Reading Charles Black Writing: "The Lawfulness of the Segregation Decisions" Revisited

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FOREWORD

READING CHARLES BLACK WRITING:
"THE LAWFULNESS OF THE SEGREGATION
DECISIONS" REVISITED

Kendall Thomas*

The year 2010 marked the fiftieth anniversary of the
publication of Charles L. Black, Jr.'s "The Lawfulness of the
Segregation Decisions." Professor Black's magisterial essay on the
Supreme Court's 1954-1955 decisions in Brown v. Board of Education
and its companion cases is, by any account, a foundational text in the
scholarly literature on race and law in the United States. Black's
short but searing defense of Brown introduced ideas and arguments
about race, about law, and about the law of race that transformed
the field. I can think of no better way to celebrate this inaugural
issue of the Columbia Journal of Race and Law than to revisit "The
Lawfulness of the Segregation Decisions," and to highlight the
continuing significance, a half century later, of Charles Black's
intellectual preoccupations and practice for the project to which the
Editors of this Journal have devoted its pages: the critical study of
race and law.

I first encountered "The Lawfulness of the Segregation
Decisions" in the spring of 1980, as one of a small group of Yale
Law students who had the good fortune to study with Charles Black

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1 Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69
YALE. L.J. 421 (1960) [hereinafter Black, Lawfulness of the Segregation Decisions].
The year 2010 is the thirtieth anniversary of another transformative moment in
the history of American race law scholarship: the publication of Derrick Bell's

in his seminar “Constitutional Law Revisited.” Among the assigned texts that semester was the manuscript, in galley proof, of Professor Black’s 1979 Holmes Lectures, which would appear in 1981 under the title Decision According to Law. I can still recall vividly a passage in the manuscript that, as I read it, seemed almost to leap from its page:

Language is the linseed oil of law. We have to use linseed oil in painting; when exposed to air it hardens to a nearly transparent substance that holds in place for centuries the very molecules of pigment that were in the mess smeared on. But it yellows, it cracks, and it peels rather badly, sometimes, however careful you are, and quite badly, much of the time, if you are not careful. In one way or another law not only uses language, but may be said only to exist in language; the dangers of language are dangers to law.3

“Law . . . may be said only to exist in language.” From one perspective, these words stand as a summary statement of one of the most salient thematic strands in Charles Black’s incomparable scholarly corpus. This is not to suggest that the author of Structure and Relationship in Constitutional Law was a “textualist,” at least not in the sense lawyers have typically tended to understand that concept.4 I mean, rather, to make two broader, different points. The first point is that Black’s abiding interest in the concurrent jurisdiction of language and law, in the imbrication and interdependence of law and language, was driven by his intuition that no deep insight into the epistemic, ontological or normative dimensions of legal thought and practice is possible without attending to the question of law’s literariness. To adapt a claim Richard Rorty famously made about the practice of philosophy, Charles Black invites his readers to consider, or, more precisely, to consider as they experience, the ways in which

3 CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW 22 (1981) [hereinafter BLACK, DECISION ACCORDING TO LAW].

4 I do not mean to imply that Black’s analysis of constitutional structure and relationship was indifferent to claims of the text. Black denied that the structural method entailed “the total abandonment of the method of particular-text interpretation.” Rather, Black posited “a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inferences drawn from them must surely be controlled by the text.” CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 31 (1969) [hereinafter BLACK, STRUCTURE AND RELATIONSHIP].
law and legal thinking represent a kind of writing.\textsuperscript{5} Even when it is not explicitly theorized, the question of how and why language matters in, and for, law is a recurring concern in Black's work. Consider, for example, in this connection, the textual strategy of Structure and Relationship, in which Black provocatively deploys the literary image and idea of "juristic style" as a substitute for more conventional "technicist" terminology such as "legal reasoning," "analysis," "argument" or "method" and so on.\textsuperscript{6}

A second, related point is that Professor Black's alertness to the discursive dimensions of law shaped not only how he thought about law, but the terms and techniques he used to write about it. "The Lawfulness of the Segregation Decisions" is an exemplary, and enviable, instance of Black's mastery of the elements of scholarly style. The persuasive power of his defense of Brown and its companion cases derives not only from its legal reasoning, but from its rhetorical register, or, to use another of his preferred terms, from the "modes"\textsuperscript{7} of language use through which that reasoning is articulated and advanced.

This can be seen, for example, in the modal mastery with which Black frames his response to the contention that the regime of state-mandated racial segregation is not necessarily hostile to the equality norm of the Fourteenth Amendment. Black asks:

\begin{quote}
[Does segregation offend against equality? Equality, like all general concepts, has marginal areas where philosophic difficulties are encountered. But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our

\end{quote}


\textsuperscript{6} See, e.g., BLACK, STRUCTURE AND RELATIONSHIP, supra note 4, at 3 (describing structural and relational analysis as a "stylistic preference"); \textit{id.} at 10 (characterizing the particular-text method as the standard "American juristic style"); \textit{id.} at 11 (specifying the "stylistic, or if you like, methodological difference" between textual and structural legal arguments).

\textsuperscript{7} BLACK, DECISION ACCORDING TO LAW, supra note 3, at 17, 23, 31, 41, 73.
laughter under control) is whether the segregation system answers to this description.\(^8\)

To state the claim another way, the force of the argument in "The Lawfulness of the Segregation Decisions" inheres not only in the substance of the ideas it advances, but in the tone and texture of its individual sentences. The essay thus inhabits a genre of legal writing that strains against the limits of the conventional boundaries between prose and poetry, between literal and figurative uses of language, between analytic and literary discourse.

It would be a mistake, though, to see Black's project in narrowly or conventionally aesthetic terms. His interest in styles of legal argument and analysis was most certainly not a matter of mere ornamentalism. Rather, Black's vision of the "art"\(^9\) of law derives from a recognition that "aesthetic choices" have significant and pragmatic effect in the real world of legal practice.\(^10\) His work demonstrates that a legal scholar's aesthetic choices are often also ethical choices. The style of the "Lawfulness" essay strives to "create a textuality and distinctive discourse [whose] material force"\(^11\) reflects the author's deep ethical commitment to a certain way of thinking as a legal intellectual about the African American freedom movement as a problem in and for our constitutional jurisprudence.

As is well known, "The Lawfulness of the Segregation Decisions" was, as Black put it, a partial response\(^12\) to the critical appraisal of Brown offered by our late Columbia Law School colleague Herbert Wechsler. In "Toward Neutral Principles of Constitutional Law,"\(^13\) published the year before "The Lawfulness of the Segregation Decisions," Professor Wechsler advanced a vision of judicial review and its justification that would come to define the agenda of U.S. constitutional scholarship for decades to come. As Derrick A. Bell, Jr. has written, Wechsler's demonstrated professional commitment to the cause of Black civil rights and his stated support for the result reached by the Court made it difficult

\(^8\) Black, Lawfulness of Segregation Decisions, supra note 1, at 424.
\(^9\) Id. at 429.
\(^10\) Id. at 428.
\(^12\) Black, Lawfulness of Segregation Decisions, supra note 1, at 421 n.3.
to dismiss his “sharp and nagging criticism” of Brown as an instance of “after the fact faultfinding by a conservative academician.”

For Wechsler, “the main constituent of the judicial process” was “that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.” A judge may be said to have given a neutral reason, in Wechsler’s sense, if that judge “states a basis for a decision that |she or he| would be willing to follow in other situations to which it applies.” Conceptually speaking, the neutrality of the decisional rule is a function of its generality, or, if you will, of its transitivity. In its moral dimension, the principle of neutrality amounts to a kind of “indifference principle”: A judicial decision is legitimate from Wechsler’s perspective only to the extent that the rule of law it announces and applies in no way turns on the identity and interests of the particular parties before the court.

Wechsler contended that the Supreme Court’s decision in Brown and its companion cases simply failed to pass the test of neutral principles. According to Wechsler, the “problem” with the reasoning in Brown inhered in the Court’s evident view that “racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved.” As Wechsler saw it, this proposition could not be considered a “neutral principle” of constitutional law. First, the Court’s conclusion appeared to “involve an inquiry into the motive of the legislature, which is generally foreclosed to the courts.” Second, and more fundamentally, the Court seemed to have adopted the interpretation given to the racial segregation law at issue in Brown by the African

14 Bell, supra note 1, at 520.
15 Weschler, supra note 13, at 15.
17 See Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 805 (arguing that Wechsler’s theory “characterizes neutrality as judicial indifference to who the winner is”).
18 Wechsler, supra note 13, at 12-14.
19 Id. at 15.
20 Id.
Americans "who [were] affected by it."\textsuperscript{21} In this connection, Wechsler asked rhetorically: "In the context of a charge that segregation with equal facilities is a denial of equality, is there not a point in \textit{Plessy} in the statement that if 'enforced separation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to put that construction upon it'?"\textsuperscript{22}

Wechsler maintained that the "human and constitutional dimensions"\textsuperscript{23} of state-enforced racial segregation had nothing to do with the concept of discrimination, which he rather narrowly defined as formally unequal treatment. Rather, at stake in \textit{Brown} were two competing claims about the freedom of association, whose denial (or recognition) by the state "impinges in the same way on any groups or races that may be involved."\textsuperscript{24} Seen in these terms, suggested Wechsler, there was no neutral, principled justification (or at least none he could see) for the Court’s decision in \textit{Brown} to disturb the decision by some states and their legislatures not to force "an association [in public schools] upon those for whom it is unpleasant or repugnant."\textsuperscript{25}

The heart of Professor Wechsler’s negative appraisal of \textit{Brown} is his expressed doubt that the judgment in \textit{Brown} "really turned upon the facts."\textsuperscript{26} Paradoxically, Wechsler’s skepticism about the "factual" foundations of the Court’s decision in \textit{Brown} itself rests on a set of equally contestable assumptions about the lived experience of racial segregation. The philosopher Charles Mills has noted that in the scholarly discourse on race and racism (as in other fields of intellectual inquiry), "factual questions" in the form of "low-level empirical assertions" or more "abstract theoretical claims" nearly always play some role in "normative disputes."\textsuperscript{27} The precise nature of these empirical and theoretical assumptions, and the degree to which they are explicitly identified and defended as such depends in significant part on the "thought style," if you will, of the scholar in question. By "thought style" I mean to refer to the "complex milieu" of a thinker’s expert or "esoteric" knowledge and

\begin{flushleft}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} (quoting \textit{Plessy v. Ferguson}, 163 U.S. 537, 551 (1896)).
\textsuperscript{23} \textit{Id.} at 34.
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.} at 33.
\textsuperscript{27} Charles W. Mills, \textit{The Racial Polity}, in \textit{RACISM AND PHILOSOPHY} 13, 17 (Susan E. Babbitt & Sue Campbell eds., 1999).
\end{flushleft}
the common or “exoteric” knowledge to which she or he has access by virtue of belonging to the society in which she or he lives.28

An alternative conceptual term for conveying the determinate force of scholarly “thought styles” is literary scholar Raymond Williams’ notion of “structures of feeling.”29 Williams invokes the terms “structure of feeling” and “structures of experience” to denote what, on his account, is a central component of intellectual work. For Williams, “structures of feeling” or “structures of experience” refer not only to formalizable or “formally held and systematic beliefs,” but to the broader constellation of human ideas and imaginings as they are “actively lived and felt.”30 In Williams’ words, “we are talking about characteristic elements of impulse, restraint and tone; specifically affective elements of consciousness and relationships: not feeling against thought, but thought as felt and feeling.”31 The crucial point here is that these elements of “thought as felt and feeling” are not incidental to, but immanent in intellectual practice. They are both the source and site of an unarticulated or even inarticulable “social imaginary,”32 made up of the intuitions and tacit understandings that give focus and form to intellectual work. “Thought styles” or “structures of feeling” frame the boundaries of the questions scholars choose to ask, and fix the boundaries of the answers they find.

One element of Wechsler’s “thought style” in “Neutral Principles” is rendered most vividly toward the end of the discussion of the Court’s recent race jurisprudence. Describing what he takes to be the essential error of the Supreme Court’s decision in Brown, Wechsler writes:

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of the freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.33

30 Id.
31 Id. (emphasis added).
33 Wechsler, supra note 13, at 34 (emphasis added).
Note the explicit assumption here, as though it were a "material" fact, that the state-mandated segregation challenged in Brown had to do with "equal facilities." I shall have more to say shortly about the nature and implications of the posited factual foundation on which Wechsler erects his normative case against Brown.

I want to focus for the moment on another factual premise that drives the thesis Wechsler is arguing here, which is never stated explicitly. This more abstract, non-empirical "theoretical" fact, whose implicit assumption is central to Wechsler's critical reformulation of the issue in Brown, has to do with the "cultural geography" of segregation.

Let me explain what I mean. As we have seen, "Toward Neutral Principles" argues that Brown is best understood as a case about conflicting assertions of associational rights. What Wechsler's analysis never makes entirely clear, however, is why the public character of public school education could not provide a principled basis for a constitutional conclusion that the right to associate and the right not to associate need not always and in every instance be considered "human claims" of equally "high dimension." The point I am stressing here—a point that Wechsler's associational rights theory entirely overlooks—is that this critique of Brown makes sense only from the perspective of a cultural geography in which the public and private spheres are not merely connected and continuous, but in some important if unspecified sense, indistinguishable.

Now, the public-private distinction is a conceptual couplet that would have made any mid-twentieth century constitutional law scholar's shortlist of "foundational ideas in American legal thought." Wechsler's silence about its implications for Brown and the other school segregation cases is curious, to say the least. This failure to reckon with the public-private distinction is particularly telling given Wechsler's explicit and extended engagement with issues of privacy, publicity and neutrality in his hard-hitting critical

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34 Id.
assessment of the Court’s decisions in the “white primary” and racially restrictive covenant cases—a discussion which appears in the very same section of “Neutral Principles” that concludes with the famous critique of Brown.

Wechsler ends his overview of the Court’s decisions in the “white primary” and restrictive covenant cases by conceding the existence of private “power aggregates in our society” which “[wield] in many areas more power than the government” (his example is the large business corporation). He nevertheless rejects the argument that this modern understanding of the public dimensions and consequences of private power justifies judicial imposition of constitutional norms on non-state actors such as political parties (as the Supreme Court did by invalidating “white primaries”) or parties to residential real estate transactions (as the Court did in striking down racially restrictive covenants).

For Wechsler, such questions as whether and when the Constitution should consider private, civic power in the same light as public, state power were not questions of law but questions of policy that entailed the identification and choice of “values,” a term that takes on outsized importance in his analysis. The judge who reached a decision based on “value judgments” about such matters of policy would be “drawing lines that courts are not equipped to draw.” The power of judicial review could remain legitimate only so long as the judges who held it respected the difference between the “exercise of reason” and mere “acts of willfulness or will.” A court that took upon itself the essentially legislative or executive task of choosing among “competing values or desires” was not acting as a “court of law,” but as a “naked power organ.”

The Brown decision’s “appraisal of conflicting values” could not be deemed truly “judicial” because the Court was insufficiently indifferent to the interests and identities of the parties before it:

I find it hard to think the judgment [in Brown] really turned upon the facts. Rather, it seems to me, it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against

36 Wechsler, supra note 13, at 26-35 & nn.83-120.
37 Id. at 31.
38 Id.
39 Id. at 11.
40 Id.
41 Id. at 12, 19.
42 Id. at 16.
whom it is directed; that is, the group that is not
dominant politically and, therefore, does not make the
choice involved.\textsuperscript{43}

For Wechsler, more than anything else, this perceived lack of
obedience to the requirements of the "indifference principle"
explained the \textit{Brown} Court's failure to justify its decision in terms
that rose to the level of a "result transcendent" principle that he and
other proponents of process theory took to be the hallmark of the
legal reasoning, and indeed, of the rule of law \textit{as such.}\textsuperscript{44}

In a sense, the assumptive axis on which Wechsler's
associational rights theory of the \textit{Brown} decision turns is not the
"assuming" of segregated but equal facilities, but the "assuming
away" of the differences between public and private social space,
and between public and private cultural institutions and practices.
As a consequence, "Neutral Principles" neither asks nor addresses
the question of whether a "genuinely principled" constitutional
distinction \textit{can} in fact be drawn between associational claims in the
intimate domain of \textit{private} life, on one side, and averred rights of
association in the impersonal arenas of \textit{public} life, on the other.
Wechsler's unacknowledged and unremarked elision of privacy and
publicity simply takes the public-private distinction off the table,
preempting its potential use as a critical resource for meeting the
"challenge"\textsuperscript{45} of writing an opinion that could survive the
associational rights critique of \textit{Brown} and the other school
segregation decisions.

In stark contrast to Wechsler, Charles Black makes it clear
from the outset that he takes the pertinence of the public-private
distinction to be basic and axiomatic for understanding the issues in
\textit{Brown}. "The Lawfulness of the Segregation Decisions" draws on the
distinction to open up what Wechsler's analysis preemptively shuts
down. Black's account of what was at stake in \textit{Brown} never loses
sight of the differences between privacy and publicity, in both their
descriptive and normative dimensions. Leaning heavily on the
public side of the public-private distinction, Black helps us
understand the full implications of Wechsler's allegation that no
"neutral" constitutional justification exists for holding that the \textit{Brown}
plaintiffs' claims for association should prevail over the defendants'
claims against association. For Black, Wechsler's associational theory of the case is in effect an argument that no constitutionally compelling case can be made for preferring "the Negroes' desire for merged participation in public life to the white man's desire to live a public life without Negroes in proximity."46 As Black sees it, a white American who asserts that she or he has a right not to associate with Black Americans is claiming a freedom that can be said to exist only in the privacy of that white American's home: "[I]n public, we have to associate with anybody who has a right to be there. The question of our right not to associate with him is concluded when we decide whether he has a right to be there."47

What accounts for the radical difference in premise and perspective between the accounts that Herbert Wechsler and Charles Black give of Brown? I would like to sketch briefly one possible answer, which connects the question of the public-private distinction to the earlier mentioned notion of intellectual "thought styles."48 I have in mind here the different ways Wechsler and Black "imagine" the world of segregation, and how these different ways of imagining segregation find expression in the language each scholar uses to write about segregation law.49

The reader of "Toward Neutral Principles of Constitutional Law" cannot help but note the mastery with which Wechsler mobilizes the terms of "analytic" legal discourse, his complete command of the rhetorical language of "postulates," "deduction," "principle," "judgment" and, above all, of "reason," "reasons," "styles of reasoning" and "reasoned exposition."50 Not surprisingly, these same rhetorical figures organize the argument in "The

46 Black, Lawfulness of Segregation Decisions, supra note 1, at 428 (emphasis added).
47 Id. at 429.
48 See supra note 28 and accompanying text.
49 In contrasting the discursive styles of Charles Black and Herbert Wechsler, I do not wish to be understood as suggesting that the language of "Toward Neutral Principles of Constitutional Law" is not rhetorical (whatever that might possibly mean). The distinction I am making here has to do with the different rhetorical strategies of the two writers. In broad terms, we might say that Black's defense of Brown proceeds through a "rhetoric of meaning" and Wechsler's critique of Brown through a "rhetoric of persuasion." A thoughtful rhetorical account of the text of "Neutral Principles" can be found in Jane B. Baron and Julia Epstein, Is Law Narrative?, 45 BUFF. L. REV. 141, 151-58 (1997).
50 See, e.g., Wechsler, supra note 13, at 19 ("A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.").
Lawfulness of the Segregation Decisions.” On the very first page of the essay, Black describes the “simple syllogism” which, for him, forms the “basic scheme of reasoning” that justifies the decisions in Brown and its companion cases:

First, the equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. Secondly, segregation is a massive intentional disadvantaging of the Negro race, as such, by state law.51

As a rhetorical matter, this “conceptual” or “propositional” line of argument tracks the terms in which Wechsler presents the “neutral principles” thesis to which Black is responding.

However, this “analytic” discourse is accompanied and eventually eclipsed by another, very different rhetorical strategy, which emphasizes ideas and images that have to do with the meaning of segregation, and of segregation law. Black early on characterizes the claim that Brown and its companion cases were wrongly decided as a “call for action” which carries pragmatic “meaning” and “significance.”52 Elsewhere, Black stresses the extent to which his understanding of the constitutional issues raised in Brown derives not so much from abstract “reasoning” as from a situated “reading” (the term is Black’s own) of the “social meaning of segregation,”53 of “what segregation means to the people who impose it and to the people who are subjected to it.”54

In another part of the essay, Black argues that a fair constitutional assessment of the laws challenged in Brown must consider the “total social meaning and impact”55 of the larger “functioning complex”56 of “indisputably and grossly discriminatory [practices]”57 to which those individual laws belong. Finally, in the essay’s most direct engagement with the “neutral principles” idea, Black insists that “it would be the most unneutral of principles” to require a court grappling with the legal issues presented in Brown to ignore a “plain fact” about American society in the middle of the twentieth century: namely, “the fact that the social meaning of

51 Black, Lawfulness of Segregation Decisions, supra note 1, at 421.
52 Id.
53 Id. at 424.
54 Id. at 426 (emphasis added).
55 Id. (emphasis added).
56 Id. at 425.
57 Id.
segregation is the putting of the Negro in a position of walled-off inferiority—or the other equally plain fact that such treatment is hurtful to human beings." 58

Black’s preoccupation with the cultural meaning of racial segregation presses focus on the semiotic dimension of that human social practice. Moreover, in stressing the value and validity of attending to the meaning of segregation, Black can be read as making a similar, but distinct point about the semiotics of segregation law. Black intimates that the “active labor of making [race] mean” 59 was a unique feature of the legal apparatus Southern states devised to enforce Jim Crow’s disciplinary regime, above and beyond its purely instrumental uses. Although he demonstrates the point more than he explicitly argues it, Black suggests that this “signifying” dimension of the rules of segregation law—what I have been calling that law’s semiotic function—must be deemed constitutionally significant precisely in virtue of its power to “create social meaning and thus shape social worlds.” 60

In emphasizing the cultural or social meanings of segregation and segregation law, Black cuts the theoretical ground out from under one of Wechsler’s chief objections to Brown. Gary Peller has noted that for Wechsler, the central defect of the Brown opinion lay in the Court’s willingness to accept the “subjective interpretation” of segregation law as it appeared from the vantage point of the African Americans who “chose” to view it as racial discrimination. 61 A “neutral” and “principled” analysis of the law challenged in Brown “would make the constitutional determination turn on the objective character of the legislation itself.” 62

Black’s emphasis on the social meaning of segregation provides a critical compass for navigating between the twin poles of “subjectivity” and “objectivity” that anchor Wechsler’s perspective. Black displaces the terms of the argument “Neutral Principles” presses against Brown, practicing what might be called an intersubjective

58 Id. at 427 (emphasis added).
59 I am claiming here with respect to the language of racial segregation law what Stuart Hall has suggested is true of all linguistic representation. Stuart Hall, The Rediscovery of “Ideology”: Return of the Repressed in Media Studies, in CULTURE, SOCIETY AND THE MEDIA 64 (M. Gurevitch et al. eds., 1982).
62 Id.
interpretive theory of segregation and segregation law. On the one hand, Black’s “reading” of the “social meaning of segregation” does not hesitate to refer to the “individual text” of his own personal experience of segregation growing up in Austin, Texas. However, Black’s account of what and how segregation signifies does not limit itself to the “subjectively obvious.” He draws as well on the intersubjective “social text” provided by the “public materials” of history, common culture, linguistic convention, social custom, and the legal system itself.

“Segregation in the South,” Black reminds us, is a regime that “comes down in apostolic succession from slavery and the Dred Scott case.” The movement for segregation,” he writes, “was an integral part of the movement to maintain and further ‘white supremacy’” The mutuality of segregation is a myth: “[Segregation] was imposed on one race by the other race; consent was not invited or required.” The asymmetrical racial power and desire that gave birth to Jim Crow are what continue to nourish it: “Segregation in the South grew up and is kept going because and only because the white race has wanted it that way—an incontrovertible fact which in itself hardly consorts with equality.”

“When you are in Leeville and hear someone say ‘Leeville High,’ you know he has reference to the white high school; the Negro school will be called something else—Carver High, perhaps, or Lincoln High to our shame.”

Importantly, Black references the active and ongoing role law has played in creating and sustaining the public, social meanings of segregation:

Southern courts . . . have held that the placing of a white person in a Negro railroad car is an actionable humiliation . . . . It is actionable defamation in the South

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63 In this regard, Black’s approach anticipates (by nearly thirty years) the “cultural meaning test” Charles Lawrence III has developed for addressing the problem of “unconscious” racism. Charles Lawrence III, The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987).

64 Black, Lawfulness of Segregation Decisions, supra note 1, at 424.

65 Id.

66 Id.

67 Id. (citing Dred Scott v. Sandford, 60 U.S. 393 (1857)).

68 Id. at 424-25.

69 Id. at 425.

70 Id.

71 Id.
to call a white man a Negro. A small proportion of Negro “blood” puts one in the inferior race for segregation purposes; this is the way in which one deals with a taint, such as a carcinogene in cranberries.\textsuperscript{72}

The great strength of Black’s theory of cultural meaning resides in its resolute refusal to consign the subjective side of social relations to the margins of legal discourse. Evidence of the way segregation law “is interpreted by those who are affected by it”\textsuperscript{73} (in Wechsler’s formulation) is not presumptively or prematurely foreclosed as a ground for judicial decision, but is tested and confirmed—in Black’s terms “backed up”—by putting those subjective interpretations in conversation with the shared, intersubjective meanings conveyed by “more public materials.”\textsuperscript{74}

If the “cultural meaning” of segregation forms the first conceptual fulcrum on which “The Lawfulness of the Segregation Decisions” pivots its defense of \textit{Brown}, the “material culture” of segregation forms the second. By “material culture,” I mean simply to refer to the \textit{life-world} or the everyday life of racial segregation.

In my view, the significance of Black’s interest in the “material culture” of Jim Crow is perhaps best appreciated by connecting it to his distinct \textit{disinterest} in what he rather dismissively describes as the “metaphysical” question of whether segregation must always and everywhere amount to discrimination. He writes:

That is an interesting question; someday the methods of sociology may be adequate to answering it. But it is not our question. Our question is whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.\textsuperscript{75}

For Black, questions about the discriminatory meaning, purpose and effects of segregation law can be answered only by reference to concrete, specific and material facts, whose content or character must not be assumed, but established.

\textsuperscript{72} \textit{Id.} at 427, 426.
\textsuperscript{73} Wechsler, \textit{supra} note 13, at 33.
\textsuperscript{74} Black, \textit{Lawfulness of Segregation Decisions, supra} note 1, at 424.
\textsuperscript{75} \textit{Id.} at 427.
One of the things that made "The Lawfulness of the Segregation Decisions" such an event in the history of public law scholarship is the force and the forcefulness with which Black attacks the central factual premise on which Wechsler and others had based their critiques of *Brown*. This, of course, was the contention (a contention, it must be noted, which found support in the language of the *Brown* Court's opinion) that the South's legally segregated public facilities were, or, more precisely, were being made, equal as a matter of fact.

The middle section of "The Lawfulness of the Segregation Decisions" painstakingly demonstrates why the assumed material equality of racial segregation is a "fiction" that "is just about on a level with the fiction of 'finding' in the action of trover."\(^{76}\) Black utterly and unapologetically demolishes the notion that a useful answer to the question of what segregation and segregation law mean can be derived from a fictional facticity that assumes away the realities of "a system which, in all that can be measured, has practiced the grossest inequality."\(^{77}\)

Several points might be made about the discursive strategy Black follows in describing the inequalities that pervade what I have been calling the "material culture" of the "segregation system" as it "is actually conceived" and as it "actually function[s]."\(^{78}\) I will confine myself to a single observation. At one point, Black quickly catalogs the many inequities that typically go unnoticed and unmentioned in discussions of the *Plessy* decision's doctrine of "separate but equal":

"Separate but equal" facilities are almost never really equal. Sometimes this concerns small things—if the "white" men's room has mixing hot and cold taps, the "colored" men's room will likely have separate taps; it is always the back of the bus for the Negroes; "Lincoln Beach" will rarely if ever be as good as the regular beach. Sometimes it concerns the most vital matters—through the whole history of segregation, colored schools have been so disgracefully inferior to white schools that only ignorance can excuse those who have remained acquiescent members of a community that

\(^{76}\) *Id.* at 424.

\(^{77}\) *Id.* at 426.

\(^{78}\) *Id.* at 430.
lived the Molochian child-destroying lie that put them forward as “equal.”

Black’s granular description of the everyday inequalities that characterize the material culture of segregation offers the prose equivalent of pointillist perspective. However, he takes care to insist that these inequalities not be focused on “as things in themselves,” but as the mise-en-scène for a kind of regional social theater. The material culture of segregation sets the stage for a command performance in which blacks are forced to act out the “unwritten law” of the South’s racial regime “as to job opportunities, social intercourse, patterns of housing, going to the back door, being called by the first name, saying ‘Sir,’ and all the rest of the whole sorry business.”

The image of the material culture of Southern segregation that Black gives us here (and this is the point I want to stress) is an image of a public that utterly escapes the optic of Wechsler’s account of Brown. Black’s insistence on the public character and meaning of racial segregation is interwoven with his equally emphatic insistence that segregation is not a set of discrete and disconnected practices but a “system.” The picture of the public, material culture of segregation and segregation law depicted in “The Lawfulness of the Segregation Decisions” illuminates aspects of the lifeworld of the South that the essentially “privative” perspective of “Neutral Principles” hides from view.

Consider in this regard the critical light Black’s account of the public culture of segregation law sheds on the image of segregation that informs an argument Wechsler makes in the final paragraphs of “Neutral Principles.” This is the claim that a state’s denial of the freedom to associate is a “denial that impinges in the same way on any groups or races that may be involved.” To support his argument, Wechsler anecdotally recounts his own personal experience of segregation. Wechsler famously recalls that “[i]n the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during recess.”

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79 Id. at 425-26.
80 Id. at 426.
81 Id. at 425.
82 Id. at 426, 427, 430.
83 Wechsler, supra note 13, at 34 (emphasis added).
84 Id.
Wechsler clearly has not taken the full measure of the distance that separated his “knowledge” and his “suffering” from that of Charles Hamilton Houston, the celebrated African American lawyer. Wechsler seems oblivious to the different positions he and Houston occupied in the larger landscape of racial segregation. The two men were in important respects “dissimilarly situated,” and thus could not in fact have been affected “in the same way” by their shared experience of segregation’s material culture. Wechsler’s “thought style” lacks the resources for “imagining” the racial specificity, the singularity of Houston’s “subjective” experience as a “subject” of racial segregation, that is, as someone who (to quote Black) was “subjected to it.”

He accordingly fails to make (or consider the meaning of) the connections between his recollected experience of two individuals of different “races” who were denied the right to break bread in public and the experience of “a whole race of people” who are denied the right to participate fully and equally “in the general public life of the community.”

One reason Charles Black finds it so “hard to make out what is being protested against when it is asked, rhetorically, how the Court can possibly advise itself of the real character of the segregation system” is because of the way he imagines race and racism in U.S. law and society. His imagination enlarges his critical perspective, leading him to language that illuminates the nested or mutually constitutive relationship between politics and society, between civil and civic life, between public culture and public freedom.

Here we have two things. First, a certain group of people is “segregated.” Secondly, at about the same time, the very same group of people, down to the last man and woman, is barred, or sought to be barred, from the common political life of the community—from all political power.

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85 Black, Lawfulness of Segregation Decisions, supra note 1, at 426 (emphasis added). It is this moment in “Neutral Principles” which, more than any other, persuades me that Gary Peller is exactly right when he argues that legal process theory, of which Wechsler was such a prominent proponent, is most “accurately understood as the cultural ideology through which mainstream, predominantly white, male, and economically secure American intellectuals in the post-War period filtered their perception of their social environment.” Peller, supra note 61, at 621.
86 Black, Lawfulness of Segregation Decisions, supra note 1, at 424.
87 Id. at 426 (emphasis added).
88 Id. at 427.
89 Id. at 425 (emphasis added).
The predominant idea-image here is one of state-enforced racial segregation as a “functioning complex” that is a condominium of cultural power and political power, of cultural power as political power, of “one in-group enjoying full normal communal life” and a second “out-group that is barred from this life and forced into an inferior life of its own.” Black’s crucial move is to connect the public culture of state-mandated segregation to the political culture of American constitutional democracy.

The thought train that propels Black’s analysis in “Lawfulness” starts from the idea that “the chief and all-dominating purpose” of the Fourteenth Amendment’s Equal Protection Clause “was to ensure equal protection for the Negro.” Black is willing to concede that those who wrote and ratified the Fourteenth Amendment may have intended the “equal protection” concept to “go forth into wider fields than the racial.” What he refuses to concede, not least “because history puts it entirely out of doubt” is that “[all] possible arguments, however convincing, for discriminating against the Negro, were finally rejected by the fourteenth amendment.”

The combination of this historical train of thought with the argument that segregation’s purpose is not merely to “discriminate” against African Americans but to keep them “in an inferior station” yields an important normative insight into the notion of “equal protection.” The idea in question emerges toward the end of the essay. Discussing Wechsler’s contention that *Brown* was a case about freedom of association, Black writes:

The fourteenth amendment forbids inequality, forbids the disadvantaging of the Negro race by law. It was surely anticipated that the following of this directive would entail some disagreeableness for some white southerners. The disagreeableness might take many forms; the white man, for example, might dislike having a Negro neighbor in the exercise of the latter’s equal right to own a home, or dislike serving on a jury with a Negro, or dislike having Negroes on the streets with him after ten o’clock. When the directive of equality cannot be followed without displeasing the white, then something that can be called a “freedom” of the white
must be impaired. If the fourteenth amendment commands equality, and if segregation violates equality, then the status of the reciprocal “freedom” is automatically settled.95

Although Black is not entirely explicit on this score, as I read it, the normative gist of the argument here appears to be that the Fourteenth Amendment supports, and may even require courts to develop what one might term a “preferential” racial equality jurisprudence. In this vision of the equal protection idea, a judge deciding a dispute involving competing claims of associational freedom would start from the premise that the Fourteenth Amendment’s equality norm does not command “neutrality” in Wechsler’s sense. To the contrary, the equal protection idea embodies a distinct “preference” in favor of “black” freedom—it takes sides.

Obviously, this is a potentially paradigm shifting approach to the law of the Fourteenth Amendment. If the Equal Protection Clause represents a constitutional taking of sides in favor of African Americans, an interpretive interest in the question of what segregation and segregation law look like from the vantage point of “the minority against whom it is directed” (as Wechsler put it) would not be vulnerable to attack for recognizing the differences in identity and interests between “a Negro” and “a segregationist.”96 The normative foundations of the equal protection principle itself would provide a principled warrant for a judge to conclude that the Constitution “prefers” (in Black’s textual image) “the Negroes’ desire for merged participation in public life to the white man’s desire to live a public life without Negroes in proximity.”97

I have been suggesting that one can read Black’s account of how he would address the constitutionality of state-mandated racial segregation under an associational interests theory as presenting important elements of a case against the very idea of “neutral principles.” However, I want to be clear about the precise claim I am not making. The reading being pursued here is a reading based on the “textual arguments” advanced in Black’s writing, which do not always converge with, and indeed at significant points in the essay, conflict with its “propositional” arguments, as well as with other “textual” arguments.

95 Id. at 429 (footnote omitted).
96 Wechsler, supra note 13, at 12.
97 Black, Lawfulness of Segregation Decisions, supra note 1, at 428.
One such divergent moment occurs toward the end of the essay, in an argument that runs through and alongside the lineaments of Black's "preferential" theory of the equal protection principle. What particularly interests me here is the way in which the terms of its textual argument are not completely consonant with the rest of essay's full-throated defense of the "lawfulness" of the segregation decisions:

[It] would be the most unneutral of principles, improvised _ad hoc_, to require that a court faced with the present problem refuse to note a plain fact about the society of the United States—the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority—or the other equally plain fact that such treatment is hurtful to human beings. Southern courts, on the basis of just such a judgment, have held that the placing of a white person in a Negro railroad car is an actionable humiliation; must a court pretend not to know that the Negro's situation there is humiliating?98

These lines mark the moment in Black's text when he comes closest to contesting the hegemony of the "neutral principles" idea, and to confronting head on its pretensions to be the only "genuinely principled" normative baseline for arguing about the constitutional law of racial equality.

For all its forcefulness, however, the language here has a halting quality, as though it were hesitant to spell out the full consequences of its formulations. At least two ideas might be said to flow from Black's argument in this passage, neither of which gets stated explicitly. First, Black could have chosen to declare flat out that "neutral principles" theory was not neutral, but _normative_, substantive in ways that its fetishism of process tended to mask.99 Second, Black could have offered an open and unapologetic defense of an "anti-neutral principles" theory of the segregation decisions, along the lines I have just discussed. Instead, the essay retreats to a rhetorical language of irony, intimation, innuendo and indirection, beginning with the _oratio obliqua_, "It would be the most unneutral of principles," and ending with the "rhetorical question" or _erotema_, "Must a court pretend not to know?" The most striking feature of the _writing_ here is the way it strains to avoid openly stating

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98 _Id._ at 427.
the conclusion toward which its argument seemed to be heading. On the evidence of what I have been calling the essay's textual argument, it would seem that the normative "law" of "neutral principles"—its sheer taken-for-grantedness—retains a hold even on the powerful critical imagination of Charles Black.

My contention here is that the text of "The Lawfulness of the Segregation Decisions" fails fully or finally to break the discursive grip of the "neutral principles" idea. In Brown, the Supreme Court famously hesitated when given the opportunity to explicitly overrule Plessy v. Ferguson, saying only: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place." In a mimetic nod to the formulation of the Brown Court, Charles Black stops short of expressly rejecting the claims of "neutral principles," writing simply: "Elegantia juris and conceptual algebra have here no place." Given the relatively private context in which it was produced and consumed, written academic discourse of the kind practiced by intellectuals such as Charles Black was by its very nature an inadequate medium for doing the necessary cultural work to create a broad public constituency that could be mobilized behind a "preferential" vision of racial equality jurisprudence. Over the course of the decade that began with the publication of "The Lawfulness of the Segregation Decisions," the task of imagining and defending a black "liberation jurisprudence" (of which the Fourteenth Amendment equality norm was only one part) would be taken up by a black freedom movement whose central ambition was to achieve and exercise full democratic citizenship. In this movement, practices of public culture and practices of public freedom were intimately connected. Animated by a shared interest in the possible uses of law as a tool for social change, this movement imagined and enacted a vision of American constitutional democracy which could be considered a secular analog of a social justice theory whose most extended theoretical articulation during the decade took place among members of religious communities. This is the notion, Black was not alone in his inability to think his way past the intellectual dominance of the "neutral principles" idea. Writing a full twenty years later, Derrick Bell framed his celebrated "interest convergence thesis" as a descriptive account or "positivistic expression of the neutral statement of general applicability sought by Professor Wechsler." Bell, supra note 1, at 523. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

Black, supra note 1, at 429.
associated with Christian liberation theology, of a “preferential option for the oppressed.”

A crucial early event in the history of this movement of “enacted constitutional jurisprudence” took place just one month after the publication of “The Lawfulness of the Segregation Decisions.” On February 1, 1960, four young African American men, students at the predominantly black North Carolina Agricultural and Technical State College, walked into the Greensboro, North Carolina F.W. Woolworth and sat down at the store’s “Whites Only” lunch counter. Within weeks, the sit-in campaign launched by Ezell Blair, Jr., Franklin McCain, Joseph McNeil and David Richmond had galvanized the imagination of other college students, professors, social service professionals, primary and secondary school teachers, and clergy on both sides of the color line.

The sit-in movement, of course, was about much more than the right to order and enjoy a meal or a milkshake. Several points might be made about the sit-in movement and its contribution to the creation of an “enacted constitutional jurisprudence.” I shall briefly mention two that bear most directly on the instant discussion. First, and most obviously, the sit-in movement was a public movement because it took place in public. The “publicness” of the movement did not turn on the formal legal status of the F.W. Woolworth Company, which was, after all, a private business corporation. Nor did it depend on the character of the formal activity that took place within the venue—the buying and selling of goods and services by market actors. What made the lunch counter at Woolworth public was the way black sit-in participants and their allies turned it into a “social stage” on which to “publicize,” and in publicizing, to contest, unmarked, unexamined and unjust white skin privilege and power.

In this respect, the sit-in movement represented a marked departure from the boycotts of the 1950’s. The essential gesture of

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103 This formulation was made popular by the father of liberation theology, the Dominican priest and theologian Gustavo Gutiérrez. See GUSTAVO GUTIERREZ, A THEOLOGY OF LIBERATION: HISTORY, POLITICS, AND SALVATION (1973). The most influential effort to develop a liberation theology rooted in the experience of African Americans is the body of work produced by James H. Cone. See JAMES H. CONE, BLACK THEOLOGY AND BLACK POWER (1969); JAMES H. CONE, A BLACK THEOLOGY OF LIBERATION (1970).

the civil rights boycott was a “withdrawal” from public life. Consider, in this connection, the 1955-1956 Montgomery, Alabama bus boycott. The organized response of Montgomery’s black citizens to the indignities of segregated bus service was to stay off the buses, which they did for some 382 days, while creating an alternative, informal transportation network of privately-owned and operated vehicles. The organizers of the lunch counter sit-ins decided on a different, and in many ways more provocative, direct action campaign. Instead of boycotting the Greensboro Woolworth, they flooded the store, appearing most days in sufficient numbers to occupy every available seat at the lunch counter. Sit-in activists in Greensboro and the other towns and cities in which sit-ins were staged sought to end segregated food service by actively and publicly interrupting it, instead of privately and more passively boycotting it.

Most Southern whites undoubtedly viewed their right of access to public lunch counters and diners as a personal and pre-political right, with no connection to or consequences for public life or public freedom. Moreover, the majority of Southern whites probably took it for granted that, like all places of “public accommodation” in the segregated South, non-whites who were allowed to enter venues such as Woolworth did so on the terms and subject to the conditions that white people laid down. In short, African Americans in the South had no public life that was not subject to the actual or potential control of whites through the rules of segregation. This racial prerogative of white private power in and over public space not only straddled the boundaries between public and private; it ran beneath, before and beyond formally instituted politics and law. By “custom,” its terms and conditions could be changed at any time by white people as a group, or for that matter, by any individual white person.

White cultural dominion involved much more than the power to exclude; it extended even to the definitional power to determine which people, places or things were public or private and which were not. The nature and scope of this dominionative power is partly but not fully captured by Cheryl I. Harris’ rich and important notion of “whiteness as property.” The cultural prerogatives of whites within the system of state-enforced segregation went far beyond the

106 Id. at 1022.
rights of “racial exclusion.” The rights of white cultural dominion of course included the power to “make up people” by deciding who was white, who was black, and who was not; but they also included the broader prerogative to “make up” the world.

The four young students who entered Greensboro’s Woolworth store that first day in February 1960 were asserting the right of African Americans to be “public” men and women, to be “subjects” in the world of the cultural commons. As Marion A. Wright put it, the sit-ins “[sprang] from a firm resolve to exercise full rights as American citizens,” including the rights of cultural citizenship.

In introducing the idea of the “rights of cultural citizenship,” I mean to signal the ways in which the demand by black students and their white allies for desegregated lunch counter service was a demand for recognition of their right to a “democratic public culture.” The “right to participate in the cultural life of the community” is a necessary precondition for acquiring the “cultural capital” required for effective participation in the institutions and practices of formal democracy. By taking their protests inside the social space of the segregated public sphere, black sit-in activists and their allies actively contested the social meaning that identified white southerners with public culture, public presence and public personhood—at the point of its production. Furthermore, the public setting of their protests not only gave sit-in participants a stage on which to “enact” the denial of cultural citizenship under segregation; the publicness of the sit-ins also provided a platform on which movement activists could prefiguratively “perform” the democratic rights and duties that would be theirs in the multicultural democracy for which they were fighting.

A second observation to be made about the sit-in movement is that the participants in the movement not only acted in public, but acted as a public. The four young men who staged the

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108 Id. at 1737.
110 Wright, supra note 104, at 447.
113 Post, supra note 111, at 8-9.
first sit-in in Greensboro acted in concert. They were not, in Thomas Keenan's words, "a collection of private individuals experiencing their commonality." Like the thousands of other activists who eventually joined them, the North Carolina A&T students who staged that first sit-in acted after weeks and months of extended discussion as members of a national black public. They found individual motivation and meaning in a shared understanding of their exclusion as black citizens from the public life of the communities where they studied, and from which they came.

Central to this understanding was a shared intuition about the damage segregation imposed on democratic public culture in the United States. The sit-in activists knew that the public realm is a "realm . . . of others, of all that is other to—and in—the subject itself." The color line that separated black and white public cultures denied all American citizens the opportunity to communicate across "the identity and assumptions" that defined the "distinctive communities" to which they belonged. Segregation deprived American democracy of one of the chief benefits of a common public culture, which is to "tear[] us from ourselves, expose[] us to and involve[] us with others." The sit-ins enacted a "nonneutral principle" of constitutional law. This principle demanded not equal, but preferential concern and respect for the excluded or marginalized civic other.

The 1960 sit-ins very quickly gave birth to an organized movement whose most important incarnation was the Student Non-Violent Coordinating Committee, better known as SNCC. This movement, "led by youngsters," marked a fundamental transformation in the Black American public sphere, not least because it challenged the historical dominance of the generation of an older, more organized, and more accommodationist Black leadership. SNCC was the most institutionally developed articulation in 1960's Black America of an alternative public of the

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115 Id. at 133 (emphasis added).
116 Post, supra note 111, at 8.
117 Keenan, supra note 114, at 133.
119 ZINN, supra note 118, at 1.
kind to which Nancy Fraser has given the name "subaltern counterpublic," a "parallel" discursive arena "where members of subordinated social groups invent and circulate counterdiscourses to formulate oppositional interpretations of their identities, interests, and needs."

As Clayborne Carson has noted, the "forms of racial consciousness that arose in SNCC during the mid-1960s were archetypes for the ideas that would later emerge in the women's liberation and other identity movements." It was in the experiential crucible of racial "consciousness" and racial "identity" that young Black college and university student activists of the 1960's helped forge interpretive tools and build civic institutions for advancing the emerging project that I have called here African American "liberation" jurisprudence.

Herbert Marcuse once famously wrote that the "restoration of remembrance to its rights, as a vehicle for liberation, is one of the noblest tasks of thought." A great distance separates us from the America of the sit-in movement, and from the America about which Charles Black, Jr. wrote in "The Lawfulness of the Segregation Decisions." Race and racism today are not what they were in 1960. Nonetheless, the spectral "fear of a Black public"—or of a Black president—has not been completely exorcised from the U.S. body politic. The volume you now hold in your hand or perhaps read on your iPad bears within it the sedimented history and the accreted knowledge of that period in our national life. As you read the contributions to this inaugural issue of the Columbia Journal of Race and Law, I hope you will find yourself as excited as I am about the insights they offer into the role law and legal scholarship might play in "writing the future" of racial justice.

120 Nancy Fraser, Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy, in HABERMAS AND THE PUBLIC SPHERE 109, 123 (Craig Calhoun ed., 1992).
121 Id. at 123.
122 CARSON, supra note 118, at 2.
124 I riff here on the title of the classic 1990 recording by the American hip hop group Public Enemy. See PUBLIC ENEMY, FEAR OF A BLACK PLANET (Def Jam Recordings 1990).
125 This phrase is taken from the title of the recent Nike video campaign for the 2010 FIFA World Cup, directed by filmmaker Alejandro González Iñárritu. See Write the Future (Nike, Inc. 2010), available at http://www.youtube.com/watch?v=lsggaxXUS8k (last visited Feb. 7, 2011).