elicited in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used to impeach).

371. ON CONSTITUTIONAL GROUND, *supra* note 284, at 212. See also, Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority* "'80 Yale L.J. 1198, 1199-00 (1971) [hereinafter "*Harris*"].

372. *Harris*, *supra* note 371, at 1226.

373. *Id.* at 1227.

374. *Id.* at 1226. (Ely cannot be attacked for his failure to use a gender neutral term since political correctness had not come into vogue.)

375. ON CONSTITUTIONAL GROUND, *supra* note 284, at 283.

376. *Id.* at 296, "*Roe v. Wade* seems like a durable decision."

377. *Id.* at 275, "*Pena* [an affirmative action case] was a 5-4 decision, however—the two Clinton appointees numbering among the four dissenters—so presumably the chaos will continue [in the affirmative action field]"

378. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

ism.³⁷⁹ Despite *Erie*'s fame—it is a mandatory citation for cases raising an issue with federal or state jurisdiction in diversity cases Ely claims that *Erie* “provides little guidance on such issues.”³⁸⁰ Ely explains that *Erie* was redefined by the Warren Court in *Hanna v. Plumer* in 1965.³⁸¹ However, *Hanna* “does not seem even remotely to capture *Erie*'s true meaning.”³⁸² Nonetheless *Erie*—providing little guidance in the first place—has apparently survived the alteration *Hanna* did to it. Why did *Erie* survive 1965 and retain its popularity? Ely is willing to place that accomplishment largely with the prestige of a single judge, Justice Harlan, who concurred separately in *Hanna*. How could the Warren Court alter a cornerstone federalism case (even if that case did not, allegedly, address the issue well), and how could a single justice in concurrence be responsible for that case surviving the Court's alterations? Well, the Supreme Court, Ely commented on this question, “is the Supreme Court.”³⁸³ Of course, Ely has noted that judges are free to change their minds, especially when they reach the Supreme Court,³⁸⁴ but are Supreme Court justices equally as entitled to overturn early Court rulings whenever they please? It seems so. Ely admits he has no “well-developed” theory of when *stare decisis* should be invoked, and he does not think anyone else does, either.³⁸⁵ “”

Then of course, there was *Brown*, which overruled *Plessy*. As one who advocates for more rules, less judicial legislation, and generally stricter separation of powers, Ely's support of *Brown* is at first blush confusing. Ely has not unequivocally supported the Warren Court.³⁸⁶ He has denounced all the per curiam orders that came down soon after *Brown* on desegregating buses, golf courses, beaches, etc., as having little if anything to do with how segregated schooling harms black children.³⁸⁷ Ely has called Justice Warren himself “sexist” because Warren did not want a female law clerk.³⁸⁸ Ely's critical attitude when it comes

379. John Hart Ely, *The Irrepressible Myth of Erie*”, 87 HARV. L. REV. 693, 695 (1974) [hereinafter “*Erie*”].

380. *Id.* at 707-08.

381. *Hanna v. Plumer*, 380 U.S. 460 (1965).

382. *Erie*, *supra* note 379, at 696-97. Ely indicates that while *Erie* reaffirms federalism, *Hanna* “[saps] the strength from that system.” *Id.* at 697 n.33.

383. *Id.* at 697 (presumably he means that they have that power).

384. See ON CONSTITUTIONAL GROUND, *supra* note 284, at 223.

385. *Id.* at 305.

386. Though Ely did dedicate his seminal book DEMOCRACY AND DISTRUST, *supra* note 289, to Earl Warren.

387. *Loving*, *supra* note 307, at 218.

388. ON CONSTITUTIONAL GROUND, *supra* note 284, at 334-35 (discussing when Ely was a clerk for Warren in 1964).

to the Warren Court's post-*Brown* lack of legal process and Chief Justice Warren's sexist attitude toward clerks is understandable. Ely's praise of *Brown* is not quite so.

Ely admits that the Warren Court at times superimposed its value judgments but only "when liberty genuinely hung in the balance."³⁸⁹ Recall that judges should not impose substantive value judgments, and are not better reflectors of "conventional values."³⁹⁰ Recall what Ely has told about the evils of judicial legislation and judges being appointed for political purposes. Yet, he has nonetheless maintained that appointed judges are "comparative outsiders" "largely removed from the political hurly-burly."³⁹¹ Judges have no "special pipeline" to the peoples' values, and in fact their nonpolitical office keeps them from having such a pipeline. Hence, objectivity.³⁹² More or less. Judges still are somewhat concerned, after all, with the next election,³⁹³ and are more like politicians than they historically had been.³⁹⁴ This is confusing.

The reasoning, of course, is that *Brown* is a *Carolene Products* note 4 type case: when "there is a special reason to distrust the democratic process in a given case"³⁹⁵—when discrete and insular minorities are at issue—then the Court may override legislation. The Warren Court did not seek to impose fundamental values;³⁹⁶ the Warren Court was simply protecting minorities from a majority rule which discriminated against and harmed the minorities—that's the *Carolene Products* spirit: "the value judgments of the majority [cannot be] the vehicle for protecting minorities from the value judgments of the majority."³⁹⁷ So, there is no problem with the Warren Court superimposing its value judgments in *Brown*. In fact, the Warren Court's approach outlines the proper "interpretivist" approach to dealing with open-ended Constitutional provisions.³⁹⁸

389. *Id.* at 4.

390. DEMOCRACY AND DISTRUST, *supra* note 289, at 102.

391. Ely, *supra* note 286, at 487.

392. *Id.*

393. *Id.* at 487 n.124

394. ON CONSTITUTIONAL GROUND, *supra* note 284, at 355.

395. DEMOCRACY AND DISTRUST, *supra* note 289, at 156 n.69.

396. *Fundamental Values*, *supra* note 293, at 21 n.77.

397. *Fundamental Values*, *supra* note 293, at 52 (emphasis omitted).

398. Ely, *supra* note 286, at 451, "An 'interpretivist' approach that would confine the Constitution's meaning to the directives actually contained within its four corners proves on analysis incapable of keeping faith with the document's promise When we search for an external source of values with which to fill in the Constitution's open texture . . . we search in vain A quite different approach is available, and to discern its outlines we need look no further than to the Warren Court."

That leaves us with the question, still, of why *Brown* is a proper *Carolene Products* type case. The *Brown* Court itself did not mention *Carolene Products* or its discrete and insular minorities. *Carolene Products*' discrete and insular minorities were actually not mentioned (after the original case) until 1971.³⁹⁹ The *Brown* Court based its Equal Protection argument solely upon the assumption that segregation in public education does in fact harm black children because "a feeling of inferiority" is generated "as to their status in the community."⁴⁰⁰ *Plessy* was quickly dismissed and rejected by looking to the authority of several contemporary social psychology studies.⁴⁰¹

The *Brown* Court probably did not cite to *Carolene Products* because *Brown*'s reasoning was not taken immediately from that case. *Carolene Products*' note on strict scrutiny for legislation affecting discrete and insular minorities simply laid the groundwork for what emerged as the "suspect class" analysis.⁴⁰² Strict scrutiny means that legislation which involves a suspect classification (such as racial minorities, women, or aliens) will be invalidated unless the state can show a compelling state interest.⁴⁰³ Suspect classification analysis was first explicitly used in 1944, in *Korematsu v. United States*.⁴⁰⁴ As one commentator put it, *Carolene Products*' analysis did not "culminat[e]" until *Brown*.⁴⁰⁵

Ely has written that segregated schools were supported by racism, which was a "dominant strain" in American life then, and [today].⁴⁰⁶ On the other hand, he has also written that to be unconstitutional, racial discrimination must be *intentional*,⁴⁰⁷ because the same governmental conduct can be both constitutional and unconstitutional depending on the intent.⁴⁰⁸ However, Ely has also stated that forcing legislatures to articulate purposes (intent) for their legislation is not workable, since there are

399. By Justice Blackmun in *Graham v. Richardson*, 403 U.S. 365, 372 (1971). See also DEMOCRACY AND DISTRUST, *supra* note 289, at 148, 151.

400. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

401. *Id.* See also *id.* at n.11.

402. Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 122 (1990).

403. See, e.g., *id.* at 132.

404. *Toyosaburo Korematsu v. United States*, 323 U.S. 214, 217-18 (1944) (holding that the relocation of Japanese residents on the West Coast constitutional).

405. Simon, *supra* note 402, at 125. This author also has read, cites heavily to, and perhaps has been influenced by Ely, however.

406. See, e.g., *Fundamental Values*, *supra* note 293, at 47.

407. DEMOCRACY AND DISTRUST, *supra* note 289, at 140.

408. *Id.* at 137.

too many overlapping purposes when legislators vote on bills.⁴⁰⁹ Legislative motivation should only be examined by courts when the “improper discrimination in the distribution of goods that are constitutionally gratuitous”⁴¹⁰ is at stake. The most important way to ordinarily read statutory provisions is on the plain language, in light of foreseeable effects, and “a healthy dose of common sense.”⁴¹¹ Aren’t the appropriate questions then, under Ely’s reasoning, whether segregation by race is intentional discrimination, and whether its legislative motivation may be examined by the court because “constitutionally gratuitous goods” are being “distributed” with “improper discrimination”? What “constitutionally gratuitous goods” are being “distributed”? Public education?

Assuming public education is a “constitutionally gratuitous good,” is segregation of schools by race discrimination, and if so, is it “improper” and “intentional”? Ely has asserted that *Brown* is correct without offering any evidence or explanation why. Apparently he relies on the same social psychology studies that the *Brown* Court did.⁴¹² Yet, while on the one hand supporting the Court’s reliance on the social psychology studies,⁴¹³ Ely has also maintained that that the social psychology studies which the Court relied on “when not simply irrelevant to the Court’s point” are, at least, widely professionally criticized.⁴¹⁴

Furthermore, Ely has stressed that “entrusted with the care of the nation’s principles,” the Court “should hesitate to issue a pronouncement which can be read to mean that Negroes are different from white persons. . . .”⁴¹⁵ Ely does not mention that the *Brown* Court’s insistence that segregated schooling harms black children was in effect averring that black children are different from white children. After all, there was no discussion by the Court that white children were harmed by segregation. Ely does not make such a distinction, either.⁴¹⁶ Ely has actually

409. *Id.* at 129 (agreement on purpose would be hard to come by).

410. John Hart Ely, *The Centrality and Limits of Motivation Analysis*. 15 SAN DIEGO L. REV. 1155, 1160-61 (1978): “It . . . cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous.” “Constitutionally gratuitous” refers to benefits which people are not entitled to as a matter of substantive constitutional law. *Id.* at 1160-61.

411. DEMOCRACY AND DISTRUST, *supra* note 289, at 130.

412. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

413. *See Loving*, *supra* note 307, at 216 n.7.

414. *See id.* at 216-17. *See also id.* at 217 n.9.

415. ON CONSTITUTIONAL GROUND, *supra* note 284, at 252.

416. Ely has elsewhere inferred that minorities are different from white majorities. In his discussion of the effects of creating black Democratic majority-minority voting blocks, Ely comments that even though creation of such blocks “bleaches” the surrounding areas, creating a higher percentage of overall Republican districts, the Democrats don’t try to block the creation of majority-

commented that the *Brown* Court “would have been better off not citing sources for the proposition that segregation harms black children,” but rather should have retorted: “A white legislature tells you that because of your color you’re not fit to go to school with their children and you’re not hurt? Get serious.”⁴¹⁷ So the Court’s reasoning was wrong, but the ends justify the means?

In any event, Ely seems to simply accept the *Brown* Court’s reliance on the Fourteenth Amendment, when he states that only “race-like” classifications should be considered “suspect.”⁴¹⁸ Yet, how Ely’s support of *Brown* squares with his assertion that suspect classes must be systematically barred access to the political system⁴¹⁹ is confusing. How do segregated schools bar black children, even implicitly or consequentially, from the political process? After all, it must be remembered, the Constitution and the Fourteenth Amendment are about equal access to the political process and discriminatory practices, not substantive rights (like the right to desegregated schooling). Courts never said that schools have to be racially balanced.⁴²⁰

Perhaps Ely and the *Brown* Court’s implicit reliance upon *Carolene Products*, and their assumption that segregation causes black children harm may be attributed to the fault found in *Carolene Products* by Justice Rehnquist: “It would hardly take extraordinary ingenuity for a lawyer to find ‘insular and discrete’ minorities at every turn in the road.”⁴²¹ In other words, lacking concrete evidence that segregation causes black children (alone) harm, perhaps Ely, as the *Brown* Court, simply decided to “find” what amounts to a discrete and insular minority, and thereafter “legitimately” impose morality upon the school systems because with “suspect” classes such morality imposition is acceptable. It seems that, though Ely denies it, he is affirming that courts are in the best position to make moral judgments.⁴²²

But shouldn’t we be wary of Ely’s warning that when courts start

minority districts. This is partly because the minority constituents lobby for such voting blocks despite the fact that the Republican districts are thereby increased. Ely appears to be inferring here that the minority constituents aren’t intelligent enough to figure out that the voting blocks do not work due to “bleaching”. Ely, *supra* note 317, at 618-19.

417. *Loving*, *supra* note 307, at 222 n.21 (noting that other commentators have agreed and citing Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960)).

418. DEMOCRACY AND DISTRUST, *supra* note 289, at 149.

419. *Id.* at 166 (discussing women).

420. ON CONSTITUTIONAL GROUND, *supra* note 284, at 255.

421. See, e.g., John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 729 (1974).

422. DEMOCRACY AND DISTRUST, *supra* note 289, at 57 (Ely denying that courts should make moral judgments).

imposing values, it is systematically in the interests of the upper-middle professional class?⁴²³ As Ely commented of the Court's 1977 freedom of expression opinions, the opinions flowed not from a *Carolene Products* perspective, but from "a jurisprudence that defines the Court's role as one of protecting those values the Court regards as truly fundamental."⁴²⁴ Judges and commentators alike often think they are speaking in terms of some objective standard, but they are in fact "discovering" their own upper-middle class values.⁴²⁵ Lower-class needs such as food, jobs, or shelter are never deemed "fundamental."⁴²⁶ So why school desegregation?

Well, perhaps, in Ely's own words: "The large liberal center of legal academia [is] characteristically fearful of getting out of step with the latest trend. . . ."⁴²⁷ Certainly by 1954 or 1994, the trend was moving away from apartheid. However, interpretivism is not a passing fad. Courts always try to talk in interpretivist terms.⁴²⁸

However, the Court sometimes takes it upon itself to change fundamental aspects of Constitutional law. Well, all right, even Ely has changed his mind about a fundamental right.⁴²⁹ Sometimes the Court amends the Constitution when it should not."⁴³⁰ Sometimes even single judges can carry terrific amounts of weight. Overall, Ely's views on the present state of the governmental structure cast a dim light; each branch has long been in serious constitutional breach. Even most legal writing today, Ely tells us, boils down to nothing but political preferences. Hence, the recent lack in consensus on what constitutes good scholarship.⁴³¹ It all comes down to politics.⁴³²

423. *Id.* at 59:

Thus the list of values the Court and the commentators have tended to enshrine as fundamental is a list with which readers of this book will have little trouble identifying: expression, association, education, academic freedom, the privacy of the home, personal autonomy, even the right not to be locked into a stereotypically female sex role and supported by one's husband.

424. *Fundamental Values*, *supra* note 293, at 14-15.

425. *Id.* at 16.

426. *See id.* at 37-38.

427. *Another Such Victory*, *supra* note 319, at 838.

428. DEMOCRACY AND DISTRUST, *supra* note 289, at 3.

429. In his earlier career, Ely decried the privacy right, but later changed his mind and stated that it's "entirely proper to infer a general privacy right, so long as care is taken in defining the sort of right the inference will support." ON CONSTITUTIONAL GROUND, *supra* note 284, at 286. "I later changed my mind about the propriety of inferring a general constitutional right of 'privacy,' though I continued to have qualms about whether it would apply in cases like *Griswold* and *Roe*." *Id.* at 455 n.3.

430. *Id.* at 299 (discussing *Roe v. Wade*).

431. *Id.* at 475 n.15.

2. And What He Says Now

Ely once wrote, “If you’re going to be a judge, the United States Supreme Court has its advantages.”⁴³³ Apparently. Ely commenced his Panel speech by reminding the audience that he, as all the other Panelists, inevitably let their own theories “seep in.”⁴³⁴ Okay, he’s not straying too far from what he has written about judges needing to be unusually strong in order to avoid being affected by a desirable political outcome.⁴³⁵ Ely also commented that unlike the *Brown* Court, this Panel is not unanimous. Considering the members of the Panel, he says this is only natural. He then attributed the Warren Court’s *Brown* decision’s unanimity to Justice Warren himself. Okay, so sometimes single justices hold terrific amounts of power. We have heard that before.

Ely proceeds to address the famous social psychology footnote. He calls the critics’ claim that courts should not engage in psychology “preposterous,”⁴³⁶ because if one wants to know about social psychology, one should obviously ask social psychologists. The trouble is that Ely admits that the social psychology studies which the *Brown* Court cited had been almost universally criticized in the social psychology literature. So Courts should rely on social psychology studies even if they are poorly conducted and have faulty results?

This dilemma Ely quickly cleans up by sweepingly accepting the social psychology studies because it is “self-evidently absurd” that black children can choose to be hurt by segregated schooling, as the *Plessy* Court had attested. Clearly, Ely says, insecurity and inferiority feelings are generated by segregation, because if a white legislature tells the black children that they are not fit to go to school with their white children, the black children will be hurt. *Plessy* is overruled. Period.

Hold on. The social psychology studies are deficient, so where is Ely getting the conclusion that black children are harmed by segregated schools? Are the black children actually hearing from a white legislature that they are unfit to go to school with the legislature’s children? Since when do legislatures communicate with school children? It sounds as if Ely is doing little more than making the “unthinkable” argument—an argument which he later in his speech accuses Michaelman

432. However, Ely has attacked realists, particularly the extreme realists who believe Courts should act as politicians and impose their own values. See, e.g., *Fundamental Values*, *supra* note 293, at 17.

433. ON CONSTITUTIONAL GROUND, *supra* note 284, at 414 n.176.

434. See Ely, *supra* note 26.

435. See, e.g., *Another Such Victory*, *supra* note 319, at 835-36 n.8.

436. See Ely, *supra* note 26.

of leaning towards. The “unthinkable” argument, Ely asserts, is “dangerous,” especially with Supreme Court Judges. Yet isn’t this what Ely is saying: It is unthinkable that black children cannot be harmed, so it’s unconstitutional.

Ely attacks the Warren Court for making the “unthinkable” argument, when it said that it is unthinkable that the Fourteenth Amendment’s Equal Protection Clause should not apply to the federal District of Columbia. The Warren Court was therefore suggesting that there was no rational construction for the Equal Protection Clause not applying to the federal government. Ely says the Warren Court was wrong—there is a rational reason. The reconstruction Congress trusted itself more than it did the state legislatures. Perfectly psychologically plausible.

Ely then quickly dismisses the idea that due process could contain such a substantive demand as being contained in the Fourteenth Amendment, since an amendment ratified in 1791 (the Fifth) cannot contain one ratified in 1868 (the Fourteenth). To do so would be turning somersaults with time. The Equal Protection Clause was intended to apply to the states, but in a context which already had been acknowledged “in various contexts” as being applicable to the federal government. Ely claims he has annotations for this blanket assertion, but does not bother to share them. So, the *Bolling* problem is solved. But his listeners really don’t know how. He refers his listeners to his book *Democracy and Distrust*.

As far as the remedy is concerned, Ely would require immediate compliance, but the Constitution, he tells us, requires no more than desegregation. Therefore, busing and demographic equality within the schools is not constitutionally required. Busing, in fact, did more harm than good, at least in Boston, where Ely attended law school during the busing period. Ely reminisces about Harvard dinner parties he attended where people were “tut-tutting” about how racist the Irish were. The Irish’s reaction was only normal though, Ely tells us, because they were the ones feeling “under siege” by the busing. The elite of Harvard and Boston had their children tucked away in private or suburban schools. Is he inferring that, in addition to the Irish, the elite circle Ely frequently dined amongst, were indeed racist but did not have need to show it? So overall, the Warren Court relied on poorly conducted studies, inaccurately interpreted the Equal Protection Clause’s application to the federal government, used the dangerous “unthinkability” standard, and apparently did not do so well with their remedy. Yet, the Warren Court’s holding, at least, is to be upheld. However, Ely gives us little, if any, explanation why.

It is ironic that Ely should play a Supreme Court Justice, and attack the Warren Court's opinion as viciously as he did. He once wrote that even if law professors could agree on what is "good . . . there is no reason to assume their judgment is any better on that issue than the Court's."⁴³⁷ It seems Ely, as well as every other panelist, has just such an assumption in mind.

It is also ironic that Ely has, in his writings, shared some of his personal and religious background with his readers in the past. He has told his readers that he descended from three centuries of Presbyterian ministers on both sides of his family,⁴³⁸ and he has also told that his thinking has remained "essentially consistent" from his student days to the present. He has commented that this continuity in thought is "frightening" to him, but he does not consider it a defect.⁴³⁹ He has further commented that his family religious history does not *really* give him authority to speak *ex cathedra*.⁴⁴⁰ Yet, he has on more than one occasion quoted a particular Bible passage in his writings: "Indeed, those not so hopelessly mired in legal positivism as I am often accused of being would do well to consult their Bibles, in particular Leviticus 24:22: 'Ye shall have one manner of Law, as well for the stranger, as for one of your own country: for I *am* the LORD your God.'"⁴⁴¹ The irony is that Ely often does in his panel speech speak *ex cathedra*. He does not quote the Bible.

Yet the legal positivism he is "accused" of, and the legal process he has held himself out as an adherent to is utterly absent from his Panel discussion. *Plessy* is sweepingly overruled. The primary authority for his *Brown* and *Bolling* rulings are an obscure certainty that blacks are harmed, and another obscure conclusion that the Equal Protection Clause was already acknowledged to apply to the federal government—despite the fact that the Equal Protection Clause does not apply to the federal government. Citations, explanation, and evidence are deemed unnecessary, apparently. Sounds rather *ex cathedra*.

Another irony is a story he once told his readers about a speech he gave in Germany. Shortly before having to go on stage, he decided with a colleague what to speak on by flipping a coin. The coin toss easily could have resulted in Ely having to speak on something he did not be-

437. ON CONSTITUTIONAL GROUND, *supra* note 284, at 294.

438. *Id.* at 197.

439. *Id.* at 188 (perhaps confining this continuity of thought to religious clauses, but perhaps not).

440. *Id.* at 197.

441. *Id.* at 390 n.199.

lieve in. This did not seem to bother Ely in the least.⁴⁴² Would Ely do the same thing at this Panel discussion? That is, would he simply uphold *Brown* despite all he has written on legal process and the proper role of courts because that is the politically correct thing to do? Is this why he neglected to give his audience any concrete explanations for his conclusions?

Apparently, his panel opinion is so obviously accurate that details can easily be omitted. (He did not run out of time, he actually complained, perhaps jokingly, that he had a whole five minutes left to speak). Perhaps law professors do actually have better judgment than courts—even the great Warren Court? Perhaps Ely does have the right to speak *ex cathedra*? Perhaps Ely flipped a coin before the Panel? Perhaps being on the Supreme Court does have its advantages—isn't the Court, after all, where the grown ups are?

IV. CONCLUSION

A. *Speculation on Panel Conflicts*

We have tried to speculate a little bit on how the conflict between the Panelists' previous positions and their Panel opinions could occur. One explanation is that the Panelists meant to give us an object lesson in how the game is played. If one is playing checkers—or, perhaps, sitting as a Fourth Century Mediterranean bishop on a monumental theological council—this is how that game is played. Maybe our secular Panel Bishops wanted to say: We do not necessarily think checkers is a good game, but if we must play we want to distinguish ourselves and win. Similarly, the Bishops at Nicaea may have thought: We do not necessarily like the term *homoousios* and what it does to the sacred text, but accepting it is better than political upheaval and anathematism. There is a received tradition of methodological orthodoxy, and a canon, albeit expandable, and here is the best justification that can be given in that mode under the circumstances at hand.

Another possibility is that “none of these Ivy League scholars was going to commit academic and political death by overturning *Brown* because it conflicted with their jurisprudential beliefs.”⁴⁴³ This introduces a hard note of reality. The jurisprudence student writing this opinion

442. *Id.* at 31-32.

443. Brian Stabley, Jurisprudence Paper, Florida State C. of L. (March 7, 2001) (paper on file with the Authors). An earlier draft of our article was presented to Professor Van Doren's jurisprudence seminar class for written comments. We thank the class for their reflections.

went on to indicate that certain economic incentives were involved, such as book contracts, more prestigious appearances, and the like.⁴⁴⁴ We do not believe that these distinguished panelists could be influenced by book contracts or other such factors. However, for some ineffable reason, what the student says is true. It could destroy her credibility if an academic were to pronounce *Brown* morally incorrect.⁴⁴⁵

Also, it may be opined that few of the participants may have thought seriously about how their opinions could have impetus beyond the week's event.⁴⁴⁶ This is a plausible explanation, and supports the general idea that the Panelists' powers of self-reflection were suspended. The idea of the *Brown* Panel seemed to be a good one. Knowledge could be disseminated, ideas exchanged, a book written, professional obligations and duties accomplished—where is the problem? The problem is that of intense internal contradiction, and affirming the insight that the Panelists left the impression (perhaps unintended) that legal realism is correct: law is or often can be manipulated and result-oriented. In other words, the text may essentially be subjected to different interpretations responsive to forces outside the text.⁴⁴⁷

Another jurisprudence student was not surprised at all that the Panelists used the standard positivist mold to affirm *Brown*, in spite of holding jurisprudential theories that positivism was not an appropriate label for the processes actually followed in the legal process.⁴⁴⁸ Presumably, this student has come to expect that jurisprudence will be selected to achieve the political result desired. The student found the Jurisprudence labels—realism, positivism, and so on—academic prattle, which does not conform to what it takes to cope in real world situations.⁴⁴⁹ She also argued that no one—academics or other legalists—really function out of boxes such as positivism or realism exclusively. Thus, the Panelists were displaying a pragmatism that legalists generally employ.

Another jurisprudence student opined much as some of the Florida State Law Professors did: What did you expect the Panelists to do?⁴⁵⁰

444. *Id.*

445. *See Canon*, *supra* note 89, at 998 (“one establishes oneself as a properly acculturated lawyer by affirming *Brown*'s correctness.”).

446. Jackson Maynard, Jurisprudence Paper, Florida State C. of L. (March 7, 2001) (paper on file with the Authors).

447. However, the fact that this Panel intended to produce a book would mitigate against the idea that the Panel offerings were “disposable.”

448. Descera Daigle, Jurisprudence Paper, Florida State C. of L. (March 7, 2001) (paper on file with the Authors).

449. Interview with Descera Daigle, student, Florida State C. of L., in Tallahassee, FL (Mar. 2001).

450. *See infra* note 67 and accompanying text.

The litigants are entitled to a reasoned opinion according to what she called “the rules of the game.” This student criticized us for labeling anyone who even refers to the Constitution as a formalist, and asked where our (the authors’) opinion is. Legal realism may be fine, but how do you write a realist opinion? The card carrying realists, like Jerome Frank (we might add), adopted the positivist mode when he became a judge, despite his resounding attack on it. Basically the student critic argued that none of the panel opinions conflicted with their previous writings, because none really rejected the rule of law in their previous writings.⁴⁵¹

Whether or not the Panelists rejected the rule of law, they did cast serious doubt on it. The Panelists we review find the system malleable in varying degrees. In other words, they are often “legal realists” when they write. Moreover, there is an analogy to Pascal’s Wager. Pascal said that maybe there is a God, and maybe not. But on the chance there might be a God, I will behave as though there is.⁴⁵² We doubt that most contemporary religions are very happy with this wager because it delegitimizes the enterprise. Similarly, if the distinguished Panelists want to say, “Even though we doubt it, we choose the formalist mode because it is taken as the effective mode for determining legal controversy,” that will sufficiently delegitimize the “law god” to make our effort worthwhile. So as our “stupidest housemaid” suggests in the Introduction: “So much for the rule of law. And that scare me too.”⁴⁵³

B. Closing Argument

In summary, we have argued that the AALS Constitutional Panel on *Brown* had similarities to the Council of Nicaea in 325 CE. Both societies were handling a crisis, a perceived need for religious orthodoxy: the labeling of religious heresy in Nicaea, and secular policies out of synch with international and national political needs and ideals in *Brown*. Both were settled with cognizance of a political spectrum, more by policy or political force field than by the dictates of doctrine.⁴⁵⁴ In

451. See Eugenia Khankhasayev, Jurisprudence Paper, Florida State C. of L. (March 7, 2001) (paper on file with the Authors).

452. On Pascal’s Wager, See generally 16 THE NEW ENCYCLOPEDIA BRITANNICA 325 (1993) (existence of God cannot be proven, but one is better off believing because if right, there is eternal life, and if wrong, little is lost).

453. See *supra* note 2; cf. Ronald Dworkin, New York Review of Books, Feb. 22, 2001, at 9-10 (suggesting that the Supreme Court in the Bush/Gore election rendered a decision responsive to their political agenda, dressed in unprincipled legal garb) (book review).

454. See Michael Klarman, Mason Ladd, Lecture at Florida State Univ. College of Law, “*Brown v. Board of Education: Law or Politics?*” (Jan. 26, 2001) (lecturer argues that the two most

both cases, there was a reinforcement of a methodological orthodoxy, Scriptures and the Constitution, as the source of truth by agreement, for a time at least.

The AALS Panel was unanimous in affirming the result in *Brown*, which is remarkable in itself because of the immense controversy when *Brown* was decided. However, we have recounted two fault lines in the Panel opinions. First, the dissonance flowing from the conflicts in composition of sources or canon relied upon, and the even greater dissonance from the variety of justifications drawn from the canon. Second, most of the Panelists used formalism, in contrast with the conflicting jurisprudence of their prepanel writings, at least the ones we selected at random. Some prepanel writings disdained the use of the Courts at all to further causes important to the Panel members, such as improved race relations.⁴⁵⁵ Most of the Panelists we studied in detail decried formalism and the operations of the legal structure at large in their prepanel writings, but were willing to use it when it suited their purposes.

How could this happen? While it could be an exercise in conscious deception,⁴⁵⁶ we doubt this possibility. Whatever the motives of the Panelists, one of the most interesting things is that their enterprise is an inadvertent example of postmodernism: their unfolding revelation of anti-foundationalism and anti-formalism in their writings, while upholding formalism at least for limited purposes in their affirmation of *Brown*. There is, in any event, irony where an exercise designed to vindicate reason and formalism ends up showing extreme manipulation, virtual meaninglessness of the canon, and at worst inadvertent hypocrisy caused by the tension between the panel opinions and the previous writings.⁴⁵⁷

We suggest that politics and current conceptions of morality controlled both the Council of Nicaea and the *Brown* Panel. Constantine wanted to consolidate and pacify his potentially unruly empire. The United States wanted to expand its empire to the hearts and minds of the Third World.⁴⁵⁸ Texts with symbolic value to the citizens involved were

conservative members of the *Brown* Court were influenced to go along due to politics of winning the Cold War).

455. See Derrick Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 71 (1985) (courts were of little help in the parable told by Bell in attacking racist law).

456. See Rob Atkinson, *Nihilism Need Not Apply: Law and Literature in Barth's The Floating Opera*, 32 ARIZ. ST. L. J. 747, 815-16 (2000) (suggesting that a novelist may have consciously attempted deception).

457. *Canon*, *supra* note 89, at 1020 (would we really be happy discussing how to make slave law the best it can be?). Could it be that instead Professor Balkin had his tongue in his cheek and set a trap for his victims?

458. See Bell *supra* note 40.

drawn into service by the legal priesthood to resolve needs outside the texts.

Incidentally, hopefully some appropriate moral natural law, if any there were, was vindicated in *Brown*. Indeed, perhaps there is a further parallel between the *Brown* Panel and the Council of Nicaea: religious or “natural law.” Perhaps the Panelists’ unanimity in result and reliance on methodological orthodoxy, if not in precise method (which canon to use), is supportive of a natural law moral result. As the Bishops at Nicaea (and perhaps even Constantine himself⁴⁵⁹) convened, deliberated, and ultimately resolved their controversy under the belief that God’s singular will would ultimately be manifested,⁴⁶⁰ the *Brown* Panel seems to be inadvertently suggesting a similar belief in an invincible moral dictate. It is as if the Panelists were saying to us collectively: *Brown* is affirmed because there is only one moral choice no matter how the canon is read. The inadvertence of this “religious” undertone underlines its very presence. On the other hand, the manipulation of the canon by the Panel, and the Panel’s ability to draw contradictory inferences from the same canon appears to seriously undermine a natural law approach. If natural law means an objective referent outside traditional legal materials to provide objective guidance, it is difficult to see it in this panel exercise.⁴⁶¹

459. Though scholars are not in agreement on Constantine’s religious convictions, see COUNCILS, *supra* note 43, at 29, some suggest that Constantine’s personal religion was not add odds with Christianity, and hence Nicaea was not solely a political matter. See CHADWICK, *supra* note 54, at 125-32. “[C]onstantine was not aware of any mutual exclusiveness between Christianity and his faith in the Unconquered Sun. The transition from solar monotheism . . . to Christianity was not difficult.” *Id.* at 126. Before a battle, Constantine said that he once saw a cross across the midday sun inscribed with “By this conquer.” *Id.* In other words, the line between paganism and Christianity was not so distinct, and Constantine may not have only been playing politics with the Bishops; perhaps he did feel he had a religious duty to unify the empire as the secular “sun.” Still, Constantine knew that the military victories that he needed to consolidate his empire were thought by Christians to be the will of the Christian God. See *id.* at 125 (his decisive victory in battle thought to be the will of the Christian God).

460. See COUNCILS, *supra* note 43, at 57 ([w]hatever is decided in the holy councils of the bishops must be attributed to the divine will.). The fact that the Nicene Creed was later repudiated is irrelevant to the analogy to natural law because God’s will can change. (Co-author Van Doren does not agree that natural law is a term properly invoked when the moral tenets used change diametrically over time. Co-author MacGrady thinks that natural law can be invoked even when moral tenets change over time because depending upon which religious or spiritual viewpoint one is coming from, natural law can be understood in different in ways. For example, to a Christian, natural law may mean the dictate of a Christian “Other” God (Other than the human self), while to a Buddhist there is no “other” to give such dictates; to a Buddhist time is not linear and what is morally right can well change over “time.”)

461. Unless one is willing to accept a definition of natural law which would include an “objective” referent manifested in different forms. In other words, the Panelists agreed on the result, but now how to get there.

Or finally, not implausibly, maybe the Panelists meant to play with us (deceive us?) and are laughing at us! On the other hand, as one of the Jurisprudence students remarked, at the end of the day, “are we [not] laughing at them. . . . ?”⁴⁶²

462. Jimmy Midyette, Jurisprudence Paper, Florida State C. of L. (March 7, 2001) (paper on file with the Authors).