

# Twins at Birth: Civil Rights and the Role of the Solicitor General

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It is painful even today to contemplate the awful devastation wreaked upon this nation by the War Between the States. But like most cataclysms, the Civil War also gave birth to some important positive developments. I would like to talk with you today about two such offspring of that war, and the extent to which, like many sibling pairs, they have influenced each other's development.

The first child—the most well-known progeny of the Civil War—was this country's commitment to civil rights. The war, of course, ended slavery. But it did not—and could not—change the way Americans thought about and treated each other. Civil rights and their polestar, the principle of equal protection of the laws, encompass far more than the absence of state-sanctioned servitude. The Congresses and Presidents that served in the wake of the Civil War aimed at this more fundamental and difficult goal. They brought about ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments. And they enacted a variety of laws designed to enforce the guarantees of those Amendments.

But as history shows so agonizingly, it takes much more than well-meaning laws—or even constitutional amendments—to reweave the social fabric of a nation. In the first place, a law that is merely on the books is quite different from one that is actually *enforced*. And what is more, a law that is enacted will not necessarily even remain on the books. Under the principle of judicial review established in *Marbury v. Madison*,<sup>1</sup> the Supreme Court is the final arbiter of the meaning of the Constitution, the interpretation of federal statutes, and the validity of those statutes under the Constitution. Congress can pass laws, but unless those laws are enforced, they have little meaning in people's lives. And unless they are upheld when challenged in the Supreme Court, they cannot be enforced. And that is where my other child of the Civil War—a much more obscure offspring—comes in.

The position of Solicitor General was created by Congress in 1870, shortly after ratification of the Fifteenth Amendment.<sup>2</sup> It is without doubt an utterly unique institution. Perhaps nothing exemplifies this better than this anomaly: whereas many lawyers consider being Solicitor General the greatest job one could ever have (and they are right), the overwhelming majority of citizens has no idea what the Solicitor General does—or even that the country has one.

The Solicitor General is, among other things, the United States's lawyer in the Supreme Court, and for that reason he is often referred to as the “Tenth Justice.” The

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\* Solicitor General of the United States. This is the text of a lecture sponsored by the Indiana Supreme Court and delivered at the Indiana University School of Law—Bloomington on February 3, 2000. The author expresses gratitude to Trevor W. Morrison for his considerable assistance in the preparation of the lecture and to Professor Michael Klarman for his helpful comments on an earlier draft of this lecture.

1. 5 U.S. (1 Cranch) 137 (1803).

2. See Act of June 22, 1870, ch. 150, 16 Stat. 162. The Fifteenth Amendment was ratified in 1870. The Thirteenth and Fourteenth Amendments were ratified in 1865 and 1868, respectively.

only officer of the United States required by statute to be “learned in the law,”<sup>3</sup> he is also responsible for supervising litigation on behalf of the United States in the lower federal courts and in the state courts.<sup>4</sup> What almost no one appreciates is the extent to which the position of Solicitor General has been linked with the national imperative to foster equal rights. To my knowledge that connection has never been subject to scholarly inquiry. It is what I want to explore with you today.

First, I want to issue a disclaimer. In my experience, there is nothing more foolhardy or dangerous than a practicing lawyer venturing into the discipline of history. Yet that is precisely what I am going to do. And thus, to use the vernacular of the entertainment industry, listeners are strongly cautioned.

Caution is particularly appropriate because what I will be attempting to set out today are little more than propositions I am exploring. The invitation to deliver this lecture provided me both an opportunity and an incentive to develop what is at this early stage a thesis. I know my thesis is defensible; but it will take a lot more work to know if it is in fact correct. This lecture represents a commencement, in the true sense of the word.

This lecture also proceeds from at least one proposition that probably can never be conclusively proved or disproved. That is the notion that litigating lawyers in general, and the Solicitor General in particular, can and do affect the direction of the law. One can never know precisely why the Supreme Court decided a particular case the way it did, and chose the words it did to express that decision. But as Solicitor General, I must—and do—proceed with the conviction that the positions we take before the Court, and the way we take them, play a role in the Court’s decisionmaking. Similarly today, my analysis of the relationship between the work of the Solicitor General’s Office and the development of civil rights law proceeds from the assumption that the choices made by my predecessor Solicitors General while participating in landmark civil rights cases had some impact on the outcomes of those cases.

Let me tell you how I plan to organize the balance of the hour. By my reckoning, civil rights law in this country has largely developed in two distinct epochs: the first began with the Civil War and ended with *Plessy v. Ferguson*;<sup>5</sup> the second was launched by the Second World War.<sup>6</sup> I plan to examine the relationship between the

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3. 28 U.S.C. § 505 (1994).

4. See 28 C.F.R. § 0.20 (1999).

5. 163 U.S. 537 (1896).

6. I am not at all certain how, or whether, to fix an end date for what I am calling this “second epoch.” Persuasive points can be made in support of contentions that it closed with the passing of the Warren Court, or the Burger Court, or even that it continues, in some manifestations, to this day. Only the passage of time will show which, if any, of those periodizations is appropriate. For now, we remain, in Bruce Ackerman’s metaphor, too close to the mountains to describe their outline in any comprehensive way:

Think of the American Republic as a railroad train, with the judges sitting in the caboose, looking backward. What they see are the mountains and valleys of our dualistic constitutional experience . . . As the train moves forward in history, it is harder for the judges to see the traces of volcanic ash that marked each mountain’s emergence onto the legal landscape. At the same time, a different perspective becomes available: As the more recent eruptions move further into the background, it becomes easier to see that there is now a mountain range out

development of civil rights doctrine and the work of the Solicitor General by looking at two Solicitors General from each period: for the first epoch, Benjamin Bristow and Samuel Phillips, the country's first two Solicitors General; for the second, Philip Perlman, who served from 1947 through 1952, and Archibald Cox, who was Solicitor General from 1961 through 1965.

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First, let me provide some background. When the First Congress met in 1789, it created the position of Attorney General and vested it with responsibility "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments."<sup>7</sup> Congress provided the Attorney General neither a department nor even a part-time clerk. He had no formal authority over the United States Attorneys created for each federal district. That anomaly caused Edmund Randolph, the first Attorney General, to lament that because of the want of a fixed relation between the attorneys of the districts and the Attorney General,

the United States may be deeply affected by various proceedings in the inferior courts, which no appeal can rectify. The peculiar duty of the Attorney General calls upon him to watch over these cases; . . . [but] his best exertions can not be too often repeated, to oppose the danger of a schism.<sup>8</sup>

Randolph therefore requested authority over the United States Attorneys. But his request, and similar ones made by every President and Attorney General until the Civil War, was refused. In the early decades of the Republic, the Attorney General was, quite literally, alone.<sup>9</sup>

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there that can be described in a comprehensive way.

Bruce Ackerman, *Constitutional Policy/Constitutional Law*, 99 YALE L.J. 453, 546 (1989).

7. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93.

8. Letter from Edmund Randolph, Attorney General, to George Washington, U.S. President (Dec. 26, 1791), reprinted in 1 AMERICAN STATE PAPERS (MISC.) 46 (1834).

9. Over the years Congress gradually granted the Attorney General both some measure of control over the litigating efforts of the federal government and some supporting personnel to aid in the achievement of that objective. But such provisions came slowly. Indeed, it was not until 1818 that Congress first gave the Attorney General a single clerk and permanent office space. See Act of Apr. 20, 1818, ch. 87, § 6, 3 Stat. 445, 447. And it was not until 1861 that the Attorney General was given control over the federal district attorneys across the country. See Act of Aug. 2, 1861, ch. 37, 12 Stat. 285, 285-286; HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 142, 218, 491 (1937). But throughout the antebellum period, principal officers in other federal departments retained the authority to direct litigation concerning their departments, independent of the Attorney General. That authority included the power to direct the work of district attorneys, long before the Attorney General had any comparable authority. See Seth P. Waxman, "Presenting the Case of the United States As It Should Be": *The Solicitor General in Historical Context*, 1998 J. SUP. CT. HIST. SOC'Y 3, 7.

By the advent of the Civil War, litigation on behalf of the United States was hopelessly confused. Much of it was conducted, even in the Supreme Court, by private attorneys retained for individual cases. These attorneys—many of whom were simply political favorites—made ill-considered and inconsistent representations about the position of the United States with respect to interpretations of law. And when the Civil War created an avalanche of litigation, the system simply collapsed. The Senate passed a resolution asking Henry Stanbery, President Johnson's Attorney General, for his advice on how to fix it.<sup>10</sup> Stanbery asked for two things: the creation of a Department of Justice that would encompass all of the law officers of the United States, and which the Attorney General would head; and the creation of a new position, to be called Solicitor General of the United States.<sup>11</sup> The latter would be responsible, in Stanbery's words, for "the preparation and argument of cases before the Supreme Court . . . and the preparation of opinions on questions of law referred to [the Attorney General]."<sup>12</sup> The new Solicitor General would thus perform the precise duties the First Congress had given the Attorney General.

Congress granted both of Stanbery's wishes. As to the position of Solicitor General, though, Congress had something additional in mind. As the report accompanying the 1870 Act stated:

We propose to create . . . a new officer, to be called the solicitor general of the United States, part of whose duty it shall be to try . . . cases [on behalf of the United States] in whatever courts they may arise. We propose to have a man of sufficient learning, ability, and experience that he can be sent to New Orleans or to New York, or into any court wherever the Government has any interest in litigation, and there present the case of the United States as it should be presented.<sup>13</sup>

Now obviously no individual, no matter how "learned," could represent the United States in the Supreme Court, deliver legal opinions for the President, serve as a second-in-command to the Attorney General, and travel around the country trying important cases. Any Solicitor General would need to prioritize. And Congress and President Grant had in mind what that priority should be. It was reflected unambiguously in the selection of the first two Solicitors General, men who occupied the position for its first fourteen years.

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Benjamin Helm Bristow, the first Solicitor General, was a renowned lawyer, a loyal Republican, and an ardent defender of black civil rights.<sup>14</sup> For the four years immediately preceding his appointment as Solicitor General, he served as United

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10. See CONG. GLOBE, 40th Cong., 2d Sess. 196 (1867); CUMMINGS & MCFARLAND, *supra* note 9, at 222.

11. See S. EXEC. DOC. NO. 40-13, at 2 (1867).

12. *Id.*

13. CONG. GLOBE, 41st Cong., 2d Sess. 3035 (1870).

14. See ROSS A. WEBB, BENJAMIN HELM BRISTOW: BORDER STATE POLITICIAN 50-70 (1969).

States Attorney in Kentucky, and during that tenure he distinguished himself as one of the most aggressive and successful prosecutors of Ku Klux Klan cases in the country. When Bristow resigned his position as U.S. Attorney, newspapers as far away as New York hailed him as a “civil rights champion.”<sup>15</sup>

That is precisely what Congress and the President wanted. They wanted the Civil War Amendments and the legislation implementing those Amendments enforced, particularly in the South; and they wanted an expansive interpretation of these laws defended in the courts, particularly in the Supreme Court. That, as I see it, is how the civil rights mandate of the Solicitor General was set in train.

No one thought this mandate would be easy, and it was not. Violence against southern blacks, frequently perpetrated by members of the Ku Klux Klan, was on the rise. In some southern states, egregious attacks were going unreimied by local law enforcement. And several southern states had passed so-called “Black Codes,” which, in the very face of the Thirteenth Amendment, reinstated a race-based caste system, keeping blacks as an inferior and dependent class by disabling them from owning, renting, or transferring property, pursuing skilled callings, or seeking access to courts. This great State of Indiana had in its constitution—and enforced through legislation—an article providing that “[n]o Negro or Mulatto shall come into or settle in the State” and further providing that “[a]ll contracts made with any Negro or Mulatto coming into the State . . . shall be void; and any person who shall employ such Negro or Mulatto, or otherwise encourage him to remain in the State shall be fined.”<sup>16</sup>

Congress responded by enacting the Civil Rights Act of 1866,<sup>17</sup> the Enforcement Act of 1870,<sup>18</sup> the Ku Klux Klan Act of 1871,<sup>19</sup> and the Civil Rights Act of 1875.<sup>20</sup> When Congress passed the 1866 Act, the Fourteenth Amendment—which is the focus of most contemporary discussions regarding Congress’s power to legislate over civil rights—had not yet been ratified. Thus, Congress asserted power under the Enforcement Clause of the Thirteenth Amendment, which grants Congress the power to enforce the prohibition on slavery by appropriate legislation. The 1866 Act granted all citizens “the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens.”<sup>21</sup> It declared the infringement of those rights under color of law to be a federal crime; it created a federal civil right of action to vindicate those rights; and it permitted the removal of state actions where a party claimed that the vindication of those rights was not possible in state court. The

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15. *Id.* at 70.

16. IND. CONST. art. XIII, §§ 1-2 (repealed) (invalidated as violating the federal Constitution in *Smith v. Moody*, 26 Ind. 299 (1866)); see also *infra* text accompanying note 24.

17. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982, 1987-1989 (1994)).

18. Act of May 31, 1870, ch. 114, 16 Stat. 140 (repealed 1894).

19. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (current version at 42 U.S.C. § 1985 (1994)).

20. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (declared unconstitutional in *The Civil Rights Cases*, 109 U.S. 3 (1883)).

21. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. at 27 (current version at 42 U.S.C. § 1982 (1994)).

Enforcement Act, the Ku Klux Klan Act, and the 1875 Civil Rights Act built on the 1866 Act, and invoked the by-then-ratified Fourteenth Amendment as authority for expanding federal criminal jurisdiction to cover racially motivated violence and general interference with national civil rights, like the right to vote.

But enforcing those statutes and convincing federal courts to sustain their constitutionality was a tall order, and it required a Janus-like posture for the Solicitor General—looking in one direction to the district courts for enforcement, and in the other to the Supreme Court for validation. On the enforcement side, the prospects of obtaining civil rights jury verdicts in the Old Confederacy seemed remote.<sup>22</sup> And with respect to challenges in the Supreme Court, the Solicitor General would be required to persuade an institution that by its very nature tends to be conservative and inclined toward incrementalism, to uphold a legislative program that was, by its very nature, far-reaching, indeed revolutionary.

Overall, the Solicitors General fared much better with enforcement in the district courts than they did with defense in the Supreme Court. Let me give you a few examples. In *United States v. Rhodes*,<sup>23</sup> Bristow, while U.S. Attorney, prosecuted three white defendants under the 1866 Act for robbing a black family in Louisville. Bristow premised federal jurisdiction on the theory that state authorities could not prosecute the case since state law precluded blacks from testifying in cases in which whites were parties. The defendants challenged the Civil Rights Act as an unconstitutionally broad grant of federal jurisdiction over matters properly left to state criminal law. Supreme Court Justice Swayne, sitting as a Circuit Justice, held that the Act permissibly granted federal jurisdiction in the case (citing as authority an opinion of the Supreme Court of Indiana that had invalidated an article of the Indiana Constitution under the Thirteenth Amendment and the 1866 Civil Rights Act).<sup>24</sup> In November 1869 Bristow was able to report to the Attorney General that as a result of the *Rhodes* decision, he had been able to “proceed[] with the trials of a large number of parties . . . under the Civil Rights Act and a number of those tried have been sentenced and are now serving their respective terms.”<sup>25</sup>

But in the Supreme Court Bristow could not sustain his legal theory. In a case called *Blyew & Kennard v. United States*,<sup>26</sup> a racially motivated murder case Bristow had *also* personally prosecuted, the Supreme Court overruled Justice Swayne’s interpretation in *Rhodes*. By a vote of 7-2 the Supreme Court held that the 1866 Act did not permit federal courts to assert jurisdiction over a criminal case, even where a state prosecution could not proceed because all of the witnesses were black and

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22. The likelihood of jury verdicts in favor of the government diminished even further when former Confederates were allowed back on federal juries in 1879. Before that, federal jurors were required to swear that they had always remained loyal to the Union. This presumably disqualified a number of those prospective jurors who were most irrevocably opposed to black civil rights.

23. 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

24. See *Smith v. Moody*, 26 Ind. 299 (1866).

25. WEBB, *supra* note 14, at 60 (alteration and omission added) (quoting Letter from Benjamin Helm Bristow, Solicitor General, to E. Rockwood Hoar, Attorney General (Nov. 9, 1869)).

26. 80 U.S. 581, 595 (1872). For a discussion of Bristow’s prosecution of the case at the trial level, see WEBB, *supra* note 14, at 58-60.

therefore unable to testify against a white defendant under state evidentiary rules.<sup>27</sup>

The phenomenon of success in enforcing the civil rights acts in the district courts, followed by frustration in the Supreme Court, became a pattern. In *Ex parte Walton*,<sup>28</sup> for example, (later characterized by a congressional committee as “[t]he first important trial in the United States under the enforcement act”)<sup>29</sup> the United States indicted twenty-eight persons for killing a black man in Mississippi. The defendants petitioned for a writ of habeas corpus, alleging that the Enforcement Act exceeded Congress’s authority under the Fourteenth Amendment. When Solicitor General Bristow arrived in Oxford to supervise the trial, tensions were so high that order was being maintained by a full company of United States infantry and a cavalry brigade.<sup>30</sup> The district court upheld the Enforcement Act as a valid exercise of Congress’s authority.<sup>31</sup> And when a defendant in another Enforcement Act case, *Ex parte Greer*, petitioned the Supreme Court for a writ of habeas corpus to review the constitutionality of the Act, Chief Justice Chase dismissed the petition for lack of jurisdiction.<sup>32</sup>

For five years thereafter the entire Enforcement Act remained in force—a critical five years during which vigorous prosecution reduced the incidence of racially motivated violence.<sup>33</sup> But in 1876 the Court struck down portions of the Enforcement Act in *United States v. Reese*<sup>34</sup> and narrowly construed the constitutional guarantees protected by another provision in *United States v. Cruikshank*<sup>35</sup>—effectively gutting prosecution efforts under the Act. Both cases were argued for the government by Samuel Phillips, who succeeded Bristow as Solicitor General in November 1872.

Like Bristow, Phillips came with a civil rights pedigree. As a federal prosecutor in North Carolina, he had conducted and overseen several important Klan prosecutions.<sup>36</sup> But Phillips’ remarkable tenure as Solicitor General—he served for twelve years under six Attorneys General—was marked by bitter defeats in the Supreme Court in a host of civil rights cases.

Most notable were the *Civil Rights Cases*<sup>37</sup> and *United States v. Harris*,<sup>38</sup> both decided in 1883. In the former, the Court struck down the provision in the Civil Rights Act of 1875 that prohibited racial discrimination in public accommodations, conveyances, and places of public entertainment. Observing that the provision in

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27. See *Blyew*, 80 U.S. at 595.

28. The case is unreported, but is discussed in CUMMINGS & MCFARLAND, *supra* note 9, at 235-37, JAMES WILFORD GARNER, RECONSTRUCTION IN MISSISSIPPI 351-52 (1901), and WEBB, *supra* note 14, at 88.

29. S. REP. NO. 42-41, at 936 (1872).

30. See GARNER, *supra* note 28, at 352; WEBB, *supra* note 14, at 88.

31. See GARNER, *supra* note 28, at 351-52; WEBB, *supra* note 14, at 88.

32. See WEBB, *supra* note 14, at 96-97.

33. See *id.*

34. 92 U.S. 214 (1876).

35. 92 U.S. 542 (1876).

36. See R.H. Battle, *Hon. Samuel Field Phillips, LL.D.*, 1 N.C. J.L. 22, 27 (1904); Robert D. Miller, *Samuel Field Phillips: The Odyssey of a Southern Dissenter*, 58 N.C. HIST. REV. 263, 275 (1981).

37. 109 U.S. 3 (1883).

38. 106 U.S. 629 (1883).

question did “not profess to be corrective of any constitutional wrong committed by the States,” the Court held, 8-1, that it exceeded Congress’s power to enforce any substantive provision of the Fourteenth Amendment.<sup>39</sup> Similarly in *Harris*, the Court struck down § 2 of the Ku Klux Klan Act of 1871, which outlawed conspiracies to deprive citizens of the equal protection of the laws. The Fourteenth Amendment, the Court held, could not be violated by the conduct of private parties, no matter how invidious their purpose or how egregious their acts.<sup>40</sup> The Court allowed that racially motivated murder by a private party might violate the Thirteenth Amendment, but § 2 of the Ku Klux Klan Act was not limited only to race and thus could not be upheld on that theory either.

One explanation for the civil rights defeats that Phillips—and, before him, Bristow—suffered at the Court may be that by the time cases implicating Reconstruction civil rights laws began reaching the Court with regularity in 1875 and later, much of the political ardor of Reconstruction had subsided.<sup>41</sup> By the mid-1870s, a nationwide recession had diverted national attention away from issues of race and towards economic matters. Then, in the 1874 national elections, Reconstruction suffered a serious blow when Democrats won back control of the House of Representatives from Reconstructionist Republicans. Those elections both severely undermined congressional support for Reconstruction and reflected the shift in national priorities away from civil rights issues. It is difficult to know how much that shift affected the Court, and we will never know whether major civil rights cases like *Cruikshank* and *Reese* would have come out differently had they been decided at the height of Reconstructionist zeal in the early-1870s. But it seems reasonable to surmise that changes in national priorities by the mid-1870s played at least some role in the defeats that Bristow and Phillips suffered at the Court.

Samuel Phillips’s best-known civil rights argument is one he made long after his twelve-year tenure as Solicitor General. In 1896, representing a black railroad passenger named Homer Plessy in the infamous case of *Plessy v. Ferguson*,<sup>42</sup> Phillips argued that a Louisiana statute requiring railroad companies to provide “equal but separate accommodations for the white and colored races” violated the Equal Protection Clause.<sup>43</sup> The Court, we all know, held otherwise. The sole dissenter in both the *Civil Rights Cases* and *Plessy v. Ferguson* was Benjamin Bristow’s former law partner, Justice John Marshall Harlan.<sup>44</sup>

The Court’s ruling in *Plessy* brought to an unmistakable end the country’s first civil rights era. Following the string of earlier losses in defense of many of Congress’s

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39. *The Civil Rights Cases*, 109 U.S. at 14.

40. *See Harris*, 106 U.S. at 643.

41. *See generally* ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS 1866-1876* (1985).

42. 163 U.S. 537 (1896).

43. *Id.* at 537 (quoting 1890 La. Acts 111); *see also* Damon Keith, *One Hundred Years After Plessy v. Ferguson*, 65 U. CIN. L. REV. 853, 854-55 (1997) (discussing facts and procedural background of *Plessy*). Phillips shared the oral argument on Plessy’s behalf with Albion Tourgee, who had represented Plessy since trial. *See generally* CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987).

44. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting); *The Civil Rights Cases*, 109 U.S. at 33 (Harlan, J., dissenting).



civil rights statutes, *Plessy*'s overwhelming rejection of what today seems like a bedrock principle of equal protection left few options, and little enthusiasm for further legal challenges.<sup>45</sup> For fifty years little happened.<sup>46</sup>

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And then another great war ended. Black soldiers returned home in 1945 with a new perspective on their abilities and their treatment. President Truman appointed a Committee on Civil Rights, which urged the federal government to become active in seeking an end to racial discrimination in all its forms.<sup>47</sup> Truman publicly committed that the federal government would be a "friendly vigilant defender of the rights and equalities of all Americans. . . . Our National Government," he said, "must show the way."<sup>48</sup>

But who was to lead? The Department of Justice had no Civil Rights Division,<sup>49</sup> and generations of federal prosecutors had come and gone with no experience whatsoever in civil rights prosecution. No significant national legislation had been enacted since the Supreme Court had eviscerated many of the Reconstruction provisions.

The mission fell to Solicitor General Philip Perlman and his staff to devise a strategy. In this new phase, the posture of the United States was quite different.

45. Justice Harlan's dissent was prophetic of *Plessy*'s impact:

The present decision, it may well be apprehended, will not only stimulate aggressions . . . upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge.

*Plessy*, 163 U.S. at 560. For a detailed analysis of the post-*Plessy* period, and the jurisprudential tenor of the times, see Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303.

46. I mean "little," of course, in a relative, not an absolute, sense. Prominent examples of pro-civil rights decisions by the Court during this 50-year period include *Smith v. Allwright*, 321 U.S. 649 (1944), and *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). For a contextual account of pro-civil rights decisions during the second decade of the twentieth century, see Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881 (1998). See also Andrew Kull, *Post-Plessy, Pre-Brown: "Logical Exactness in Enforcing Equal Rights"*, 1999 J. SUP. CT. HIST. SOC'Y 155.

47. The Committee, formed by President Truman in December 1946, released its report in October 1947. See PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947).

48. Brief for the United States as Amicus Curiae at 2, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (No. 72).

49. A small civil rights unit had been established in 1939 by then-Attorney General Frank Murphy, but it was diminutive. As one historian described it, "[it] was still pretty much the Tinker Toy it had been when Frank Murphy set it up." RICHARD KLUGER, *SIMPLE JUSTICE* 252 (1977).

Litigation now came to the Supreme Court not in enforcement suits brought by the United States, but in private litigation brought by the likes of Charles Hamilton Houston, Thurgood Marshall, and the attorneys of the NAACP. Those attorneys devised a litigation strategy much like that often employed by Solicitors General in managing litigation on behalf of the United States—bringing to the Supreme Court cases in an incremental progression, generating momentum one small step at a time.<sup>50</sup>

The United States was not a party in these cases. But there can be little doubt, in this period of utmost fragility in civil rights litigation, that the cautious Supreme Court would attach great significance to the position—if any—the Tenth Justice might choose to take. And in a series of filings, the Solicitor General lent unqualified support to the plaintiffs.

*Shelley v. Kraemer*<sup>51</sup> was one of several cases involving constitutional challenges by private parties to racially restrictive covenants on real property. Perlman filed a brief amicus curiae, urging the Supreme Court to declare that the Fourteenth Amendment prohibits judicial enforcement of racially restrictive covenants. The brief reminded the Court that, although formal, de jure residential segregation no longer existed, “[a]ctual segregation, rooted in ignorance, bigotry and prejudice, and nurtured by the opportunities it affords for monetary gains from the supposed beneficiaries and real victims alike, does exist because private racial restrictions are enforced by courts.”<sup>52</sup> In bold language asserting a broad right to be free from race-based discrimination, the Solicitor General urged the Court to prohibit judicial enforcement of restrictive covenants. And the Court did.<sup>53</sup>

*Shelley* was the first time the United States had gone on record in the Supreme Court broadly condemning all manifestations of racial discrimination. Two years later, a civil rights case came to the Court in which the United States was a party—a party defendant. In an unusual and bold filing, the Solicitor General announced that he would not defend the judgment in favor of the United States, but instead would argue in support of the civil rights plaintiff.<sup>54</sup> The case was *Henderson v. United*

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50. See generally MARK TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION* (1987); Seth P. Waxman, *The Physics of Persuasion: Arguing the New Deal*, 88 GEO. L.J. (forthcoming 2000).

51. 334 U.S. 1 (1948).

52. Brief for the United States as Amicus Curiae at 121, *Shelley* (No. 72).

53. There is an ironic footnote to this proud moment. The brief for the United States in *Shelley* was written by four Jewish lawyers named Philip Elman, Oscar Davis, Hilbert Zarky, and Stanley Silverberg. Their names, however, were deliberately omitted from the filed brief. According to a subsequent account by Mr. Elman, Arnold Raum, the Solicitor General's principal assistant (and himself a Jew) told the others that it was “bad enough that Perlman's name has to be there, to have one Jew's name on it, but you have also put four more Jewish names on. That makes it look as if a bunch of Jewish lawyers in the Department of Justice put this out.” Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 819 (1987).

54. It is unusual, although consistent with the finest traditions of the Solicitor General's office, for the United States to decline to defend in the Supreme Court a lower-court judgment in favor of the United States when the Solicitor General concludes that the lower-court judgment cannot be defended. The practice is known as “confessing error.” See generally Archibald Cox, *The Government in the Supreme Court*, 5 CHI. BAR REC. 221, 224-25 (1963).

States,<sup>55</sup> and here is what happened.

Elmer Henderson, a black passenger on a train, was declined service in the train's dining car because the tables conditionally reserved for blacks were partially occupied by whites when he arrived in the dining car. The dining car steward refused to seat Henderson at those tables, even though they had empty seats. Henderson filed a complaint with the Interstate Commerce Commission ("ICC"). During the litigation, the railroad changed its rules so that a separate table surrounded by a partition would always be reserved for black passengers. But that still left the question of whether such segregation was itself permissible. Henderson maintained that it was not, and contended specifically that it violated the Interstate Commerce Act. The ICC rejected his claim on the ground that the provision of separate but equal facilities was not discrimination. Henderson appealed to a three-judge district court, naming both the United States and the ICC as defendants. The Justice Department defended the ICC's decision, the district court agreed, and Henderson appealed directly to the Supreme Court.

Consistent with his now-public stand against racial discrimination, Perlman refused to defend the district court's judgment and switched sides in the case. The brief filed on behalf of the United States contended that segregation on trains violated the Interstate Commerce Act. But Perlman did not stop there. He also argued that the doctrine of "separate but equal" was itself unconstitutional, and that *Plessy* should be overruled.<sup>56</sup> Never before had the United States called for the overruling of *Plessy*, and to fully appreciate the significance of this step it is necessary to understand how very rarely the Solicitor General ever asks the Supreme Court to overrule one of its precedents.<sup>57</sup> But in *Henderson*, the Solicitor General left no room for doubt. As Philip Elman, then an attorney in the Solicitor General's Office, later described the brief, it "took a flat, all-out position that segregation and equality were mutually inconsistent, that separate but equal was a contradiction in terms."<sup>58</sup>

The Supreme Court was not prepared to take such a bold step. It found for Henderson without reaching the constitutional question. But even though the Court

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Between the time the Solicitor General filed the United States's amicus brief in *Shelley* and the date on which he announced that the United States would switch sides in *Henderson v. United States*, 339 U.S. 816 (1950), Perlman on five separate occasions asked the Supreme Court to vacate lower-court decisions in civil rights cases in which the United States, as a defendant, had prevailed, because on review he concluded the lower courts had been wrong to rule against the civil rights plaintiffs.

55. *Henderson*, 339 U.S. 816.

56. See Brief for the United States at 12, 23-66, *Henderson* (No. 25).

57. See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE* 107 (1987) (quoting Rex Lee, Solicitor General during President Reagan's first term, as saying that it "accomplishes nothing" to "lecture the Justices about where they went wrong" and to urge them to overturn well-established precedent); Craig R. Callen, *Stare Decisis and the Case for Executive Restraint*, 9 MISS. C. L. REV. 79, 90-95, 97-99 (1988); see also *infra* text accompanying notes 83-84, 88.

58. Elman & Silber, *supra* note 53, at 821. Elman himself played a crucial role in the development and articulation of the United States's position in *Henderson*. For a brief account of that role, see Anthony Lewis, "Imposing on Them a Badge of Inferiority", N.Y. TIMES, Jan. 22, 2000, at A15.

did not reach *Plessy in Henderson*, it seems reasonable to surmise that the Solicitor General's willingness to do so made an impression with the Court.<sup>59</sup>

That impression was of the utmost importance in the succession of all-important school desegregation cases Thurgood Marshall had lined up for the Court. On the same day the Court announced its decision in *Henderson*, it decided two cases—*Sweatt v. Painter*<sup>60</sup> and *McLaurin v. Oklahoma*<sup>61</sup>—involving racial segregation in universities. Again, the Solicitor General filed amicus briefs in both cases urging the Court to overrule *Plessy* and declare that state-sponsored racial segregation is unconstitutional in all cases.<sup>62</sup>

Again the Court ruled on narrow grounds. This time, it did reach the Constitution: it found equal protection violations in both *Sweatt* and *McLaurin*, but it did so by focusing on the inferiority of the education black students had received in both cases, not on the fact of segregation itself.<sup>63</sup> Because blacks' educational opportunities were not equal to those of whites, the Court emphasized that the cases did not require any reconsideration of whether "separate but equal" was itself a valid doctrine.<sup>64</sup>

But the Court could not avoid *Plessy* forever. In its landmark 1954 decision in *Brown v. Board of Education*,<sup>65</sup> a unanimous Court held that state-mandated segregation in public education is unconstitutional, without regard to the relative quality of the educational opportunities available to either race.

A full discussion of *Brown*, and the roles of all the major players in the case, particularly the legendary efforts of lawyers at the NAACP, is beyond the scope of this lecture. I would like to focus your attention, however, on one part of the *Brown* decision, a part in which the Solicitor General played a key role. That was the Court's decree that de jure school segregation be eliminated not immediately, but "with all deliberate speed." Even today, the Court's choice of that locution stirs controversy and debate.

The actual parties in the *Brown* litigation presented the Court with a stark choice: either uphold "separate but equal" or end school segregation virtually immediately. Were those truly the Court's only options, there is reason to doubt whether *Brown* would have come out quite as it did. An order compelling immediate desegregation almost certainly could not have commanded unanimous support on the Court, and many on the Court may well have worried that attempts at executing such an order might have been met with widespread civil disobedience and violence.

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59. I do not mean to suggest that the Court invariably lagged behind the federal government on matters of civil rights during this period. In at least a few instances, the Court evidenced a progressive attitude towards civil rights before the United States government did. In *Smith v. Allwright*, 321 U.S. 649 (1944), for example, the Court invalidated the exclusion of blacks from a primary election in Texas. The Roosevelt administration, however, elected not to participate in the case, possibly for fear of offending southern Democrats in Congress.

60. 339 U.S. 629 (1950).

61. 339 U.S. 637 (1950).

62. See Brief for the United States at 9-14, *Sweatt* (No. 44); Memorandum for the United States as Amicus Curiae at 9-14, *McLaurin* (No. 34).

63. *McLaurin*, 339 U.S. at 640-41; *Sweatt*, 339 U.S. at 632-33.

64. See *Sweatt*, 339 U.S. at 635-36.

65. 347 U.S. 483 (1954).

Speaking as an *amicus curiae* supporting the plaintiffs, the Solicitor General proposed a third option: hold segregation to be unconstitutional, but allow school districts some leeway in the implementation of desegregation.<sup>66</sup> As Philip Elman described it, this option “offered the Court a way out of its dilemma, a way to end racial segregation without inviting massive disobedience, a way to decide the constitutional issue unanimously without tearing the Court apart.”<sup>67</sup> By balancing its principled opposition to segregation with a pragmatic view of what sorts of arguments were actually viable to the Justices, the Solicitor General helped the Court to arrive at a decision that was both forceful in principle and workable, even if neither side was fully satisfied.

The United States’s position in *Brown* reflected an important aspect of the Solicitor General’s unique role with respect to the Supreme Court. In our constitutional system, respect for precedent and the rule of law are of surpassing importance, and adherence to those principles makes the Supreme Court an inherently cautious institution. The United States as a litigant benefits from, and shares, the Court’s institutional adherence to doctrines of stability in the law. And for that reason, the Court has come to rely on the Solicitor General to present briefs of the most scrupulous fidelity, and to combine statements of principle with strategies by which the Court may rule in a manner most consistent with principles of stability. Thus, the Solicitor General’s position in *Brown* combined an unambiguous, principled insistence on an end to “separate but equal” with a suggestion for a mechanism by which the Court could abandon *stare decisis* in a matter of critical societal importance with a minimum of upheaval and risk to the Court’s institutional authority.

The suggestion of “all deliberate speed” has been criticized as both without legal foundation and responsible for a great deal of foot-dragging in the post-*Brown* era.<sup>68</sup> There is some force to both of those points. But it also seems clear that the Court could not have resolved *Brown* as it did—and certainly could not have done so unanimously—without the cushion of “all deliberate speed.” Although both sides in the case opposed it, “all deliberate speed” proved to be the ground on which all members of the Court felt they could stand together.

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The approach manifested in *Brown*—tempering principle with pragmatism and a respect for precedent—was the very hallmark of the government’s strategy in the next

66. The actual phrase “deliberate speed” did not appear in the United States’s initial brief. According to Elman, that phrase “made its first appearance in *Brown* in [Assistant Attorney General J. Lee] Rankin’s oral argument in 1953.” Elman & Silber, *supra* note 53, at 830; see 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT: CONSTITUTIONAL LAW 538 (Philip B. Kurland & Gerhard Casper eds., 1975); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 208 (1994).

67. Elman & Silber, *supra* note 53, at 827.

68. See *id.* at 827-28 (describing the idea of a delayed remedy for a constitutional violation as “entirely unprincipled [and] . . . just plain wrong as a matter of constitutional law”); Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938, 1947 (1987) (noting that “a decade after *Brown*, only 2.3 percent of black schoolchildren in the south were attending desegregated schools”).

phase of civil rights litigation. Archibald Cox was John F. Kennedy's Solicitor General. A Harvard law professor with expertise in labor law and government experience during the Truman administration, Cox enjoyed a storied tenure as Solicitor General.<sup>69</sup> Many of his important victories came in civil rights cases.

When Cox assumed office, several different types of civil rights cases were making their way to the Supreme Court. Some school cases still remained in the aftermath of *Brown*. A newer group of cases included prosecutions of African-American sit-in demonstrators for refusing to leave whites-only public facilities. Other cases concerned the reapportionment of electoral districts and racial discrimination in voting procedures.

Archibald Cox was a cautious litigator by nature, and his views about the appropriate posture for the Solicitor General with respect to positions taken before the Court was similarly conservative. As a result, in several civil rights cases, he found himself in tactical disagreement with Attorney General Robert F. Kennedy. Kennedy envisioned the Department of Justice championing a broad vision of the Reconstruction Amendments as prohibiting all forms of race-based discrimination and as authorizing Congress to pass legislation concerning even purely private conduct.<sup>70</sup> Cox was more circumspect. He was mindful of the Supreme Court's opinion in the *Civil Rights Cases* and skeptical that the Court would agree that the Fourteenth Amendment authorized Congress to reach purely private conduct, however discriminatory.

Moreover, Cox thought it inappropriate for the Solicitor General to be pressing expansive and doctrinally tenuous arguments before the Court. He knew that the views of the Solicitor General carried considerable weight with the Court, and he felt he had a duty (as Robert Kennedy once described Cox's view) "to protect the Court from itself" when it came to delicate questions of constitutional rights.<sup>71</sup>

*Bouie v. City of Columbia*<sup>72</sup> is a prime example of Cox's approach. *Bouie* was one of a series of cases arising out of the convictions of black protestors for violating state trespass laws by staging sit-ins at whites-only lunch counters. In the Supreme Court, the protestors argued that the States had enforced their trespass statutes in a racially discriminatory manner, and they urged the Court to find that such discrimination violated the Equal Protection Clause.<sup>73</sup>

Many in the Department of Justice wanted the United States, as *amicus curiae*, to take a similar position.<sup>74</sup> And after all, that was not much of a step beyond *Shelley v. Kraemer*, or indeed *Yick Wo v. Hopkins*,<sup>75</sup> decided in 1886, which held that racially discriminatory enforcement of a facially neutral rule violates the Fourteenth

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69. For general accounts of Cox's tenure as Solicitor General, see CAPLAN, *supra* note 57, at 188-201, and KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 140-96 (1997).

70. See GORMLEY, *supra* note 69, at 164, 172, 177, 189; VICTOR S. NAVASKY, KENNEDY JUSTICE 289-95 (1971); ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 290-91 (1978).

71. GORMLEY, *supra* note 69, at 172 (quoting Interview by Anthony Lewis with Robert F. Kennedy and Burke Marshall (Dec. 12, 1964)).

72. 378 U.S. 347 (1964).

73. See Brief for Petitioners at 19-59, *Bouie* (No. 10).

74. See GORMLEY, *supra* note 69, at 155-59.

75. 118 U.S. 356 (1886).

Amendment. But Cox chose a much more narrow ground. Rather than invoking sweeping equal protection principles, he focused the Court's attention on statutory interpretation. Cox contended that the South Carolina trespass statute could not fairly be read to proscribe the conduct of the protestors. And even if the statute *was* susceptible of such a reading, he argued, the defendants in *Bouie* certainly did not have fair warning that the statute would be so construed.<sup>76</sup>

To me, that position seems rather far-fetched, since an obvious objective of the plaintiffs' demonstration had been to get arrested.<sup>77</sup> But the Supreme Court accepted Cox's invitation to rule narrowly.<sup>78</sup> The South Carolina courts were free to construe the trespass statute to cover a protestor's refusal to leave a lunch counter, it held, but because such a reading was an unforeseeable expansion of the previous meaning of the statute, it could not be applied against the defendants in *Bouie*.<sup>79</sup>

The next Term, Cox again adopted a cautious approach, this time in two landmark cases involving challenges to the Civil Rights Act of 1964—the first significant civil rights legislation since the Civil Rights Act of 1875 was struck down in the *Civil Rights Cases*. The cases were *Heart of Atlanta Motel v. United States*<sup>80</sup> and *Katzenbach v. McClung*.<sup>81</sup>

76. See Brief of the United States as Amicus Curiae at 25-55, *Bouie* (No. 10). The protestors themselves also made a similar argument as an alternative basis for reversal, see Brief for Petitioners at 59-65, *Bouie* (No. 10), but their focus was on the equal protection issue.

77. See *Bouie*, 378 U.S. at 367 n.4 (Black, J., dissenting) (noting that “[o]ne petitioner said that he had intended to be arrested; the other said he had the same purpose ‘if it took that.’”).

78. Before it did so, however, the Court invited the Solicitor General to file a supplemental brief “expressing the views of the United States upon ‘the broader constitutional issues which have been mooted’” in the case. Supplemental Brief for the United States as Amicus Curiae at 1-2, *Bouie*, 378 U.S. 347 (Nos. 6, 9, 10, 12, & 60). In its supplemental brief the United States took the position that discriminatory enforcement of trespass laws does constitute an equal protection violation. The brief accepted the Court's decision in the *Civil Rights Cases*, but argued that *Bouie* and the cases with which it was consolidated were distinguishable because they involved state action in the form of police and judicial enforcement of state laws in a discriminatory fashion. See *id.* at 10, 16-17. Thus, Cox was willing to make the equal protection argument if pressed. Presumably, he simply judged the more narrow argument to be preferable as a strategic matter.

79. *Bouie*, 378 U.S. at 363. In part because the protestors intended and expected to be arrested, the Court's “unforeseeability” rationale seems rather tenuous at best. Indeed, even at the time *Bouie* was decided, commentators were skeptical of that rationale. See, e.g., Monrad G. Paulsen, *The Sit-In Cases of 1964: “But Answer Came There None”*, 1964 SUP. CT. REV. 137, 141 (“The majority's position respecting due process requirements in interpreting criminal statutes has established a precedent that will be difficult to follow because of the breadth of its effect. . . . It is not to be expected that the Court will be diligent in applying the *ratio decidendi* of *Bouie* to other cases.”). But the Court's willingness to base its decision on that rationale underscores its desire to avoid reaching the equal protection issue, even if doing so means jeopardizing doctrinal credibility. See Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 274 (1991) (contending that in *Bouie* and other sit-in cases, “the Court employed a variety of clever/disingenuous strategies for reversing the demonstrators convictions” without reaching the equal protection issue).

80. 379 U.S. 241 (1964).

81. 379 U.S. 294 (1964).

At issue was the 1964 Act's "public accommodations" section, which prohibited discrimination in restaurants, motels, movie theaters, and the like.<sup>82</sup> For the United States, the question was whether to defend the provision under the Fourteenth Amendment, or under the Commerce Clause, or under both. The Attorney General, many leading civil rights lawyers and constitutional scholars, and even reportedly the President, preferred the Fourteenth Amendment.<sup>83</sup> The underlying aims of the Civil Rights Act, after all, sound more in equal protection than interstate commerce, and so the Fourteenth Amendment seemed a more appropriate choice.

Cox disagreed. In his view, the Court could accept the Fourteenth Amendment argument only if it were prepared to overrule its decision in the *Civil Rights Cases*. The "public accommodations" section of the Act was directed specifically at private action, and the Court had held in the *Civil Rights Cases* that Congress could not reach purely private discrimination under Section 5 of the Fourteenth Amendment. Not only did a decision overruling the *Civil Rights Cases* seem unlikely to Cox,<sup>84</sup> but his regard for stare decisis made him uncomfortable at the prospect of mounting an argument that conflicted directly with an eighty-year-old precedent.<sup>85</sup>

In contrast, Cox considered the Commerce Clause argument to be "as easy as rolling off a log."<sup>86</sup> A former labor law professor, Cox knew that during the New Deal Solicitor General Stanley Reed had used a succession of NLRB cases to coax the Supreme Court into a remarkable expansion of Congress's Commerce Clause authority.<sup>87</sup> And since in passing the Civil Rights Act Congress had determined that

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82. See 42 U.S.C. § 2000a (1994).

83. See, e.g., GORMLEY, *supra* note 69, at 189.

84. Cox may also have had in mind a case decided just before he became Solicitor General. In *Boynton v. Virginia*, 364 U.S. 454 (1960), decided just a month after President Kennedy was elected, the Supreme Court had seemingly gone out of its way to avoid having to address the question whether private conduct could violate the Fourteenth Amendment. In that case, a black law student named Bruce Boynton was convicted of unlawfully remaining in the whites-only section of a bus terminal restaurant in Richmond, Virginia. His petition for certiorari challenged his conviction both as an invalid burden on interstate commerce, in violation of the Commerce Clause, and as contrary to the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In a brief filed by Solicitor General J. Lee Rankin in support of Boynton, the United States argued that the Fourteenth Amendment is violated when generally applicable state laws are applied to effectuate the racially discriminatory practices of private entities. See Brief for the United States as Amicus Curiae at 16-28, *Boynton* (No. 7). In making that argument, Rankin stopped short of asking the Court to overrule the *Civil Rights Cases*, noting that "there the Court carefully reserved the question whether the [Fourteenth] Amendment secured the right to be free from state-sanctioned discrimination in places of public accommodations." *Id.* at 21 (emphasis in original). The Court, however, was unwilling to thread that needle. Instead, it took the unusual step of reversing the judgment of the court of appeals on a ground wholly separate from the questions raised in Boynton's petition. Rather than reaching the constitutional issues, the Court held that Boynton's convictions violated the Interstate Commerce Act. Considering *Boynton*, therefore, Cox may have believed that the Court would be reluctant even to engage, much less overrule, the *Civil Rights Cases* in *Heart of Atlanta Motel* and *McClung*.

85. See GORMLEY, *supra* note 69, at 189.

86. *Id.*

87. See Waxman, *supra* note 50.



motels, restaurants, and other public accommodation establishments “affected” interstate commerce, Cox believed the Court would have to accept that determination unless it could conclude that Congress had acted irrationally.

He was, of course, right. Relying on the Commerce Clause, the Court unanimously upheld the 1964 Civil Rights Act in both cases. Two members of the Court—Justices Douglas and Goldberg—wrote separately to indicate that they would also uphold the Act under Section 5 of the Fourteenth Amendment.<sup>88</sup> But with respect to the Court as a whole, just as in the sit-in cases, Cox’s strategy was effective in achieving the desired result without requiring the Court to revisit entrenched precedent or create wholly new areas of jurisprudence. Cox was, in that sense, a successful civil rights advocate during a period in which the Court might not have been as willing as many in the Department of Justice and elsewhere to redefine the foundations of civil rights law.

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There is much more to tell, but I will not try your patience for much longer. Let me make a few remarks consolidating what I have tried to say about the four men I have covered.

First, I do not mean to leave the impression either that promotion of civil rights doctrine was the principal reason the position of Solicitor General was created, or that Solicitors General have pursued civil rights objectives at the expense of other responsibilities. The overarching imperative for creating the office, and the mandate under which Solicitors General have acted ever since, focused on the need to vest in one position the responsibility for ascertaining, and promoting, the interests of the United States with respect to *all* litigation, regardless of subject matter. At the same time, though, it would be a mistake to overlook the undeniable civil rights subtext for creation of the office, the consequent special responsibility many Solicitors General have felt for civil rights litigation, and the contribution they have made to the development of this unique area of law.

It is interesting—and it may even be useful—to contemplate the similarities and differences among the strategies of the Solicitors General I have discussed. The role played by Bristow and Phillips was unique to the period. Their impact in quelling persistent violence by vigorous enforcement was significant, but riding circuit and overseeing criminal prosecutions in the district courts has long since passed from the Solicitors’ General repertoire. Also entirely unique was the opportunity Bristow and Phillips had to write on a truly clean slate. The Civil War Amendments and the Reconstruction civil rights legislation were all new. They fundamentally altered the relationship between the national government and the states. Then—unlike now—*stare decisis* was simply not a major consideration.

Why Bristow and Phillips were so notably unsuccessful in the Supreme Court is a question that calls out for research. An advocate with the orientation of Archibald Cox might question whether the approach his early progenitors took—using creative arguments in support of broad readings—presented a bridge that was simply too long

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88. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 279 (1964) (Douglas, J., concurring); *id.* at 291 (Goldberg, J., concurring).

and uncertain for cautious jurists to cross. And yet Bristow and Phillips did not have the luxury Cox enjoyed—surveying 100 years of precedent to determine what might and might not work.

Philip Perlman did have the benefit of hindsight; and yet he pursued a litigation strategy quite reminiscent of the one Bristow and Phillips had followed—this time with great success. The position staked out by the United States in *Shelley, Henderson*, and the early school desegregation cases was broad and uncompromising. The Court did not go as far, as fast, as the Solicitor General advocated, but it seems reasonable to conclude that the arguments of the United States—particularly the unequivocal embrace of a broad theory of equal protection and the outright call for the overruling of *Plessy*—had considerable influence, coming as they did from an office that is itself institutionally committed to the principle of stare decisis.

Archibald Cox was quite different, and caution in his case was rewarded with an enviable record of success. Cox's approach was grounded in pragmatism, but it also reflected something more. Like many other Solicitors General,<sup>89</sup> Cox had a strong reverence for stare decisis and the Solicitor General's special obligation to safeguard the institutional integrity of the Court. And Cox's approach in civil rights litigation was a lineal continuation of the posture adopted by the United States in *Brown*—pointing the Court at a momentous juncture toward an approach that would permit all members of the Court to articulate with one voice a result the nation would respect.

Cox's decision to ground the United States' defense of the 1964 Civil Rights Act on the Commerce Clause alone has left standing a quiet chorus of "what ifs." By the time the United States filed its briefs in *Heart of Atlanta Motel* and *Katzenbach v. McClung*, President Kennedy had been assassinated and his brother was distraught and preoccupied. But what might have happened if *their* strategic preference had prevailed and the United States had sought to uphold the Act under the Fourteenth Amendment?

We can glimpse at a tantalizing hint by looking at a case that was before the Court the very next Term. *United States v. Guest*<sup>90</sup> involved a civil rights prosecution of private individuals for conspiracy to deprive black citizens of their rights to equal enjoyment of public facilities. The brief for the United States—written by the new Solicitor General, Thurgood Marshall—argued without hesitation that Congress, under Section 5 of the Fourteenth Amendment, may proscribe wholly private conduct aimed at denying persons equal enjoyment of public facilities.<sup>91</sup> Six members of the Court agreed, and wrote separate opinions to express the view that Congress may, under its Section 5 authority, reach wholly private conduct to deny equal enjoyment of state facilities or otherwise to "interfere with the exercise of Fourteenth

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89. I think particularly of Rex Lee, a highly regarded Solicitor General who served during President Reagan's first term. See CAPLAN, *supra* note 57, at 107, 144-46; Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 600-01 (1986).

90. 383 U.S. 745 (1966).

91. See Brief for the United States at 18-52, *Guest* (No. 65).

Amendment rights.”<sup>92</sup> But three of these Justices were in the majority,<sup>93</sup> and three were in the dissent,<sup>94</sup> and the opinion for the Court found it unnecessary to decide the question.<sup>95</sup>

It may well be that even if Cox *had* made the Fourteenth Amendment argument in *Heart of Atlanta Motel* and *McClung*, the Court would have rejected it, or found it unnecessary to reach that ground of decision. But especially in light of the current Court’s efforts to delineate the limits of Congress’s authority under both the Commerce Clause and Section 5 in civil rights cases, questions like these are interesting to contemplate. I hope you will.

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92. *Guest*, 383 U.S. at 782 (Brennan, J., concurring in part and dissenting in part).

93. *See id.* at 761 (Clark, J., concurring). Justices Black and Fortas joined Justice Clark’s opinion.

94. *See id.* at 774 (Brennan, J., concurring in part and dissenting in part). Chief Justice Warren and Justice Douglas joined Justice Brennan’s opinion.

95. The opinion of the Court, written by Justice Stewart, construed the indictment at issue in that case to allege actual state action. *See id.* at 753-57. In that way, it avoided the question whether the Fourteenth Amendment might be violated in the absence of state action.