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## REWRITING *BROWN*, RESURRECTING *PLESSY*

JAMES E. FLEMING\*

### INTRODUCTION

It is an honor and a pleasure to ponder *Cooper v. Aaron*<sup>1</sup> and the legacy of *Brown v. Board of Education*<sup>2</sup> in general and to respond to David A. Strauss's wise and insightful Childress Lecture<sup>3</sup> in particular. I want to address three topics. The first two are encapsulated in my title: *Rewriting Brown, Resurrecting Plessy*. I'll examine the widespread phenomenon of "rewriting *Brown*." And I'll document what I shall call "resurrecting *Plessy*": the phenomenon, evident in both liberal and conservative scholarship and opinions, of charging one's opponents with repeating the mistakes of *Plessy v. Ferguson*.<sup>4</sup> I'll illustrate the liberal version by charging Justice Clarence Thomas with resurrecting *Plessy*.<sup>5</sup> Then I'll demonstrate the conservative version by showing how Thomas charges Justice Stephen Breyer with resurrecting *Plessy*.<sup>6</sup> My third topic will be *Cooper* in relation to Strauss's well-known theory of common law constitutional interpretation.<sup>7</sup> I'll argue that such a theory needs a clearer distinction than he has provided between the Constitution itself and what the Supreme Court has said about the Constitution in order to be able to criticize *Plessy* as wrongly decided and to justify *Brown* as rightly decided.

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\* The Honorable Frank R. Kenison Distinguished Scholar in Law and Professor of Law, Boston University School of Law. I prepared this Article for the Richard J. Childress Memorial Lecture & Conference, *Cooper v. Aaron: Little Rock and the Legacy of Brown*, held at Saint Louis University School of Law, October 5, 2007. I want to thank Professor Joel K. Goldstein and the editors of the *Saint Louis University Law Journal* for their warm hospitality on that occasion.

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

2. 347 U.S. 483 (1954).

3. David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065 (2008) [hereinafter Strauss, *Little Rock*].

4. 163 U.S. 537 (1896).

5. See *infra* text accompanying notes 32–42, 50–62.

6. See *infra* text accompanying notes 48–49.

7. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) [hereinafter Strauss, *Common Law*].

### I. WHAT *BROWN* SAID OR SHOULD HAVE SAID: REWRITING *BROWN*

As Strauss observes, *Brown* is an icon, a fixed point.<sup>8</sup> No candidate for the Supreme Court who expresses doubts about the lawfulness of *Brown* stands a chance of being confirmed. No theory of constitutional interpretation that cannot justify *Brown* is publicly acceptable. This iconic status of *Brown* has generated an entire industry of scholarship: that of “rewriting *Brown*.” We all know the general cast of this scholarship. The critic begins by saying: “I believe *Brown* was rightly decided. But I am critical of Chief Justice Earl Warren’s opinion in the case. Here is how I would have written the opinion.” The critic then proceeds to justify *Brown* in terms of the theory of constitutional interpretation, or the conception of the Equal Protection Clause, she or he finds most cogent.

This type of scholarship is epitomized in Jack Balkin’s book, *What Brown v. Board of Education Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Landmark Civil Rights Decision*.<sup>9</sup> When Balkin was preparing this book, I said to him, “Jack, you should invite me to contribute to your book on rewriting *Brown*.” I continued: “For my chapter, I would contribute, word for word, the opinion of Chief Justice Earl Warren in *Brown*.” I explained: “Despite all of the criticism of the opinion, it contains every argument one needs to justify *Brown*.” Balkin declined to invite me, but he did laugh and reply: “It’s been tried.”

Why would I have contributed, word for word, the opinion of Chief Justice Warren in *Brown* instead of rewriting it? What arguments does it contain that are sufficient? Here I would emphasize three points, echoing Strauss’s analysis in many respects. One, Warren articulates a powerful conception of the harm of segregation in terms of an anti-caste principle of equal protection: “To separate [black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>10</sup> Therefore, Warren concludes, “[s]eparate educational facilities are inherently unequal.”<sup>11</sup> That is the principle we need to justify *Brown*. To be sure, Warren does articulate arguments that emphasize the significance of education in preparing children for the responsibilities of citizenship,<sup>12</sup> arguments that do not apply to segregation in bathrooms, drinking fountains, marriage, and the like. Nonetheless, his opinion rests upon

8. Strauss, *Little Rock*, *supra* note 3, at 1.

9. WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001).

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

11. *Id.* at 495.

12. *Id.* at 493.

an abstract anti-caste principle that condemns segregation in all of these contexts. Two, relatedly, Warren rejects *Plessy's* doctrine of "separate but equal" because he rejects *Plessy's* view of the world, its view that the regime of "separate but equal" did not harm blacks.<sup>13</sup>

Third, Warren's conception of what violates the Constitution is a state of affairs in the world, a practice that denies black school children the opportunity of an equal education. It is not a state of mind in government, e.g., an intent of particular governmental actors to discriminate or an attitude of race-consciousness as such. Beginning with *Milliken v. Bradley*<sup>14</sup> and *Washington v. Davis*<sup>15</sup> and continuing to the present, the Court has taken a different course. The upshot is that we have been saddled with a "de facto" version of "separate but equal" for our time.<sup>16</sup> Warren's opinion, by contrast, entails that government has an affirmative obligation to secure a state of affairs in the world that would afford equal education and equal citizenship for all.<sup>17</sup>

## II. THE CONSERVATIVE REWRITING OF *BROWN*

Clarence Thomas has contributed to this industry of rewriting *Brown*, both before he was appointed to the Supreme Court and recently in his concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>18</sup> In a series of speeches in 1987, during the celebration of the bicentennial of the framing of the Constitution, he criticized Warren's opinion in *Brown* for improperly making "sensitivity" or "the feeling of inferiority" rather than "[j]ustice and conformity to the Constitution" the paramount issue in race relations and constitutional interpretation.<sup>19</sup> Thomas also suggested that the

13. *Id.* at 494–95; see also SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 89–90, 135–39, 156–58, 167–69 (2007).

14. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977); *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974).

15. 426 U.S. 229 (1976).

16. Cf. Paul R. Dimond, *Panel II: Concluding Remarks*, 61 FORDHAM L. REV. 63, 63 (1992) ("In its own way, *Milliken* can best be understood as a 'separate but equal' result for our times."). Dimond explains:

First, in considering the meaning of *Milliken*, it seems to me that the public message of *Milliken I* and *Milliken II*, in combination, is that racial segregation in metropolitan America is innocent once you get beyond the inner-city boundary: it's no one's fault and no one's responsibility. At the same time, the Burger Court bent over backwards to permit an order against a state authority to infuse funds into an inner-city school district proven guilty of de jure segregation.

*Id.*

17. See SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION (2003).

18. 551 U.S. \_\_\_, 127 S. Ct. 2738 (2007).

19. Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 990 (1987).

opinion fostered an attitude of dependence, victimhood, and entitlement.<sup>20</sup> To the contrary, I would argue, the Court's statement about "feelings of inferiority as to their status in the community" expresses an anti-caste principle, a principle of justice that condemns racial classifications that undermine African Americans' status as equal citizens by reducing them to or maintaining them in the status of an inferior or subordinate caste. In any event, Thomas argued that Warren should have written an opinion invoking a conception of the color-blind Constitution.<sup>21</sup>

For some time now, debate about the interpretation of the Equal Protection Clause has been a clash between two competing understandings: an anti-caste principle versus a principle of racial neutrality (or color-blind Constitution). To state the clash simply, on the anti-caste interpretation, the Equal Protection Clause condemns only racial classifications that reduce African Americans to the status of an inferior race or caste (or maintain them in that status), whereas on the racial neutrality interpretation, it condemns racial classifications as such, whether unquestionably invidious or ostensibly benign. This debate has played out most dramatically in the context of affirmative action, with the defenders of affirmative action programs interpreting the Equal Protection Clause as manifesting an anti-caste principle,<sup>22</sup> and the critics of those programs arguing that the Clause embodies a principle of racial neutrality or color blindness.<sup>23</sup> Clarence Thomas and Antonin Scalia have been the leading champions of the latter view.<sup>24</sup>

Notably, for a time, the proponents of the color-blind Constitution put *Brown* to one side (perhaps implicitly acknowledging that it speaks the language of the anti-caste principle). They also put original understanding of the Equal Protection Clause to one side (perhaps implicitly acknowledging, as Justices Brennan and Marshall argued,<sup>25</sup> that the Congress that proposed the Fourteenth Amendment also afforded race-conscious relief to newly-freed

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20. See *id.* at 991.

21. *Id.* at 992–95.

22. See, e.g., *Parents Involved*, 127 S. Ct. at 2815 (Breyer, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243–45 (1995) (Stevens, J., dissenting); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Marshall, J., dissenting); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part); *id.* at 387 (Marshall, J., concurring in the judgment in part and dissenting in part).

23. See, e.g., *Parents Involved*, 127 S. Ct. at 2782 (Thomas, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting); *Adarand*, 515 U.S. at 240–41 (Thomas, J., concurring in part and concurring in the judgment); *Croson*, 488 U.S. at 520 (Scalia, J., concurring in the judgment).

24. See *Parents Involved*, 127 S. Ct. at 2782 (Thomas, J. concurring); *Croson*, 488 U.S. at 520 (Scalia, J., concurring in the judgment).

25. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564 n.12 (1990) (Brennan, J., for the Court); *Bakke*, 438 U.S. at 396–98 (Marshall, J., concurring in the judgment in part and dissenting in part).

slaves and, therefore, the original meaning of the Equal Protection Clause was not to ban programs like affirmative action). Instead, despite their professed originalism, Thomas and Scalia argued for the color-blind Constitution as a matter of abstract principle, justice, and wisdom, not original meaning. And they appropriated Justice Harlan's dissent in *Plessy* for their principle of color blindness.<sup>26</sup>

But Harlan's dissent warrants further analysis. To be sure, Harlan did write: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."<sup>27</sup> This is the passage Thomas and Scalia love to quote. But Harlan also wrote, in the same paragraph: "in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here."<sup>28</sup>

I would interpret Harlan's dissent as a whole as expressing an anti-caste principle. For one thing, I would read the forbidden "classes among citizens" to refer to "castes among citizens," not to "classifications among citizens." For another, *Plessy* itself pointedly rejects an anti-caste principle (and Harlan famously criticizes it for doing so). The *Plessy* majority writes: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."<sup>29</sup> The Court continues: "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."<sup>30</sup> That is, that's their problem: they've got an inferiority complex. Harlan famously retorts that everyone knows that "the real meaning" of the law is to affix a "badge of servitude" or to put "the brand of servitude and degradation" upon "colored citizens" as being "so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."<sup>31</sup> There is no more articulate expression of an anti-caste principle anywhere. Harlan is not saying, pace Thomas and Scalia, that the real flaw in the law is that it reflects race-consciousness as such.

Strikingly, Thomas's concurrence in *Adarand* and dissent in *Grutter* reflect the *Plessy* worldview. (You see, here is the part where I, a liberal, charge the conservative Thomas with resurrecting *Plessy*.) One, *Plessy* had expressed the view that: "Legislation is powerless to eradicate racial instincts . . . , and the attempt to do so can only result in accentuating the difficulties of the present situation." It continued: "If one race be inferior to the other socially, the

26. See, e.g., *Grutter*, 539 U.S. at 378 (Thomas, J., concurring in part and dissenting in part); *Crosby*, 488 U.S. at 521 (Scalia, J., concurring in the judgment).

27. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

28. *Id.*

29. *Id.* at 551 (opinion of the Court).

30. *Id.*

31. *Id.* at 560, 562 (Harlan, J., dissenting).

Constitution of the United States cannot put them upon the same plane.”<sup>32</sup> Similarly, Thomas writes in concurrence in *Adarand*: “Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.”<sup>33</sup> Furthermore, Thomas clearly believes that governmental attempts to “make us equal” through affirmative action programs have accentuated the difficulties of race relations in America.<sup>34</sup>

Second, and relatedly, *Plessy*, like *Lochner v. New York*,<sup>35</sup> bespoke a strong anti-paternalism and a conception of natural social ordering (analogous to *Lochner*’s conception of natural market ordering) that government should not upset and in any event could not overcome.<sup>36</sup> Similarly, Thomas’s concurrence in *Adarand* expresses the view that the Equal Protection Clause forbids “racial paternalism.”<sup>37</sup> He further develops this view in dissent in *Grutter*, invoking Frederick Douglass’s plea to “[d]o nothing with us!” Douglass explains: “[I]f the negro cannot stand on his own legs, let him fall . . . . All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury.”<sup>38</sup>

Finally, at the same time that Thomas rejects the anti-caste principle in favor of a principle of color blindness, he subverts the anti-caste principle to condemn affirmative action programs. First of all, whereas Justice O’Connor’s opinion in *Adarand* argues for strict scrutiny of affirmative action programs because it is hard to tell the difference between “benign” classifications and invidious ones,<sup>39</sup> Thomas’s concurrence goes so far as to argue that ostensibly “benign” classifications *are* invidious. He writes, “I believe that there is a ‘moral [and] constitutional equivalence’ between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.”<sup>40</sup> Second, Thomas argues that affirmative action programs, far from being benign, “stamp minorities with a badge of inferiority” and “may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”<sup>41</sup> Here, he is appropriating a

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32. *Plessy*, 163 U.S. at 551–52 (opinion of the Court).

33. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

34. *See id.* at 241.

35. 198 U.S. 45 (1905).

36. For analysis of *Lochner* along these lines, see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 45–51 (1993). Sunstein’s analysis of *Plessy* suggests this analogy between the two cases. *See id.* at 42–45, 56, 64–67.

37. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment).

38. *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part).

39. *Adarand*, 515 U.S. at 225–26, 228–29.

40. *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment).

41. *Id.* at 241.

version of the anti-caste principle to condemn affirmative action programs. He adds that such programs stoke the resentment of non-African Americans.<sup>42</sup> We should observe that Thomas, despite his criticism of *Brown* for emphasizing “feelings” or “sensitivity,” is here emphasizing both the feelings of inferiority of African Americans and the feelings of resentment of non-African Americans.

In *Parents Involved*, Thomas and Chief Justice Roberts take a new tack regarding *Brown*. It’s one thing to say that *the Constitution* is color-blind—that’s what Thomas has been saying up to now. It’s quite another thing to say that *Brown* says the Constitution is color-blind—yet Chief Justice Roberts’s plurality opinion in *Parents Involved* insinuates precisely that: “It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954.”<sup>43</sup> Similarly, Thomas now rewrites *Brown*, implying that it *did* reflect the color-blind principle as against the anti-caste principle. He asserts that his view of the color-blind Constitution “was the rallying cry for the lawyers who litigated *Brown*,”<sup>44</sup> even relating an anecdote about Thurgood Marshall, during his most depressed moments, turning to his “Bible,” Justice Harlan’s dissent in *Plessy*.<sup>45</sup> But there can be no doubt that Marshall himself held the anti-caste conception and viewed Harlan’s dissent as expressing the anti-caste conception.<sup>46</sup>

Thomas also asserts that Breyer’s dissent, though ostensibly invoking an anti-caste conception of equal protection,<sup>47</sup> “replicates” the arguments made by “[t]he segregationists in *Brown* . . . to a distressing extent,” and that “*Brown* decisively rejected those arguments.”<sup>48</sup> What is more, Thomas now resurrects *Plessy*, tarring Justice Breyer’s dissent with its brush. Thomas asserts that Breyer’s view—“pin[ning] its interpretation of the Equal Protection Clause to current societal practice and expectations, deference to local officials, likely practical consequences, and reliance on previous statements from this and other courts”—“first appeared in *Plessy*, where the Court asked whether a state law providing for segregated railway cars was ‘a reasonable regulation.’”<sup>49</sup>

In fact, though, Thomas himself resurrects *Plessy*’s view of the world in his concurrence in *Parents Involved*. One, he denies that in the field of

42. *Id.*

43. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. \_\_\_, 127 S. Ct. 2738, 2767 (2007).

44. *Id.* at 2782 (Thomas, J., concurring).

45. *Id.* at 2783.

46. *See, e.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 392–93 (1978) (Marshall, J., concurring in the judgment in part and dissenting in part).

47. *Parents Involved*, 127 S. Ct. at 2815–16 (Breyer, J., dissenting).

48. *Id.* at 2783 (Thomas, J., concurring).

49. *Id.* (quoting *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896)).



education, separate is inherently unequal. Where Breyer sees racial segregation,<sup>50</sup> Thomas sees only “[r]acial imbalance,” and claims that “[r]acial imbalance is not segregation.”<sup>51</sup> Thomas states that “racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices.”<sup>52</sup> He surely would view these voluntary housing choices about where to live as a product of freedom of association (remember Herbert Wechsler’s critique of *Brown*<sup>53</sup>).

Furthermore, Thomas disputes Breyer’s argument that integration improves educational outcomes for black children, stating: “In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.”<sup>54</sup> Thomas here is unwittingly paraphrasing *Plessy*’s infamous passage:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the . . . separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the [separation], but solely because the colored race chooses to put that construction upon it.<sup>55</sup>

For, on Thomas’s view, many African Americans attending predominantly black schools have succumbed to feelings of inferiority, victimhood, and entitlement.<sup>56</sup> That is because they—aided and abetted by proponents of integration and affirmative action—have mistakenly chosen to put that construction upon it. They should instead, according to Thomas, take pride in the accomplishments of the students from these predominantly black schools.<sup>57</sup> And, they should work hard and succeed rather than whining about being a victim of racism. Furthermore, on Thomas’s view, Justice Breyer and white progressives are engaging in “[r]acial paternalism” and insult by assuming that the predominantly black schools are inferior.<sup>58</sup> Indeed, Thomas views them as patronizing and demeaning to blacks who have succeeded in such schools. This sounds a lot like a “de facto” version of “separate but equal” for our time.<sup>59</sup>

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50. *Id.* at 2801–02 (Breyer, J., dissenting).

51. *Id.* at 2768 (Thomas, J., concurring).

52. *Parents Involved*, 127 S. Ct. at 2769.

53. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

54. *Parents Involved*, 127 S. Ct. at 2776 (Thomas, J., concurring).

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

56. *See Parents Involved*, 127 S. Ct. at 2775–79 (Thomas, J., concurring) (discussing the achievement of black students in predominantly black schools).

57. *Id.* at 2777–78.

58. *Id.* at 2775.

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

Two, Thomas disputes Breyer's argument that integration in education benefits democracy, either by reflecting the "pluralistic society in which our children will live" or by "teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of three hundred million people one Nation."<sup>60</sup> Thomas writes: "[I]t is unclear whether increased interracial contact improves racial attitudes and relations."<sup>61</sup> In Thomas's words, I hear echoes of *Plessy*:

We cannot accept this proposition . . . that social prejudices may be overcome by [governmental action]. . . . If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.<sup>62</sup>

It seems to me that, ironically, Thomas is not only rewriting *Brown* and resurrecting *Plessy*, but perhaps even rewriting *Brown* as resurrecting *Plessy*! For hereafter, *Brown* is to be interpreted through a worldview analogous to that of *Plessy*.

### III. WHAT *COOPER* SAID—AND SHOULD HAVE SAID—COULD EDWIN MEESE BE RIGHT THIS TIME?

In an event whose occasion is the 50th anniversary of *Cooper v. Aaron*, and whose keynote speaker is David Strauss, our leading theorist of common law constitutional interpretation, I would be remiss if I did not say something about *Cooper* in relation to common law constitutional interpretation. *Cooper* proclaims that the United States Supreme Court is the ultimate interpreter of the United States Constitution for the federal system: "the federal judiciary is supreme in the exposition of the law of the Constitution."<sup>63</sup> In recent years, many discussions of *Cooper* have focused on this pronouncement, and what *Cooper* entails for "judicial supremacy."<sup>64</sup>

My focus will be different. We should distinguish between two fundamental interrogatives of constitutional interpretation that are at issue in *Cooper*:<sup>65</sup> *What* is the Constitution? and *Who* may authoritatively interpret it? When people talk about the Supreme Court's opinion in *Cooper* in terms of

60. *Parents Involved*, 127 S. Ct. at 2821 (Breyer, J., dissenting) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971)).

61. *Id.* at 2780–81 (Thomas, J., concurring).

62. 163 U.S. 537, 551 (1896).

63. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

64. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

65. For works that conceptualize the enterprise of constitutional interpretation on the basis of not only these two interrogatives but also a third—How ought we to interpret the Constitution?, see JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* 71–72 (2006); WALTER F. MURPHY, JAMES E. FLEMING, SOTIRIOS A. BARBER & STEPHEN MACEDO, *AMERICAN CONSTITUTIONAL INTERPRETATION* (4th ed. 2008).

judicial supremacy, they are talking about *Cooper's* answer to the "Who" interrogative: the Court's anointment of itself as the ultimate interpreter of the Constitution. Consider, for example, several other papers in this symposium.<sup>66</sup>

But I want to talk about *Cooper's* answer to the "What" interrogative. In *Cooper*, the Supreme Court practically equates the Constitution itself with what the Supreme Court says about the Constitution. The reasoning proceeds by syllogism. Major premise: "Article 6 of the Constitution makes the Constitution the 'supreme Law of the Land.'"<sup>67</sup> Minor premise: *Marbury* declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>68</sup> Conclusion: "It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* Case is the supreme law of the land."<sup>69</sup> Put another way, the Court practically obliterates the distinction between the Constitution itself and constitutional law. In doing so, as former Attorney General Edwin Meese famously objected, "the Court seemed to reduce the Constitution [, our fundamental and paramount law,] to the status of ordinary constitutional law, and to equate the judge with the lawgiver."<sup>70</sup>

What turns on this distinction between the Constitution itself and constitutional law? Nothing less than whether we can criticize the Supreme Court's decisions as erroneous interpretations of the Constitution. As Meese puts it, "to confuse the Constitution with judicial pronouncements allows no standard by which to criticize and seek the overruling of what University of Chicago Law Professor Philip Kurland once called the 'derelicts of constitutional law'—cases such as *Dred Scott* and *Plessy v. Ferguson*."<sup>71</sup> It pains me to acknowledge that Meese might ever have been right about anything, but I must say it: Meese was right this time.<sup>72</sup> And let's observe a splendid irony: Meese is saying that the implication of *Cooper*, the case that reaffirmed *Brown*, is that we cannot criticize *Plessy* as wrongly decided.

I want to generalize Meese's criticism of *Cooper* and frame it as a challenge to common law constitutional interpretation. For *Cooper*, in its equation of the Constitution itself with constitutional law, may seem to be a

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66. See Ashutosh Bhagwat, *Cooper v. Aaron and The Faces of Federalism*, 52 ST. LOUIS U. L.J. 1087 (2008); Frederic M. Bloom, *Cooper's Quiet Demise (A Short Response to Professor Strauss)*, 52 ST. LOUIS U. L.J. 1115 (2008); Kermit Roosevelt III, *Judicial Supremacy, Judicial Activism: Cooper v. Aaron and Parents Involved*, 52 ST. LOUIS U. L.J. 1191 (2008), Anders Walker, "Things Cannot Go On As They Are": Contextualizing Herbert Weschler's Critique of The School Segregation Cases, 52 ST. LOUIS U. L.J. 1211 (2008).

67. U.S. CONST. art. VI, § 2.

68. 5 U.S. (1 Cranch) 137, 177 (1803).

69. *Cooper*, 358 U.S. at 18.

70. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 987 (1987).

71. *Id.* at 989.

72. Cf. Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987).

canonical expression of common law constitutional interpretation. And therefore, one of the challenges for common law constitutional interpretation is to articulate a criterion for criticizing the Supreme Court's interpretations of the Constitution on the ground that they have misinterpreted the Constitution.

To generalize, any adequate theory of constitutional interpretation needs a criterion for distinguishing the Constitution itself from constitutional law. Originalism in all of its varieties readily provides such a criterion: original meaning of the Constitution may trump judicial doctrine of constitutional law at any time.<sup>73</sup> Ronald Dworkin's moral reading of the Constitution,<sup>74</sup> and Sotirios A. Barber's and my philosophic approach to constitutional interpretation,<sup>75</sup> also readily provide such a criterion: we can always criticize judicial doctrine from the standpoint of the moral and political theory that provides the best justification of the Constitution.

What about common law constitutional interpretation? Does it provide a criterion for distinguishing the Constitution from constitutional law? Does it provide a standpoint from which to criticize the "derelicts of constitutional law" like *Plessy*? And from which to justify *Brown*? Indeed, from which to criticize the work of the Roberts Court?

In pondering this question, we should distinguish several varieties of common law constitutional interpretation: (1) *ipse dixit* common law constitutional interpretation; (2) doctrinalist common law constitutional interpretation; (3) Strauss's "rational traditionalist" common law constitutional interpretation; and (4) moral reading common law constitutional interpretation. I'll sketch each as I go along.

Needless to say, an *ipse dixit* common law constitutionalism could justify *Brown* in a manner of speaking: it would simply say, the Constitution equals what the Supreme Court says about the Constitution, and since the Supreme Court itself decided *Brown*, the decision is justified *ipse dixit*. That would hardly be a satisfactory account.

What do I mean by doctrinalist common law constitutional interpretation? This would be the view that one can avoid making moral and philosophic arguments and judgments in constitutional interpretation if we simply develop and apply doctrine, deciding one case at a time through the common law method. Perhaps Herbert Wechsler was in the grip of such a conception. Perhaps that is one reason why he thought *Brown* was not justifiable, and why

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73. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38–47 (1997); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007).

74. See, e.g., RONALD DWORIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996).

75. See, e.g., BARBER & FLEMING, *supra* note 13, at xiii–xiv, 155–70.

it violated the commitment to neutral principles.<sup>76</sup> In fact, far from being weak on principle, *Brown*'s strong suit is principle, its commitment to an anti-caste principle of equal citizenship. Strauss has put this very well in his lecture.<sup>77</sup> In any case, Barber and I have criticized a doctrinalist common law approach in our new book, *Constitutional Interpretation: The Basic Questions*.<sup>78</sup> We have shown that it cannot avoid the moral and philosophic choices that it aims and claims to avoid.

Also, needless to say, a theory of common law constitutional interpretation that incorporates the moral reading of the Constitution could justify *Brown*; it would say that the anti-caste principle of equal citizenship manifested in *Brown* is the best interpretation of the Equal Protection Clause, and that *Plessy*'s view that "separate but equal" does not deny equal protection is mistaken.<sup>79</sup>

Now, Strauss presumably would say that a "rational traditionalist" theory of common law constitutional interpretation like his own<sup>80</sup> also can criticize *Plessy* and justify *Brown*, but it is a little harder to articulate why. He certainly allows moral insights and judgments into common law constitutional interpretation,<sup>81</sup> but it is less clear how he can do so (and how he does so) than it is, say, with Dworkin's moral reading or Barber's and my philosophic approach. And so, we should ask whether a moral reading is really doing the work here in criticizing *Plessy* and justifying *Brown*, not a version of common law constitutional interpretation that is an alternative to the moral reading. I propose this as a friendly amendment to Strauss's theory of common law constitutional interpretation.

## CONCLUSION

I want to thank David Strauss for his wise and profound remarks about *Cooper* and the legacy of *Brown*, in particular about how conservatives are radically recasting the meaning and legacy of *Brown*. We must step up our efforts in this vein, lest the conservatives of the Roberts Court ironically rewrite *Brown* as resurrecting *Plessy*! That would be both a travesty and a tragedy.

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76. Wechsler, *supra* note 53, at 27, 34.

77. Strauss, *Little Rock*, *supra* note 3, at 8–9.

78. BARBER & FLEMING, *supra* note 13, at 135–40.

79. See RONALD DWORKIN, *LAW'S EMPIRE* 379–92 (1986).

80. See Strauss, *Common Law*, *supra* note 7, at 891.

81. *Id.* at 894–97.