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THE WARREN COURT AND THE PURSUIT OF JUSTICE

MORTON J. HORWITZ*

From 1953, when Earl Warren became Chief Justice, to 1969, when Earl Warren stepped down as Chief Justice, a constitutional revolution occurred. Constitutional revolutions are rare in American history. Indeed, the only constitutional revolution prior to the Warren Court was the New Deal Revolution of 1937, which fundamentally altered the relationship between the federal government and the states and between the government and the economy. Prior to 1937, there had been great continuity in American constitutional history. The first sharp break occurred in 1937 with the New Deal Court. The second sharp break took place between 1953 and 1969 with the Warren Court. Whether we will experience a comparable turn after 1969 remains to be seen. Clearly, however, some of the resonances of the Warren Court continued through the Burger Court and perhaps even later.

The constitutional revolution embarked upon by the Warren Court was based on two general conceptions that may have been in conflict. The first was the idea of a living constitution: a constitution that evolves according to changing values and circumstances. The second was marked by the reemergence of the discourse of rights as a dominant constitutional mode.

I. THE LIVING CONSTITUTION

The late eighteenth century idea of a constitution was based on newtonian conceptions of separation of powers and checks and balances. The idea was to create that perfect governmental machine designed to last forever. This model represented a static conception of a constitution as fixed for all time. In the second half of the nineteenth century, legal thought shifted under the influence of Darwinism and evolutionary theory. Legal thinkers for the first time talked about law as changing according to changing circumstances. Remarkably, however, this change did not fundamentally affect constitutional thought, though you can find Darwinian influences elsewhere in the law. In most other legal areas—in jurisprudence, in torts, in contracts—evolutionary thought did have a major impact. But in constitutional thought there was relatively little recognition of change by the end of the nineteenth century. Originalism remained the dominant mode of discourse. The notion that the Constitution and constitutional meaning

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were fixed for all time was a regular part of the way in which people continued to think about law.

Why was constitutional law different? Sanford Levinson of the University of Texas Law School has called the Constitution "America's civic religion."¹ Indeed, this serves to underline an important relationship between religious and legal thought in the nineteenth century. As the power of religion reached its zenith in the second half of the nineteenth century, and then began to decline amid an ever more secular society, one begins to see the shift from religion to law as a dominant American public concern. Perhaps the Constitution represented the displacement of religious ideas. If the Constitution constitutes civic religion and if modes of religious thinking affected much of constitutional thinking, then the notion of timeless truths that are unchanging was carried over from religious to constitutional thought. Constitutional thought became the sublimation of declining religious thought. So while late nineteenth century legal thought had been widely influenced by Darwinism and evolutionary thought, it did not, in fact, create such a way of thinking in constitutional thought. Why?

Beginning in the 1890s, thinkers started to emphasize the significance of rapid social change. It was argued that the old individualist ethic was anachronistic as a result of a shift from an agricultural to a concentrated, industrialized economy. More frequently, legal thinkers asserted that the Constitution was out of touch with changing times. For example, the doctrine of freedom of contract, as elaborated in *Lochner v. New York*,² was no longer appropriate for an industrial society in which individual laborers could not freely contract with large industrial corporations. In the generation before 1937, a growing body of thought suggested that it was not possible to talk about the Constitution as having a fixed and permanent meaning. Though the living Constitution concept was a widespread theme in the period leading up to 1937, it virtually vanished after 1937. Why?

The legal thinkers who justified the New Deal constitutional revolution after 1937 explained their triumph not as a constitutional revolution but as a restoration of neutral constitutional principles. The errant *Lochner* Court, they said, had written its own parochial views into the Constitution during the late nineteenth century. They had endowed the Constitution with the Justices' own ideas of natural law. Because the *Lochner* Court had been overcome by "mechanical jurisprudence," it had applied legal ideas badly and had created a monster. Under the doctrine of judicial restraint, the New Dealers claimed they were restoring the Constitution to its pre-*Lochner* Court status. Thus, the New Deal constitutional revolution was not justified under a conception of a changing Constitution, but rather as a restoration of unchanging neutral principles embodied in the original Constitution. Which of us, after coming to power, would not be tempted to justify our changes as a restoration of constitutional principles and not as a "consti-

1. SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

2. *Lochner v. New York*, 198 U.S. 45 (1905).

tutional revolution"? It is too tempting to turn to the conservative, restorative idea rather than to openly acknowledge a constitutional revolution that needs to be justified. As a result, intellectual opportunism immediately suppressed the issue of how to think about a changing Constitution after the New Deal revolution.

The question of how to conceptualize the Constitution arose again with *Brown v. Board of Education*.³ As *Brown* was appealed to the United States Supreme Court and about to be argued for the first and then the second time, the likelihood of a unanimous Supreme Court decision holding that the "separate but equal doctrine" of *Plessy v. Ferguson*⁴ was unconstitutional was extremely low. The Supreme Court, by 1950, had signalled to those who were pressing for racial equality that it would thereafter be almost impossible, given the actual unequal conditions of segregated public education, to satisfy the separate but equal standard. The opponents of segregation were thus offered the promise of a strictly applied separate but equal standard that would virtually guarantee the illegality of most segregated school systems. However, litigation under the separate but equal standard would require a case by case attack on segregated schools that would necessitate a costly and time consuming creation of a trial record that could demonstrate actual, "material" inequality. It might take fifty or one hundred years to end segregation this way, but it would gradually be eliminated. Thus, the likelihood that the Supreme Court might reaffirm the separate but equal doctrine under a very rigorous standard that for most of American history had never been applied seemed quite high. Consequently, *Brown v. Board of Education* was not some inevitable expression of American ideals. Rather, it was a quite surprising and perhaps even miraculous moment in American constitutional history.

When the Supreme Court considered *Brown v. Board of Education*, it had to decide what it was going to say about *Plessy v. Ferguson*. Although the *Brown* Court stated that separate education facilities are "inherently unequal,"⁵ *Brown v. Board of Education* tiptoed around *Plessy v. Ferguson*, rather than expressly overruling it, thus blurring the question of whether the Constitution changes over time. The famous social science footnote eleven⁶ was basically designed to say that "[t]hese social psychology studies show that segregation is stigmatizing to blacks and, hence, is inherently unequal." The footnote was also designed to suggest that the Justices who decided *Plessy v. Ferguson* in 1896 had not had all of this modern social science information before them. Thus, the Court implicitly reasoned that what the *Plessy* Court thought in 1896 might have been correct and what we think now, in 1954, can also be correct. The Court implied that the

3. *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

4. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

5. *Brown*, 347 U.S. at 495.

6. *Id.* at 495 n.11.

different results stemmed from different applications of the guarantee of equal protection to the changing circumstances of public education and to deeper understandings of intangible harms that the study of human psychology had made possible. Viewed from this perspective, *Brown v. Board of Education* raised the momentous issue of whether there was a changing Constitution.

Plessy v. Ferguson was the result of twenty years of racist decisions by the United States Supreme Court after federal troops were withdrawn from the South and the Great Compromise of 1877 signalled to the South that it could reinstitute segregation without interference. But for the judges who were deciding *Brown v. Board of Education*, the desire not to offend the South and not to directly overturn almost a century of Supreme Court decisions under the Fourteenth Amendment was very powerful. Accordingly, the theory of a changing Constitution, a living Constitution, a Constitution that could be interpreted in one way in 1896 and in another in 1954, received a lot of discussion. Out of this seed in *Brown v. Board of Education* there sprouted, during the Warren Court's tenure, a very powerful view held among several of the Justices that constitutions cannot be static, but are designed to change. A constitution meant to endure for ages can only endure if it adapts to different views held under different circumstances.

II. RIGHTS DISCOURSE

In addition to the concept of the Constitution's ability to evolve, the second major constitutional development brought about by the Warren Court revolution was the resurrection of rights discourse. In 1940, most progressive legal thinkers had come to believe that the theory of natural rights was a conservative doctrine designed to protect private property and should best be left out of interpretations of the Constitution. In one of its previous appearances it had been invoked in *Dred Scott v. Sandford*⁷ to defend property and, indeed, slavery. Thus, one of the most amazing reversals in modern constitutional history is how a doctrine held in such low esteem, so discredited in 1940, came to be used by the Warren Court to represent a liberatory, emancipatory, and outsider's way of talking about the law. One of the most fascinating aspects of the Warren Court revolution is the resurrection of rights discourse which, prior to the Warren Court's tenure, had been more or less discredited among Progressives.

The Warren Court developed and changed several legal doctrines. First, of course, was the monumental decision in *Brown v. Board of Education* and its echo in dozens of cases during the years of the Warren Court. Even those Warren Court cases that are doctrinally not about race are almost always, in one way or another, ultimately about the agony of race relations in America. For example, *New York Times v. Sullivan*,⁸ which held for the

7. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

8. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

first time that state common-law rules about defamation are restricted by the First Amendment, involved an attempt by the State of Alabama to force newspapers that published pro-desegregation advertisements out of business. By invoking the First Amendment against libel laws, the Supreme Court acted in a context in which it was becoming very clear that the threat of bankruptcy was being directed against newspapers in order to uphold segregation. Similarly, if you study those cases collected under the heading of "federalism," or if you examine the criminal law decisions of the Warren Court, you can grasp the extent to which race is the central, often unacknowledged, factor in the decisions. So I think of *Brown v. Board of Education*, decided one year after Earl Warren became Chief Justice, as setting the central theme of the Warren Court. It was both the basis for the development of rights discourse as well as the development of the idea of a living constitution.

Under Warren's Chief Justiceship, the Supreme Court also radically transformed the application of the Bill of Rights to the states. Until the Civil War, the Bill of Rights was held not to apply to the states. As of the time Earl Warren became Chief Justice, the First Amendment had already been incorporated into the Due Process Clause of the Fourteenth Amendment. There were also several other areas in which the Bill of Rights had begun to infiltrate into the Due Process Clause. But it was the Warren Court that over the course of one decade incorporated most of the remaining provisions of the Bill of Rights as restrictions on the states.

In the area of reapportionment, the Warren Court affected a political, as well as a legal, revolution. Not only did the one-man, one-vote idea correct a strongly antiurban bias in existing state political structures, but the system of judicial enforcement developed in the reapportionment cases, growing out of the desegregation cases, radically expanded the equity power of the federal courts. It foreshadowed a more interventionist federal judiciary in prisons and other public institutions. Before *Brown* and the reapportionment cases, federal courts were unwilling to craft the kind of decrees that have now become more or less usual in many forms.

Within Warren Court jurisprudence there developed a contradiction between its "living constitution" ideas and its "rights" ideas. Where did its rights ideas come from? We can find no better text with which to begin discussion of rights than the Declaration of Independence. "We hold these truths to be self-evident; that all men are created equal and they are endowed by their Creator with certain inalienable rights." It was this tradition that came to be regarded as anachronistic. The Warren Court thus revived the revolutionary spirit of rights discourse after it had been debased in the protection of slavery and, arguably, in the protection of property. But the rights idea was an eighteenth century newtonian idea. A static conception of self-evident truths, endowed by a creator as inalienable, as there for all time, as unchanging. The living constitution idea, by contrast, regarded constitutions as changing and changeable depending on the circumstances. Both of these ideas coexisted in the Warren Court and they continue to coexist uncomfortably today.

Now I wish to shift to a slightly different perspective about the Warren Court. The Warren Court was the first and, so far, the only Court in American history that emphathized with the outsider. I have gone back over different periods in American history, and I have tried to be fairly generous and not historically bound in my definition of the outsider. Still, I do not see an arguable competitor. The Warren Court was unique. The Warren Court was the first Court in American history that really identified with those who are down and out—the people who received the raw deal, those who are the outsiders, the marginal, the stigmatized. It was the first sympathetic treatment that blacks received from the Supreme Court, with the arguable exception of the decade after the passage of the Fourteenth Amendment in 1868. Moreover, not only blacks but other minorities—religious minorities, political dissenters, illegitimates, poor people, prisoners and accused criminals received sympathetic treatment.

Brown v. Board of Education set the theme for this aspect of the Warren Court as well. The Supreme Court did not arrive at the declaration that separate facilities are inherently unequal enthusiastically. It was pushed in that direction by many circumstances involving the place of America in the world. Looking back to Nazism or across the ocean to Stalinism, Americans after 1945 were obsessed with defining and defending democratic principles. They were increasingly made aware of the emergence of the Third World. The experience of black fighting men in segregated units during World War II reopened issues of second class citizenship.

The Supreme Court was also pressed by the unbelievably courageous behavior of President Truman in the area of civil rights. He split the Democratic Party and risked his re-election mainly because of his really unbending devotion to the civil rights of black Americans, a devotion that does not appear to be very prominent in his biography before he became President.

So *Brown v. Board of Education* created this powerful current, producing a vision of American society that was radically different from the complacent view that preceded it. Eventually, it overflowed its bounds. The decision in *Brown v. Board of Education*, I am suggesting, shifted the Warren Court to an outsider perspective. Let me go further and propose that the Justices who made up the Warren Court majority were, in different and complicated ways, themselves outsiders. There was Justice Black, the Senior Justice of the Warren Court majority, who had been on the Court for sixteen years when Warren was appointed Chief Justice. He had been a Senator from Alabama, a member of the Ku Klux Klan. It was often said that you could not get elected to the Senate from Alabama unless you had been a member of the Ku Klux Klan. Black's previous career as a prosecutor was heralded as racially fair and just by the standards of Alabama in the 1930s. He was one of the first two Justices to insist that *Brown v. Board of Education* needed to decide that segregation was inherently unequal. How was Black an outsider? An evangelical Baptist who was outside of the mainstream of sophisticated eastern establishment legal thought, Black carried the Constitution in his pocket the way his Baptist forbearers

carried the Bible in their pockets. He had the same literalist interpretation of the Constitution that his Baptists ancestors had of the Bible. If Black was an outsider, he was a regional and cultural outsider. Black did not know what was being thought about the Constitution at Harvard and Yale Law Schools.

Justice Douglas, the second senior member, referred to himself as an outsider in his autobiography.⁹ A sickly child, with no friends, he built his body up with long backpacks through the Washington Mountains, rode hobo trains across the country, and was suspicious of the religious, political, and economic "establishment" from the time he was a young man. In Douglas' magnificent first volume, *Go East Young Man*, he portrays himself as the very essence of a loner with deep empathy for those who did not "make it."¹⁰

The third member of the Warren Court in seniority was Earl Warren, appointed in 1953 by President Eisenhower in return for Warren's having thrown the 1952 Republican Convention to Eisenhower. He had been Governor of California and before that a prosecutor. He had participated in the internment of the Japanese-Americans during the Second World War. In his subsequent reflections on his role in the internment of Japanese-Americans, Warren identified the internments as a traumatic experience that had had a powerful effect on him personally and led him eventually to acknowledge that an egregious mistake had been made. But Warren too was an outsider to sophisticated legal culture. When I was in law school, it was common to mock Warren for often asking from the bench whether a particular legal position was "just." Sophisticated legal scholars did not speak that way. This is the sense in which I mean that Warren—and Black—were outsiders to sophisticated legal culture.

In any other supreme court of a democratic nation, you would not find a Black or a Warren. The channels of promotion and recruitment to the supreme courts of most democracies is much more professionalized, much more controlled by one's standing at the Bar. One who is appointed to the highest court of Britain, France, or practically any other democratic country, has usually spent a lifetime of distinction at the Bar, often as a lower court judge. Only in America do politicians become Supreme Court Justices, and Black and Warren were politicians. Only in America have Supreme Court appointees been able to remain out of touch with the latest thinking on federal jurisdiction. And only in America are Supreme Court Justices not necessarily already trained out of asking the question, "is it just." Black and Warren brought something special and unique to the Supreme Court. When it came to defining the agenda of the Warren Court, their deep political experience served them well, allowing them to draw upon knowledge of the way law actually works in America, something that a more profes-

9. WILLIAM O. DOUGLAS, *GO EAST YOUNG MAN: THE EARLY YEARS* (1974).

10. *Id.*

sionalized and sophisticated judge like Felix Frankfurter was unwilling to do.

The Justice I have the greatest difficulty in fitting into my "outsider" thesis, because so little of the details of his biography is yet known, is the greatest justice of the Warren Court—William Brennan—who I think will clearly be regarded in the judgment of history as among the greatest of all American Supreme Court Justices. Brennan was appointed in another fluke. As the 1956 congressional elections were nearing, President Eisenhower decided he needed help with the Catholic vote. So he began a search for a Catholic Democrat to appoint. His Attorney General consulted Chief Justice Arthur Vanderbilt of New Jersey who suggested that a young fellow named Brennan on the New Jersey Supreme Court should be appointed. Justice Brennan's authorized biography is a year or two away from appearing. We still know very little about Brennan's background. But let me propose, without pretending that it is enough to make the case, that as the only Roman Catholic on the Supreme Court, Brennan was different. In many parts of the country, in much of American history, Roman Catholics have deeply felt like outsiders. Whether and to what extent this was true of Justice Brennan remains to be seen.

Next, we have Arthur Goldberg, appointed in 1962 as Felix Frankfurter's successor. A Jew, and counsel to the CIO steelworkers union, Goldberg was involved with the CIO when it was a quite radical industrial union. He was engaged in the intense labor struggles of the 1930s. Arthur Goldberg can clearly be fit into outsiders status; and his successor, when Goldberg left three years later for the U.N. Ambassadorship believing that President Johnson would appoint him Secretary of State, was Abe Fortas. Fortas was also a Jew, a New Dealer, and founder of the New Deal law firm of Arnold & Porter. In her excellent biography of Abe Fortas, Laura Kalman's analysis begins with the assumption that Abe Fortas felt himself, always, to be an outsider.¹¹

The final liberal member of the Warren Court was Thurgood Marshall. I suppose I need not explain too much why he was an outsider. Chief counsel of the NAACP Legal Defense Fund, he was the architect of the organization's legal strategy against segregation and spent many years of his life not knowing whether he would be murdered before he awoke the next morning in whichever town he had brought the battle against segregation. Mark Tushnet of Georgetown University Law School is writing a two volume biography of Justice Marshall, so we are going to have to wait a while before we are treated to a full account of Marshall's life.

All of these justices were, in their different ways, outsiders. They empathized with outsiders in ways that another distinguished judge of the Warren court, Justice John Marshall Harlan, could not do. His privileged life experiences—prep school, Princeton, Rhodes Scholarship, Oxford, part-

11. LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 7-26 (Yale Univ. Press 1990).

nership in a large New York law firm—did not encourage him to think about outsiders.

So, in my view, the Warren Court represented a unique period in American constitutional history. It did not just happen, nor was it a random event, except for the constellation of the justices who were appointed. In biographical as well as social and historical terms, it produced a major turning point in American constitutional history.

