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THE WARREN COURT AND THE CONSTITUTION (WITH SPECIAL EMPHASIS ON *BROWN* AND *LOVING*)

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WHEN Earl Warren joined the Court as its fourteenth Chief Justice in 1953, Jim Crow ruled the South. Many states disfranchised blacks with impunity. The Bill of Rights did not generally apply against the states. The Court had never used the First Amendment to invalidate congressional action. Some states had succeeded in chilling core political expression. State-organized prayers were commonplace in public-school classrooms. State criminal defendants had precious few federal constitutional rights. No general right to vote existed. Almost all state legislatures were malapportioned, some grossly so.

Over the next sixteen years, Warren helped change all that, dismantling the old judicial order and laying the foundations of the basic doctrinal regime that has remained in place ever since. Warren did not act alone, of course. But it is conventional to periodize the Supreme Court by reference to its chief justices, and the "Warren Court" is an especially handy label, denoting a remarkable period of judicial history, beginning with the Court's deliberations and decision in *Brown v. Board of Education*, and culminating in a series of landmark rulings in the 1960s, dramatically extending the reach of the Bill of Rights and revolutionizing the right to vote.

A powerful triumvirate led the Court in this pivotal era: Earl Warren—a former Republican governor and vice presidential candidate from the West; Hugo Black, a former Democratic senator from the South who had been on the Court since the late 1930s; and William Brennan, a former Democratic state court judge from the Northeast who joined the Court in 1956. In addition to their striking geographic, professional, and political complementarities, the Warren-Black-Brennan triumvirate brought impressive methodological diversity to the bench. The Chief inclined toward arguments from constitutional ethos and American ideals of fair play; Black liked to highlight the literal words of the Constitution and their original intent; and Brennan generally saw things through the lenses of

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case law and practicality.[1]

Decades after Warren's departure, his Court continues to inspire spirited debate, but most commentators have missed the real virtues, vices, and implications of the Warren Court revolution. Many conservative critics have accused Warren and his brethren of turning the Constitution upside down—dishonoring the document's text and original intent, disrespecting the considered views of coordinate branches of government, and disregarding American public opinion. In response, many of the Court's liberal admirers have glibly conceded the truth of these objections but countered that constitutional text, original understandings, congressional legislation, and popular sentiments are vastly overrated as decisional guideposts. According to these friends of the Court, the Warren-era justices were wiser and more evenhanded than the outdated constitutional text, the self-serving politicos in Congress, and the unwashed majority of ordinary Americans. Thus, the high court brethren were right to follow their own lights.

With defenders like this, who needs detractors? Even if the Warren Court justices were indeed smarter and fairer than everyone else—a doubtful proposition—these men in robes swore oaths to uphold the Constitution, and their opinions purported to apply, not amend, that document. Let us, then, review the work of the Warren Court and measure it against the words of the written Constitution.

In this Irving L. Goldberg Lecture—a lecture named in honor of one of the great judicial crusaders for racial justice in the late twentieth century—I shall pay special attention to the Warren Court's most famous encounters with Jim Crow. Those seeking more detailed discussion of other major quadrants of Warren Court case law may wish to consult my most recent book, *America's Unwritten Constitution*, which seeks to place the claims that I shall make today in a broader and more comprehensive framework of analysis.

I. BROWN

Perhaps the most iconic moment in twentieth-century American judicial history occurred on May 17, 1954, when the Court held that racial segregation in public schools was *per se* unconstitutional. *Brown v. Board of Education* famously ruled against state and local regimes of race separation,[2] while *Brown*'s companion case, *Bolling v. Sharpe*, proclaimed that the same anti-segregation principles applied to the federal government.[3] In a widening circle of later rulings that made clear that the justices were completely repudiating the "separate but equal" doctrine underlying the 1896 case of *Plessy v. Ferguson*, the Warren Court held that apartheid had to end not just in public schools but in virtually every

1. For more on these distinct styles of constitutional argument, *see generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

2. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

3. Bolling v. Sharpe, 347 U.S. 497 (1954).

domain where Jim Crow laws had prevented whites and blacks from intermingling—at state beaches, on public golf courses, inside buses, and even within the bonds of matrimony.[4]

These rulings had deep constitutional roots. Jim Crow aimed to create two hereditary classes of Americans, with whites on top and blacks on the bottom. This racial class system was a throwback to aristocracy, assigning Americans unequal and intergenerationally entrenched legal slots on the basis of birth status. Such a regime was hard to square with the democratic social structure expressed and implied by the Philadelphia Constitution. Beyond the Preamble and the Article IV Republican-Government Clause, the bans on federal and state titles of nobility in Article I explicitly condemned the trappings of aristocracy: "No title of nobility shall be granted by the United States" and "No state shall . . . . grant any title of nobility." Under the letter and spirit of these clauses, which promised a democratic republic and renounced a feudalism based on birth and blood, no American government could properly name some Americans "lords" and others "commoners." But in effect that was precisely what Jim Crow circa 1954 aimed to do, perpetuating a hereditary overclass of fair-skinned lords atop a hereditary underclass of dark-skinned commoners.

Alongside the anti-nobility clauses, another pair of Article I provisions prohibited both the state and federal governments from enacting "Bill[s] of Attainder"—statutes that singled out persons by name and pronounced them guilty of capital offenses. Beneath this specific rule ran a deeper and wider principle that forbade government from stigmatizing persons because of who they were (their status) as opposed to what they did (their conduct). When read generously, with idealistic attention to both letter and spirit, the original Constitution thus seemed to condemn a legalized racial hierarchy.[5]

However, this idealistic reading did not prevail in the early republic. Arrayed against this grand vision were antebellum arguments that on racial-equality issues, the Constitution had to be understood as a compromising and compromised document. Strong constitutional protections of chattel slavery were tightly woven into both the fabric of the document—most enduringly in the three-fifths clause, giving slaveholders extra political clout in both Congress and the electoral college—and the fabric of everyday life in antebellum America. In the old South there was in fact a legal structure of lordship and serfdom despite the anti-nobility clauses. Nor were these clauses unique in not meaning what they seemed to say. Slavery contradicted a huge part of the original Constitution, if the words of that document were read idealistically. For example, despite the Bill of

4. *See generally Brown*, 347 U.S. 483; *Bolling*, 347 U.S. 497; Mayor & City Council of Balt. City v. Dawson, 350 U.S. 877 (1955) (per curiam) (discussing beaches); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (discussing golf courses); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (discussing buses); Loving v. Virginia, 388 U.S. 1 (1967) (discussing matrimony).

5. *See* Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 215–16 (1996).

Rights, slaves had no entitlements to worship, assemble, speak, bear weapons, or marry—indeed, no right even to eat and sleep as they pleased. In effect, each slave was sentenced to life imprisonment at birth without any ordinary due process in the form of an individualized adjudication of wrongdoing.[6]

Candid antebellum interpreters resolved the original Constitution's seeming contradictions by conceding that slaves were simply not part of "We the People" at the founding. Rather, slaves were akin to enemy aliens, and America's Constitution aimed to protect Americans first and foremost. If protections for the American people meant privations for other peoples—whether the British, the Spanish, the French, the Mohawks, or the slaves—then so be it.

Free blacks, however, were a different story. Many had borne arms for America in the Revolution and had even voted on the Constitution itself. Thus, free blacks in antebellum America could plausibly claim all the Constitution's guarantees—or, more modestly, could claim these guarantees in any state that recognized their formal citizenship. Alas, the antebellum Supreme Court saw things differently. Chief Justice Taney's 1857 opinion in *Dred Scott* went so far as to proclaim that a free black descended from slaves could never be a citizen even if his home state said otherwise. Taney's was a twisted and ultimately temporary reading of the document. In the wake of the Civil War, America adopted a trio of amendments reaffirming the most idealistic elements of the Philadelphia Constitution and renouncing the original text's original sin.

The Thirteenth Amendment abolished slavery and empowered Congress to pass sweeping anti-caste legislation, a mission Congress immediately began to fulfill. The Fourteenth and Fifteenth Amendments made clear that the republic was being re-founded on principles of free and equal citizenship. Pointedly repudiating Taney, the first sentence of the Fourteenth Amendment declared the birthright citizenship of all persons born in America, black and white alike: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Notably, this clause governed the federal government as well as the states. In the next sentence, the word "equal" explicitly appeared, promising that all persons would receive "equal protection of the laws." Finally, the Fifteenth Amendment threw voting booths open, inviting blacks to participate equally with whites in the grand project of American democracy. With this trio of amendments proclaiming a new birth of freedom, the key contradictions and compromises of the Founders' Constitution melted away. No longer was it necessary or proper to read the Preamble and the other anti-aristocracy and anti-attainder clauses in a stingy way.

In light of all these constitutional clauses, all these structural considerations, and all this historical evidence, *Brown* and *Bolling* were not just

6. On "extra" clout for slave holders, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 87–98, 148–59, 344–47 (2005) [hereinafter ACAB].

correct but *clearly* correct. These iconic cases vindicated the central meaning of the Reconstruction amendments. Jim Crow laws were not truly equal. American apartheid created a subordinated caste in violation of the vision of the Thirteenth Amendment and its early implementing legislation; perpetuated two unequal classes of citizens in defiance of the logic of the Fourteenth Amendment's first sentence; deprived blacks of the genuinely equal laws commanded by the Fourteenth Amendment's next sentence (and by the companion Fifth Amendment); and kept blacks and whites apart in a manner that renounced the premise and promise of the Fifteenth Amendment that Americans of different races would come together—at polling places, in legislatures, on juries—as democratic equals.[7]

II. COUNTERARGUMENTS

Leading critics (and some friends) of the Warren Court have raised two counterarguments based on the alleged original intent of the Reconstruction Amendments. First, while the Fourteenth Amendment was pending, many congressional supporters emphatically stated that it would not prohibit segregation. Second, although the Reconstruction Congress never explicitly enacted legal segregation, it did continue to fund the preexisting segregated schools in the nation's capital, and it even allowed its own public galleries in the Capitol building to be racially segregated.

Practices put in place as the ink on a newly ratified constitutional clause is still drying may properly help resolve textual ambiguities. But post-enactment practices cannot trump the central meaning of a constitutional provision as that provision was plainly understood by the public at the moment of its enactment. When the Fourteenth Amendment was adopted, Americans undeniably understood that one of its central purposes was to end all "Black Codes"—laws that withheld from blacks the ordinary civil rights enjoyed by whites. Virtually all the amendment's supporters agreed that it would prohibit any law that enforced white supremacy in the domain of civil rights.

For example, had any legislature in 1869 enacted a candid statute entitled "An Act to Put Blacks in Their Proper Place at the Bottom of Soci-

7. Both the Fifth and the Fourteenth Amendment promised "due process of law"—the Fifth vis-à-vis the feds and the Fourteenth vis-à-vis states. As understood by the Reconstruction generation, who in effect reglossed the Fifth Amendment by adopting a later amendment echoing it, "law" in its nature was general, equal, and impartial; and the "due process" that generated "law" had to respect that nature by ensuring that lawmaking would be general and prospective, while law execution/adjudication would be impartial. Thus, implicit in due process, as understood by the Reconstruction generation, was an equality idea of sorts. Indeed, an early draft of the Fourteenth Amendment spoke of "equal protection in the rights of life, liberty, and property." CONG. GLOBE, 39th Cong. 1st Sess., 1034 (1866). The final draft, which featured separate "equal protection" and "due process" clauses, aimed not to sharply contradistinguish these two related concepts but to elaborate their interrelatedness as two sides of the same coin: Proper "law" had to be equal and pursuant to fair process. To punish or stigmatize a person on the basis of his birth status violated this vision, which the Reconstruction Congress understood as a first-principles limit that derived from the nature of law and thus bound all levels of government.

ety," or "An Act to Demean and Degrade Negroes," or "An Act to Deny the Equal Citizenship and Civil Equality of NonWhites," such a statute would have plainly violated the core meaning of the Fourteenth Amendment as understood by those who framed and ratified it in 1866–68. The only question in 1954 was whether Jim Crow was legally equivalent to these hypothesized laws—equivalent in purpose, equivalent in effect, and equivalent in social meaning. True, Jim Crow laws, with a sly wink, purported to be "equal" and did not declare their true social meaning with the candor of our hypothetical statutes. But by 1954, honest observers understood that the "equal" part of "separate but equal" was a sham. The whole point of Jim Crow was inequality, and everyone knew it.[8]

How, then, are we to account for the fact that the Reconstruction Congress itself failed to end segregation and instead ended up perpetuating segregation in certain respects?

Actually, many Fourteenth Amendment supporters opposed racial segregation. One of the amendment's chief architects, House leader Thaddeus Stevens, established an interracial orphanage upon his death and chose to be buried alongside African Americans in an integrated graveyard. He composed his own tombstone inscription:

I repose in this quiet and secluded spot
Not from any natural preference for solitude
But, finding other Cemeteries limited as to Race
by Charter Rules,
I have chosen this that I might illustrate
in my death
The Principles which I advocated
Through a long life

III. EQUALITY OF MAN BEFORE HIS CREATOR

Stevens went to his final resting place in August 1868, less than a month after the Fourteenth Amendment became the supreme law of the land.[9]

While Stevens ranked among the most radical of Republicans on racial issues, many other Republicans were also high-minded opponents of legally imposed segregation. But some Republicans were considerably less zealous, and most Democrats refused to support an all-out crusade against segregation. In the end, faithful constitutional interpreters must investigate not merely how many segregationists existed from 1866–68, but also what they said and did, and whether their words and deeds plausibly glossed the Fourteenth Amendment. In short, we must probe how the unwritten Constitution of the mid-1860s interacted with the written Constitution itself. The question is not just whether Representative X or

8. *See generally* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

9. HANS L. TREFOUSSE, THADDEUS STEVENS: NINETEENTH-CENTURY EGALITARIAN xi (1997).

Senator Y supported segregation in 1867 or 1869, but how he read the Constitution's words—how he reconciled segregationism with the Constitution's express commands.

Ultimately, nothing in what segregationists actually said or did provides good grounds for revising our initial understanding of the Fourteenth Amendment's central meaning. The text calls for equal protection and equal citizenship, period. There is no textual exception for segregation, no clause that says "segregation is permissible even if unequal." Nor did most 1860s segregationists who supported the amendment argue that there was such a categorical exception. Instead, they offered up a medley of legal and factual assertions, some plausible and others less so.[10]

Many merely argued that separation was not intrinsically unequal and therefore unconstitutional. As a matter of logic they were right. It is logically possible to imagine forms of separation that are not unequal. For example, separate bathrooms for men and women today are not widely understood, by either men or women, as stigmatizing or subordinating. But in some places and at some times, separate bathrooms might indeed be a way of keeping women down. In Jim Crow America, racially separate train cars, bus seats, schools, bathrooms, drinking fountains, and the like were engines of inequality in purpose, effect, and social meaning. They were ways of keeping blacks down, creating a pervasive legal system of untouchability and uncleanness that violated the basic equality ideal constitutionalized by the Fourteenth Amendment.

Put differently, this first segregationist argument accepted the correct legal meaning of the Fourteenth Amendment and simply posited that as a matter of fact—not law—separate could and would be equal in the Capitol galleries and elsewhere. Whether or not this fact was true in 1868, it hardly answered the question in 1896 or 1954. Surely the Court was entitled to draw its own factual conclusions about whether separate was actually equal. Although the *Brown* Court overstated when it proclaimed that in the field of education separate was *inherently* unequal, the Court surely could properly say, with the benefit of history, that Jim Crow in America was *inevitably* unequal. *Brown* came at the end of a decades-long string of cases in which black plaintiffs challenging regimes that claimed to be "separate but equal" had been obliged to bear the expense of proving actual inequality case by case—a string of cases in which inequality was

10. While each of the main segregationist arguments persuaded some Republicans in the 1860s, none appears to have won over a majority of Republicans at that time. In embracing or accepting segregation, various Republican Congressmen in the 1860s did not need to agree upon one single plausible legal theory. Various minority theories, even if each was ultimately implausible, could nevertheless give rise to a powerful political bloc—a bloc reinforced by diehard Democrats who stood united in their opposition to the Fourteenth Amendment and its promise of racial equality in civil rights. But had the *Brown* Court sought to defend segregation in a judicial opinion, the justices would have needed to articulate a particular legal reason, a principled and doctrinally acceptable reason. It would have been odd for *Brown* to have adopted one or another eccentric theory that was in fact rejected by most Republicans and that also reflected an implausible understanding of the amendment's text.

indeed invariably found by the judiciary when it looked closely. In light of this experience, the *Brown* Court sensibly shifted the burden of proof to segregationist governments in all future Jim Crow cases. Henceforth, governments would need to offer compelling evidence that racial separation was indeed equal in purpose, effect, and social meaning.[11]

Segregationists in the 1860s also argued that racial separation would actually serve the interests of both races and was favored by most blacks as well as most whites. If true, then separation might indeed be "equal" enough sociologically and therefore constitutionally—just as separate bathrooms and separate sports teams for males and females today pass constitutional muster precisely because a majority of each sex presumably accepts and perhaps even prefers this separation. But whether or not blacks in the 1860s truly preferred to sit separately in Capitol galleries or elsewhere was largely irrelevant in the 1950s, when it was clear that Jim Crow was an insulting and subordinating imposition by whites upon blacks, an imposition vigorously opposed by a wide range of black leaders and the great mass of black citizens.[12]

Another segregationist argument in the 1860s was that racial segregation had a different legal form than the infamous 1860s Black Codes. Black Codes were formally and facially asymmetric: They heaped disabilities on blacks but not whites. By contrast, Jim Crow was formally symmetric: While blacks could not go to School X, whites were symmetrically barred from attending School Y.

Although some 1860s segregationists thought that formal symmetry rendered the Fourteenth Amendment textually inapplicable, they were clearly wrong about this. To repeat, the text does not say and cannot easily be read to say that deep and abiding inequality is permissible so long as a law is formally symmetric. Formal symmetry does not and cannot mean the law is automatically valid. Rather, formal symmetry merely means the law is not automatically (what lawyers call "facially") invalid, as were the Black Codes. The simple question remains: Were formally symmetric Jim Crow laws truly equal? It is possible to imagine some parallel universe where blacks as well as whites sought separation, where no stigma attached to separation, where separation was not an instrument of subordination. But that was not the world of Jim Crow in 1954 (or in 1896, when the Court wrongly upheld segregation in *Plessy v. Ferguson*).

Reconstruction-era conservatives sometimes articulated their intuition that formal symmetry decisively distinguished segregation and anti-miscegenation laws from Black Codes by claiming that race-separation laws

11. Pre-*Brown*, *see generally* Mo. *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Okla. St. Regents, 339 U.S. 637 (1950). Many lower-court decisions in this era also identified fact-specific inequality.

12. *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

involved not "civil rights," but rather "social rights" that lay beyond the reach of the Fourteenth Amendment. But segregation laws did not merely *allow* whites to separate themselves from blacks if whites preferred this "social" arrangement. These laws *required* separation even if both whites and blacks preferred to socialize together or intermarry, and the clear purpose and meaning of such enforced separation was to deify whites and demean blacks. Nothing in the text of the Fourteenth Amendment signaled that this species of state action was somehow categorically exempt from the amendment's general requirement of equal citizenship.[13]

A final segregationist argument was that the Fourteenth Amendment's equality norms applied only against state governments. While this argument, if correct, could not justify state apartheid policies, it might explain segregation in various federal spaces such as the Capitol galleries. But the Constitution's text plainly contradicts this argument. The amendment's first sentence creates rights of equal citizenship that apply against the feds as well as states. Its text provides that "[a]ll persons born . . . in the United States" are by that fact alone "citizens of the United States"—and thus, equal citizens at birth. This sentence in effect constitutionalized the Declaration of Independence's "self-evident" truth—a truth that Lincoln had famously stressed (and glossed) at Gettysburg—that all men (that is, persons) are created (that is, born) equal. Any law, state or federal, heaping disabilities or dishonor upon any citizen by dint of his or her birth status—because he was born black, or because she was born female or out of wedlock—violates a core principle of the Fourteenth Amendment's opening sentence.[14]

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13. Beyond the issues raised by formally symmetric laws, the civil-rights/social-rights distinction prominent in Reconstruction-era discourse was reflected in two additional Fourteenth Amendment ideas. First, the amendment did not apply of its own self-executing force to certain nongovernmental activities. (Hence the so-called "state action" doctrine, whose textual font is the opening "No State shall" language of the amendment's second sentence.) Second, while Congress would have power under section 5 to enforce the equal-birth-citizens idea of the amendment's opening sentence (which does not use the phrase "No State shall") against various nongovernmental practices and institutions that might threaten a regime of equal citizenship, there would remain real boundaries to this congressional power. Congress, for example, could not under section 5 require private persons to refrain from race discrimination in private dinner parties and dating. Such "social" practices lay outside the domain of equal citizenship, which could extend beyond the strictly governmental (especially if Congress so provided) but which would not encompass highly private spaces governed by individual associational/social freedom.

14. Perhaps it might be argued that in regulating its own galleries, neither house was thereby *legislating*; and that each house was therefore not bound by ordinary principles applicable to ordinary laws. But if so, segregation in the Capitol galleries loses virtually all precedential significance for other forms of segregation backed by actual legislation. More generally, America's implicit Constitution surely imposes many restrictions on Congress to abide by first principles even when Congress is not strictly speaking legislating. If the First Amendment's free-speech principles apply to presidents and courts who seek to censor—notwithstanding the amendment's limited textual command that "*Congress* shall make no *law*"—then surely these principles also constrain Congress even when Congress is not legislating but, say, regulating its galleries via the internal rules of each house. And what is true of free-speech principles is likewise true of equal-citizenship principles.

The Civil Rights Act of 1866—a companion statute passed by the same Congress that proposed the Fourteenth Amendment, in the same season and by nearly the same vote—featured language virtually identical to this sentence, and explicitly linked this language to a racial-equality rule binding both state and federal officialdom:

> All persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, *of every race and color* . . . shall have the same right, in every State *and Territory* in the United States, to . . . full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other.[15]

Beyond the Fourteenth Amendment, the anti-nobility clauses of the Founders' Constitution explicitly applied against both state and federal officials, as did the Fifteenth Amendment, which demanded racial equality not just in Election Day voting but also in other voting venues such as jury rooms and legislative assemblies.[16]

And speaking of legislative assemblies, we should pay close attention, as did Massachusetts Senator Charles Sumner in pointed and poignant remarks delivered shortly after the Fifteenth Amendment's ratification, to the fact that the Reconstruction Congress itself allowed its black and white members to sit side by side on a plane of perfect equality—indeed, as "brother[s]"—on the House and Senate floor.[17] "[W]e have had in this Chamber a colored Senator from Mississippi; but according to [segregationist ideology] we should have set him apart by himself; he should not have sat with his brother Senators . . . . [A colored man] is equal here in this Chamber. I say he should be equal in rights everywhere."[18]

In embracing Sumner's brotherly vision many decades later, the *Brown* Court not only obeyed the plain meaning of the Constitution's text, but

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15. Civil Rights Act of 1866, 14 Stat. 27 (1866) (emphasis added). Congress enacted this statute to implement the Thirteenth Amendment's anti-slavery and anti-caste principles, and to overrule the *Dred Scott* case, which had claimed that free blacks were not citizens. Democrat critics claimed that the statute went beyond Congress's powers under the Thirteenth Amendment. Ending slavery, they argued, did not entail citizenship for all and race-neutral civil rights, as provided for in this act. Andrew Johnson vetoed the bill, and Congress overrode him by a two-thirds vote of each house—the first major override in American history. Once it became clear that Reconstruction Republicans could muster a two-thirds vote on a matter of supreme consequence, reformers proceeded to propose the Fourteenth Amendment, in part to provide an unquestionable constitutional foundation for the still-contested Civil Rights Act. The act has always been understood by lawyers and judges as intimately linked to the amendment. Indeed, the act can even be seen as part of the amendment's very enactment process.

16. On the Fifteenth Amendment, see ACAB, *supra* note 4, at 400–01, 612–13 n.106; AKHIL REED AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION 273–74 (1998); *see generally* AMAR, *supra* note 3. Consider also the equality component of the Fifth Amendment's due-process clause, as glossed by the Fourteenth Amendment's equal-protection and due-process clauses, see BILL OF RIGHTS: CREATION AND RECONSTRUCTION, *supra* at 281–83; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 763–73 (1999). Cf. *supra* note 3.

17. CONG. GLOBE, 42d Cong. 2d Sess., 242 (1871).

18. *Id.*

also carried forward the Reconstruction practice that best embodied the promise of the text: the integration of the floor of Congress itself.

IV. LOVING

Brown and *Bolling* thus correctly understood and honored the document's core meaning. Equal meant equal, and citizenship meant citizenship. On May 17, 1954, the Court read the Constitution aright and said what the law was. As cases about constitutional interpretation—about the meaning of the written Constitution, and about the judiciary's province and duty of law declaration—*Brown* and *Bolling* were easy as pie.

The *Brown* opinion also famously said that, at least in the field of education, separate was "inherently unequal." Inherently? If understood as a claim about the meaning of the Constitution, this sentence might seem confused. Separate does not mean "unequal" in any obvious dictionary sense. Nor did the Reconstruction Republicans believe that separate was always and everywhere unequal as a matter of logic.

But if *Brown*'s famous sentence is understood as an effort to *implement* rather than simply *interpret* the Constitution, the sentence makes perfect sense. In order to make the equality rule—the Constitution's true meaning—effective in courtrooms and in the world beyond courtrooms, the Supreme Court had to fashion implementing sub-rules to guide lawyers, lower courts (both state and federal), school administrators, state legislators, and so on. One possible implementing sub-rule could have simply required black plaintiffs in each and every case to prove that separate was unequal on the facts at hand. But given that separate was almost always unequal in the real world of 1954, would this litigation burden have been fair? After all, this sub-rule would have imposed serious and not-fully-compensable litigation costs and time delays on those who, at the end of the day, were highly likely to prevail in court based on the actual history and practice of Jim Crow. This sub-rule would also have perversely encouraged state officials to continue to sham and wink and frustrate the real meaning of the Constitution. And would such a sub-rule have given strong guidance and cover to lower courts—especially state courts operating under pressure from segregationist state lawmakers?

The written Constitution's terse text did not—and could not realistically be expected to—answer all these second-order issues about how to implement the equality norm in the particular milieu of mid-twentieth century Jim Crow. The written Constitution simply laid down the civil equality principle and entrusted courts (among others) with the task of making that principle real in court and on the ground, as genuine law of the *land*. The rule announced on May 17, 1954—that de jure segregation would be presumed unequal in light of the actual history of Jim Crow—was a thoroughly proper way for the Court to discharge its duty of constitutional implementation.

Why, we might wonder, did *Brown* limit its ruling to the field of education? As a matter of constitutional meaning, the Court was right to note

that the Fourteenth Amendment equality mandate applied only over a limited domain. (For example, the words and the original public meaning of section 1 of the amendment did not apply to political rights such as voting or jury service.) But nothing in the Fourteenth Amendment's idea of equal citizenship distinguished between a racial caste system in public schools on the one hand and a racial caste system in public beaches or public transportation on the other.

The *Brown* Court nevertheless dealt only with education:

> *Plessy v. Ferguson* involv[ed] not education but transportation . . . . [In 1950] the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education. In the instant cases, that question is directly presented . . . . We conclude that *in the field of public education* the doctrine of 'separate but equal' has no place.[19]

One case at a time is an appropriate way for "judicial power" to operate. It would also have been permissible for the *Brown* Court to have fashioned a more sweeping opinion that made clear that the Court's core idea—that Jim Crow was simply not equal—of course applied outside education as well. Alongside the cautious sensibility that judges may and often should simply decide one case at a time, there exists a background first principle—a principle that went without saying for the Founders and/or was implicit in the words "judicial power"—that judges must decide like cases alike. If a caste system in transportation was really no different than a caste system in education, then the same constitutional rule that applied in one domain applied as well in the other.

Having opened the door in *Brown* to the possibility that education might be unlike transportation, the Warren Court correctly closed that door in a 1956 case involving Alabama buses, *Gayle v. Browder*. But the *Gayle* Court acted in a two-sentence ruling that offered no real explanation. The first sentence simply announced the result ending bus segregation, and the second sentence merely cited *Brown* and two post-*Brown* cases (neither of which involved transportation). This was problematic. Judicial doctrine and judicial power require judges to offer carefully reasoned explanations for their rulings. Having opted to write a 1954 *Brown* opinion that did not simply say "equality, equality, equality" but that seemed to qualify the scope of the Court's holding by also saying "education, education, education," the Warren Court over the next several years failed in its declaratory and implementational tasks of making crystal clear to lawyers, lower courts, school administrators, state legislators, and the rest of the citizenry what the legally operative principles truly were and why.[20]

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19. Brown v. Bd. of Educ., 347 U.S. 483, 491–95 (1954) (citations omitted; emphasis altered).

20. *See also* Mayor & City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955) (discussing beaches); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (discussing golf courses).

Two factors, one backward-looking and one forward-looking, explain this lapse. First, had the Court in 1954 simply said "equality, equality, equality" in all realms of public citizenship (political rights excepted), the justices would have had to make clear that the Court had been wrong from day one in *Plessy*. In addition to striking down a mass of state law, the Court would have had to openly overturn its own high-profile precedent. Yet the Court has at times been loath to admit its own past errors. Although most people today remember *Brown* as having formally overturned *Plessy*, in fact the Court did no such thing in May 1954, and the overruling of *Plessy* became evident only in retrospect (in the cryptic *Gayle* case).

Second, the *Brown* justices knew that massive remedial and implementational challenges lay ahead in making the Court's ruling and the underlying constitutional equality principle truly the law of the land on the ground. Had the Court in 1954 simply said "equality, equality, equality" it would have been clear that all state laws prohibiting interracial marriage were also unconstitutional.[21] This is indeed what the Constitution, properly read, means. Equal means equal, and legally imposed racial separation in this domain was not truly equal. In the 1967 case of *Loving v. Virginia*, the Court said just that, in an opinion authored by Warren himself.

But when Warren said this in June 1967—at the dawn of the now-famous "summer of love"—bans on interracial marriages were relatively rare among states and were even more rarely enforced with vigor and efficacy. By 1967, Congress and President Johnson had jumped into the fray in full support of *Brown*'s vision, via landmark civil rights and voting rights laws, and via the appointment of pro-*Brown* judges such as Thurgood Marshall and Irving L. Goldberg. By 1967, blacks who had long been disfranchised in massive numbers in some parts of the South were finally being allowed to vote and could count on fair apportionment rules after the next census. By 1967, Martin Luther King, Jr. had delivered his iconic speech celebrating an interracial dream of whites and blacks joining hands, and America had indeed witnessed and celebrated the interracial joining of hands that was visible at the Lincoln Memorial at the very moment King spoke these words.

In 1954, however, resistance to interracial dating was far more intense, widespread, and politically powerful. Indeed, this resistance underlay much of Jim Crow in education: many white parents did not want their fair-skinned girls to go to integrated schools where they might socialize (and perhaps become romantically involved) with dark-skinned boys. Had Earl Warren written *Brown* in a manner that clearly entailed the invalidity of miscegenation laws, he would have thereby made the task of

21. *But cf.* Naim v. Naim, 87 S.E.2d 749 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849 (Va. 1955), *motion to recall, mandate denied, and appeal dismissed*, 350 U.S. 985 (1956) (a case in which the Court ducked the miscegenation issue in the immediate aftermath of *Brown*).

ensuring actual compliance with *Brown* all the harder in the difficult days ahead. If the judicial province and duty is not merely to say what the law is, but also to make the law real, then *Brown*'s narrowness becomes easier to justify.

V. LEGACY

Nearly half a century after Earl Warren's departure from the bench, the justices continue to operate on a field of constitutional argumentation mapped by the Warren Court. So do other branches of government, state and federal; so does the legal professoriate; and so does the public at large. Thus, lawyers, judges, politicians, and pundits of all stripes—liberal and conservative, originalists and living constitutionalists—now take for granted the basic teachings of the Warren Court and argue within the Warren framework.

For example, no one today challenges the rightness of *Brown*. Rather, Americans now wrangle over *Brown*'s meaning, with both liberals and conservatives wrapping themselves in its mantle. Liberals invoke *Brown* for its affirmation of substantive equality, its vision of integration and inclusion, and its recognition of the supreme importance of public education as a gateway to equal citizenship. Conservatives deploy *Brown* and its companion *Bolling* to underscore the general evil of racial classifications, even when such classifications are claimed to benefit blacks and/or promote integration, and even when Congress itself has endorsed these race-conscious regimes.[22]

Perhaps some justices today may (erroneously) harbor private doubts about the rightness of the Warren Court's incorporation doctrine—that Court's insistence that, thanks to the Fourteenth Amendment, virtually all of the provisions of the Bill of Rights properly apply to (in legal jargon, are "incorporated" against) state and local officials. Yet none of the justices in the last three decades has ever called this basic doctrine into question, even in passing. Every term the Court's docket teems with post-incorporation cases, with the justices routinely using the Bill of Rights to keep states in line—sometimes to achieve liberal results (for example, by striking down unusually troubling death-penalty sentences and laws improperly favoring religion), other times for more conservative ends (for instance, by invalidating ultra-strict gun-control ordinances and confiscatory environmental regulations).[23]

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22. Compare the contrasting visions of *Brown* on pervasive display in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 705, 742–43, 747–48, 773–79, 788, 798–99, 303–04, 864, 866–68 (2007), in which Chief Justice Roberts and Justice Thomas offered politically conservative readings of *Brown*, Justices Breyer and Stevens offered politically liberal readings, and Justice Kennedy's swing opinion split the difference.

23. While Justice Thomas has raised questions about the incorporation of the establishment clause in particular—*see, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49–54 (2004) *abrogated by* Lexmark Intern., Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (U.S. 2014) (Thomas, J., concurring)—he has elsewhere vigorously applied and, in the context of the Second Amendment, extended the basic principles of incorporation.

Freedom of speech has never had so many friends on the Court as at present, but conservatives and liberals have different ideas about the deep meaning of Warren Court landmarks such as *New York Times v. Sullivan*. Liberals have deployed *Sullivan* to explain why Congress should not be able to insulate itself from criticism spearheaded by the Legal Service Corporation, while conservatives have invoked the case to explain why Congress should likewise be barred from regulating campaign finance in incumbent-protective and speech-limiting ways.[24] So, too, current church-state law operates within the boundaries laid down by landmarks such as *Engel v. Vitale* and *Abington v. Schempp*. It is hard to imagine that the Court in the foreseeable future would countenance a return to state-sponsored recitational prayer in the classroom.

Voting-rights case law follows the same pattern. All justices accept the basic teachings of *Harper v. Virginia*, *Kramer v. Union Free School District*, *Baker v. Carr*, and *Reynolds v. Sims*, even as conservatives and liberals joust over the meaning and proper application of these Warren Court classics. Exhibit A is the Court's 2000 decision in *Bush v. Gore*. In that case, a bare Court majority explicitly invoked *Harper* and *Reynolds* to end an uneven recount then underway. Dissenters claimed Warren's legacy for themselves, arguing that the recount was actually working to mitigate Election Day inequalities that had disproportionately disfranchised poor and minority voters.[25]

The Justices are not the only ones who have enthusiastically embraced Warren-style voting rights. Every state legislature today abides by one-person, one-vote; so does the House of Representatives; and the franchise extends to nearly all adult citizens. Virtually no one—neither major political party, no important political leader, no mass popular movement, no notable school of academic thought, no respected group of public intellectuals or opinion leaders, no venerable think tank—forthrightly proposes a return to the old days of disfranchisement and malapportionment. (Crafty politicos today do attempt to cheat—and frankly, Texas politicos are some of the worst offenders—but these pols loudly deny that their true purpose is to disfranchise eligible voters and/or to count votes unequally.) Moving outside of government circles, ordinary Americans today broadly claim the rights to vote and to vote equally, believe that these rights are theirs, and embody these beliefs in routine practices that are nearly universally celebrated. These rights have thus become Ninth Amendment rights retained by the people and elements of

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See McDonald v. Chicago, 561 U.S. 742, 130 S. Ct. 3020, 3059–60 (2010) (Thomas, J., concurring).

24. The leading opinion on each topic—*Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548–49 (2001), and *Citizens United v. Federal Election Commission*, 558 U.S. 310, 339–41 (2010)—was authored by the Court's current swing Justice, Anthony Kennedy. When Kennedy was a youth in Sacramento, California, then-Governor Earl Warren was a frequent guest at the Kennedy home.

25. *Compare* Bush v. Gore, 531 U.S. 98, 104–05 (2000) (per curiam) (citing *Harper* and *Reynolds*) with 124–25 (Stevens, J., dissenting, joined by Ginsburg and Breyer, JJ.) (citing *Reynolds*).

proper republican government—even if they were not so when the Republican-Government Clause and the Ninth Amendment were written.[26]

The only major post-Warren retrenchment involves the exclusionary rule, which continues to limp along, but with substantial restrictions and amidst considerable anti-exclusion rhetoric on the Court, paralleling broader skepticism in the American populace about the rule's basic premises.[27]

Today's world of judicial doctrine and general constitutional discourse is thus the world of Earl Warren, Hugo Black, and William Brennan. Their legacy endures.[28]

VII. LESSONS

What lessons should we draw from the Warren Court cases, and from the post-Warren Court's response to this body of case law, about the proper relationship between the document and the doctrine?

Recall the basic lines of critique aimed at Warren and his brethren. First, critics claimed that Warren Court doctrine mangled the document. But as we have seen, the landmark cases generally got it right.

Alas, the Warren Court often reached the right result while saying odd things that confounded serious textualists and honest historians. Did "process" really mean substance? Was the key clause of the Fourteenth Amendment's opening section, affirming the privileges and immunities of citizens, irrelevant? What about the "sleeping giant" Republican-Govern-

26. While popular understandings do not generally suffice to subtract from expressly enumerated or structurally implicit constitutional rules and rights, the beliefs of the American people over time are especially relevant in glossing open-ended clauses, especially those that explicitly reference "the people," as the Ninth does in so many words and as the Republican-Government Clause does via the cognate word "republican," which both etymologically and conceptually revolves around the principle of popular/populist/public/people-based government. (For more details on these etymological and conceptual connections, see ACAB, *supra* note 4, at 276–81.)

27. *See, e.g.*, Fisher v. United States, 425 U.S. 391, 407 (1976) (proclaiming that the only truly principled basis for the exclusionary rule—involving a fusion of the Fourth Amendment and the Fifth Amendment Self-Incrimination Clause—had "not stood the test of time"); Stone v. Powell, 428 U.S. 465, 481–82, 486, 493 (1976) (holding the exclusionary rule inapplicable in federal habeas corpus cases reviewing state court convictions); United States v. Janis, 428 U.S. 433, 447 (1976) (refusing to extend the exclusionary rule to civil cases); United States v. Havens, 446 U.S. 620 (1980) (creating an exception to the exclusionary rule in order to impeach a criminal defendant's testimony); United States v. Leon, 468 U.S. 897, 905–06 (1984) (echoing *Fisher* verbatim and carving out an exception to the exclusionary rule for certain violations of the Fourth Amendment involving "good faith" behavior of police officers); Hudson v. Michigan, 547 U.S. 586, 591, 599, 616 (2006) (applying the "inevitable discovery" exception to the exclusionary rule); United States v. Herring, 555 U.S. 135, 138–39 (2009) (broadly reading the *Leon* good-faith exception doctrine).

28. Most commentators agree that the key constitutional contributions of the Warren Court occurred in the following six fields: race, incorporation, speech, religion, criminal procedure, and voting rights. While two other fields in today's constitutional discourse—privacy law and sex-equality law—have more obvious origins in the 1970s Burger Court, as reflected in cases such as *Roe v. Wade*, 410 U.S. 113 (1973), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), some see the 1965 Warren Court decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), as the forerunner of these later cases.

ment Clause that had made Reconstruction possible? Did the rights of "persons," as sharply distinguished from those of "citizens," really encompass voting? (Was the Fifteenth Amendment thus unnecessary? The Nineteenth as well?) If equal protection principles applied against the federal government (à la *Bolling*), and if these principles required equally populous districts even for state senates (as required by *Reynolds v. Sims*), then why wasn't the United States Senate itself unconstitutional? (If the Court could one day say that most states had unconstitutional governments that required major restructuring after the next census, what would stop the Court from saying the same thing the next day about the Senate?) In the face of these questions, the Warren Court failed to explain itself satisfactorily.

The Court's case law was also a moving target, making it harder for contemporaries to understand the Court's real principles. Thus, *Brown* said not that the pro-Jim-Crow precedent of *Plessy v. Ferguson* was overruled, but only that *Plessy* did not apply in the domain of education. But then the Court promptly issued a series of one-paragraph decisions with absolutely no explanation, applying *Brown* beyond education to public beaches and to golf courses, and even to state-segregated buses—that is, to transportation, the very domain that had given rise to *Plessy* (a railroad segregation case). Similarly, in *Baker v. Carr*, the Court floated one standard for voting, but then in *Reynolds v. Sims*, the justices followed a very different standard—one that had been expressly disavowed by a couple of the concurring opinions in *Baker*.

Consider next another major charge against the Court—that it bristled with activists disrespectful of Congress. Here are the numbers: in Warren's sixteen years as Chief, the Court invalidated acts of Congress in twenty-three cases—about the same clip that had prevailed in several earlier periods, and a somewhat lower rate than in the ensuing Burger-Rehnquist Court, which slapped down Congress sixty-nine times in thirty-six years. Notably, the Warren Court never struck down a federal civil rights or voting rights act of Congress, as had early Courts and as would later Courts.[29]

In fact, the Warren Court generally partnered with Congress, especially in the area of civil rights and voting rights. True, the Court did strike down a federal policy of segregation in *Bolling*, but that policy was the

29. From 1865 through 1888, the Court struck down acts of Congress in sixteen cases (one of which—one of the *Legal Tender Cases*—was later overruled within this window); from 1899 through 1912, the Court invalidated congressional action in fourteen cases; from 1920 through 1936, the Court tossed out Congress's handiwork in over thirty cases. The data here derive from compilations in LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENT 776–80 tbl. 2-15 (4th ed. 2007). There is some imprecision in these numbers. Nice classification questions arise when a very small part of a large statute is judicially disregarded, and also when a statute is not held to be to be "facially" unconstitutional in all applications but is rather found to be unconstitutional only as applied to certain facts. Moreover, judicial review resulting in the "invalidation" of a statute exists on a continuum with judicial techniques "avoiding" invalidation by construing a statute in an exceedingly narrow—and perhaps textually implausible—way.

ghost of Congress past. Most Congress members in 1954 were probably opposed to federal segregation, but reformers could not overcome the intense opposition of a pro-segregation minority that enjoyed considerable congressional seniority and deployed the filibuster aggressively. Eventually, this congressional minority was overcome in the mid-1960s, and it was precisely Congress's landmark legislation under President Lyndon Johnson's leadership that burnished *Brown*'s reputation and increased compliance with *Brown*'s mandate.[30]

Critics also err in suggesting that the Warren Court generally defied public opinion. Had the Court done so consistently, its legacy would likely not have lasted. In the long run, old justices leave; new ones arrive; the new ones are picked by presidents (with senatorial oversight); *and the people pick presidents (and senators)*. In fact, many of the Warren cases and ideals are widely celebrated in today's popular culture—*Brown*, of course; the free-speech principles of *New York Times v. Sullivan*; the innocence-protecting vision of *Gideon v. Wainwright*; and the basic *Harper-Reynolds* notion that everyone should vote and have his vote counted equally. Most citizens would recoil against any proposal that states should be free to violate the Bill of Rights.

The big exceptions to this general pattern are the exclusionary rule and closely related Warren Court doctrines that freed criminals on what critics called "legal technicalities"—that is, on grounds unrelated to actual innocence or innocence-protecting procedures, such as *Gideon v. Wainwright*'s right of counsel.

The general fidelity of the Warren Court to the deepest ideals of the written Constitution came at the expense of fidelity to precedent. As one tart critic put it, "[T]he list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook."[31]

Under Warren, the Court overruled itself in some forty-five cases—more than half as many times as in the entire history of pre-Warren America. Since Warren, the Court has continued this brisk pace of over-

30. *See generally* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014).

31. Philip B. Kurland, Politics, the Constitution, and the Warren Court 90–91 (1970). While the work of Professor David Strauss is far more celebratory of the Warren Court, Strauss has not successfully explained how that Court's reversal of precedents across the board— race, incorporation, speech, religion, criminal procedure, and voting rights—squares with his own advocacy of "common law constitutionalism." See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 894–95 (1996). For a valiant effort to provide such an explanation—an effort that, alas, fails to discuss huge portions of the Warren Court revolution and that nowhere confronts the breathtaking sweep of the revolution as a whole—see David A. Strauss, The Common Law Genius of the Warren Court, 49 Wm. & Mary L. Rev. 845 (2007). Strauss claims that "the Warren Court's most important decisions cannot be easily justified on the basis of the text of the Constitution or the original understandings" and that "If you look only to those sources of law, you will not find justification for what the Warren Court did." Id. at 845, 850. In today's lecture and elsewhere, I have attempted to defend the Warren Court against precisely these sorts of claims. The only major Warren-era decisions that I have declined to defend, today and in other venues, are exclusionary-rule rulings such as Mapp—a quadrant of case law unmentioned by Strauss.

ruling. For example, in the 1970s and 1980s, the Court overturned its own precedents in over sixty cases. Here, too, the Warren Court established the basic judicial model that still applies.[32]

If the Warren Court was essentially right in its constitutional vision, and if earlier Courts that had rejected that vision were wrong—if, for example, *Plessy* stank and *Brown* soared; if incorporation was constitutionally correct, whereas earlier cases erred in refusing to protect Americans from state abuses; if Warren and company were right to embrace federal civil rights and voting rights laws that earlier justices had improperly condemned or ignored; if *Gideon v. Wainwright* deserves to be glorified for overturning an earlier decision that was impoverished even at the moment it was handed down—then what does this say about the Court itself over time?[33]

Just this: For much of its history after John Marshall and before Earl Warren, the Court dishonored both the American Constitution's terse text and the American people, who enacted and who continue to embrace that text. The Warren Court's friends who urged the justices to quit worrying about the written Constitution got it backwards. Reflecting the deep wisdom of the American people in their most decisive moments, the written Constitution deserves judicial fidelity because it is the law, and because, for all its flaws, it has usually been juster than the justices. In the century and a half since the Civil War, the Court whose grand themes most closely tracked the letter and spirit of that text—the Warren Court—is the Court that has quite rightly enjoyed the most enduring influence over both its judicial successors and American society more generally.

32. THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION 2245–89 (1996), (Johnny H. Killian & George A Costello eds. 2014) (appendix prepared by Congressional Research Service compiling "Supreme Court Decisions Overruled by Subsequent Decisions") (listing eighty-eight cases overruling precedents pre-Warren; forty-five cases from the Warren years; and sixty-one cases in the 1970s and 1980s). As with the data presented in *supra* note 26 and accompanying text, the figures here are the products of the compilers' interpretive judgments. For example, at what point are we to say that a given disfavored case has been in effect overruled *sub silentio*—rejected by the Court even though not expressly overruled? When certain language in case 1 is cast aside in later case 2, does it matter whether that discarded language is the "holding" of case or merely "dicta"? If so, how is the line to be drawn between "holding" and "dicta"?

33. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963), *overruled by* Betts v. Brady, 316 U.S. 455 (1942); Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, SUP. CT. REV. 211 (1963).

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