Florida Law Review

Volume 43 | Issue 3 Article 2

July 1991

Critical Theory, Neutral Principles, and the Future of Legal Scholarship

Earl M. Maltz

CRITICAL THEORY, NEUTRAL PRINCIPLES, AND THE FUTURE OF LEGAL SCHOLARSHIP

*Earl M. Maltz**

I. INTRODUCTION 445
II. CRITICAL THEORY AND THE EVOLUTION OF LEGAL SCHOLARSHIP 446
III. NEUTRAL PRINCIPLES AND THE JUDICIAL PROCESS . 451
A. *Neutral Principles and Constitutional Law* 451
B. *Neutral Principles and Statutory Analysis* 454
IV. CONCLUSION 460

I. INTRODUCTION

In many ways, Mark Kelman's analysis[1] is typical of the more sophisticated critical legal theorists. He recognizes that judges' decisions are shaped in part by forces that have little or no impact on other political actors.[2] At the same time, however, Professor Kelman's analysis starts from the premise that "our basic political ideologies determine the legal positions we advocate more than any other factor: there are literally no legal issues that anyone cares about in which ideological predispositions lack primary importance."[3] From this perspective, Kelman heaps scorn on traditional, process-oriented legal scholarship.[4] He argues that the primary task of centrist liberals and other legal scholars is to articulate and defend both a coherent ideological vision of rights and the proper course for government generally.[5]

Professor Kelman's perspective is, in many ways, quite seductive. It invites law professors to break out of their intellectual isolation and participate directly in debates that are central to the future of American society. The difficulty, however, is that the mode of legal scholarship Kelman advocates would both maximize the weaknesses and minimize the strengths that law professors can bring to the debate over legal issues. This comment will explore that difficulty and suggest a focus for legal scholarship that would avoid the problems of Professor Kelman's approach.

---

*Professor of Law, Rutgers (Camden), B.A., 1972, Northwestern; J.D., 1975, Harvard.

1. Kelman, *Emerging Centrist Liberalism*, 43 FLA. L. REV. 417 (1991).
2. *Id.*
3. *Id.* at 417-18.
4. *See id.* at 420-21 & nn.7-11.
5. *See id.* at 442-44.

II. CRITICAL THEORY AND THE EVOLUTION OF LEGAL SCHOLARSHIP

Professor Kelman's paper reflects the dramatic changes that have taken place in legal scholarship during the second half of the twentieth century. These changes have been particularly apparent in constitutional scholarship. As Professor Kelman notes, legal scholarship of the 1950s, 1960s, and early 1970s was dominated by two themes. First, legal scholarship of that time generally was concerned with the process of adjudication, rather than the need to reach specific desirable results.[6] Second, constitutional analysis focused on the need to constrain the judiciary in order to preserve the integrity of the democratic process.[7] Concern with these issues cut across conventional ideological lines.[8]

The classic centrist liberal article of that era was Herbert Wechsler's *Toward Neutral Principles of Constitutional Law*.[9] Wechsler argued against ad hoc analysis of the results of specific cases, contending instead that "the main constituent of the judicial process is . . . that it must be genuinely principled, resting . . . on analysis and reasons quite transcending the immediate result that is achieved."[10] Analyzing *Brown v. Board of Education*[11] from this perspective, Wechsler questioned the legitimacy of the determination that school segregation was unconstitutional,[12] notwithstanding his expressed distaste for the policy of segregation itself.[13]

Beginning in the 1970s, critical legal scholars launched a powerful attack on the underpinnings of the then-dominant mode of legal analysis. They argued that judicial results reflect judges' general political beliefs more clearly than they reflect neutral, distinctively legal principles.[14] Further, as a normative matter, the critical legal scholars contended that virtually any result can be justified by reference to the appropriately described neutral principle.[15] Thus, the critical legal

---

6. *See id.* at 420-22 & nn.7-11.
7. *See id.* at 422-24.
8. *See id.* at 420-22 & nn.7-11.
9. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
10. *Id.* at 15.
11. 347 U.S. 483 (1954).
12. Wechsler, *supra* note 9, at 33-34.
13. *Id.* at 34.
14. *See, e.g.*, Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981).
15. *See, e.g.*, Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

scholars concluded that the dominant methodology was intellectually bankrupt.

These arguments brought the orthodox approach to legal analysis under severe intellectual pressure. In addition, an important change in political context contributed to the undermining of the centrist liberals' commitment to a process oriented, constraining mode of legal scholarship. Legal scholars of the 1950s, 1960s, and 1970s operated in the shadow of the *Lochner* era,[16] when an activist Court often struck down legislative initiatives[17] embodying elements of the centrist liberal political program. In contrast, since *Brown*, judicial activism had had a quite different impact, generally defending centrist liberal values from attacks by more conservative government actors.[18] Thus, from a purely political perspective, the centrist liberal emphasis on the legislative process and its concomitant advocacy of judicial restraint became considerably less attractive.[19]

Centrist liberals have reacted to these forces by adopting a more overtly political approach to constitutional adjudication. Some centrist liberals have embraced the critical theorists' view that constitutional "interpretation" is an intrinsically open-ended process leaving judges essentially unconstrained.[20] Other centrist liberals have employed a variety of devices in an effort to maintain links to the traditional process oriented analysis and the ideology of neutral principles. For instance, some claim that the drafters of the Constitution intended that there be wide-ranging, open-ended judicial review.[21] Others argue that the Constitution as a whole embodies a broad political theory such as representative democracy,[22] classical republicanism,[23] or toler-

16. *See generally* Lochner v. New York, 198 U.S. 45 (1905) (holding maximum hour legislation unconstitutional).

17. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923) (holding minimum wage legislation unconstitutional).

18. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (holding statutory classification based upon gender unconstitutional); Roe v. Wade, 410 U.S. 113 (1973) (holding complete prohibition of abortion at any stage of pregnancy unconstitutional); *Brown*, 347 U.S. at 483 (holding school segregation unconstitutional).

19. *See generally* Maltz, *The Court, the Academy and the Constitution: A Comment on* Bowers v. Hardwick *and Its Critics*, 1989 B.Y.U. L. REV. 59, 65-80 (discussing evolution of centrist liberal analysis).

20. *See, e.g.*, Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985).

21. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1514-16 (2d ed. 1988); Sedler, *The Legitimacy Debate in Constitutional Interpretation: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 126-37 (1983).

22. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST (1980).

23. *See, e.g.*, Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

ance.[24] Still other centrist liberals claim that the federal judiciary is uniquely well-placed to make fundamental moral decisions for society,[25] or at the very least to contribute a unique perspective to debates on these issues.[26]

By a strange coincidence, however, all of these views of the judicial role lead to the same conclusion: that the courts should require other branches of government to follow some or all of the principles espoused by the liberal wing of the Democratic party. Therefore, while the preliminary appeal to neutral principles serves a legitimating function in this centrist liberal literature, it is generally clear that the main point of the argument is the advancement of specific substantive policies.

Until quite recently, conservative constitutional scholars generally remained loyal to the theory of constitutional analysis that developed in the 1950s and 1960s. The political pressures on this conservative group were quite different from those that shaped the centrist liberal approach. As judicial activism increasingly favored centrist liberal positions, it behooved conservatives to elaborate a theory of judicial review that strongly constrained the Court. The ideology of neutral principles, in this case often embodied in the defense of a jurisprudence based on originalism,[27] was a natural choice to serve this purpose.

By the late 1980s, however, a number of the most prominent conservative commentators had begun to abandon this position. These commentators favored an advocacy of judicial activism based on either the theory of law and economics or a more general libertarian approach.[28] A variety of factors no doubt influenced this trend. First, the centrist liberal advocacy of judicial activism was proving impervious to arguments based on the ideology of neutral principles. Indeed, centrist liberals were arguing for ever-increasing judicial intervention in support of their positions. Second, the composition of the Supreme Court itself had changed, with conservative Justices becoming ascendant. This change raised the likelihood that a generalized judicial activism would favor conservative positions. In such a climate, increasing calls for judicial activism by conservatives were almost inevitable.

---

24. *See, e.g.*, D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

25. *See, e.g.*, Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-10 (1979).

26. *See, e.g.*, P. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 182-83 (1982); M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 113 (1982).

27. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

28. *See, e.g.*, J. DORN & H. MANNE, ECONOMIC LIBERTIES AND THE JUDICIARY (1987).

Taken together, these forces have changed dramatically the character of legal scholarship. Discussions of the proper application of the ideology of neutral principles largely have faded into the background. Instead, the law journals (particularly the most prestigious law journals) are filled with articles that primarily define and defend a particular vision of a "good" society, and then describe the best strategy for judicial implementation of that vision.

This new emphasis in legal scholarship creates a number of difficulties. Most importantly, it forces law professors to focus on tasks that they are often simply unqualified to perform. The distinguishing feature of legal academics is their postgraduate training in law schools. This training does not significantly enhance their expertise in economics, philosophy, political science, sociology or any other discipline related to the definition of a general substantive vision of a good society. Instead, legal education focuses on the operation of specialized legal conventions — neutral principles of the highest order of generality. These legal conventions can be used to persuade judges to adopt some preexisting substantive vision, but they cannot define the vision itself.

When legal scholars attempt to define their vision of a "good" society in the manner that Professor Kelman suggests,[29] the limited scope of their education often becomes painfully apparent. In many cases, the legal scholarship dealing with these issues is merely an oversimplified or garbled presentation of the secondary sources from other disciplines. Such efforts may impress those who are less well read than the author, and perhaps more importantly, the student editors whose judgments are so important to professional standing in legal education. However, they make no real independent contribution to our substantive understanding of the issues involved in defining a "good" society.

Admittedly, some interdisciplinary legal scholarship avoids these difficulties. A few law professors have postgraduate education in other fields and use that training well. Others may overcome their lack of formal training and contribute substantially to the discussion of broad issues of public policy. Nonetheless, an emphasis like that of Professor Kelman effectively renders legal education irrelevant to legal scholarship. Thus, it denies the possibility that legal scholars as a class can play a definable, unique role in adding to our knowledge of the way in which governmental institutions do and should operate.

The relative narrowness of their expertise thus presents law professors with something of a dilemma. Realists and critical legal scholars

29. *See* Kelman, *supra* note 1.

have argued persuasively that judicial decisions are best viewed as applied political theory.[30] Yet legal scholars are unqualified to discuss these decisions at the level of general political theory. Therefore, they must contribute to the understanding of specific judicial decisions and the judicial decisionmaking process generally in a different manner.

Legal scholars can escape this dilemma by focusing on the constraints that are unique to the judicial decisionmaking process. Without question, the political factors featured so prominently in the contemporary scholarship strongly influence judicial decisions. However, the fact remains that judges typically do not consciously focus on those factors in reaching their decisions; instead, virtually all are committed to Wechsler's ideology of neutral principles.[31] This phenomenon should not be surprising: Wechsler's aspirations for the judicial process reflect beliefs that are widely held in American society and strongly reinforced by the law school education that all judges must undergo.

Critical legal theorists downplay the importance of this point, contending that distinctively legal principles never yield determinate answers. This response is effective against attempts to deploy the ideology of neutral principles as a normative defense of particular results. It does not, however, demonstrate that the ideology of neutral principles is not in fact an element in the judicial decisionmaking process. To the contrary, judges' commitment to good faith implementation of this basic ideology has a demonstrable impact on their approach to judicial decisionmaking, even where the results of the application of the ideology are controversial.

The importance of neutral principles to the judicial process presents an important opportunity for legal academics. Legal education is centered on the interaction between the ideology of neutral principles and other factors in "difficult" cases. Further, law professors are drawn from the ranks of highly successful law students, those who have demonstrated the most talent for dealing with this interaction. Therefore, legal scholars are peculiarly well qualified to analyze how the judicial thought process differs from that of other governmental decisionmakers.

The approach to legal scholarship advocated by Professor Kelman and other critical theorists does not take advantage of this special expertise of legal scholars. Indeed, an analysis centered on peculiarly legal knowledge would essentially be a mirror image of Kelman's approach. This analysis would be descriptive rather than normative. It

30. *See supra* notes 14-15 and accompanying text.

31. *See* Wechsler, *supra* note 9.

would recognize that judicial decisions are bounded by mainstream American political values, and that within those bounds judges are influenced strongly by their personal political views. Primarily, however, the analysis would focus on how the ideology of neutral principles influences the overall judicial decisionmaking process. As the next section of this comment will demonstrate, a focus on this influence can yield important insights into both constitutional and nonconstitutional decisionmaking.

III. NEUTRAL PRINCIPLES AND THE JUDICIAL PROCESS

A. *Neutral Principles and Constitutional Law*

The Supreme Court's decision in *South Carolina v. Gathers*[32] demonstrates the importance of the ideology of neutral principles in constitutional cases. *Gathers* involved a challenge to the death sentence imposed on a defendant convicted of murder and first degree criminal sexual conduct.[33] During the sentencing phase of the trial, the prosecutor read extensively from a religious tract that the victim had been carrying.[34] Further, the prosecutor commented on personal qualities he inferred from the victim's possession of the tract and a voter registration card.[35] The defendant argued that the prosecutor's use of such information rendered the imposition of the death sentence unconstitutional under the Eighth Amendment.[36] By a 5-4 vote, the Supreme Court adopted the defendant's position.[37]

Gathers was influenced strongly by the Court's earlier decision in *Booth v. Maryland*.[38] The *Booth* Court analyzed the constitutionality of a Maryland law requiring juries in capital cases to consider a victim impact statement (VIS), which the state included in its presentence report.[39] In *Booth*, the VIS was based on information gathered from the family of two murder victims.[40] The VIS described the personal characteristics of the victims, the severe impact of the crimes on the victims' family, and the family members' opinions and characterizations of the crime and the defendant.[41]

---

32. 490 U.S. 805 (1989).
33. *Id.* at 805.
34. *Id.* at 808-09.
35. *Id.* at 809-11.
36. *See id.* at 810.
37. *See id.* at 805.
38. 482 U.S. 496 (1987).
39. *Id.* at 498-500.
40. *Id.* at 499.
41. *Id.*

Over four dissents,[42] the *Booth* Court found the introduction of the VIS unconstitutional.[43] Justice Powell's majority opinion concluded that the admission of the VIS created a constitutionally unacceptable risk that the jury might impose the death penalty in an arbitrary and capricious manner.[44] Powell based his conclusion partially on the argument that the VIS introduced factors that might be "wholly unrelated to the blameworthiness of a particular defendant."[45] The consideration of such evidence "could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."[46]

Not surprisingly, the majority opinion in *Gathers* relied heavily on the reasoning in *Booth.*[47] Indeed, speaking for the Court, Justice Brennan treated *Gathers* as a simple application of the neutral principle of stare decisis.[48] Brennan noted that the *Booth* VIS included descriptions of the victims' personal characteristics by the victims' survivors.[49] In *Gathers*, he concluded that even though "it was the prosecutor rather than the victim's survivors who characterized the victim's personal qualities, the statement is indistinguishable in any relevant respect from that in *Booth.*"[50]

The four dissenters in *Gathers* recognized that the stare decisis issue raised by *Booth* significantly weakened their position.[51] Speaking only for himself, Justice Scalia argued that overruling *Booth* would create few of the problems normally associated with abandoning precedent.[52] The remaining three dissenters joined Justice O'Connor's opinion,[53] which approached the problem differently. Justice O'Connor noted a willingness to overrule *Booth*; however, she devoted far greater effort to distinguishing that case from *Gathers.*[54] Because *Booth* did not involve comments by the prosecutor, O'Connor argued that it was not necessary to read the case as establishing "a rigid

42. *See id.* at 515-19 (White, J., dissenting); *id.* at 519-21 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice O'Connor joined in these dissents. *See id.* at 515, 519.
43. *Id.* at 509.
44. *Id.* at 505-09.
45. *Id.* at 504.
46. *Id.* at 505.
47. *See Gathers*, 490 U.S. at 810.
48. *See id.*
49. *Id.*
50. *Id.* at 811.
51. *Id.* at 823-25 (Scalia, J., dissenting); *id.* at 813-14 (O'Connor, J., dissenting).
52. *Id.* at 823-25 (Scalia, J., dissenting).
53. *See id.* at 812 (O'Connor, J., dissenting).
54. *See id.* at 813-23.

Eighth Amendment rule eliminating virtually all consideration of the victim at the penalty phase."[55] Instead, she contended, *Booth* could be read more narrowly to "allow jury consideration of information about the victim and the extent of the harm."[56] O'Connor concluded that the defendant's constitutional rights had not been violated in *Gathers*.

Both the majority and dissenting opinions in *Gathers* clearly reflect the rhetorical significance of the ideology of neutral principles in judicial decisions. On their face, however, they do not demonstrate the substantive impact of that ideology on the actual results of cases. Indeed, a comparison of Justices Brennan's and O'Connor's treatment of *Booth* supports one of the key tenets of critical legal theory: the idea that precedent is very malleable. Moreover, in *Gathers*, almost all of the Justices read *Booth* in a manner consistent with the substantive views that they had expressed in *Booth*. Once again, this outcome is more consistent with critical legal theory than the ideology of neutral principles.

By contrast, Justice White's action in *Gathers*[57] reflects the substantive importance of neutral principles. Justice White was the only *Booth* dissenter to join the *Gathers* majority. Further, his vote was critical to the *Gathers* result. After *Booth*, the author of the majority opinion, Justice Powell, was succeeded by Justice Kennedy. Justice Kennedy joined the *Gathers* dissenters. Thus, if Justice White had remained with his erstwhile allies in *Gathers*, the case would have been decided differently.

Critical legal theory does not provide a rationale for Justice White's change in position. The ideology of neutral principles, on the other hand, provides a clear, plausible explanation. In his brief concurring opinion in *Gathers*, Justice White concluded that the majority's position must be accepted "[u]nless *Booth* is to be overruled."[58] In conjunction with this statement, Justice White's vote in *Booth* implies two points. First, while O'Connor's reading of *Booth* might have been plausible, Justice White read the case as controlling *Gathers*. Second, Justice White, at least at the time *Gathers* was decided, was not sufficiently disenchanted with the *Booth* result to overcome his allegiance to the doctrine of stare decisis.[59] Thus, Justice White's vote in *Gathers* illus-

55. *Id.* at 814.

56. *Id.*

57. *Id.* at 812 (White, J., concurring).

58. *Id.* (citation omitted).

59. Justice White's view on this point apparently changed between the time *Gathers* was decided and the Court's subsequent disposition of Payne v. Tennessee, 111 S. Ct. 2597 (1991).

trates clearly the impact of the ideology of neutral principles on the decisionmaking process.

B. *Neutral Principles and Statutory Analysis*

Gathers is a fairly simple example of the interaction between the ideology of neutral principles and other factors that influence judicial decisionmaking. However, neutral principles can be even more important in statutory cases. The Court's shifting treatment of 42 U.S.C. sections 1981 and 1982[60] provides a relatively complex example.

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."[61] Section 1982 states that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."[62] In the modern era, the key question has been the applicability of these statutory prohibitions to purely private acts of racial discrimination. The Warren Court first considered this issue in *Jones v. Alfred H. Mayer Co.*[63] In that case, the Court held by a vote of 7-2,[64] that section 1982 prohibited private racial discrimination in transactions related to real property.[65]

The dispute between the majority and the dissent in *Jones* focused on both proper application of the doctrine of stare decisis and proper interpretation of the statutory language. On the stare decisis issue, the *Jones* dissent argued that *Hurd v. Hodge*[66] held definitively that section 1982 did not reach purely private discrimination.[67] In contrast, the majority characterized this statement in *Hurd* as nonbinding dictum.[68]

In *Payne*, he joined the majority in overruling both *Booth* and *Gathers*. Unlike in *Gathers*, Justice White's vote was not critical in *Payne*; a change in the makeup of the Court had left the *Booth/Gathers* doctrine with only three supporters. But in any event, the fundamental lesson of *Gathers* — that the ideology of neutral principles can and does have an important impact on judicial decisionmaking — remains unaffected by Justice White's post-*Gathers* change of heart.

60. 42 U.S.C. §§ 1981-1982 (1988).
61. *Id.* § 1981.
62. *Id.* § 1982.
63. 392 U.S. 409 (1968).
64. *See id.*
65. *Id.* at 440-44.
66. 334 U.S. 24 (1948).
67. *Jones*, 392 U.S. at 452 (Harlan, J., dissenting).
68. *Id.* at 420 n.25.

The dispute over statutory language also was phrased in terms of the widely accepted neutral principles that courts should effectuate legislative intent, and the corollary that courts should follow the "plain meaning" of statutory language in the absence of strong contrary evidence of legislative intent.[69] The *Jones* majority argued that, on its face, the language of section 1982 seemed to prohibit private discrimination by guaranteeing blacks "the same right" as whites to acquire real property.[70] Further, the majority argued that the legislative history of section 1982 supported this conclusion.[71] Finally, the majority concluded that section two of the Thirteenth Amendment vested Congress with the authority to reach private discrimination.[72] In contrast, the dissent contended that the language of section 1982 was ambiguous[73] and that the legislative history and context of the statute suggested an intent to prohibit only state-imposed racial discrimination.[74]

The *Jones* holding was extended to cover section 1981 in *Runyon v. McCrary*.[75] In *Runyon*, seven members of the Court concluded that section 1981 prohibited a private school from excluding black applicants from its student body solely on the basis of race.[76] All members of the majority saw *Runyon* as clearly controlled by *Jones*.[77] Included in this group were Justices Powell and Stevens, who had not been on the Court at the time *Jones* was decided. Each filed a separate opinion in *Runyon*[78] conceding that the majority's view of the legislative history in *Jones* was at best questionable[79] but concluding that the result in *Runyon* was compelled by the doctrine of stare decisis.[80]

The two *Runyon* dissenters, Justices White and Rehnquist, took a different view.[81] Rather than arguing that *Jones* should be overruled, they strained to demonstrate that the *Jones* case was distinguishable from *Runyon*.[82] The dissenting opinion first argued that while section

69. *See id.* at 420, 437.
70. *Id.* at 420-22.
71. *Id.* at 422-37.
72. *Id.* at 437-44.
73. *Id.* at 452-54 (Harlan, J., dissenting).
74. *Id.* at 455-76.
75. 427 U.S. 160 (1976).
76. *Id.* at 168-75.
77. *Id.*
78. *Id.* at 186-89 (Powell, J., concurring); *id.* at 189-92 (Stevens, J., concurring).
79. *Id.* at 186; *id.* at 189.
80. *Id.* at 186; *id.* at 189-92.
81. *Id.* at 192-214 (White, J., dissenting).
82. *See id.* at 213-14.

1982 was derived from the Civil Rights Act of 1866, section 1981 was derived from the Civil Rights Act of 1870.[83] Second, Justices White and Rehnquist noted that while the Civil Rights Act of 1866 was passed to enforce the Thirteenth Amendment, the Civil Rights Act of 1870 was adopted pursuant to section five of the Fourteenth Amendment.[84] Therefore, the dissenters argued that because the prohibitions of the Fourteenth Amendment did not apply to purely private action, section 1981 logically could not have been intended to reach such action.[85]

As in *Jones* and *Runyon*, discussions of precedent also played a central role in *Patterson v. McLean Credit Union*.[86] *Patterson* began as a section 1981 action alleging racial harassment and racially-motivated refusal to promote the plaintiff employee.[87] Initially, the Court granted certiorari to resolve two issues: the applicability of section 1981 to racial harassment, and the appropriateness of the specific jury instruction given on the promotion claim.[88] After the first oral argument, however, a majority of the Court issued a sua sponte order requesting briefs and argument on the question of whether *Runyon* should be overruled.[89] None of the five Justices who concurred in the order had been members of the *Runyon* majority.[90]

On re-argument, the *Patterson* Court declined to overrule *Runyon*.[91] Nonetheless, the Court limited the applicability of section 1981 in employment discrimination cases.[92] The same five Justices who had concurred in the order for re-argument also joined Justice Kennedy's majority opinion.[93] Emphasizing the particular significance of the doctrine of stare decisis in statutory interpretation cases,[94] Justice Kennedy concluded that the defendants had not shown any "special justification" to support overturning *Runyon*.[95]

On the specific issues of racial harassment and discrimination in promotion, Justice Kennedy relied primarily on the kind of close tex-

83. *Id.* at 195.
84. *Id.* at 197-202.
85. *Id.* at 201-02.
86. 491 U.S. 164 (1989).
87. *Id.* at 169.
88. 484 U.S. 814 (1987).
89. 485 U.S. 617 (1988).
90. *See Runyon*, 427 U.S. at 163; *Patterson*, 491 U.S. at 167.
91. *Patterson*, 491 U.S. at 174-75.
92. *Id.* at 175-85.
93. *See id.* at 167.
94. *Id.* at 171-73.
95. *Id.* at 173.

tual analysis that underlay the *Jones* holding.[96] He observed that by its terms the language of section 1981 does not extend to the employer's conduct after the contractual relationship has been established.[97] Therefore, Justice Kennedy concluded that a refusal to promote was covered by section 1981 only if the promotion would have involved the making of an entirely new contract.[98] Further, Justice Kennedy determined that the racial harassment claim was not actionable under any circumstances.[99]

Justices Stevens[100] and Brennan[101] dissented from the *Patterson* majority's conclusion that section 1981 covered neither racial harassment claims nor most promotion decisions.[102] Justice Stevens argued that the logic of the *Jones* and *Runyon* decisions, operating through the doctrine of stare decisis, precluded the limiting construction adopted by the majority.[103] In addition to amplifying Justice Stevens' argument involving stare decisis, Justice Brennan argued that the *Jones* analysis suggested that section 1981 was indeed intended to prohibit both racial harassment and racial discrimination in promotion decisions.[104]

From a purely formalistic perspective, the progression from *Jones* to *Runyon* to *Patterson* could be described as a series of disputes over the proper application of neutral principles. Certainly, almost all of the arguments in the opinions are phrased in these terms. However, as any critical legal theorist or conventional Realist would quickly point out, such a description would be incredibly naive. First, the critical legal theorist might point out that these three cases present classic examples of the legal indeterminacy that is central to critical legal analysis. Indeed, conventional legal analysis could support all of the results advocated by the various Justices in *Jones*, *Runyon*, and *Patterson*. Further, the critical legal theorist could observe that both Justice Stevens' concurring opinion in *Runyon* and Justice Kennedy's majority opinion in *Patterson* explicitly relied upon conventional political considerations as justifications for refusing to reinstate what they believed to be the original understanding of the drafters of the Civil

96. *See id.* at 175-89.
97. *Id.* at 171.
98. *Id.* at 185.
99. *Id.* at 179-80.
100. *Id.* at 219-22 (Stevens, J., dissenting).
101. *Id.* at 189-219 (Brennan, J., dissenting).
102. *Id.* at 179-80, 185.
103. *See id.* at 219-22 (Stevens, J., dissenting).
104. *Id.* at 189-202 (Brennan, J., dissenting).

Rights Act of 1866.[105] Moreover, the critical legal theorist could then note that the *Patterson* majority's sua sponte decision to request briefs on the continued vitality of *Runyon* was highly irregular. Finally, the theorist certainly would observe that in each case the liberal members of the Court voted for a sweeping interpretation of the civil rights statutes, while the more conservative Justices almost invariably voted to give the statutes a narrower scope. This pattern seems to support Professor Kelman's central thesis that "our basic political ideologies determine the legal positions we advocate more than any other factor: there are literally no legal issues that anyone cares about in which ideological predispositions lack primary importance."[106]

A closer analysis of *Jones*, however, exposes the limits of this analysis. Justice Harlan — one of the *Jones* dissenters — was indeed probably the most conservative Justice on the Court at the time that *Jones* was decided.[107] However, the import of this characterization easily can be overstated. The Warren Court was an extraordinarily liberal institution, and Justice Harlan would be characterized most accurately as a centrist by current standards. Moreover, there is simply no evidence that Justice Harlan opposed federal efforts to attack private racial discrimination. To the contrary, in *Heart of Atlanta Motel, Inc. v. United States*[108] and *Katzenbach v. McClung*,[109] Justice Harlan joined in the rejection of plausible constitutional challenges to the Civil Rights Act of 1964, which outlawed a wide range of private discrimination. The juxtaposition of Justice Harlan's positions in *Heart of Atlanta*, *Katzenbach*, and *Jones* creates considerable difficulties for those who explain voting patterns solely in conventional political terms.

Justice Byron White's dissenting vote in *Jones* is even more difficult to reconcile with the view that judges are primarily influenced by political considerations.[110] Justice White not only concurred in the refusal to strike down the Civil Rights Act of 1964,[111] but also aggres-

105. *Id.* at 174 ("*Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin."); *Runyon*, 427 U.S. at 191-92 (Stevens, J., concurring) ("The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society. . . . For the Court now to overrule *Jones* would be a significant step backwards. . . .").

106. Kelman, *supra* note 1, at 417.

107. *See Jones*, 392 U.S. at 449 (Harlan, J., dissenting).

108. 379 U.S. 241 (1964).

109. 379 U.S. 294 (1964).

110. *See Jones*, 392 U.S. at 449 (Harlan, J., dissenting, in which White, J., joins).

111. *See Katzenbach*, 379 U.S. at 294; *Heart of Atlanta*, 379 U.S. at 241 (Justice White joined the majority in both of these cases).

sively interpreted the Constitution to protect the interests of minority races in a wide variety of contexts.[112] Indeed, although Justice White was more conservative than Justice William O. Douglas and Thurgood Marshall, his record on civil rights during the tenure of Chief Justices Earl Warren and Warren Burger was clearly more liberal than that of Justice Potter Stewart,[113] the author of the majority opinion in *Jones*. Therefore, Justice White's position in *Jones* is very difficult to explain in conventional political terms.

The most plausible explanation for the positions adopted by Justices Harlan and White in *Jones* is that both Justices were influenced profoundly by the ideology of neutral principles. Each sincerely believed that the drafters of the Civil Rights Act of 1866 did not intend to outlaw private racial discrimination[114] and that the drafters' intent had been settled conclusively by prior case law.[115] Whatever their personal opinions on the propriety of federal intervention against private racial discrimination, these factors led Justices Harlan and White to hold that the Act should not govern private discrimination.

Similar considerations also may have influenced the outcome in *Patterson*. A conventional political analysis of the majority's decision to restrict the scope of section 1981 in that case[116] is more informative than a similar analysis of *Jones*. Because most members of the *Patterson* majority had shown consistent hostility to federal protection for the rights of minorities, their refusal to extend section 1981 is not surprising. By contrast, the same Justices' refusal to overrule *Runyon* is clearly not subject to the same explanation. Conventional political analysis simply cannot explain why the majority of the Court chose to outlaw racial discrimination in hiring, but not promotion.

One possible explanation for the *Patterson* result is that the Justices simply retreated in the face of the intense political reaction that

---

112. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980) (Justice White joined the majority in this case, upholding, against an equal protection challenge, the implementation of a public works employment act provision which required contractors who receive federal funds to use 10% of those funds, when feasible, to procure business and supplies from minority business enterprises); City of Mobile v. Bolden, 446 U.S. 55 (1980) (Justice White dissented in this case, arguing that Mobile's at-large election system unfairly diluted the voting rights of Mobile's black population, in violation of the Fourteenth and Fifteenth Amendments); Milliken v. Bradley, 418 U.S. 717 (1974) (Justice White dissented in this case, arguing that courts should be empowered to impose a multi-district remedy for single-district *dejure* school segregation, even if there is no proof that the outlying districts have practiced *dejure* school segregation).

113. *See, e.g.*, cases cited *supra* notes 111-12.

114. *See, e.g.*, *Jones*, 392 U.S. at 450 (Harlan, J., dissenting).

115. *See, e.g., id.* at 450-52.

116. *See Patterson*, 491 U.S. at 175-85.

greeted the initial order requesting briefs on the continued viability of *Runyon*. However, the ideology of neutral principles provides an equally plausible rationale for the structure of the *Patterson* analysis. Overruling *Runyon* would have vindicated the principle that judges are to be guided by the original understanding of the legislative drafters but sacrificed the principle of stare decisis. By contrast, narrowing the *Jones/Runyon* doctrine in a manner at least facially consistent with the original *Jones* analysis protected both principles. The damage done to basic principles of statutory interpretation was circumscribed, and the doctrine of stare decisis was also honored, at least formally. The appeal of such a solution to judges steeped in the structures of legal analysis is not surprising.

Of course, no one could argue persuasively that only distinctively legal principles influenced the Justices in the *Jones*, *Runyon*, and *Patterson* cases. Obviously, the Justices' basic political philosophies profoundly influenced their attitudes toward sections 1981 and 1982. However, one cannot describe the judicial process adequately without a full appreciation of the importance of the ideology of neutral principles, in addition to more general political theory. Although Professor Kelman seems to appreciate this point,[117] critical legal theory is neither designed nor equipped to explore the influence of the ideology of neutral principles on judicial decisionmaking. Thus, a truly adequate model of the judicial process can be constructed only by combining the best elements of Professor Kelman's critical legal theory with more conventional legal analysis.

IV. CONCLUSION

Professor Kelman and other critical legal theorists perform an important service by reminding us that judicial decisions have political consequences that transcend narrow doctrinal concerns. But in denigrating the study of the ideology of neutral principles, they inappropriately downplay the central role that institutional context plays in shaping the actions of judges. In addition, Professor Kelman and other critical theorists encourage legal scholars to neglect the task for which their training best prepares them. Of course, law professors should not abandon their exploration of the insights to be gained from other disciplines. Indeed, the very best scholarship on neutral principles would incorporate such insights into the analysis. Moreover, to the extent that interdisciplinary studies by legal scholars meet the prevailing professional standards of disciplines such as economics, political

117. *See* Kelman, *supra* note 1, at 417.

theory, philosophy, and history, these studies can have a significance that transcends the relatively isolated world of legal scholarship. However, law professors who completely abandon traditional legal analysis will not only underestimate the importance of their own expertise, but also distort our understanding of the legal process itself.