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Roger Fairfax

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WIELDING THE DOUBLE-EDGED SWORD: CHARLES HAMILTON HOUSTON AND JUDICIAL ACTIVISM IN THE AGE OF LEGAL REALISM

Roger A. Fairfax, Jr.*

I. INTRODUCTION

A new progressive movement in the law profoundly affected the American judicial climate of the 1930s and 1940s. The jurisprudence of American Legal Realism, which sprang from the progressive American sociological jurisprudence, boasted the adherence of some of America's most influential legal minds. Legal Realism, which complemented the New Deal reform legislation emerging in the 1930s, advocated judicial deference to legislative and administrative channels on matters of social and economic policy. Judicial activism, which had been used as a tool for the protection of economic rights since the late nineteenth century, was seen as inimical to progressive social reform and, thus, was discouraged by Legal Realists, who saw the Supreme Court consistently strike down progressive reform measures through the mid-1930s.¹ After the New Deal constitutional revolution of 1937, the Supreme Court began to practice restraint, and the ideology of Legal Realism rose to prominence.

At the same time, the political climate of the 1930s and 1940s was, to say the very least, inhospitable to Black demands on Congress and state

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1. Defining judicial activism is problematic due to the lack of consensus among those attempting to articulate its core meaning. Judicial activism has been defined by some as "the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit." Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 296 (1996). Others have defined judicial activism simply as a result-oriented approach to interpreting the Constitution. See Jennelle L. Joset, *May It Please the Constitution: Judicial Activism and Its Effect on Criminal Procedure*, 79 MARQ. L. REV. 1021, 1021 (1996). For the purposes of this Article, the term "judicial activism" is defined as a mode of judicial review, the adherents of which use the power of the judicial function to effect social or economic policy changes outside of legislative or administrative channels. See Carroll Rhodes, *Changing the Constitutional Guarantee of Voting Rights From Color-Conscious to Color-Blind: Judicial Activism by the Rehnquist Court*, 16 MISS.

legislatures for racial justice. Throughout most of the American South, Blacks were prevented, through both legal and extra-legal means, from exercising their right to vote. And in Northern states, where attempts to quiet the Black franchise were not as overt, Black numbers were not great enough to influence state and national legislative politics significantly. Furthermore, many "progressive" White legislators were unwilling or unable to pass laws that restored Black civil rights. In addition, this lack of Black political efficacy was mirrored in the general reluctance of presidential administrations to use the power of the federal government to protect the civil rights of Blacks.

Charles Hamilton Houston, the chief architect of the legal assault on Jim Crow laws, sought a new method for pursuing Black equality before the law. Heavily influenced by sociological jurisprudence, but recognizing the inadequacy of Legal Realism and its philosophy of deference to the legislature for racial justice, Houston developed the philosophy of "social engineering." This jurisprudence borrowed from sociological jurisprudence—an antecedent of Legal Realism—but prompted jurists to challenge statutes and state actions that denied full citizenship rights to Americans who were Black. Houston's encouragement of judicial activism is significant both for its incompatibility with Legal Realism and because judicial activism had been used for over a century to diminish the constitutional status of Blacks in America—first to deny Blacks their constitutional existence and, later, to remove the teeth from the very laws and amendments meant to reaffirm that existence. This Article argues that Houston's reliance on judicial activism, despite its past abuses by those opposed to his cause, signaled the beginning of the end of the liberal consensus on the principle of judicial restraint. Charles Hamilton Houston's wielding of the double-edged sword of judicial activism was antecedent to the Warren Court activism that brought about many of the civil rights gains of the second half of the twentieth century.

II. BIOGRAPHICAL SKETCH

Charles Hamilton Houston was born to William and Mary Houston on September 3, 1895 in Washington, D.C. Despite the inequalities associ-

C. L. REV. 309, 344 n.240 (quoting GLENDON SHUBERT, *JUDICIAL POLICY-MAKING* 153, 154 (1965)). This power is usually used to either challenge or uphold legislation by applying an expansive or restrictive interpretation of constitutional protections against state or federal actions. The term "judicial restraint" is defined as the mode of judicial review roughly opposite judicial activism—a general reluctance to use judicial discretion in all but the clearest cases of constitutional violation. See Sanford Levinson, *Raoul Berger Pleads for Judicial Activism*, 74 TEX. L. REV. 773, 777 (1996). While it cannot be claimed that this definition of judicial activism and restraint is exhaustive and without valid criticism, see Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 903 (1987) (describing the lack of an objective "baseline for measurement of departures from neutrality and of action and inaction" by judges), it captures the fundamental essence of these modes of judicial review which will be discussed repeatedly throughout this Article. For a definitional overview of judicial activism and judicial restraint and their respective roles in the American constitutional order, see CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY?* 2-32 (1991).

ated with the District of Columbia's severely segregated public school system, Houston attended an elementary school that accommodated his accelerated capacity for learning. Houston opted for extra summer school courses and consequently graduated from junior high school at the age of twelve. Early in 1908, Houston began his studies at the renowned M Street High School.²

While Houston was in high school, his father William resigned from his government clerk job to serve as an apprentice for Edward Morris, a prominent Black Chicago attorney. In 1910, when William Houston returned to the District from Chicago, he began private practice while teaching evening law classes at Howard University.³ The following year, Houston graduated from M Street High School at the age of fifteen and was admitted to Amherst College. In September of 1911, he entered Amherst as the sole Black member of the class of 1915 and, despite the expected racism that Houston encountered, he was well liked by classmates and professors.⁴

An English major, Houston maintained an eighty-eight percent grade point average throughout his tenure at Amherst. He was elected to Phi Beta Kappa his senior year and was chosen to deliver one of the commencement addresses. After receiving his Bachelor's degree in English in 1915—at the age of nineteen, Houston began to teach English at Howard University despite his father's wishes that he attend law school and join him in private practice.⁵ When the United States entered World War I, in 1917, Houston was of draft age. Aware of the mistreatment of Black enlisted soldiers in the military, Houston and a number of other Black college graduates formed the Central Committee of Negro College Men, the purpose of which was to lobby the War Department and elected officials for the establishment of a Black officers training camp.⁶ After many appeals, a Black officer training camp was set up in Des Moines, Iowa and Houston was assigned. In October 1917, Houston was commissioned a first lieutenant in the United States Army.⁷

Despite his officer's rank, Houston still felt the sting of racism in the United States military. Houston and other Black officers were segregated from the White officers on the base and were consistently denied the opportunity to serve as artillery officers.⁸ White officers would embarrass

2. The M Street High School, later named the Paul Laurence Dunbar High School, became known as the model for excellence in secondary Black education. Black students—most of them privileged—from all over the greater Washington area sought M Street's classical curriculum, which was taught by graduates of elite colleges and universities. Dunbar High School, the nation's first Black public high school, has produced literally hundreds of prominent and influential Blacks who impacted the District of Columbia and the nation at large. See THOMAS SOWELL, *EDUCATION: ASSUMPTIONS VERSUS HISTORY* 29–32 (1986); Thomas Sowell, *Black Excellence: the Case of Dunbar High School*, 35 *PUBLIC INTEREST* 1, 3–21 (1974).

3. See GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 26–27 (1983).

4. See *id.* at 31–33.

5. Genna Rae McNeil, *Charles Hamilton Houston, 1895–1950*, 32 *How. L.J.* 469, 470 (1989).

6. On efforts to establish the Black officers training camp, see JOYCE B. ROSS, E. SPINGARN AND THE RISE OF THE NAACP, 1911–1939 81–102 (1972).

7. See MCNEIL, *supra* note 3, at 36–40. See also ROSS, *supra* note 6, at 81–102.

8. See MCNEIL, *supra* note 3, at 40–41.

and harass the black officers in front of European civilians.⁹ Houston and several fellow Black officers were almost lynched by White American officers in France.¹⁰ However, it was the unfair court martial of an innocent black officer that ultimately would compel Houston to attend law school following his military service.¹¹ As Houston wrote of his trials during his military years, "I made up my mind that I would never get caught again without knowing something about my rights; that if luck was with me, and I got through this war, I would study law and use my time fighting for men who could not strike back."¹²

A disillusioned and bitter Charles Hamilton Houston returned to a nation whose race relations by 1919 had deteriorated since he had left for the foreign war. The summer of 1919 was one of the worst periods for race relations in the nation's history.¹³ The wave of race riots that swept the nation was particularly intense in Houston's hometown of Washington, D.C.¹⁴ This time of intense racial strife and Houston's negative experience in the military may have galvanized his resolve to study the law. In September of 1919, Houston enrolled in Harvard Law School.¹⁵

During his first year at Harvard, Houston distinguished himself, earning top marks and seemed "[u]ndaunted by the rigor and the pace at which Harvard legal education was conducted."¹⁶ Houston had an even stronger academic performance his second year and was elected to the editorial board of volume 35 of the Harvard Law Review—the first African American to serve as an editor of the prestigious journal.¹⁷ Houston's academic performance was so strong that he caught the attention of several professors and administrators, including Dean Roscoe Pound, who would serve as a mentor and advisor throughout his career.¹⁸ Houston also was mentored by Professors Joseph Beale and Felix Frankfurter. The latter, who "had taken a special interest in Houston while he was a Harvard student,"¹⁹ also would continue to serve as Houston's advisor after Harvard Law School.

In 1922, after graduating with honors with his LL.B., Houston went on to study, again at Harvard, for his S.J.D. on a Langdell Scholarship.²⁰ Houston continued to excel in his academic work, earning an "A" grade

9. See *id.* at 43–44.

10. See *id.* at 44.

11. See *id.* at 41–42.

12. Charles Hamilton Houston, *Saving the World for Democracy*, PITTSBURGH COURIER, Aug. 24, 1940.

13. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 109–13 (1975).

14. See CONSTANCE McLAUGHLIN GREEN, *THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION'S CAPITAL* 190–94 (1967).

15. See *BLACKS AT HARVARD: A DOCUMENTARY HISTORY OF AFRICAN-AMERICAN EXPERIENCE AT HARVARD AND RADCLIFFE* 5 (Werner Sollors, et al., eds., 1993).

16. McNEIL, *supra* note 3, at 50.

17. Houston served as a leader of the Nile Club, Harvard's Black students association, see SOLLORS, *supra* note 15, at 191–92, and was also instrumental in founding the Dunbar Law Club for the Black and Jewish students who were excluded from membership in the mainstream law clubs. See McNEIL, *supra* note 3, at 51–52.

18. See McNEIL, *supra* note 3, at 52.

19. MICHAEL D. DAVIS & HUNTER R. CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH* 53 (1994).

20. See McNEIL, *supra* note 3, at 53.

average,²¹ with Professor Frankfurter advising his doctoral dissertation in administrative law.²² Despite these accomplishments, Houston had not yet quenched his thirst for learning. In 1923, Houston received the Sheldon Traveling Fellowship and continued his legal studies in the civil law program at the University of Madrid in Spain, where he spent some time corresponding with Roscoe Pound and studying Pound's *Outlines on Jurisprudence*.²³

Upon returning from Spain, Houston was admitted to practice law in the District of Columbia and entered into private practice with his father. In 1927, Houston co-authored his first United States Supreme Court brief.²⁴ Although it dealt with an industrial tort case and not a civil rights case, it was the first of many Supreme Court briefs Houston would file during his career. However, in the late 1920s, the young Houston was more interested in teaching law than practicing law, and he sought an appointment as a professor in the evening program at Howard University Law School.

On the recommendations of Roscoe Pound and Felix Frankfurter, Houston was offered a teaching position and quickly gained a reputation for being an intense and demanding professor, earning him the nickname "Iron Shoes."²⁵ Outside teaching his evening classes in Agency, Surety Mortgages, Jurisprudence, and Administrative Law, Houston sought to enhance the law school's effectiveness; he was named Vice Dean of Howard Law School in 1929.²⁶

While at Harvard, "Houston studied under some of the nation's greatest legal minds, and they convinced him it was necessary to develop a cadre of competent black lawyers to fight for the rights of black Americans."²⁷ As Vice Dean of Howard Law School, Houston sought to do just that by installing more rigorous admission standards, a new curriculum,

21. *See id.*

22. Charles H. Houston, *Government is a Practical Affair: A Functional Study of the Requirements of Notice and Hearing in Governmental Action in the United States* (1923), Cambridge, Mass., Harvard Law School, Administrative Law Theses.

23. *See* Papers of Roscoe Pound, Harvard Law School Modern Manuscript Collection, Langdell Library, Harvard Law School, Cambridge, Mass. (various correspondence between Houston and Pound, 1923–1924).

24. In the 1927 case of *Bountiful Brick Company v. Elizabeth Giles*, 276 U.S. 154, Houston successfully argued for the upholding of a lower court's decision to compensate the widow of a worker killed in a work-related accident. *See* McNEIL, *supra* note 3, at 62.

25. *See* Leland Ware, *A Difference in Emphasis: Charles Houston's Transformation of Legal Education*, 32 *How. L.J.* 479, 485 (1989).

26. When Houston became Vice Dean, Howard Law School was unaccredited and offered a relatively substandard education. Howard mirrored the state of Black legal education in general. At the time, there were only one thousand Black lawyers in the nation—less than one percent of the national total—and fewer than 100 of them had graduated from top law schools. *See* HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE, VOLUME I: THE DEPRESSION DECADE 217–18* (1978). In addition, not one civil rights law course was offered in the United States. *See id.*

27. DAVIS & CLARK, *supra* note 19, at 53. Among those prompting Houston to help Howard produce more effective civil rights advocates was Justice Louis Brandeis. Brandeis asserted that the quality of briefs submitted to the Supreme Court by Black lawyers needed to be enhanced. W.E.B. DuBois argued that the poor quality of

a new full-time faculty, and eliminating the school's evening division.²⁸ This was the first step in the creation of the Howard machine that would define the legalistic approach to civil rights.²⁹ Houston was unrelenting in his vision of creating a school for the training of "Black lawyers who would actively and aggressively represent and advocate for the rights of the Black citizenry [which was] vital to the struggle for the equality of Blacks within American society."³⁰ In the fall of 1930, while Houston dealt with improving Howard Law School, he became acquainted with one of the first-year students, a young Thurgood Marshall, who would go on to graduate as valedictorian of the class of 1933.

During his time as Vice Dean, Houston worked as an attorney for the National Association for the Advancement of Colored People (NAACP) with increasing frequency, often involving Thurgood Marshall and other students in cases he was litigating. Opportunity for further involvement presented itself when Houston's former Harvard colleague, Nathan Margold, resigned as special counsel to the NAACP. Houston, whose name was presented for consideration along with the likes of Felix Frankfurter, came highly recommended. While they had never had a Black special counsel, NAACP leaders, aware of the animosity toward civil rights litigation, particularly in the South, felt that "a colored lawyer with the dignity, ability and tact of Mr. Houston would encounter far less hostility than a white lawyer."³¹ In 1935, Houston took a leave of absence from Howard and accepted the position as special counsel to the NAACP. A year later, he named Thurgood Marshall as his assistant special counsel.

While in New York, Houston spent his time dealing with a variety of issues. He traveled frequently, documenting disparities in the quality of Black and White public schools in the South as well as speaking to groups across the nation about the burgeoning NAACP legal campaign against discrimination in educational opportunity.³² Houston also spent a good deal of time helping to develop the newly organized National Bar Association, formed in 1925 because of the American Bar Association's refusal to admit Black members of the bar.³³ Houston also aggressively lobbied

advocacy was a major factor in the continued legal subjugation of Black Americans. See SITKOFF, *supra* note 26, at 217.

28. See Charles Hamilton Houston, 27 NEW ENG. L. REV. 595, 597-98 (1993).

29. See generally Genna Rae McNeil, *Justiciable Cause: Howard University Law School and the Struggle for Civil Rights*, 22 HOW. L.J. 283 (1979) (describing the key role played by Howard University Law School in the civil rights movement).

30. Charles Hamilton Houston, *supra* note 28, at 599. As a result of Houston's efforts, Howard received accreditation from the American Bar Association's Council on Legal Education, New York State, and the Association of American Law Schools in 1931. See McNEIL, *supra* note 3, at 75.

31. MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* 29 (1987) (quoting Letter from Walter White to Nathan Margold, May 22, 1934, NAACP papers Box I-C-196).

32. See NAACP papers, A-393, Box 2, Reel 2, Government Documents, Lamont Library, Harvard University, Cambridge, Mass. (various correspondence outlining travel itineraries).

33. See NAACP papers, A-393, Box 2, Reel 2, Government Documents, Lamont Library, Harvard University, Cambridge, Mass. (various correspondence between Houston and other officers of the National Bar Association).

Franklin D. Roosevelt's attorney general, Homer Cummings, to nominate a Black lawyer to the federal bench.³⁴ However, work on the new NAACP litigation campaign dominated Houston's time and had him in close contact with field marshals like Thurgood Marshall, who was litigating the case of a Black law school applicant who was rejected from the University of Maryland on the basis of race.³⁵

By 1938, Houston again prepared to make a change when lack of NAACP funding prompted him to return to Washington and rejoin his father's law practice.³⁶ In 1940, Houston resigned as special counsel to the NAACP and began work with the NAACP's National Legal Committee in Washington. Thurgood Marshall was named to succeed Houston as special counsel to the NAACP. Shortly thereafter, the NAACP decided that it was necessary to create a separate, financially independent entity that specifically dealt with litigation of civil rights cases. As a result, Marshall was named as the first Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF).³⁷ Houston, although not officially affiliated with LDF, continued as one of its greatest resources, working on building a team of talented civil rights lawyers who could break the back of segregation in the United States.³⁸

Eschewing potential judicial appointments, Houston sought to affect the bar through his advocacy in the National Bar Association and the National Lawyer's Guild.³⁹ Outside of his NAACP work, Houston provided legal assistance to a variety of causes, including the effort to desegregate the District of Columbia public school system.⁴⁰ Also, while engaging in private practice in Washington, Houston found himself increasingly involved with extra-legal attempts to achieve equality, serving in the

34. See Letter from Houston to Homer S. Cummings, July 12, 1935, NAACP Papers, A-393, Box 2, Reel 1, Government Documents, Lamont Library, Harvard University, Cambridge, Mass. These efforts culminated in the 1937 appointment of William Henry Hastie as federal judge in the Virgin Islands. Hastie, who was also educated at M Street High School, Amherst College, and Harvard Law School, was a second cousin of Houston's and, at one time, was a partner in the Washington, D.C. Houston & Houston firm. For more on Hastie, see GILBERT WARE, *WILLIAM HASTIE: GRACE UNDER PRESSURE* (1984).

35. See *Pearson v. Murray*, 182 A. 590 (1936).

36. See NAACP Papers, Box 2, Reel 2, Government Documents, Lamont Library, Harvard University, Cambridge, Mass. (NAACP press release (undated, circa 1938)).

37. LDF was founded on March 20, 1940, primarily to absorb the skyrocketing costs associated with civil rights litigation. Thurgood Marshall, who drafted its charter, performed both the function of chief litigator and chief fundraiser. See JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 14-25* (1994) (describing the history of the NAACP Legal Defense and Educational Fund, Inc.).

38. See McNEIL, *supra* note 3, at 156.

39. See Letters between Francis Biddle and Felix Frankfurter, May 1 and 4, 1942, Papers of William H. Hastie (1916-1976), Harvard Law School Modern Manuscript Collection, Langdell Library, Harvard Law School, Cambridge, Mass. See also McNEIL, *supra* note 3, at 188.

40. Houston's fight against discrimination in the D.C. public schools culminated in the brief for *Bolling v. Sharpe* 347 U.S. 597 (1954), which was filed by James Nabrit, shortly after Houston's death. KLUGER, *supra* note 13, at 508-23; see McNEIL, *supra* note 3, at 188-90.

federal government as counsel to, and as a presidentially appointed member of, the Fair Employment Practices Commission (FEPC).⁴¹ Houston also advocated on behalf of the District of Columbia home rule movement,⁴² and sought to expose corruption in the election campaigns of segregationist members of Congress.⁴³

Houston participated in the most significant anti-discrimination and anti-segregation cases of the era. Indeed, the strategy of the NAACP's legal function during the late 1930s and 1940s was essentially the strategy of Charles Hamilton Houston. Houston, who also served as chief legal strategist in cases outside of the purview of the NAACP, led the legal fight against racial discrimination in six major areas: education, labor, housing, voting, jury exclusion, and transportation. As precedents which upheld state sponsored discrimination and segregation were increasingly threatened, Houston's legal battles would produce widespread notoriety.

Sadly, Houston never would have the opportunity to see the achievement of his ultimate goal. Worn down from decades of intense devotion to the cause of racial justice, he suffered a heart attack late in 1949 and finally succumbed on April 22, 1950. With him died a determination and spirit that would not be replicated. However, Houston left behind a unique philosophy of law that would be perpetuated by the talented civil rights attorneys whom he had trained, shaped, and inspired. While on his deathbed, Houston wrote these words to be read years later to his then infant son: "Tell Bo I did not run out on him but went down fighting that he might have better and broader opportunities than I had without prejudice or bias operating against him, and in any fight some fall."⁴⁴

Houston's dream of breaking the stranglehold that segregation had on public schools began to be realized on May 17, 1954, a little more than four years after his death. On that day, Chief Justice Earl Warren read the unanimous decision of the Court in the case of *Brown v. Board of Education*,⁴⁵ which reversed the "separate but equal" doctrine put forth in the 1896 case of *Plessy v. Ferguson*.⁴⁶ *Brown* would prove to be the beginning of the end of lawful segregation in schools, public places, transportation, and other segments of American society.

41. The FEPC, established by Franklin Roosevelt's Executive Order 8802, was meant to address discrimination in labor. Houston was appointed as a full committee member by Roosevelt in 1944. He resigned out of protest in 1945 when President Truman failed to eliminate discrimination from firms over which he had gained direct control through his wartime powers. See McNEIL, *supra* note 3, at 166-74.

42. See *id.* at 197.

43. CHARLES H. HOUSTON & THURGOOD MARSHALL, IN THE MATTER OF THE MISSISSIPPI DEMOCRATIC PRIMARY CAMPAIGN OF SENATOR THEODORE G. BILBO, SENATOR, STATE OF MISSISSIPPI—BRIEF FOR THE NAACP TO THE SPECIAL COMMITTEE TO INVESTIGATE SENATORIAL CAMPAIGN EXPENDITURES, 1946, SENATE OF THE UNITED STATES, 79TH CONGRESS (1946).

44. Houston's inscription to his son on page 48 of JOSHUA LIEBMAN, PEACE OF MIND (1946) (cited in McNEIL, *supra* note 3, at 212).

45. 347 U.S. 483 (1954).

46. 163 U.S. 537 (1896).

III. DEFINING HOUSTON'S SOCIAL ENGINEERING JURISPRUDENCE

In a 1989 article, Professor J. Clay Smith asked, "how do ideas like Houston's find sanctuary in the jurisprudential matrix?"⁴⁷ To define Houstonian jurisprudence comprehensively and place it within the American jurisprudential matrix requires, as Smith writes, "study, discussion and an investigation of law and the history of law by scholars who believe that the Houstonian ideas merit preservation."⁴⁸ As of yet, relatively few scholars have undertaken the task of documenting and attempting to define Houstonian jurisprudence.⁴⁹ However, this lack of treatment may be due less to a dearth of interest in Houston's legal philosophy than to lack of exposure. The first known mention of a Houstonian school of jurisprudence can be found in a 1973 article by Smith and, until the publication of the seminal biography in 1983, Houston was virtually unknown by all but the closest students of the legal struggle against discrimination before the *Brown* decision.⁵⁰

Another reason for the absence of a body of critical scholarship surrounding Houstonian jurisprudence is the difficulty of defining what that jurisprudence entails. The Houstonian school of jurisprudence is not an easily discernible legal philosophy embodied in law review articles or other scholarly works by Houston.⁵¹ With such dynamic and multi-faceted roles in the struggle against racial discrimination, Houston had little opportunity to submit scholarly appraisals of his ideas even to law journals that might have dared to publish articles written by a Black civil rights lawyer.⁵²

However, as has been asserted, "Houston's *Summa Theologica* was the plan of action contained in his many letters and briefs."⁵³ This plan of action embodied various principles supporting Houston's legal philosophy. The documents containing Houston's ideas have been well preserved in archives of the Library of Congress, Howard University, Harvard Law School, the NAACP, and in Houston's private law firm. The Houstonian school of jurisprudence, though slightly unearthed, is still waiting to be fully discovered:

The time has arrived, if not, long past due for legal scholars to search the annals of case law, briefs, letters, opinions and other

47. J. Clay Smith, *Principles Supplementing the Houstonian School of Jurisprudence: Occasional Paper No. 1*, 32 How. L.J. 493, 503 (1989).

48. *Id.* at 503.

49. See Steven H. Hobbs, *From the Shoulders of Houston: A Vision for Social and Economic Justice*, 32 How. L.J. 505 (1989); Michael W. Reed, *The Contribution of Charles Hamilton Houston to American Jurisprudence*, 30 How. L.J. 1095, 1095-1100 (1987); Smith, *supra* note 47, at 493-504.

50. See J. Clay Smith, *In Memoriam: Professor Frank D. Reeves, Towards a Houstonian School of Jurisprudence and the Study of Pure Legal Existence*, 18 How. L.J. 1, 1-11 (1973).

51. Reed, *supra* note 49, at 1098 n.21 ("Charles Houston did not write a treatise or a series of law review articles which established the foundation for a school of jurisprudence.").

52. McNEIL, *supra* note 3, at 216 ("[Houston] was a legal scholar-teacher-practitioner who became so involved in struggle that he wrote neither treatises nor lengthy law review articles.").

53. Reed, *supra* note 49, at 1098.

statements in order to trace the analytical process which Houston uniquely and indelibly left imprinted in American jurisprudence.⁵⁴

An examination of Houston's briefs, letters, and statements elicits the conclusion that Houstonian jurisprudence is built around the key concept of "social engineering." Houston's assertions that "[a] lawyer is either a social engineer or . . . a parasite on society"⁵⁵ and that a lawyer as a social engineer is "the mouthpiece of the weak and a sentinel guarding against wrong" were representative of his belief in social engineering as a channel toward change.⁵⁶ Social engineering, as Houston saw it, involves the use of "the Constitution, statutes, and 'whatever science demonstrates or imagination invents' both to foster and to order social change for a more humane society."⁵⁷

Houston believed that the social engineer "was a highly skilled, perceptive, sensitive lawyer who understood the Constitution of the United States and knew how to explore its uses in the solving of 'problems of . . . local communities' and in 'bettering conditions of the underprivileged citizens.'"⁵⁸ Furthermore, the social engineer "ought to use the law as an instrument to achieve social justice and full, equal civil rights for all Americans."⁵⁹ Another crucial role of the social engineer was "to engage in 'a carefully planned [program] to secure decisions, rulings and public opinion on . . . broad principle[s],'" a role that Houston would revolutionize throughout his career.⁶⁰

Houston, while Vice Dean and professor at Howard Law School, "published, litigated and taught with fervor for the purpose of instilling in law students and young lawyers the principles of his 'social engineering' philosophy."⁶¹ Houston did not equivocate when it came to his expectations for the students he trained in civil rights advocacy: "Students were called upon to become not only skilled lawyers but also 'social engineers' seeking and developing solutions through the application of law to problems of segregation and racism."⁶²

Houston helped to fuel a new generation of young lawyers who would use the Constitution and its provisions as the main weapon against racism: "As he explained to his students, discrimination, injustice, and the denial of full citizenship rights and opportunities on the basis of race and a background of slavery could be challenged within the context of the

54. Smith, *supra* note 50, at 6-7 n.22.

55. McNEIL, *supra* note 3, at 84 (quoting Thurgood Marshall in GERALDINE SEGAL, *IN ANY FIGHT SOME FALL* 34 (1975)).

56. *Id.* at 85 (quoting Charles Hamilton Houston, *Law as a Career*, July 27, 1932, Charles Hamilton Houston/Houston & Gardner firm files); see also Herbert O. Reid, *Introduction, Charles Hamilton Houston Commemorative Issue*, 32 *How. L.J.* 461, 461 (1989) ("Houston developed a school of jurisprudence which observes law as an organism for social justice through social engineering.").

57. McNEIL, *supra* note 3, at 133 (quoting Charles Hamilton Houston, *Law as a Career*, July 27, 1932, Charles Hamilton Houston/Houston & Gardner firm files).

58. *Id.* at 84.

59. Hobbs, *supra* note 49, at 508.

60. NAACP, *ANNUAL REPORT* 22 (1934).

61. McNeil, *supra* note 5, at 471.

62. McNeil, *supra* note 29, at 288.

Constitution if it were creatively, innovatively interpreted and used."⁶³ Many of Houston's students, including Thurgood Marshall, would go on to use and interpret the Constitution in a way that would eventually break the back of racial discrimination in America.

Houston's jurisprudence of social engineering "grew out of research, study, [and] ideological as well as ethical considerations."⁶⁴ Three main moral jurisprudential principles undergird Houston's legal philosophy of social engineering: (1) "[T]he law and constituted authority [were] supreme only as they cover[ed] the most humble and forgotten citizen,"⁶⁵ (2) "Human beings, regardless of their differences, were 'each equally entitled to life, liberty and the pursuit of happiness,'"⁶⁶ and (3) "[I]n a good society, its system of government 'guarantees justice and freedom for everyone' while providing for succeeding generations 'better and broader opportunities . . . without prejudice or bias operating against [them].'"⁶⁷

Another key element in Houston's philosophical grounding was his avowed faith in democracy. Houston realized, however, "that democracy could not survive if the rights of the minority were continually denied and the State fostered the continuation of a caste system based on race."⁶⁸ Thus, Houston's social engineering philosophy sought to secure the rights of the minority and strike at the heart of state-sponsored discrimination. Houston's desire to vindicate the principles of the American Constitution resulted in a "reliance on resort to courts for gaining recognition of [Blacks'] constitutional rights."⁶⁹

The use of the courts was central to Houston's social engineering philosophy because of "its potential with respect to promoting a nondiscriminatory interpretation of the Constitution or federal statutes."⁷⁰ Houston believed fervently that "demands could be made on the system's courts with the results being changes in the common law."⁷¹ This transformation of the common law, which Houston visualized, would be produced when the courts "rendered decisions supportive of the protection of the civil rights of African-Americans."⁷² For Houston, this was the goal of the social engineer.

63. McNEIL, *supra* note 3, at 84–85.

64. McNeil, *supra* note 5, at 471.

65. McNEIL, *supra* note 3, at 213 (quoting Charles Hamilton Houston letter to Stephen Early, August 16, 1933, Charles Hamilton Houston/Houston & Gardner firm case files).

66. Charles Hamilton Houston, An Approach to Better Race Relations, May 5, 1934, (address before the YWCA Convention, New York City).

67. McNEIL, *supra* note 3, at 213 (quoting Charles Hamilton Houston, untitled tape recording [c. December, 1949]) (on file with Houston family).

68. Reed, *supra* note 49, at 1100.

69. McNEIL, *supra* note 3, at 218.

70. *Id.* at 217–18.

71. *Id.* at 218.

72. *Id.* at 218.

IV. THE RELATIONSHIP BETWEEN SOCIAL ENGINEERING AND THE PROGRESSIVE LEGAL TRADITION

It is imperative to examine how Houston's "social engineering" jurisprudence related to the progressive legal tradition: Legal Realism and its predecessor, sociological jurisprudence. This not only highlights the similarities between the two judicial traditions, but also illuminates the key incompatibility. The tension between the jurisprudential strands—mainly social engineering and Legal Realism—over the role of the courts would produce a chasm between the progressive mode of thought and the civil rights legal establishment. This gap in understanding would usher in the peculiar use of judicial activism for progressive ends in the Warren Court era.

The sociological school of jurisprudence, which gained popularity in the United States in the early twentieth century, undoubtedly influenced Houston's legal philosophy. American sociological jurisprudence has roots that can be traced back to Montesquieu.⁷³ Eugen Ehrlich, the man who developed the modern sociological school of law, believed that "social phenomena in the legal sphere . . . are of importance for a scientific understanding of law."⁷⁴ Therefore, those charged with interpreting law should consider "all social forces which lead to the creation of law."⁷⁵ The general thrust of sociological jurisprudence is that the "positive law cannot be understood apart from the social norms of the 'living law.'"⁷⁶

American sociological jurisprudence followed the example of its European predecessors in stressing the need for jurists to shed their tendency towards "mechanical jurisprudence,"⁷⁷ the mode of legal thought canonized by the Classical Legal Thinkers from 1895 to 1937.⁷⁸ Those within the

73. See EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 473 (Walter L. Moll trans., Harvard University Press, 1936) ("The man who, a century and a half ago, wrote the three words *L'Esprit Des Lois* as the title of his book surely was seeking a sociology of law within his own soul even at that early date."); Eugen Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 HARV. L. REV. 582, 583 (1916).

74. *Id.* at 474.

75. *Id.*

76. EDGAR BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 114 (1974) (quoting Filmer S.C. Northrop, *Ethical Relativism in the Light of Recent Legal Science*, 64 J. PHIL. 651 (1955)).

77. The term "mechanical jurisprudence" was coined by Roscoe Pound in the early 20th century. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908).

78. The Classical Legal school of thought was marked by a well-intentioned attempt to produce a philosophical or scientific arrangement of the law. The result of this movement was the categorization of scattered branches of certain types of law under headings, such as "negligence" and "fault" in tort law. In contract law, there were clear distinctions made between contract "rights" and contract "remedies." This strict categorization facilitated the syllogistic type of decision-making that defined the Classical Legal Thinkers. The result of this formalistic jurisprudence was the rise of the laissez-faire conception of freedom of contract which was interpreted as originating in the due process clause of the Fourteenth Amendment. The era in which the Classical Legal Thinkers held sway (about 1895 until 1937) is commonly called the *Lochner* era named after *Lochner v. New York*, 198 U.S. 45 (1905), the case which read the "freedom-of-contract" into the Fourteenth Amendment. See *id.* at 60.

Progressive legislative attempts of social reform at the expense of capital were consistently thwarted by an activist United States Supreme Court armed with the essentially laissez-faire conceptions of substantive economic due process, freedom of

sociological school of jurisprudence felt that law should not be derived through supposed universal and axiomatic first principles, but rather through a study of the sociological factors that underlie the law.⁷⁹

American sociological jurisprudence denies that the law can be understood without regard for the realities of human social life Sociological jurists urge that a judge who wishes to fulfill his functions in a satisfactory way must have an intimate knowledge of the social and economic factors which shape and influence the law.⁸⁰

Houston first came into contact with sociological jurisprudence at Harvard Law School, where he studied Jurisprudence under Roscoe Pound as part of his S.J.D. program.⁸¹ Pound's philosophy of law had great

contract, and private property rights through the late 1930s. Until 1937—the popularly recognized end of the period when the Classical legal school of thought dominated American jurisprudence—the path the Supreme Court took was marked with an activism rivaled in American history only by that of the post-*Brown* courts. Over 50 Acts of Congress and 400 state statutes were invalidated from 1898 to 1937. This can be compared to the Supreme Court's striking down of 12 Acts of Congress and 125 state laws during the 25 years prior to 1898. See GARY L. McDOWELL, *CURBING THE COURTS: THE CONSTITUTION AND THE LIMITS OF JUDICIAL POWER* 3 (1988). See also MORTON J. HORWITZ, *TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 9-31 (1992); ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDE OF BAR AND BENCH, 1887-1895* (1976); EDWARD A. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

79. Among the most prominent of American sociological jurists were Louis D. Brandeis, Oliver Wendell Holmes, Jr., Benjamin Cardozo, and Roscoe Pound. The contributions of Holmes, Brandeis, Cardozo, and Pound to the rise of American sociological jurisprudence are immeasurable. To be sure, an in-depth comparison of their philosophies brings forth differences that distinguish them from each other. However, in keeping with the sociological school of thought, all four men held social considerations to be paramount in the judicial process and rejected the formalistic reasoning of the Classical Legal Thinkers. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (Louis Brandeis, brief for the respondent); *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting); BENJAMIN CARDOZO, *NATURE OF THE JUDICIAL PROCESS* (1920); OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911) (Part I), 25 HARV. L. REV. 140 (1912) (Part II), 25 HARV. L. REV. 489 (Part III).

80. BODENHEIMER, *supra* note 76, at 120-21.

81. At Harvard, the nation's top institution of legal education of that era, Pound was working from a very visible platform, where many of the nation's top legal scholars were situated. In 1911, Pound published, perhaps, the most influential scholarly work of the American sociological jurists. See Pound, *supra* note 79. Pound's lengthy, three-part article traces the development of sociological jurisprudence from its antecedents in social utilitarianism until the "emergence of Sociological Jurisprudence as a discrete and definable philosophy of law." G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1004 (1972).

Pound's article recognizes the various contributing factors to sociological jurisprudence and demonstrates his own philosophy on the role of the new "science" in 20th-century jurisprudence. Pound would continue to shape and influence American sociological jurisprudence for another forty years, writing numerous books and articles, and influencing legal thought throughout three of the most turbulent periods in American legal history: the rise of Legal Realism, the New Deal constitutional revo-

impact on Houston and "represented the final tie between Houston and the advocates of sociological jurisprudence."⁸² Pound's influence on Houston was later reflected in Houston's legal philosophy.⁸³

Houston, through his legal advocacy, urged judges to incorporate practical knowledge of the factors that shaped discriminatory laws in the United States. He demonstrated how certain state actions, which seemed constitutional on their face, violated the civil rights of certain groups of citizens when coupled with the social realities of segregated America. When this occurred, Houston wanted the courts to take over the essentially legislative function of incorporating practical knowledge into the judicial function of constitutional adjudication. In this way, Houston incorporated sociological jurisprudence into his philosophy:

Undoubtedly, Pound's view that judicial and legislative functions, while separate, at times ran together in the "judicial ascertainment of the common law by analogical application of decided cases" was a catalyst as Houston urged black social engineers to prepare for arguments in the U.S. Supreme Court.⁸⁴

Throughout his legal and teaching career, Houston kept in rather close contact with Pound, who served as an informal advisor during Houston's "Harvardization" of Howard Law School.⁸⁵ Pound, who advocated the use of law in "a continually more efficacious social engineering,"⁸⁶ undoubtedly continued to influence Houston long after the latter left Harvard Law School in 1923. Houston, like Pound, continually advocated bringing law closer to reality and this became "the preferred strategy of the legal leadership of the NAACP, men who had themselves been trained in sociological jurisprudence and who had strong commitments to social engineering."⁸⁷ Houston's social engineering, which "[grew] out of tenets of Roscoe Pound's sociological jurisprudence," strengthened the link between the two jurisprudential traditions.⁸⁸

The Legal Realist movement emerged from the pre-World War I sociological jurisprudence critique of Classical Legal Thought.⁸⁹ While many

lution of 1937, and the emergence of the Warren Court era. See generally DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* (1974).

82. Reed, *supra* note 49, at 1097.

83. McNEIL, *supra* note 3, at 217 ("[Houston's] encounter with Roscoe Pound's sociological jurisprudence [was] evident in the premises of the theory that Houston posited about law, lawyers, and the United States.").

84. *Id.*

85. *Id.* at 77-85.

86. ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 43 (1975).

87. Joan Roelofs, *Judicial Activism as Social Engineering: A Marxist Interpretation of the Warren Court*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 254 (Stephen C. Halpern & Charles M. Lamb eds., 1982).

88. Genna Rae McNeil, *To Meet The Group Needs: The Transformation of the Howard University School of Law, 1920-1935*, in *NEW PERSPECTIVES ON BLACK EDUCATIONAL HISTORY* 157 (Vincent P. Franklin & James D. Anderson eds., 1978).

89. See generally Gary J. Aichele, *Legal Realism and Twentieth Century American Jurisprudence: The Changing Consensus* [Ph.D. thesis, University of Virginia, 1983] (Ann Arbor, Mich.: University Microfilms International); WILLIAM W. FISHER, MORTON J. HORWITZ, & THOMAS A. REED, *AMERICAN LEGAL REALISM* (1994); WILFRID E. RUMBLE, *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968).

Realists saw key differences between Pound's theories and their own, there was substantial common ground between them.⁹⁰ Like sociological jurisprudence, at the "heart of [Legal Realism] was an effort to define and discredit classical legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence."⁹¹

Legal Realism is difficult to define as it "was neither a coherent intellectual movement nor a consistent or systematic jurisprudence."⁹² Although "[m]ost generalizations about their work are subject to numerous exceptions,"⁹³ the Legal Realists can be generally defined as the law professors, judges, and attorneys who, mainly in the interwar period, were "driven by the twin motives of intellectual discovery and social improvement. They hoped to understand the legal process in a new and more useful manner, and they hoped to see both political and legal reform flow from their discoveries."⁹⁴

Included among the Legal Realists were Felix Cohen, Jerome Frank, and Karl Llewellyn—some of the most influential legal minds of the era.⁹⁵ However, "[t]he legal realists were a heterodox lot" and accepted the title "Realist" reluctantly if at all.⁹⁶ And being autonomous legal thinkers, the Realists were often disjointed and sometimes contradictory. But those given the name "Realist"

shared one basic premise—that the law had come to be out of touch with reality. Holmes' statement that "the life of the law has not been logic, it has been experience" was its battle cry. Pound's distinction between the law in books and the law in action was its most famous academic formulation.⁹⁷

On its face, Legal Realism would seem to be as compatible with Houston's social engineering as had sociological jurisprudence. Just as their sociological jurisprudence predecessors, the Realists, "[i]rreverent, iconoclastic, and steeped in the political tradition of Progressivism," sought to bring about fundamental change in both the law and society.⁹⁸ However, just like many adherents of the progressive reform movement, the Realists avoided the race issue.⁹⁹

Plessy v. Ferguson, which constitutionalized the doctrine of "separate-but-equal" and validated state-sponsored discriminatory Jim Crow laws,

90. RUMBLE, *supra* note 89, at 13 ("[T]he debt of the legal realists to Pound [is] clear. To a degree the realist movement was quite obviously a vigorous reassertion of doctrine the lineage of which leads back to [Pound].").

91. FISHER, HORWITZ, & REED, *supra* note 89, at xiii–xiv.

92. HORWITZ, *supra* note 78, at 169.

93. RUMBLE, *supra* note 89, at 28.

94. PURCELL, *supra* note 78, at 93.

95. See generally JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

96. RUMBLE, *supra* note 89, at 28.

97. HORWITZ, *supra* note 78, at 187–88.

98. FISHER, HORWITZ, & REED, *supra* note 89, at xiii.

99. ROBERT L. ALLEN, *RELUCTANT REFORMERS: RACISM AND SOCIAL REFORM MOVEMENTS IN THE UNITED STATES* 85 (1974).

was the product of the era of Classical Legal Thought.¹⁰⁰ The Realists, however, did not attack *Plessy* as they had attacked the constitutionalization of "freedom-of-contract" in *Lochner*. Rather, with the exception of a few, "most canonical Realists . . . preferred to sidestep the race question despite its extreme susceptibility to Legal Realist critique."¹⁰¹ However, it was not the unwillingness of the Realists to confront racial discrimination that demonstrated their key incongruity with Houston's social engineering, rather, it was the Realists' aversion to judicial activism.

A significant number of Realists served in the Roosevelt administration and "became ardent New Dealers, sharing a strong hostility to the method of juristic reasoning that struck down social welfare laws and wrought what they considered great human injustices."¹⁰² The Realists denounced the "mechanical jurisprudence" used by the Classical Legal Thinkers who, in their view, mistakenly claimed to be guided by established rules when, in fact, they were actively reading their own social and economic policy preferences into the Constitution:

Out of this progressive critique of the so-called "nine old men" came the rallying cry of liberal jurisprudence—"judicial restraint." For a half century until the decision in *Brown*, the notion that courts should ordinarily defer to the policies of the legislature became the principle article of faith of liberal jurisprudence.¹⁰³

Believing that the legislature and administrative agencies—not the courts—were the rightful social and economic policy makers, Legal Realism "concentrated much of its energy in arguing for statutory or administrative change"¹⁰⁴ and denounced judicial activism as a tool for thwarting the will of the people:

[L]egal realism encouraged judicial deference to congressional determinations of fact and degree. . . . If "law" was truly only a set of determinations based partly on "fact" and partly on the value judgments of those in power, what right had a court to overturn the findings of fact and value judgments of the people's elected representatives?¹⁰⁵

This notion of judicial restraint or deference to the legislature, which played a central role in Legal Realist thought, was incompatible with Houston's social engineering philosophy. Implicit in Houston's jurisprudence was a heavy reliance on judges to do just what the realists discouraged—thwart the will of the people when that will denied to certain citizens their fundamental rights under the Constitution. For this reason, the link between Houstonian jurisprudence and the progressive legal tradition ceased with the shift in influence from sociological jurisprudence

100. 163 U.S. 537 (1896).

101. Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1608 (1995).

102. PURCELL, *supra* note 78, at 93.

103. Morton J. Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C. R.-C. L. L. REV. 599, 600 (1979).

104. HORWITZ, *supra* note 78, at 170.

105. ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 167 (1987).

to Legal Realism. This tension between Houston and the Realists illuminates an important period in American legal history when judicial activism began to be transformed from a tool for the protection of private property rights to a tool for the protection of civil rights.

While many place this point at the 1954 Supreme Court decision in *Brown*, it came much sooner. During the mid to late 1930s, while Houston was special counsel to the NAACP, judicial activism began to be used increasingly as a viable tool for the attack on segregation and discrimination.¹⁰⁶ This is a full two decades before the popularly recognized end of the "half-century-old, post-*Lochner* Progressive commitment to judicial restraint."¹⁰⁷ Furthermore, the Warren Court activism was not a sudden break with tradition, but was the result of a carefully planned litigation attack on the logic of *Plessy* waged by Houston and his contemporaries. As early as the 1938 Supreme Court case of *Missouri ex rel. Gaines v. Canada*,¹⁰⁸ which Houston argued, "the first systematic Supreme Court attention to racial discrimination was beginning."¹⁰⁹ Houston and his contemporaries should be credited with ending the "progressive consensus" of adherence to judicial restraint and laying the groundwork for the Warren Court's personal rights substantive due process activism.¹¹⁰

V. WHY THE COURTS? HOUSTONIAN JURISPRUDENCE AND JUDICIAL ACTIVISM

As discussed above, central to Legal Realism was deference to the legislature on matters of economic and social policy. This notion was anathema to Houston's social engineering philosophy, which was marked by a mistrust of legislative channels. Implicit in Houston's attack on state-sponsored discrimination was a reliance on the courts to actively strike down discriminatory state laws and restore meaning to the Civil War amendments and Reconstruction civil rights legislation that had been "emptied of meaning by the Supreme Court in decision after decision."¹¹¹ This strategy was, thus, a call for judicial activism—the tool that was despised by Legal Realism, the "progressive" legal movement of the time. However, what was most peculiar about Houston's embrace of judicial activism was the reality that it was a tool that had been used to deny rights to Blacks for over a century.¹¹²

For those interested in the constitutional rights of American Blacks, judicial activism—and, arguably, the Supreme Court itself—had long been

106. See generally Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

107. HORWITZ, *supra* note 78, at 247.

108. 305 U.S. 337 (1938).

109. RICHARD L. PACELLE, *THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION* 161 (1991).

110. But see HORWITZ, *supra* note 78, at 247, 254; WOLFE, *supra* note 1, at 25; Horwitz, *supra* note 103, at 599.

111. William Bradford Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343, 1348 (1987).

112. See generally BLACK AMERICANS AND THE SUPREME COURT SINCE EMANCIPATION: BETRAYAL OR PROTECTION? (Arnold M. Paul ed., 1972); LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* (1966); *THE SUPREME COURT ON RACIAL DISCRIMINATION* (Joseph Tussman ed., 1963).

more foe than friend. In the 1842 case of *Prigg v. Pennsylvania*,¹¹³ the Supreme Court struck down a Pennsylvania statute which protected its free Blacks from the Fugitive Slave Act. The law required any person seeking to remove an alleged runaway slave from Pennsylvanian borders to first obtain judicial approval from a state or federal judge. The Court held that the state law violated both the fugitive slave clause of the Constitution and the Fugitive Slave Act of 1793.¹¹⁴ By reading into the fugitive slave clause the authority of Congress to regulate fugitive retrieval as well as a constitutional property right in slaves, the Court reasoned that "any state legislation on the subject was unconstitutional."¹¹⁵ This included state legislation "that established mandatory procedures which gave alleged fugitives the opportunity to prove their freedom and protect themselves from enslavement."¹¹⁶

Perhaps the most notorious example of judicial activism harming the constitutional status of Blacks can be found in *Dred Scott v. Sanford*.¹¹⁷ Here, the Supreme Court, under the leadership of Chief Justice Roger Taney, struck down the anti-slavery provision of the Missouri Compromise, stating that Congress had no power to exclude slavery from the territories.¹¹⁸ But worse from the Blacks' perspective was the other portion of this badly reasoned ruling, where Taney asserted that Scott had no standing to sue because Blacks, regardless of condition of servitude, could not be citizens and "had no rights which the white man was bound to respect."¹¹⁹ This clearly activist decision, which was not grounded in the text or meaning of the Constitution and read the Court's policy preferences into the Constitution, stripped Blacks of their constitutional existence—an existence that would not be restored in theory until the passage of the Civil War amendments.¹²⁰

The Supreme Court, however, would again take an activist stance and wipe out many of the legislative gains made by Blacks through the post-Civil War civil rights legislation. In *The Civil Rights Cases* (1883),¹²¹ the Supreme Court held that the federal Civil Rights Act of 1875 was unconstitutional as it applied to acts of private discrimination.¹²² Although the ruling left the door open for states to pass anti-discrimination measures, the political realities of the post-Reconstruction era left little hope for the passage of such laws in states where they did not already exist. The Supreme Court's activist neutering of post-Civil War federal civil rights legislation represented the end of federal protection of the civil rights of Blacks.

113. 41 U.S. (16 Pet.) 539 (1842).

114. *See id.* at 622.

115. DONALD G. NIEMAN, *PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT* 19 (1991).

116. *Id.* at 19.

117. 60 U.S. (19 How.) 393 (1857).

118. *See id.* at 452.

119. *Id.* at 407.

120. *But see* Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?* 40 VAND. L. REV. 1337, 1337-42 (1987).

121. 109 U.S. 3 (1883).

122. *Id.* at 25.

The Supreme Court's decision in *Plessy v. Ferguson* (1896)¹²³ represented the beginning of an era of legal segregation and discriminatory state action that would rule the South for more than a half century. In this case, the Supreme Court, guided more by 19th century scientific racism than legislative intent, read into the Fourteenth Amendment the doctrine of "separate but equal."¹²⁴ Refusing to invalidate a Louisiana state law that separated the races in train cars, the Court held that the framers of the Fourteenth Amendment had not intended social equality, but rather only "absolute equality of the races before the law."¹²⁵ The Court also asserted that if, as the petitioner claimed, Blacks were stigmatized by laws that isolated them, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."¹²⁶ The lone dissenter, Justice John Marshall Harlan stated that the activist decision would one day "prove to be quite as pernicious as . . . the *Dred Scott* case."¹²⁷ Harlan was correct, as this activist decision gave birth to Jim Crow laws throughout the South.¹²⁸

Recognizing that the Supreme Court had promoted the diminution of the constitutional status of Blacks, the judiciary seemed the least likely place for Houston to concentrate his civil rights efforts: "From the founding of the nation until the Civil War, the Court aggressively rejected inroads upon the constitutionally protected right to own slaves."¹²⁹ The Supreme Court after the Civil War consistently "upheld the constitutionality of laws and practices under which Negroes were reduced to second class citizenship."¹³⁰ With this historical background, the question remains why Houston and his contemporaries selected the courts as their vehicle and encouraged judicial activism as their sword and shield for racial justice.

Some developments after the turn of the century may illuminate the reasons for Houston's choice of judicial activism as a tool. Houston believed that "the classical liberal argument for judicial restraint [n]ever really made sense" as it was a pragmatic ideology meant for "restraining conservative judges who were interfering too much with a long overdue program of social reform at the beginning of the twentieth century."¹³¹ Under this conception, judicial activism was not a "conservative" tool, merely because courts that had used it were considered protective of conservative ends. Decades before the Legal Realists, Houston's social engineering philosophy saw judicial activism as a tool that could be used for the benefit of any ideological position, as long as judges were sympathetic to the cause in question.¹³²

123. 163 U.S. 537 (1896).

124. See NIEMAN, *supra* note 115, at 111.

125. *Plessy*, 163 U.S. at 544.

126. *Id.* at 551.

127. *Id.* at 559.

128. See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

129. Randall L. Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1623 (1986).

130. *Id.* at 1623.

131. Horwitz, *supra* note 103, at 600.

132. See Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 677-78 (1993).

While finding judges sympathetic to his cause was, on the whole, still a discouraging proposition for Houston in the 1920s and 1930s, some trends could be identified that may have brightened the outlook somewhat. During the years between 1910 and 1921, the Supreme Court under Chief Justice Edward Douglass White "breathed some life into Reconstruction principles that had been comatose for more than two decades."¹³³ The Supreme Court, under the leadership of an ex-Confederate soldier, took a surprisingly activist stance toward civil rights, striking down state laws that denied Blacks the right to vote,¹³⁴ supported peonage,¹³⁵ and expanded segregation.¹³⁶ In addition, the 1920s saw the Supreme Court expand its protection of speech and religion.¹³⁷ These small, but bright lights in an otherwise dark era may have offered Houston encouragement on the efficacy of judicial activism for the cause of civil rights.

However, Houston's choice becomes even clearer when the political context of the time is considered. A racial caste system existed in the southern United States when Houston waged his legal battles in the 1930s and 1940s.¹³⁸ These patterns of racial discrimination throughout the southern states included restrictions on employment, educational opportunity, voting, rights in court trials, admission to public accommodations, interpersonal relations, membership in organizations, and residency.¹³⁹ This system of segregation was supported by laws and enforced by the police. Where this was not sufficient, mob rule and lynchings maintained the balance of power between the races.¹⁴⁰

The situation in the North was little better than in the South: "The total system of constraints upon blacks in the North was considerably less than in the South; however, in certain areas, there was very little difference."¹⁴¹ Most Northern cities, with the possible exception of some in New England, maintained a system of racial restrictions on housing, occupational positions, lending practices, municipal services, and access to public accommodations and city services.¹⁴² In cities like New York and Chicago, the presence of large immigrant groups compounded the oppression of newly migrated Blacks who were trapped at the bottom of a three-tiered social system.¹⁴³

133. Benno C. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 446 (1982). But see generally Kennedy, *supra* note 129.

134. See, e.g., *Guinn & Beal v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915).

135. See, e.g., *Bailey v. Alabama*, 219 U.S. 219 (1911); *United States v. Reynolds*, 235 U.S. 133 (1914).

136. See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917).

137. See WOLFE, *supra* note 1, at 22.

138. See generally JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* (1957); CHARLES S. JOHNSON, *PATTERNS OF NEGRO SEGREGATION* (1943); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

139. RICHARD M. BURKEY, *RACIAL DISCRIMINATION AND PUBLIC POLICY IN THE UNITED STATES* 29-31 (1971).

140. See MYRDAL, *supra* note 138, at 558-69. See also *RACIAL VIOLENCE IN THE UNITED STATES* (Allen D. Grimshaw ed., 1969); IDA B. WELLS-BARNETT, *ON LYNCHINGS* (1990); WALTER WHITE, *ROPE AND FAGGOT: A BIOGRAPHY OF JUDGE LYNCH* (1929).

141. BURKEY, *supra* note 139, at 31.

142. *Id.* at 30-31.

143. See generally NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991).

This racial caste system produced a concomitant lack of black political efficacy. In the North, Blacks only influenced politics in areas with a heavily concentrated black population,¹⁴⁴ and in the South, Blacks simply did not influence politics at all.¹⁴⁵

Since the turn of the century, a host of legal and extralegal devices had been in place that prohibited the great majority of southern blacks from exercising a fundamental democratic right, the right to vote. Legal restrictions included the poll tax, property requirements, literacy tests, understanding clauses, and the all-white primary. With the exception of the white primary, impartial administration of these laws would have eliminated a large number of potential white voters, and it did in some cases. But in most instances, local registrars had almost unlimited power in administering the registration laws and used them to disqualify blacks, regardless of their qualifications. If these obstacles were not sufficient to deter potential black voters, local whites routinely relied on terror and violence.¹⁴⁶

While Blacks were largely unrepresented in America's halls of political power, many of those who were represented seemed disinterested in, if not opposed to, Black demands for fair treatment. In addition to the political marginalization at the local and state levels, Blacks faced hostility from the federal government.¹⁴⁷ In the legislative branch, the representatives and senators often mirrored the racial attitudes of those they represented, which meant bitter opposition to civil rights initiatives from many southern Congressmen.¹⁴⁸ Even while the New Deal federalism "implicitly challenged the southern structure of state's rights supported by legalized white supremacy,"¹⁴⁹ liberals within Congress were no match for the southern Democrat voting blocs that were vital to the passage of Roosevelt's New Deal initiatives. The southern congressional delegations were in a position to both reduce the effectiveness of New Deal programs in providing

144. See WILLIAM L. CLAY, *JUST PERMANENT INTERESTS: BLACK AMERICANS IN CONGRESS, 1870-1991* (1992).

145. This is not to say that there were no Black elected officials in southern states, nor is it to say that there was no Black suffrage. However, political constraints kept Blacks from exerting any substantial political influence in most areas of the South. See FREDERIC BANCROFT, *A SKETCH OF THE NEGRO IN POLITICS, ESPECIALLY IN SOUTH CAROLINA AND MISSISSIPPI* (1976); CHARLES V. HAMILTON, *THE BLACK EXPERIENCE IN AMERICAN POLITICS* (1973).

146. Patricia Sullivan, *Southern Reformers, the New Deal and the Movement's Foundation, in NEW DIRECTIONS IN CIVIL RIGHTS STUDIES* 87 (Armstead L. Robinson & Patricia Sullivan eds., 1991).

147. See RALPH J. BUNCHE, *THE POLITICAL STATUS OF THE NEGRO IN THE AGE OF FDR* 121-502, 572-631 (1973).

148. Houston, in fact, led a drive to expel from the Senate Theodore Bilbo from Mississippi, who held virulent racist attitudes and promoted a philosophy of white supremacy. See generally CHARLES HAMILTON HOUSTON & THURGOOD MARSHALL, *IN THE MATTER OF THE MISSISSIPPI DEMOCRATIC PRIMARY CAMPAIGN OF SENATOR THEODORE G. BILBO, SENATOR, STATE OF MISSISSIPPI; BRIEF FOR THE NAACP TO THE SPECIAL COMMITTEE TO INVESTIGATE SENATORIAL CAMPAIGN EXPENDITURES, 1946, SENATE OF THE UNITED STATES, 79TH CONGRESS* (1946).

149. Sullivan, *supra* note 146, at 82.

economic relief to Blacks and to protect the racial norms within their own states:

While the New Deal marked a break with the past, it neither eliminated discrimination from federal programs, won enactment of federal civil rights legislation, nor made civil rights issues a top priority. Southern Democrats controlled key congressional committees and were a force to be reckoned with on Capitol Hill. Consequently, many New Deal administrators were reluctant to root out discrimination in relief and recovery programs in the South because they feared antagonizing powerful committee chairmen who controlled their agencies' appropriations.¹⁵⁰

Besides fending off any threats the New Deal programs might pose to the racial caste system, southern segregationists were also adept at fighting federal civil rights laws: "Southern legislative power—especially skillful use of the filibuster—also thwarted efforts by liberals to enact federal legislation outlawing lynching and the poll tax."¹⁵¹ The threat of violence was the cement that solidified the racial caste system, with opposition to anti-lynching laws being particularly fierce. The NAACP tried unsuccessfully for nearly four decades to pass substantive anti-lynching legislation in the face of hostile segregationists in the House and Senate.¹⁵² In 1938, opponents filibustered an anti-lynching bill for almost six weeks.¹⁵³

Hope of leadership from the executive branches was thin, as recent history had taught.¹⁵⁴ Theodore Roosevelt, while aligned with the Progressives, was also guilty of their sins, including flirtings with White supremacy.¹⁵⁵ William Howard Taft bowed to southern pressure and refused to appoint Blacks to federal posts in the South or speak out against lynchings.¹⁵⁶ Woodrow Wilson, a "moderate" Northerner, aggressively segregated the federal government.¹⁵⁷ Warren G. Harding opposed social equality and further segregated the federal government.¹⁵⁸ Calvin Coolidge also tolerated segregation in the federal government.¹⁵⁹ Herbert Hoover nominated Judge John J. Parker, whom many considered to be a racist, to the Supreme Court.¹⁶⁰ Even Franklin D. Roosevelt, whose rise to power was

150. NIEMAN, *supra* note 115, at 132–33.

151. *Id.* at 132–33.

152. See generally ROBERT ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950* (1980).

153. *THE NEGRO IN DEPRESSION AND WAR: PRELUDE TO REVOLUTION, 1930–1945* 187 (Bernard Steinsher ed., 1969).

154. See generally GEORGE SINKLER, *THE RACIAL ATTITUDES OF AMERICAN PRESIDENTS: FROM ABRAHAM LINCOLN TO THEODORE ROOSEVELT* (1971).

155. See ROMEO B. GARRETT, *THE PRESIDENTS AND THE NEGRO* 213 (1982).

156. GARRETT, *supra* note 155, at 222–27.

157. *Id.* at 230–34.

158. *Id.* at 244–46.

159. *Id.* at 256.

160. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 42–43 (1992). Parker was defeated largely through the efforts of the NAACP. See KLUGER, *supra* note 13, at 140–44. See also KENNETH W. GOINGS, *THE NAACP COMES OF AGE: THE DEFEAT OF JUDGE JOHN J. PARKER* (1990).

initially perceived as "a shot in the arm for Negroes,"¹⁶¹ often equivocated on matters of Black civil rights.¹⁶²

With the lack of cooperation from the executive branch and the hostility within the legislative branch, Houston realized that litigation was the best option. Houston, however, did not fail to recognize the limitations of his court centered strategy: "Notwithstanding his devotion to litigation, Houston refused to place blind trust in the nation's courts. How could he? He litigated in the era of *Plessy*, an era in which the courts were as much the pillars of American apartheid as they were parties to its ultimate dismantling."¹⁶³ Houston realized that many judges, despite their supposed independence, were often responsive to the same political pressures as legislators: "[F]ormal safeguards [such as life tenure and salary protection] cannot be relied upon to ensure that judges will operate free of the influence of majoritarian preference when they endeavor to protect minority interests."¹⁶⁴

As a result, "the Supreme Court [or any court for that matter] is ultimately unable to protect minorities from the tyranny of the majority."¹⁶⁵ Realizing that Blacks could not "depend upon the judges to fight all of [their] battles nor . . . dump all of their problems in the lawyers' laps and go off to sleep," Houston emphasized additional methods of achieving his goals.¹⁶⁶ Among these techniques were increased political participation and control over lawmakers, despite the impediments.¹⁶⁷ Houston also emphasized economic solidarity and direct-action when absolutely necessary.¹⁶⁸ Far from ignoring other aspects of the struggle for racial justice, Houston's "concurrent warnings about the limitations of the judicial system proved indispensable to the larger civil rights struggle."¹⁶⁹

161. Sullivan, *supra* note 146, at 82.

162. Although Roosevelt had shifted significant Black political loyalty to the Democrats from the party of Lincoln, he reluctantly answered to the demands made by his new constituency. Houston learned this from his experience in the NAACP's anti-lynching campaign when he often had to encourage his colleagues to "put the screws on Roosevelt" to provide party leadership. ZANGRANDO, *supra* note 152, at 127 (quoting letter from Houston to Walter White, Mar. 11, 1935, Box C-64, NAACP-Library of Congress). See also SITKOFF, *supra* note 26, at 288. In addition to pressuring Roosevelt's Justice Department to integrate the federal judiciary, Houston "suggested that [it] ought to more actively intervene whenever a citizen's civil rights were unprotected locally." MARY FRANCES BERRY, *BLACK RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA* 134 (1994). Furthermore, Houston's negative experience while serving on the presidential Fair Employment Practices Commission under Roosevelt and Harry S. Truman also explains his misgivings about executive remedies. See *supra* note 41.

163. J. Clay Smith, *Forgotten Hero*, 98 HARV. L. REV. 482, 489-90 (1984).

164. GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* 25 (1993). But see WOLFE, *supra* note 1, at 80-81.

165. SPANN, *supra* note 164, at 19.

166. TUSHNET, *supra* note 31, at 34 (quoting Houston, Tentative Statement Concerning Policy of N.A.A.C.P. in Its Program of Attacks on Educational Discrimination, July 12, 1935, NAACP Papers, Box I-C-197).

167. See MCNEIL, *supra* note 3, at 197.

168. See generally Smith, *supra* note 47; Hobbs, *supra* note 49.

169. MCNEIL, *supra* note 3, at 220.

However, as has been discussed, considering the political realities of the times, along with the relative apathy of the executive branch and the hostility of the legislative branch, Houston's focus on the courts is certainly understandable. The protection against discrimination and the alleviation of segregation Houston desired were not possible through legislative or executive channels. The courts were not only a viable vehicle for racial justice, they also fit with Houston's social engineering philosophy which called for innovation in forcing reforms as "[t]he choice of litigation rather than grass-roots activism was based on the consideration that the courts would be more receptive than other governmental agencies to arguments for legal equality."¹⁷⁰

Houston knew that courts were an option for a minority "even when that minority was without access to the ordinary weapons of democracy."¹⁷¹ Unlike with the executive and legislative branches, in the courts "a black man could 'compel a white man to listen,' and reforms could be forced when blacks had no chance through politics."¹⁷² With the lack of Black political efficacy, Houston "realized that the very structure of our government afforded the opportunity for the court, the Supreme Court, to really be that in-place instrument to do something about [segregation]. . . . The only logical instrument for it . . . [was] a courthouse."¹⁷³ In the courts, Houston prompted the use of the sword and shield of judicial activism to force the end of legally sanctioned racial discrimination in America.

VI. USHERING IN THE WARREN COURT ACTIVISM: HOUSTON'S LEGAL CAMPAIGN AGAINST SEGREGATION

During the twenty years (1930-1950) when Houston was associated with the NAACP, there was an upward trend of civil rights cases reaching the Supreme Court.¹⁷⁴ This heightened scrutiny of cases dealing with racial discrimination and the resulting favorable outcomes were due, in large part, to the efforts of Houston and his court-centered strategy to attack segregation.¹⁷⁵

Houston ran a highly sophisticated and "methodical campaign of litigation designed to undermine Jim Crow and to nurture grass-roots civil rights consciousness."¹⁷⁶ Recognizing that the courts were the best option for the bolstering of civil rights, Houston planned to tap their full potential. Houston's "well-conceived and well-executed plan of preparation and litigation" focused on six main areas: education, labor, housing, voting rights, jury exclusion, and transportation.¹⁷⁷

170. ROELOFS, *supra* note 87, at 254.

171. McNEIL, *supra* note 3, at 218.

172. *Id.* at 217.

173. *Interview of William B. Bryant*, 27 NEW ENG. L. REV. 677, 681-82 (1993).

174. PACELLE, *supra* note 109, at 159.

175. SITKOFF, *supra* note 26, at 217 ("[B]oth the number of cases involving blacks that the Supreme Court agreed to hear and the percentage of outcomes favorable to Negro litigants leaped significantly after 1937.").

176. NIEMAN, *supra* note 115, at 116.

177. McNEIL, *supra* note 3, at 219.

Education was, however, Houston's main focus, especially in the early years of his advocacy. Recognizing that schooling was the key to further opportunity, Houston made the attack on discrimination in education the crown jewel of his strategy. While Houston realized that *Plessy* was settled law and therefore attacks on segregated public grammar and high schools would be futile, he chose to concentrate on the "soft underbelly" of graduate school education. Houston would only use as plaintiffs Black applicants who had impeccable academic credentials, so that their denial of admission to segregated graduate schools clearly had to have been on account of race. In this way, Houston knew he could establish the precedents that would one day be used to undermine separate-but-equal all together:

Houston's masterful strategy was to strike at segregation where it would be most repugnant to well-educated judges—in graduate and professional schools—and ratchet backward toward his ultimate target: segregation in grade schools and high schools across the country.¹⁷⁸

In the cases of *Pearson v. Murray* (1936)¹⁷⁹ and *Missouri ex rel. Gaines v. Canada* (1938),¹⁸⁰ Houston persuaded judges to challenge state statutes that

178. Ken Gormley, *A Mentor's Legacy: Charles Hamilton Houston, Thurgood Marshall and the Civil Rights Movement*, 78 AMER. BAR ASSN. J. 63, 65 (1992). Houston sought to capitalize on the fact that judges were highly educated and, thus, would be sensitive to the nuances of a graduate school education. Judges would especially recognize the disadvantage created by the dual law school system and other Jim Crow mechanisms, such as out-of-state scholarships given to Black applicants by southern states that could not provide equal educational opportunity. See KLUGER, *supra* note 13, at 187.

179. *Pearson v. Murray*, 182 A. 590 (1936). Under state law, the University of Maryland had operated a separate (and substandard) law school for Blacks and offered scholarships to out-of-state law schools for those Blacks whose educational needs could not be met by the Black school. When Donald Murray, a highly qualified Black student, was turned down for admission to the main Baltimore campus, Houston, Thurgood Marshall, and the NAACP sued the university. Finding the Maryland statute as violative of the doctrine of "separate-but-equal," the judge issued a writ of *mandamus* ordering the admission of Murray. The state appealed and the lower court decision was affirmed Maryland's highest court. See *id.* at 594. Ironically, Thurgood Marshall, a Maryland native, was rejected from the University of Maryland Law School on the same grounds in 1930. See CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* 5 (1993).

180. 305 U.S. 337 (1938). The state of Missouri, under statute, maintained separate White and Black law schools. The University of Missouri Law School had facilities and faculty far superior to Lincoln University, the school for Black students. Houston and the NAACP took the case of Lloyd Gaines, an exemplary Black student who had been denied admission to the better school, all the way to the Supreme Court which held that a state is bound to admit a qualified Black student to the White state law school or "furnish him within its borders facilities for legal education substantially equal" to the all-White law school. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938). This effectively disposed of the "out-of-state scholarship" as a means for avoiding the offering of equal educational opportunity in legal education. Because achieving this equality was virtually impossible in segregated schools, states were under pressure to integrate, as did the state of Missouri. Ironically, Gaines never showed up at the final hearing and has not been seen nor heard from since. Thurgood Marshall, Houston's co-counsel in the case, believed that Gaines was lynched before he could integrate the law school. See Gormley, *supra* note 178, at 65. This highlights

required separate law schools for Black students. The results in these landmark education cases opened the way for several other key cases, all of which Houston worked on. The 1948 case of *Sipuel v. Oklahoma State Regents*¹⁸¹ and three 1950 cases, *McCreedy v. Byrd*,¹⁸² *McLaurin v. Oklahoma State Regents*,¹⁸³ and *Sweatt v. Painter*¹⁸⁴ all helped to open the doors of graduate school education to all citizens, regardless of race.

Houston's advocacy also prompted the Court to take activist stances in the face of state laws that failed to provide equal protection to Black citizens in other aspects of life. In the area of labor, Houston secured landmark decisions in *Steele v. Louisville & Nashville Railroad Company* (1944)¹⁸⁵ and *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen* (1944).¹⁸⁶ In the famous housing discrimination case, *Shelley v. Kraemer* (1948) and its companion cases¹⁸⁷ Houston successfully argued that the Court should outlaw the judicial enforcement of restrictive covenants by state and federal governments.¹⁸⁸ And in the case of *Hollins v. Oklahoma*,¹⁸⁹ Houston convinced the Court to declare that discriminatory jury exclusion could warrant the overturning of a conviction.¹⁹⁰ Time and time again, state action was thwarted by a Supreme Court called upon by Houston to take an activist stance.

Charles Hamilton Houston left an indelible mark on American law: "The extent to which [Houston's] legal advocacy has altered the course of American law and history is yet unmeasured and untold."¹⁹¹ Several of the cases in which Houston was a key strategist or litigant "must be recognized for the principles they established in American constitutional law."¹⁹² Even after Houston's death, those "social engineers" Houston influenced would go on to bring about some of the most significant Supreme Court decisions in American history. Houston's work and influence in these cases is, perhaps, the most lasting demonstration of his legacy: "The cases Houston influenced and those in which he participated *are*

the dangers that plagued both the plaintiffs and lawyers during these legal attacks on state-sponsored discrimination.

181. 332 U.S. 631 (1948).

182. 195 Md. 131 (1950).

183. 339 U.S. 637 (1950).

184. 339 U.S. 629 (1950). The decision in *Sweatt v. Painter*, which integrated the University of Texas Law School, was particularly important because it posed a direct challenge to the doctrine of "separate-but-equal" put forth in *Plessy*. The Court emphasized "intangibles" as being as important as physical facilities when determining the parity of the Black and White state law schools, *see id.* at 633-34, which foreshadowed *Brown* and its reasoning. *See* NIEMAN, *supra* note 115, at 147.

185. 323 U.S. 192 (1944).

186. 323 U.S. 210 (1944). In these cases, Houston successfully convinced the Court to read into the Railway Labor Act an implicit intolerance for discrimination on the part of the labor unions engaged in collective bargaining. *See* McNEIL, *supra* note 3, at 168-71.

187. 334 U.S. 1 (1948). *See also* Sipes v. McGhee, 334 U.S. 1 (1948); Urciolo v. Hodge, 334 U.S. 24 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); McNEIL, *supra* note 3, at 181-85.

188. *See* Leland Ware, *Charles Hamilton Houston: The Leading Strategist Against Restrictive Covenant Cases*, 2 NAT'L BAR ASS'N MAG. 24 (Dec., 1988); Leland Ware, *Shelley v. Kraemer and the Restrictive Covenant Cases*, 2 NAT'L BAR ASS'N MAG. 23 (Dec., 1988).

189. 295 U.S. 394 (1935).

190. *See* McNEIL, *supra* note 3, at 121-22.

191. Smith, *supra* note 163, at 490.

192. Reed, *supra* note 49, at 1100.

substantial precedents unlikely to be overturned by contemporary Supreme Court jurists."¹⁹³

Houston cleverly "devised an antisegregation strategy that paid fealty to the law's own conservatism"¹⁹⁴ and turned the doctrine of "separate-but-equal" against itself, securing substantial gains. He "push[ed] the doctrine of separate but equal to its logical limits. Houston knew that separate was never intended to be equal, and that under its strict application, the doctrine would fall of its own weight."¹⁹⁵ His well-planned litigation strategy struck at Jim Crow laws where they were most vulnerable and prompted the Court to slowly, but syllogistically, question the constitutionality of the doctrine of "separate-but-equal": "If the Supreme Court in the 1930s did not cripple the underpinnings of the Jim Crow system, it did make them wobble."¹⁹⁶

Houston achieved success by encouraging judicial activism for progressive ends. By the time *Brown* and *Bolling* were decided, "the philosophy of judicial restraint began to look less attractive to the . . . 'progressives'."¹⁹⁷ It was clear that Houston had dissolved the progressive commitment to judicial restraint as "certain of those lawyers who had applauded Holmes' dissent in *Lochner* were also applauding the decision in *Brown*."¹⁹⁸ Houston's social engineering prompted the shift from economic rights activism to personal rights activism and "[a]s a result, where the old activist decisions prior to 1937 merely blocked legislative initiatives in order to maintain the status quo, the decisions of the 1950s and 1960s . . . were to force major changes in the established legal and social order."¹⁹⁹

Houston's unique and innovative legal strategy laid the groundwork for *Brown* and *Bolling* when the focus would be not on fulfilling the promise of "separate-but-equal" but, rather, exposing its hypocrisy. Houston, by introducing judicial activism as a tool for progressive ends, transformed American constitutional history. Thus, Houston helped to effect some of the most fundamental changes in American law and society. His contribution to American jurisprudence, though often overlooked, is as great as that of any jurist thus far.

VII. CONCLUSION: THE DOUBLE-EDGED SWORD OF JUDICIAL ACTIVISM

The saga of Houston and his battle against segregation offers a lesson for the future of judicial activism. As has been discussed, the political circumstances faced by Houston required him to rely upon judicial activism to further his legal strategy. Obviously, in the case of the legal attack on segregation, "[t]he use of constitutional adjudication as an instrument of reform made ours a freer, more equal, and more humane society."²⁰⁰

193. *Id.*

194. Stephen L. Carter, *Do Courts Matter?* 90 MICH. L. REV. 1216, 1223 (1992).

195. Hobbs, *supra* note 49, at 515.

196. SITKOFF, *supra* note 26, at 243.

197. Cox, *supra* note 105, at 177.

198. Neil Duxbury, *The Theory and History of American Law and Politics*, 13 OXFORD J. LEGAL STUD. 249, 252 (1993).

199. Cox, *supra* note 105, at 182.

200. *Id.* at 182-83.

However, it must be remembered that while Houston's carefully planned strategy minimized the "usually high chances"²⁰¹ for adverse decisions, there always existed the possibility that the Supreme Court might actually *strengthen* the foundations of *Plessy*, which was, itself, an activist decision.

There is a danger in thinking like some proponents of judicial activism who have "objected to the Supreme Court adjudicating politically only when they disapproved of the Court's politics."²⁰² Once we vest the courts with policy-making power, we cannot easily take it back. While this may not be a concern to those whose causes hold the sympathies of the Court at a given moment, in time, the structure of the judiciary changes and ideological balances shift, leaving formerly protected causes to the will of the new majority. This means that judicial activism will produce decisions both favorable and unfavorable and "for every *Brown* there is likely to be a *Lochner*."²⁰³

So where does this leave us? Houston's strategy of securing activist decisions was the most prudent method of working to overturn *Plessy*, another activist decision. In addition, without making a value judgment on judicial activism, it is clear that Houston's strategy presents a special case because he was working to restore fundamental rights denied to certain Americans because of their race. When the legislature tyrannically infringes upon the constitutionally protected rights of the minority, the courts should step in, as they did in *Brown* and the other cases influenced by Houston.

However, we must recognize the dangers associated with judicial activism. Not every instance of judicial activism has the same constitutional grounding as the cases Houston litigated. A contemporary activist Court has the potential to erase the civil rights gains of the last thirty years, just as the 19th century courts erased the civil rights gains of the Reconstruction era. As the twenty-first century approaches, we will continue to examine the nature and function of judicial review in the American constitutional order. In the process, we must not fail to look to the past and recognize that judicial activism can, indeed, be a double-edged sword.

201. McNEIL, *supra* note 3, at 223.

202. Duxbury, *supra* note 198, at 251-52.

203. *Id.* at 252.