

# THE UNFINISHED BUSINESS OF THE WARREN COURT

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## I. ON THE FAILURE AND SUCCESS OF COURTS

Come with me, in imagination, back to the Seattle of early 1861, just in time for the last news of 1860 to have reached us from the populous East. This news has been long in coming, for the planned Pacific Telegraph will not reach the Coast until later this year.<sup>1</sup> But now we have before us a New York newspaper of December 31, 1860.

What we read opens our minds to grim doubt concerning our own future. The bleak fact is that we are held as the territory of a dissolving nation. What is to happen to us out here? We dimly see many possibilities. Shall we be part of a loose customs-union with some or all of our distant sister states? Will there be a split into two or three confederations—perhaps North and South and West? We have brought here and kept our loyalties to the Union as it was, but may not that Union soon be so changed that incorporation with Canada and the British Empire may after all seem the best step we can plan? None of these possibilities is unrealistic.

So we have to consider—and on long winter evenings we do consider—the condition and history of the United States. Does that Republic seem to be growing toward the kind of national character that can reach out to Seattle, nourish and guard Seattle, make Seattle a part of itself?

There are educated people amongst us—a wide reader such as Henry L. Yesler,<sup>2</sup> a man of many lives like David S. Maynard,<sup>3</sup> a

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1. R. THOMPSON, *WIRING A CONTINENT* 367-68 (1947).

2. C. BAGLEY, *PIONEER SEATTLE AND ITS FOUNDERS* 10 (1925).

3. *Id.* at 9 n.2.

doctor who also practices law—people who know a good deal about the political history of the United States, in these days when politics is so eager a preoccupation of all. What has gone wrong (they may ask one another) with the so carefully built and so much praised structure of the Union? Perhaps they may even discuss the part that has been assigned in this structure to the judicial branch. If we get that far, in 1861 Seattle, it may be someone will think of so famous a man as John Marshall. Perhaps one or two people now in Seattle know something of his work. If any of us do, then they can tell the rest of us that the constitutional judgments of Marshall's Court defined, better than any other public utterances have defined, the kind of nation it would take to come and stand strongly on Puget Sound and Elliott Bay, and to make our Seattle wholly a part of itself forever. Seattle needs John Marshall, in 1861.

But twenty-five years should suffice for judging the work of a public man, and if we think at all about this man whose judgments could have meant so much to Seattle, we must without reservation pronounce him a failure. Marshall, it can now be seen, followed that *ignis fatuus* most fatally attractive to intellectual man—he sought to create by noble language a structure which reality was all the while rejecting. Seattle must find its future in another kind of structure.

If anyone in our village happens to have had conversation with John Marshall toward the end of the Chief Justice's life—and this is obviously possible, in the case of so accessible a man and so well-traveled a group—and if the Chief Justice was then, as he often was, in a mood for frank talk, then that person may add that Marshall bitterly agreed with this verdict on his work. He knew that his doctrines had not taken root. Even before he came on the bench, his more famous and powerful fellow-Virginians, Jefferson and Madison, had espoused notions of “interposition” quite irreconcilable with nationhood. In the late 'twenties and early 'thirties, “nullification” had taken off the “interposition” mask, and had found its greatest but by no means lonely theorist in Calhoun. When Marshall showed signs of acting against genocide in Georgia, against the planned smashing to bits of a civilized Indian tribe, his interventions were rejected as impudent and were successfully defied, with the acquiescence of the

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President.<sup>4</sup> It is true that Jackson, in the nearly contemporary nullification controversy involving South Carolina and the tariff, spoke the language of national supremacy, but what value was there in a sporadic enforcement of national law, according to Presidential preference?<sup>5</sup> In any case, as Beveridge is later to say, "The net result was that nullification triumphed,"<sup>6</sup> for the tariff act was drastically modified in 1833, as a direct result of South Carolina's threat of disobedience. John Marshall died a crushed man.

Now, in Seattle village of 1861, twenty-five years later, it is very plain that Marshall did right to despair. He built on the concept of one people. The people of the Union are two peoples, with a third voiceless people in slavery. Nobody cares about national supremacy, or broadly defined national power, as things in themselves; people care about less abstract issues, and use these two ideas when they help, flouting them when they hinder.<sup>7</sup> Now the threatened news has come. South Carolina has left the Union, and other States are sure to follow.

Through these same twenty-five years, the Supreme Court has built little on Marshall's foundations. Here in Seattle, in 1861, we will probably be as unsuccessful as later generations are to be in arriving at a satisfactory evaluation of the Taney Court. But we do know one thing, and in that one thing all else is merged. In the *Dred Scott*<sup>8</sup> case, the Court has said that the national government flatly lacks constitutional power to deal with the chief national question—the question of slavery in the territories. That is what has happened, on the Court, to *Gibbons v. Ogden*<sup>9</sup> and *McCulloch v. Maryland*.<sup>10</sup> Those cases projected national power adequate and apt to national need. *Dred Scott*, applying the narrowing-interpretation techniques which were anathema to Marshall's mind and death to his vision, says the nation has not even the power to save itself *in extremis*.

Maybe I have overdrawn on the political knowledge of the settlers

4. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); see generally 4 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 539-52 (1919).

5. See E. PESSER, *JACKSONIAN AMERICA* 198 (1969).

6. 4 A. BEVERIDGE, *supra* note 4, at 574.

7. See, e.g., 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 290 (Rev. ed. 1926).

8. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

9. 22 U.S. (9 Wheat.) 1 (1824).

10. 17 U.S. (4 Wheat.) 316 (1819).

of Seattle in 1861. What reading I have been able to do on the backgrounds of some of them leads me to doubt this. But if they knew even a little about John Marshall's constitutional work, they knew that that work had utterly failed. The system he had built in his mind was just right for Seattle. But Seattle, as of 1861, is going to have to content itself with something more tuned to the ethos of the Union's people, something less perfect but more feasible, something—if I may lapse anachronistically into the cant of our own '60's—more "relevant."

In late 1861, the Pacific Telegraph reaches San Francisco,<sup>11</sup> and news comes to us a little faster. And what surprising news, as the next years go on! No one, I think, knows why the North decided to fight, and fought on in the face of defeat, and gave 675,000 lives; the secret is dispersed with the ashes of bonfires on village greens, with the echoes of sober conversations among families and friends. There must have been something in unconsciousness, waiting for the sound of a trumpet. However it happened, the news of Appomattox at last reached Seattle. Washington Territory was not lacking in lawyers.<sup>12</sup> Some of them must have been reminded of John Marshall's splendid nationalist judgments. In your beautiful Seattle phrase, perhaps in use even in those days, the mountain was out.

Now the Marshall Court, as all know, is the paradigm of judicial success. I have tried to show what an abysmal and final failure it must have seemed in 1861, here in an outpost to which its success was supremely important. The failure occurred because, in 1861, it was plain that John Marshall had misread the national character. The paradigmatic success that finally emerged came because what was plain in 1861 was altogether untrue and had been untrue from the beginning. Lincoln and Antietam did not happen after 1861. They were there already. John Marshall became the archetype of success because all along, against all seeming, in spite even of his own despair, he had correctly read the deepest impulses of the nation, and the destiny toward which those impulses were to lead it.

The Warren Court is now just dissolved, and the urge to evaluate

11. R. THOMPSON, *supra* note 1, at 367-68.

12. See A. BEARDSLEY, *CONTROVERSIES OVER LOCATION OF THE SEAT OF GOVERNMENT IN WASHINGTON* 284 (1941), reprinted from 32 *PACIFIC NORTHWEST QUARTERLY* 239, 401 (1941).

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its place in history is nearly irresistible. What question can we meaningfully ask, now?

The first thing is to arrive at some overall strategic approximation to a statement of what the Warren Court has been about. Here there is considerable though not insuperable difficulty.

The difficulties arise in part from the fact that—unlike the Marshall Court—the Warren Court has not spoken with a single voice. The habits of dissent and of separate concurrence have grown since Marshall's time. A second difficulty, connected with the first, is that the Warren Court has contained many strong figures, not by any means all like-minded. Then, thirdly, changes in personnel have resulted in changes in direction, in the taking of new tacks, and even in some retreats.

I wish I had the training to study to some effect the fascinating problem in decisional dynamics presented by this Court's history. The process by which it has brought the law so far will never yield its secret to counting, in simplistic categories such as "liberal" and "conservative." There has been at work, instead, a most complicated set of interactions. Mr. Justice Clark, sometimes spoken of as though he were consistently conservative, wrote for the Court in a number of chain-breaking decisions—*Mapp v. Ohio*,<sup>13</sup> *Hamm v. Rock Hill*,<sup>14</sup> and *Burton v. Wilmington Parking Authority*,<sup>15</sup> characterized in the New York Times story on his retirement as conservative on civil rights,<sup>16</sup> he was in fact reliably anti-racist. Mr. Justice Stewart, whom many think of as relatively traditionalist, wrote the opinion that emancipated the thirteenth amendment and gave it room to grow into a general law on all the incidents and badges and consequences of slavery.<sup>17</sup> Mr. Justice White wrote for the Court the most advanced of its "state action" opinions—*Reitman v. Mulkey*<sup>18</sup>—and contributed from the

13. 367 U.S. 643 (1961).

14. 379 U.S. 306 (1964).

15. 365 U.S. 715 (1961).

16. N.Y. Times, March 1, 1967, at 1, col. 6.

17. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). I ought in candor to say that I cannot agree with the Court's interpretation of the 1866 statute in this case, though for other reasons not now requiring rehearsal I think the case rightly decided. The important thing about *Jones* is its recognition of Section 2 of the thirteenth amendment as a source of wide Congressional power—and its clear implication that the Amendment of its own force does more than merely abolish chattel slavery.

18. 387 U.S. 369 (1967).

lawyer-like quality of his mind to legitimation of the result in *Evans v. Newton*.<sup>19</sup> Mr. Justice Harlan gave the support of his careful general conservatism to the result in what is probably the most advanced of the Court's doctrinal motions—the judgment in *Griswold v. Connecticut*.<sup>20</sup> On the other hand, no Justice has been found always on the side which the public would classify as “liberal.” The Warren Court was a body of strong-minded independent men, each sensitively conscious of his individual responsibility, but whose dynamic interaction somehow added up to a strong thrust in an at least vaguely identifiable direction. When time has unlocked the documents, students of the decisional process will have here a uniquely interesting course of events to study.

For all this complexity, we would be wrong not to see in the work of the Warren Court, as a matter of net thrust, an affirmation—the strongest, by a very long interval, in our whole history—of the positive content and worth of American citizenship. Without making this lecture a catalogue of cases, I will invite your own reflection on what I would take to be the structure of American citizenship as the Warren Court has projected it and filled it in—sometimes with a feeling of obviousness in the product, and sometimes with that “sublime audacity”<sup>21</sup> which has been praised in John Marshall, and which often goes into the making of good law.

First, citizenship is the right to be heard and counted on public affairs, the right to vote on equal terms,<sup>22</sup> to speak,<sup>23</sup> and to hold office when legitimately chosen.<sup>24</sup> Concomitant to and enveloping these rights is the right to associate for political purposes.<sup>25</sup> Alexander Mei-

19. 382 U.S. 296 (1966).

20. 381 U.S. 479 (1965). See Part III, *infra*.

21. 4 A. BEVERIDGE, *supra* note 4, at 302.

22. *Baker v. Carr*, 369 U.S. 186 (1962), and its sequel cases. I have to say that I cannot go all the way with the Court in its imposition of mathematically precise equality across the board. See Black, *Representation in Law and Equity*, in REPRESENTATION 131 (Pennock & Chapman eds. 1968). But the excesses, if they are that, are minor and correctable, while the pre-*Baker* position was intolerable.

23. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) is perhaps the greatest landmark. It is worth noting, however, that in *United States v. Robel*, 389 U.S. 258 (1967), the Court finally threw the last shovelful of earth on the theory that the first amendment is not “law” by squarely holding unconstitutional an Act of Congress under that amendment.

24. *Powell v. McCormack*, 395 U.S. 486 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966).

25. *Shelton v. Tucker*, 364 U.S. 479 (1960).

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Meiklejohn long ago taught us that the citizen is as much a part of government, as definitely an empowered component in government, as is any official;<sup>26</sup> in a recent book of my own, I have argued that from this mere status much of what we derive from the first amendment could have been derived even if there had been no first amendment.<sup>27</sup> This public aspect of citizenship has been strongly firmed into law by the Warren Court.

Secondly, citizenship means the right to be treated fairly when one is the object of action by that government of which one is also a part. Continual expansion is of the essence here, for no procedure is ever fair enough. The Warren Court has effected great expansion,<sup>28</sup> and, even more important, has put in our hands the conceptual means for further growth. The change effected is one of kind rather than of degree, for the Warren Court has finally cast aside the methodological canons that would bound this part of citizenship by narrow historical considerations, and has given our legal culture a new freedom to search out and destroy the blight of rightlessness, wherever it may spread.

Thirdly, citizenship is the broad right to lead a *private* life—for without this all dignity and happiness are impossible, and public rights mere futilities. The Warren Court has powerfully affirmed this aspect of citizenship—as to marriage,<sup>29</sup> as to religion,<sup>30</sup> as to travel<sup>31</sup>—and has given us methodologic tools for extending it wherever it should be extended.<sup>32</sup>

This citizenship of three interconnected aspects should be enough. But to this triad, defining as it does the good political life, the Warren Court has added one more thing—a thing our history made it sadly necessary to add. It has affirmed, as no Court before it ever did, that this three-fold citizenship is to be enjoyed in all its parts without respect to race,<sup>33</sup> “as far as constitutional law can accomplish it”—the long-unhonored promise of the *Slaughter-House Cases*.<sup>34</sup>

26. A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

27. C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 35-51 (1969).

28. Citation seems idle; the names of the cases are a proud legion.

29. *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

30. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

31. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

32. See Part III, *infra*.

33. See Part II, *infra*.

34. 83 U.S. (16 Wall.) 36 (1873).

I would expand here a little, though not to full extension, my belief, elsewhere expressed,<sup>35</sup> that filling with content the concept of citizenship need not result in neglect of the rights of aliens among us. I think just the opposite to be true—that the rights of the lawfully resident alien ought to be measured by the rights of the citizen, with only such exceptions as definite history or *nationally* determined necessity may dictate, in strict subjection to the Bill of Rights. I should think that it may one day be squarely held, as it has already been suggested, that the whole subject of alienage is constitutionally preempted to the nation,<sup>36</sup> and that no state may take any action adverse to aliens as such, save for the historically and textually validated exceptions of voting and office-holding. I should think that once the nation has decided that a man may live here, that decision implies by plain necessity a decision that he may live in some state, and that a state's putting him (except with respect to these political rights) on a different footing from its other residents amounts to diminution by a state of that which the nation, for its own purposes, has given—an action no more to be countenanced than would the discriminatory taxation by a state of foreign imports as such.<sup>37</sup> As to national action respecting aliens, the relevant parts of the Bill of Rights, and inferentially all the radiations and penumbræ of the Bill of Rights,<sup>38</sup> protect all “persons.” But this is an excursus, and I shall leave it at that, except to say that it is a part of the unfinished business of the Warren Court.

Now if I am right in this overall characterization of the triadic citizenship the Warren Court has worked to establish, what question should we be asking about that Court?

If the Marshall Court is the paradigm of success, then perhaps the mode through which it became that may be the paradigm of evaluation. I took a look the other day at the well-written article on Marshall in a volume of the *ENCYCLOPEDIA AMERICANA* published in 1854.<sup>39</sup> His early career is sketched in detail. His service as Chief Justice is

35. C. BLACK, *supra* note 27, at 64.

36. See *Hines v. Davidowitz*, 312 U.S. 52 (1941).

37. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

38. If something like the methodology advocated in Part III should continue to make its way, very broad protection of lawfully resident aliens would follow, for their position is in many respects and for many purposes soundly to be analogized to that of citizens.

39. *ENCYCLOPEDIA AMERICANA, MARSHALL* (Vethake ed., Supp. Vol. 1854).

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lauded in general terms. But there is not a word about any of his constitutional judgments, or even (except for one quite vague hint) about his place as a constitutional judge. How did this article get revised?

It took a lot of time. Constitutional doctrine succeeds if it expresses what turn out to be at last the authentic impulses of the nation. If I have rightly, though vaguely, caught the true characterization of the Warren Court, then we shall have to wait and see—and we should be extremely wary of accepting the fashions and feelings of one day, or of one or ten or twenty years, for that which may at length assert itself.

Closely connected is another point. Even within the political structure narrowly considered, no Court succeeds alone. *McCulloch v. Maryland*<sup>40</sup> and *Gibbons v. Ogden*<sup>41</sup> constructed a frame ample to any national need. But those cases would be dead today—mere antiquarian curiosities—if Congress and the President and the people had not taken the leads they gave, used the powers they validated, and accepted that use as legitimate. Declared constitutional rights will not be enjoyed unless people will litigate on them to judgment, and unless the judgments are supported by the other branches of government. They will not be enjoyed—and here I speak to the immediate and longer future—if lawyers will not show a *constans et perpetua voluntas* to guard them against practical as well as conceptual circumvention.

There is another thing to be learned from the failure of the Marshall Court, and the events that followed it. In virtually contemporary sizing-up of the success of any Court, it is a delicate task indeed—I am inclined to think an impossible one, in its effect if not in its intent—to distinguish between evaluation and desire. The wrongness, inadaptability, failure of a Court's work are questions rather than observations, and they are questions about the future, and so they easily become questions about one's own hopes rather than questions about what one is evaluating. If one were talking about the Marshall Court in, say, 1858, such phrases as "proved unworkable" or "merely visionary" would seem inevitably to contain implications as to one's own position in a battle still being fought.

There is therefore only one thing I would say confidently, now, about

40. 17 U.S. (4 Wheat.) 316 (1819).

41. 22 U.S. (9 Wheat.) 1 (1824).

the Warren Court. It is the only Court so far in American history which has so much as a chance of being one day thought as great as the Marshall Court, for it is the only Court that has made an assertion as large as the Marshall Court made. Marshall took a set of disconnected texts and read them together in the light of an overall vision of nationhood. The Warren Court—and this is its distinctive achievement in method—decisively and one may hope finally has rejected that mode of reading our constitutional guarantees, both substantive and procedural, as though each were a narrow thing-in-itself, to be grudgingly construed, and has insisted that these guarantees, readable in themselves, in their radiations, and in their interstices, are to be looked on as forming a total scheme of citizenship.<sup>42</sup> The Warren Court (not, to be sure without honored antecedents, as Marshall's work was not without antecedents) perceived in these guarantees a pervading systemic equity, an equity of respect for the citizen, and thus set in full motion a way of looking at them which can make of their totality a plan adequate, in shape and size, to confront Marshall's plan of nationhood.

Marshall wove his firm-textured dream of *one* people. In his day, state particularism was the unrelenting threat to that dream. But was it merely an accident that state particularism, where at its most virulent, where it strained and then broke the Union, was built around the most drastic possible denial of equality and freedom? Could, or *can*, a *nation* endure half slave and half free?

I think it plain that we will not be or remain a nation worth calling a nation unless we plant ourselves on the moral ground to which the Warren Court has given its outlines—not in all the details of all the decisions of that Court, but following the broad lines the Warren Court has laid out. We need this moral basis of citizenship—common, growing citizenship—as we need cleaner water and air. It is conceivable that there may exist sometime, somewhere, a national state with no other vocation than the modest one of preserving itself. But we have a different birth from that; we live congenitally under a different and inescapable commandment; we have stood together at the foot of the mountain. If a sense of rightness and mission is a thing we need so as to be able to face the future, and if extension to all of that three-

42. See Part III, *infra*.

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part citizenship which I have outlined is the only mission to which we can worthily give ourselves, then the Warren Court, like the Marshall Court, has been trying to make us a nation.

I have made a large claim for the Warren Court—the largest possible against the background of our history. I have asserted that there was set to us, in our beginning, a task that is not two but one—the task of making a nation, based on the consent and will of one people, wherein full citizenship should prevail for all. If this is right, then in the joint company of John Marshall and Earl Warren we are questing after a nationhood with moral meaning and purpose, after a political society as good as politics can make it. For that society, even for the earnest attempt to build it, we can give E. M. Forster's "Two Cheers,"<sup>43</sup> reserving three cheers, as he did, for the society which politics alone can never create. All here will die before we know how it comes out. Indeed, such things never finally come out. For us, as for all men, the search is the Grail.

I asked a little while ago what might be the right question to put to ourselves about the Warren Court, as it steps back into the shadows of time. The question with meaning, the realistic question, the answerable question, is not whether the Warren Court succeeded. It is not even whether, in the Seattle of 1993, where, if I am spared and blessed, I shall bring grandchildren to ride that quaint old Monorail, it will be thought to have succeeded; sometimes even tentative success takes longer than that, as the posthumous history of the Marshall Court shows. The answerable question, the question that hard realism asks, is whether we want to make it succeed.

It has been said that the South surrendered at Appomattox to John Marshall.<sup>44</sup> Then it is not too much to say that in one generation, willingly and unwillingly, for the most part unknowingly, 675,000 people died to make reality of the rhetoric of *Cohens v. Virginia*.<sup>45</sup> If in the coming generation 675,000 people were to ded-

43. E. FORSTER, *TWO CHEERS FOR DEMOCRACY* 70 (1951).

44. JOHN MARSHALL: *LIFE, CHARACTER AND JUDICIAL SERVICES* xiii (J. Dillon ed. 1903).

45. 19 U.S. (6 Wheat.) 264 (1821). Rereading that opinion, and having recently had occasion (see note 39, *supra*) to go over the main events in Marshall's life, I cannot keep myself from recording my lively distaste (I had almost chosen a stronger word) for what has become a thing of frequent occurrence—the patronizing and light ridiculing of the work and style of such a man, by persons who are so many untravellable

icate themselves, willingly and knowingly, to making the Warren Court succeed—particularly if a few thousand were to be young lawyers of skill and dedication—then I tremblingly predict that in Seattle in this law school in 1993, twenty-five years after Earl Warren's stepping down, people will be saying that the Warren Court, for all their difference in style and decisional dynamics, was comparable in greatness to the Marshall Court.

I have spoken of young lawyers because what will be required of us, above all, is *advocacy*. It has often been pointed out that skilled and tireless advocacy, returning again and again to insist on the rightness of its cause, can make new law. What we need now to understand, and to act upon, is the associated truth that advocacy can also guard and sustain law. It can even bring it about that retreat, where retreat is compelled, not become rout, and that there be left behind, for the uses of a better day, indestructible monuments like the great dissents of Brandeis. The law of the Warren Court is on the whole a law of political health and wisdom, worth the most earnest sustaining advocacy, and sustainable if that advocacy is forthcoming. The management of this legacy, the prevention of its dissipation, so eagerly anticipated by so many, will be the new challenge to creative advocacy in our next years.

Good law continually refines its reasons, and it will be a vital component in the sustaining advocacy of these coming years to refine continually the reason behind the constitutional law the Warren Court has formed. This will be the answer—the only possible answer and the sufficient answer—to the recurrent charge of want of “principle” in the Warren Court decisions. That charge has been multifarious. In part, it is no more than a call for something unattainable in any working law at any time—total logical consistency not only of enunciated rules but of rules thought likely to be enunciated with respect to imagined future cases. In this aspect, the call for “principle” is but old mechanical jurisprudence writ large, or small, and it is sufficient to say that one hundred years of jurisprudential

leagues from having dared as much and done as much as he, and who could not write in a style as good for their century as his was for his, if they had labored at it from childhood all through every day and prayed for it every night.

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rejections of this mode of thought only put in bold relief the tragedy of its being wheeled up again to cast a shadow on results of the most evident justice. Much of this critique ignores the fact, plain as a pikestaff, that any viable legal system has different methods and styles, as well as different rules, for different problem-areas. We do not even treat real property and personal property just alike; we treat marital rights and riparian rights very differently indeed. On the other hand, some of the worst mistakes in any legal system come from insufficient inconsistency; in our own case, one sore instance, productive of injustice and suffering, is our treating a housewife as though she were a banker, for the purpose of defining the consequences of her making a promissory note. On analysis, too, the question of "principle" often turns out to be merely an ordinary lawyers' question about the sufficiency of a distinction. Religious differences, race differences, age differences, political differences, and sex differences are not the same, either with respect to the facts or with respect to the relevant constitutional texts, and there is no across-the-board a priori reason why they should be treated as though they were the same. The intellectual soundness of a constitutional system may quite as likely be shown in its differentiating one kind of discrimination from another—or in its devising evidentiary or remedial rules which are applicable to one but not to the other—as by its lumping them together. If the life of the law has been experience, then experience teaches that tolerable solutions to the problems of law are rarely attainable by the utterance and Procrustean application of huge generalizations. Tolerable solutions, moreover, are not attainable, never have been attainable, and never will be attainable if justice must wait until answers are given to every question intellectual curiosity can suggest as to the reaches and connections of every rule.

I make bold to quote, moreover, from Plucknett, on an important phase in the development of English law: "[T]hose sweeping and violent social revolutions which occurred in Switzerland and France were avoided in English history through the slow adaptation of the law to new social conditions, no doubt assisted by the lack of a precise definition of property, while the willingness to tolerate for a time a few anomalies helped to accomplish by peaceful means the

great task of transforming the ancient serfdom into a class of free workers.”<sup>46</sup> A legal system in process of change will not move at a uniform rate, nor find *instante* its new reason to the last decimal place. Those who insist it must are insisting on paralysis.

(I shall have more to say of this matter tomorrow, for the charge of want of “principle” in the Warren Court’s decisions has in fact been levelled mainly at its racial decisions, the subject for my second lecture.)

At the same time, reason is an essential component in the art of law—reason supporting justice, reason subtly and flexibly adapting itself to the gross and fine-grained differences in life. In the end, it is quite true that the work of the Warren Court will endure only if our own later work can support it with that kind of reason, the only kind good law ever has or needs. This process of continual reworking and search will surely result in some changes in rule and in outcome—in some contractions and in some expansions. But if the great changes effected by the Court are in the direction of a justice consonant with our national ethos—and I believe they are—then the reasoned system will be constructed and refined that can contain them.

For my remaining lectures, I shall be driven to an extreme selectivity. Tomorrow, I shall talk about the race problem, with which the Warren Court has so heroically striven, with particular reference to the *Brown*<sup>47</sup> case, as it appears in the perspective of just on sixteen years. My third lecture will be on the Connecticut birth control case,<sup>48</sup> a subject I have chosen because it opens vast new vistas of protection of the human personality by law, and sets us on the road to the construction, or, better, to the continual and systematic expansion, of a whole body of law and equity protective of human rights.

## II. THE UNFINISHED BUSINESS OF RACISM

The most urgent particular item in the unfinished business of the Warren Court is the work of eradicating racism in the United States—

46. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 34 (5th ed. 1956).

47. *Brown v. Board of Education*, 347 U.S. 483 (1954).

48. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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of opening full citizenship to black people. In going about this work (to start with methodological considerations) the Warren Court has effected two changes, both long overdue, both obviously called for, and both, I hope, irreversible.

First, the Court has rejected fiction as a substitute for fact in its dealings with racism. We may think here first of its centrally important and plainly right rejection of the fiction of equality in the separate-but-equal formula.<sup>49</sup> But the Court has consolidated another rejection of another fiction—the fiction of “privateness,” and hence of immunity from constitutional control, in cases where the “private” action is really supported by public authority and communal participation.<sup>50</sup>

Secondly—and this is a vaguer but vastly important point—the Court has broken altogether out of the quite unjustified juristic style of reading the constitutional and statutory guarantees of racial equality in a narrow sense, as one reads the criminal law, and has begun to apply to them the same kind of broad interpretative spirit as has long been applied to virtually all the other parts of the Constitution. The dominant judicial unneutrality of some eighty years (an unneutrality of principle, I think I may call it, for no principles are of more importance than those of method)—one set of interpretative canons and attitudes for the Constitution in general, and another far more grudging set for those parts of the Constitution that would make the black man a citizen—has, it seems, come to an end.

Having specialized in racism and admiralty, I have long thought that all we need in legal method, to get all we need in the field of racial equality—at least so far as a court can give it us—is that the thirteenth, fourteenth and fifteenth amendments be read in the same spirit as the admiralty clause. A major component in the 1877 surrender was the tacit resolution, taken by our legal culture, to

49. *Brown v. Board of Education*, 347 U.S. 483 (1954). See also note 55, *infra*, and accompanying text.

50. See, e.g., cases cited in notes 15, 18, 19, *supra*. The extent to which professional consensus has moved in this field is well shown by Judge Henry Friendly's *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* (1969). Judge Friendly, no radical, sees impermissible use of state power in many actions which were thought twenty years ago to be immune from constitutional control. This excellent little book should be carefully read by those who remain under the illusion that realistic views on “state action” are confined to the radical fringe.

insist that, though inference was to be piled on inference when it came to the admiralty clause, though instrumental relations and functional equivalencies were freely to be sought and given effect, those parts of the Constitution set up to protect blacks were to be addressed with the question whether it was so nominated in the bond. The Warren Court has overthrown the strangling tyranny of this juristic style.

This change in the spirit and technique of interpretation is of particular importance with respect to the powers of Congress. The admiralty power—not so much as named in the Constitution as a legislative power, but inferred from the existence of federal judicial power over admiralty cases—was held to give Congress authority to limit liability in cases of catastrophe at sea,<sup>51</sup> and to set up a machinery for enforcing ship mortgages,<sup>52</sup> both for the purpose of encouraging shipping and ship-building. But in times easily remembered, he was a relapsed heretic who twice timidly suggested, for example, that the power to “enforce” a guarantee of equal protection of the laws was a power to bring it about that people really enjoy the fruits of this equality—that all obstructions to such enjoyment, wherever originating and however indirect, were removable by Congress, as an obstruction to navigation is removable by Congress.

The Warren Court has cut all this away, and put the right to racial equality, and Congress’s power to protect racial equality, into the main stream of constitutional-law method. *South Carolina v. Katzenbach*,<sup>53</sup> upholding of the Voting Rights Act of 1965 is the paradigm. In that Act, for the soundest of practical reasons, Congress provided an enforcement machinery which did far more than make illegal that which was already illegal under Section 1 of the fifteenth amendment. Congress perceived that certain “tests and devices” for qualifying voters, tests in themselves seemingly quite innocuous, were in fact obstacles to enfranchisement of Negroes. Congress swept these tests away, as Congress might sweep away what it found in fact to be an economic or physical obstacle to interstate commerce. And the Court, in this critically important judgment, sustained the action.

51. *Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527 (1889).

52. *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934).

53. 383 U.S. 301 (1966).

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No one can now say how far we may go with the use by Congress, in application to racial problems, of the very same spaciousness of interpretation that is elsewhere applied to Congressional powers. I will only mention what to many of us now is a possibility of prime moral importance. It has been pretty generally assumed that capital punishment can be abolished in the United States only through action by 50 state legislatures. But suppose Congress were to conclude—as I think statistics would force it to conclude—that capital punishment had been administered for a long time in a manner discriminatory against blacks and other minority groups.<sup>54</sup> Suppose Congress were to judge, from this long experience, that this discriminatory administration was likely to continue or to recur. Could these judgments be faulted? If so, how? If not, then why could not Congress abolish capital punishment for the entire nation? Congress could beyond doubt make unlawful a practice whose adverse impact on interstate commerce was far less well attested than is the inequality, past and predictable, in capital punishment as actually administered. I will not press the point, but simply mention it as an example of the vistas opened by the Warren Court's bringing the juristic methods of racial constitutional law into line with the juristic methods of other constitutional law.

When we turn to the question of what the Warren Court did with these new methods, Mount Rainier is *Brown v. The Board of Education*.<sup>55</sup> As the correctness of this great case comes simply to be assumed as background, its importance is easy to forget; it all seems so obvious now. But it cannot hurt to take another look at it, particularly as its significance, though not its rightness, has lately been questioned.

First, it is most misleading to see the *Brown* case, with its antecedents and its sequels, as being concerned only with schools. The previously assumed validity of school segregation was supported almost entirely by a holding that concerned not schools but railroad cars.<sup>56</sup> And the *Brown* case was immediately followed by a series of cases, decided *per curiam* on its authority, condemning segregation

54. A very old phenomenon, in one form or another; "Ye poor and miserable were hanged, but ye more substantial escaped." 6 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 508 (1924). (The reference is to executions following Monmouth's rebellion.)

55. *Brown v. Board of Education*, 347 U.S. 483 (1954).

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

by law in a number of situations whose variety and range left no doubt that what was being condemned in the most general possible terms was the entire regime of segregation.<sup>57</sup> What did the *Brown* case, so interpreted, accomplish?

To answer this question generally, we must turn it around and ask what, after all, was generally, *pervasively* wrong with racial segregation in schools, in transportation, in restaurants, on golf courses, in cemeteries. What was the common factor in *all* American racial segregation by law?

I insist<sup>58</sup> that this common factor was a huge assertion, a life-pervading symbolism. Many tangible hurts were inflicted, to be sure. These may have been at their maximum in the school cases. But it is not much of a tangible inconvenience to get on a bus full of strangers for a ten-minute ride, and to sit in the back rather than in the front. Yet people in Montgomery put their livelihoods and even their lives on the line to be freed from having to do this, and the late Dr. Martin Luther King, Jr., hardly a man to pick a foolish quarrel wherein nothing was at stake, led them. What was so bad about sitting in a separate section on the bus?

The question answers itself. To walk to the back of that bus and to sit down there was to take part, with one's own body, in a compulsory pantomime which asserted, with entire clarity to all concerned, "The political society in which blacks live officially judges and declares their closeness to be contaminative; it judges them unfit to associate with all other citizens." If that was not what was being asserted, then what was? What were the whites and the blacks of Montgomery struggling about, if not that?

If that was what segregation by law asserted, then the national validation of this pantomime requires adding a final sentence to its assertion: "Not only does the immediately surrounding society offi-

57. *New Orleans City Park Improvement Association v. Detiege*, 358 U.S. 54 (1958); *Gayle v. Browder*, 352 U.S. 903 (1956); *Holmes v. Atlanta*, 350 U.S. 879 (1955). I heartily agree with Herbert Wechsler that the per curiam device was wrong for these non-school cases (H. WECHSLER, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 30-31 (1961)), while even more heartily dissenting from his doubt concerning the *Brown* case and all that flowed from it. See Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421 (1960).

58. See C. BLACK, *THE OCCASIONS OF JUSTICE* vii (1963). Charles Evers has no doubt, it seems, that segregation is imposed because black children are thought "not good enough" to go to school with whites. *N.Y. Times*, Jan. 9, 1970, at 1, col. 4.

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cially declare this judgment, but the nation officially declares the assertion of such a judgment to be permissible, to be, in the broadest sense, within the law and equity of our whole polity.”

That, I take it, is what the *Brown* case destroyed. It began by erasing that last sentence. And, in our hierarchy of laws, the wiping out of the last sentence robs the others of moral as well as of legal authority.

The Warren Court's outlawing of segregation by law has to a very considerable extent worked out in practice. I think none of us whites can do more than guess what it must have meant to live all one's life in repeated daily enactments of a ritual of legally declared unfitness to play golf on the same course as the master race, or to eat at the same counter in a restaurant. My guess is that its effects were deep and corroding. In our disappointment at the slow pace of enforcement in the schools, we forget that many of these other kinds of segregation have either vanished or been greatly reduced. I often visit my old home in Austin, Texas, and my chest is lightened when I see there so much quite unnoticed integration—in stores, at the University, in our wonderful pool, Barton Springs, and in many other places. The old symbolism is crumbling; the untouchable are now the unremarked or the welcomed. To me, this seems very important; it defines a wholly new standing and respect, one quite unimaginable in the Austin of my youth. Changes like this have gone on over much of the South; no man can say whether it would ever have happened if the *Brown* case had not been decided.

These gains from *Brown* tend to be disparaged, for three reasons. First, we do not like to seem exultant over what is, after all, painfully limited progress, especially when blackness and misery are still so closely and massively connected. As to this, fairness to the historic record of the Warren Court plainly requires balance, and the awarding of appropriate credit, without any suggestion that anything like enough changes have occurred. Secondly—and here I have to say I am a little impatient with the disparagers—most, though not all, of the progress resulting from *Brown* has been made in the South, and would in overwhelming likelihood not have been made in the South without *Brown*. But the southern black is out of fashion. It is the unspoken assumption, at least in the circles wherein I move, that all human wrong is in the northern urban centers. The very word “concerned” is

a term of art, meaning "concerned with northern urban racial problems." To talk about the South is to be a bore. Still, millions of blacks do live in the South, and in many parts of the South the quality of their lives has been improved by *Brown*, and by all that came from *Brown*.<sup>59</sup>

The third reason takes us to an agonizingly unfinished item in the business of the Warren Court. The enforcement of *Brown*, in the area of school segregation, has been painfully, dangerously slow.

I cannot acquit the Court of having made a terrible mistake in its 1955 "all deliberate speed" formula.<sup>60</sup> That formula was wrong for four reasons. First, it had no affirmative justification. There was just exactly no reason, in 1955, for thinking it would work better than an order to desegregate at once. Secondly, there was on no view any need for the Court's sanctioning delay. Delay would have been present in any event, for many specious evasive schemes—"pupil assignment," fictionally "private" schools, "freedom of choice," "tracking," "gerrymandering" and so on—had to go through litigation. Thirdly, on its face the formula invited white dissent and obstruction. Whatever the Court said, it was clear that *feasible* speed, once delay of any kind had been sanctioned by law, would be an inverse function of community acquiescence. Fourthly, and most fundamentally, there was asked of the laity an understanding of which lawyers are scarcely capable—an understanding that something could be unlawful, while it was nevertheless lawful to continue it for an indefinite time. Invocation of respect for law, the strongest weapon we could have had, became nothing but an invitation to dispute on this paradox.<sup>61</sup>

But the blame for fifteen years disappointment cannot be laid wholly on the "all deliberate speed" formula. With strong and continuous legislative, presidential and popular backing, the word "speed" in the phrase might have become its operative part. At most times, that backing was not present (Lyndon Johnson was the conspicuous

59. It is entirely plain that many Southern blacks still see integration as the way of hope. *See, e.g.*, N.Y. Times, March 21, 1970, at 22, col. 4; Feb. 15, 1970, at 25, col. 1; Jan. 9, 1970, at 1, col. 4.

60. *Brown v. Board of Education*, 349 U.S. 294 (1955).

61. I stand by every word I wrote in *Paths to Desegregation*, THE NEW REPUBLIC, Oct. 21, 1957 at 10, reprinted in C. BLACK, OCCASIONS OF JUSTICE 144 (1963). It seems to me that everything since 1955 confirms the judgment that slowness and softness were not the right medicine.

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exception), and by 1965 or thereabout the situation had deteriorated to the point where a new position seemed close to being stabilized, a new symbolism, one of non-enforcement, set in place.

In this aspect, then, the Warren Court, as of its dissolution, seemed to be failing—as the Marshall Court, as of 1832 or 1833, seemed to be failing. Recent events in Congress have made this failure seem even more abysmal. Then let us ask ourselves the only meaningful question. Do we want the *Brown* decision to fail? If we do not, how can we try to see to it that it succeeds?

Setting myself firmly against the current fashion of thought, I say that the first and most essential task is to summon the will to root out the evil where it is at its most virulent and visible, and where its symbolic impact is accordingly plainest, and not to be deterred from this by the fact that conundrums can be propounded with respect to situations where the evil is less virulent and visible. The evil symbolism of segregation—its official affixation on the black man of a badge of inferiority—is entirely palpable and beyond doubt wherever public power, openly or by visible fraud, maintains separate white and black facilities. There is little difference in this regard between admitting no blacks and setting up a system the virtually declared and publicly understood purpose of which is to admit as few as you can. And easily penetrable fraud by public officials adds insult to insult; hypocrisy may sometimes be the homage vice pays to virtue, but not when hypocrisy thumbs its nose. The first task then is the full and final implementation of *Brown* in its own terms. Every trick and device for perpetuating segregation should be reached and scotched, every separate school system radically disestablished where the separateness is in any way traceable to official action—with the burden of proof on this latter issue allocated as equity plainly demands. We should not hesitate in this work merely because a great deal of segregation-in-fact is to be found in other places, as a function of a residential segregation that is hard to reach, remedially and conceptually. In Texas, we used to be told rattlers go in pairs. But you did not refrain from killing the located rattler just because you were sure that another rattler lurked somewhere in the grass, and must in due course be located and killed too.

In what I have now to say, I recur, tritely, to the myth of Proteus, that Old Man of the Sea, who, on being caught and held, changed

form with bewildering rapidity, from ram, to serpent, to fish, and so on through a range of metamorphoses. Evasion of enforcement of *Brown* is Protean, and the issues it raises are therefore endlessly multifarious. I will seize just one of the forms of this Proteus, the one he is taking this Spring. In parts of the South, schools called "private" have sprung up, and it is being proposed that, though "private," they be supported by the state, through tax exemptions, through tuition grants, and through other favors.<sup>62</sup> The thought is that these schools, being "private," may choose their pupils, and that they will choose white pupils. *Brown*, then, could stand intact—no segregation in the public schools. But, since all the white pupils will be in "private" schools, only blacks will remain in the public schools and everybody will be, or ought to be, or had better be, satisfied. Can such a scheme work?

I shall now redeem a promise I made in my first lecture, and resume a subject I broached there. It has become the fashion in some quarters to discuss such questions as the present one in terms of what is called "principle," by which is meant that one deals quickly and abstractly with the question actually presented, and then proceeds to develop imaginatively all the unacceptable consequences which might be thought to be inescapable if a pro-black solution is reached to the problem at bar. Since very many—perhaps all—legal actions or rules can be analogically expanded into other fields in a manner unacceptable in those fields, this method usually seems to show that "principle" once again requires that the interests of black people be ploughed under—with the implication that those who favor the pro-black solution are "unprincipled." To me there are two general answers to this sort of argumentation, and I shall mention them briefly before I come back to say the little I have to say about so-called "private" schools, and the "tuition grants" or other state favors that are to support them.

My first point is sufficiently obvious, and very traditional, for it

62. See the general story on these "private" schools in the N.Y. Times, Feb. 1, 1970, at 1, col. 1. As Judge Henry Friendly implies, *supra* note 50, at 24, it is "hardly imaginable" that the state will not aid these "private" schools in some way. In any case, as Judge Friendly says, "A state's *acquiescence* in a *general pattern* of discrimination by private educational institutions against persons of a particular color or religion should be held to constitute a deprivation of equal protection of the laws." *Id.* at 22 [emphasis supplied].

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comes straight out of the *Slaughter-House Cases* of 1873,<sup>63</sup> the first decision under the fourteenth amendment, and it is supported to absolute certainty by the grossly visible history to which the opinion in the *Slaughter-House Cases* adverts. The point is simply that the Reconstruction Amendments have a highly special application to *racial* discrimination, and that from this it follows, with equal certainty, that one need not extend analogically into any other field any rule announced or step taken against racial discrimination, any more than one need treat all contracts as one treats charter parties on the one hand or marriage on the other. This is not to say that the same rule may not, on fresh inquiry, turn out to be appropriate and supportable in the other field. It is to say that race, under the thirteenth, fourteenth and fifteenth amendments, is a special subject; substantive, evidentiary and remedial rules regarding it need no more necessarily square with those in other areas than the rules of trade acceptances need to square with the rules of seamen's releases. This is sound law, but it ought not to be irrelevant to add—in a legal culture thoroughly aware, since at least the time of the man after whom these lectures are named, that law mirrors and follows judgments of high expediency and justice—that it is also supremely good justice. Racism *is* a special subject in the United States, whether in or outside the law; it is *the* special subject in the United States. A system of law which is self-disabled from seeing it as such, and so from fashioning concepts and remedies to fit racism, if need be, uniquely, would be a law that could not be of any use as the legal system of the United States.

I do not say all this as an opponent of "principle;" I too am against sin. To me, the specialness of race and racism in our law is itself a high principle, not made the less such by its obvious justice and common sense. It is most unneutral to talk as though there were something unwonted in our law—a law containing admiralty, patents, trusts, and a host of other special subjects—in our frankly dealing with race as a special subject.

My second general remark, which I desire strongly to emphasize, is that analogy works both ways. What is so often done is to dwell

63. 83 U.S. (16 Wall.) 36 (1873).

long on the anomalies and difficulties which will ensue in other fields if racial justice be fully done, while not talking very much about the racial injustice itself. But "principle" is not a one-way street. If it were true that untoward consequences must follow in, say, the field of religion, if law were to track racism down to its last lair and kill it, then the game can be played both ways, and one may and must ask how untoward and paradoxical are the softnesses toward racism which seem to be compelled by this sort of argument, and whether we can afford the result we want as to religion, if that result leads analogically to the repudiation in practice of our principled commitment against racism.

This brings me right up to "private" schools and "tuition grants," as a means of evading the *Brown* case. Having got to there, I cannot think that anything very subtle needs to be said. What needs to be said, rather, is something almost unattainably emphatic.

Are we now, after nationwide self-congratulation in 1954, and after sixteen years of promise, to tell black people at last that all the *Brown* case meant was that no state could call its schools "public" and segregate them by law, but that if, as a matter of state policy, it wants to call some of its schools "private," subsidizing them in multiple ways, and if in fact all or nearly all the white children go to those so-named "private" schools, while all or nearly all the black children go to the public schools, that is "perfectly legal?" Is *that* all the *Brown* case meant? Were the bells that rang really so cracked all the while?

Even at this late hour I dare suggest that, in dealing with this "private school" swindle, we proceed strictly on principle, but that we start from where we are, and not from some point we vaguely fear reaching. The high principle, to which we have committed ourselves so fully that only uncleanable shame will attend its abandonment, is that state power may not effectuate, facilitate or encourage separation by race, imposed by dominant whites on blacks. The "private school" caper in the South is not a close case, in confrontation with this principle; it is a clear case for the principle's application. The indicated remedies are not one but many. No general choice has to be made between enjoining the tuition payments, or other forms of state support, and ordering the desegregation of the so-called "private" schools; a court of equity might find it expedient to take either or both of these

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steps, or some third or fourth step, as full enforcement of the principle requires.

I would urge, moreover, that the fraudulently "private" school ought not be held to take itself out of the reach of the *Brown* principle by any kind of tokenism. It ought to be treated for what it really is—just a component in the same old public school system, wherein all classification by race must be utterly disestablished.

Many new factual patterns, some foreseeable and some now unforeseen, would present themselves as time went on. It is to these that I would address, when they come, the question of principle—the question whether they can, in principle, distinguish themselves from the "private school" scheme evasive of *Brown*, and the additional question whether the plan then presented can be validated without in fact providing a dangerously facile escape-route from the full implementation of the principle of *Brown*—for the principle of *Brown*, like the principle of free speech, is important enough for us to surround it with an adequate buffer territory. If either of these questions had to be answered in the negative, then I would (perhaps with reluctance so far as the individual case went) conclude that adherence to the principle of *Brown* required invalidation. "Principle," as I have said, is a two-way street.

I have already given my reasons for thinking, however, that judicial action on private school plans which do not involve racism need not be the same, even in highest principle, as in private school plans that do. I could put this in a more general way. If fraudulent racist "private school" schemes are to be condemned—and they certainly are if our legal system is not too imbecile to live—and if a situation presents itself of a non-racist private school scheme, as to which none of the *Brown* considerations apply, then it seems to me the very life of sound legal method hangs on its capacity to conceptualize and to give effect to this distinction. We can see looming, to take the chief foreseeable example, problems about aid to parochial schools. Those problems will arise in the field of tension between two equally precious constitutional ideas—the one embodied in the establishment clause, and the one embodied in the free exercise clause. Can it be that there must be no difference between the way we view that case and the way we view the racist case, where no counterweighing constitutional or ethical value can be discerned? Are our means for taking and evaluating evidence

so astigmatic that we cannot factually distinguish these cases? On the other hand, before we give relief to the Mississippi victims of racism, must we answer every question which may later arise about parochial schools? I had thought the genius of our law would lead to just the opposite of that, that it was enough if the broad possibility of sound distinction appeared, and that no court could be expected to withhold action against obvious injustice, patently contravening established principle, until every question was answered concerning the exact location of the frontier between that principle and the other principle it may one day encounter.

I have been reading the novels of Anthony Powell, works of much instruction. I have been interested to see in how important a place he puts the *will*, as determinant of human destiny. This "private school" ruse brings into clarity the truth that in a legal system, as in a human being, it is at last the will that is supremely important. There is nothing new, after all, in the perception, which the "private school" scheme tritely illustrates, that any legal system contains, intellectually, the means of frustrating itself, of bringing its most solemnly enunciated commands to nothing, just as any healthy human being carries with him always the means of bringing about his own disgrace or death. Fiction alone—and no legal system is bereft of the power to proliferate fictions—always makes this possible. And so, without purely intellectual inconsistency, our legal system, having uttered the *Brown* judgment, can bring that judgment into conceptual harmony with a "private school" regime which utterly robs it of practical meaning. No one can say such a course is technically wrong, anymore than he can say that piercing the fiction is technically wrong. The question, rather, is one of will. Has our legal system the will to stand by *Brown*, and to make *Brown* stick, no matter what evasive scheme is devised? To me, the answer to this question answers the question whether our legal system has in it enough of honesty to deserve to live.

For law, as Jerome Michael<sup>64</sup> used to say, is a *practical* subject, and the first principle of law is that its commands, and above all its promises, are to be translated into practice—that a solemn judicial utterance like that of the *Brown* case, formally assented to by both

64. Formally my colleague, he was in substance both that and my teacher at the Columbia Law School. See Black, *supra* note 58, at 203.

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other branches, is to have actual effect in life, and not merely in terminology. One can take this further back and say that a legal culture that has committed itself to the thirteenth, fourteenth, and fifteenth amendments is in loftiest principle, because law is a practical subject, bound to hold on to Proteus until he goes limp, and the promise of racial equality, in fact and not in concept only, is fulfilled.

Let me pass now to another point, which I must make rather summarily. Nothing in *Brown*, nor anything in any possible implementation of *Brown*, can wipe out the obligation, antedating *Brown*, independent of *Brown*, and no wise contradictory to *Brown*, to provide for those schools which are *in fact* mainly black facilities equal in every way to those furnished to schools which are in fact predominantly white. It is absurd to think that this obligation—a mere aspect of the obligation to treat the races equally—is gone just because we ought not to have school segregation, though residential patterns bring it about that in fact we do. The Constitution may be color-blind, but it is not blind drunk. If—as often—it be shown that, in any district or city, there is a negative correlation between blackness and *per capita* expenditure on schooling, or a negative correlation between blackness and the actual quality of facilities and teaching afforded, then in my view an irrebuttable case has been put of lack of equal protection of the laws. If not, why not?

But I follow others in going further.<sup>65</sup> It has long been a comfortable tacit assumption, but, I submit, a wholly unwarranted one, that inequalities in schooling which result from one's living in a relatively poor district or city or county are unassailable under the equal protection clause. But it is the *State* that is obliged to furnish equal protection. The State may whack itself up into any sort of units and sub-units: counties, townships, villages, *ad infinitum* or *ad infinitesimale*. It may change these configurations anytime it wants to, abolishing some, adding others, drawing and erasing lines. What it may not do, through this power any more than through any other power, is to "deny equal

65. The authorities are collected in Professor Michelman's discussion of *McInnis v. Ogilvie*, 394 U.S. 322 (1969), *aff'g (per curiam) McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), in *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 47-59 (1969). Professor Michelman perceives and ingeniously explores some of the difficulties to which I briefly refer in the text, and they are (as he shows) real difficulties. But we should begin to wrestle with them.

protection of the laws" to blacks. I submit that it may not do this *as a whole State*, through the joint operation of the whole set of its agencies, created, chartered, bounded and empowered by itself. It may have as many hands as it wants, but the positive result of the joint action of all those hands must be that blacks be equally treated. So I say that if, in any State, considered as a whole, the whole population of black children is getting an education tangibly inferior to the whole population of white children, then that State is denying to the black children the equal protection to which they are entitled. The devising of remedies here is of course one of very great complexity, but we ought to make earnest and long-sustained trial.<sup>66</sup>

Let me go back now to the *Brown* case, and say at last the whole of what I must say about it. I speak in full awareness of how quixotic I shall sound, in exalting the integrationist spirit of that judgment. I speak with knowledge that the current seems to be racing just the other way, both in the white and in the black communities. But despair is impermissible. And for the long run, I see nothing but despair in the prospect of two Americas. I am very much aware, too, that I am speaking to young people, young lawyers, whose working lives will go far beyond the moods of these sorrowful days, and who will one day have to pick up the thread. To me, then, much hangs on the answer to a last question. Is the *Brown* case any longer meaningful to our society?

I have taken no poll, but from my wide acquaintanceships and readings, and a few precious friendships, I know that there are still very, very many black people who want full integration into what, with them, would at last have the right to call itself the American people. I must avow that it is to their desire that my own heart assents; they are my companions-in-arms of a quarter century, with whom I have sworn the oath; they are my blood kin, through those remote descendants we may dare dream of. They exist, whether or not, in 1970, they make front-page copy; they have their yearnings; they cannot be disregarded. If they are regarded, then the *Brown* case with all its radiations and even with all the problems it created, in its practical results but far more in its symbolism and promise, is the most fateful decision of this or perhaps of any American century.

Much is today being said of "identity," and of the search for

66. *Id.*

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identity. I have no desire or impulse to disparage these thoughts, or to make light of the needs out of which they come. But there is another search for identity, a search in which millions of black and white people are engaged together—identity in the mystery of birth and in the cruelty of death, identity in the love of parents and children, identity in the obscurity of our nature and destiny, identity in our hope that the world may not be what it seems—identity, that is to say, in being human. This is the identity that racism denies—and with it every value and hope of man as man. It would be the ultimate falsity in me to lay down my present subject without having confessed my belief that this identity is the one that matters at last, and that the unity it creates ought to enfold, though by no means to obliterate, all diversity. In America, late as it is, we still have a unique opportunity to search for this identity, just because its denial has been so rawly exposed to sight, and so flagrantly contradicts our best hopes and undertakings. If we can build our citizenship on this identity, then we will have something supremely precious to give the world. The *Brown* case, in its context and its broad radiations, does all that law can do to help *our* identity-quest; millions of us, black and white, will pronounce the *Brown* case “irrelevant” only when we give up the quest after this identity transcending all others—and that is a thing we will never do.

It seems to me that it is to this identity-quest that the Declaration of Independence, in its noblest and most ridiculed phrase, calls us. The words of the Declaration, like the earth in the words of the Declaration's author, belong in usufruct to the living. May not our living generation take the words not as a statement of a creation already performed, but as an invitation to participate in that ongoing work of creation whose goal they define? If we can do that, then the *Brown* case, in its wide bearings, will have been an indispensable beginning of a process in which we must continue, or, if we abandon it now, to which we must one day return. Here, for the new Court, for Congress and the Presidency, and for all of us, is a part of the unfinished business of the Warren years.

### III. THE UNFINISHED *CORPUS JURIS* OF HUMAN RIGHTS

There are many cases the law decides, and there are a few cases that decide the law.

As to the run of the mill, the sound thing to do, the thing virtually compelled by the economics of time and thought, is to apply the law by its familiar methods, given all the leeways any viable legal system contains, and to proceed to judgment by those methods. On the other hand, there come to court a few cases which evidently must be decided a certain way, but cannot, it may seem, be decided that way by application of methods already familiar. One of the highest reaches of the art of law is the recognition of such cases, and the devising of means for deciding them as they must be decided, without unbearable perturbation in the system as it stands.

The Connecticut birth control case (*Griswold v. Connecticut*)<sup>67</sup> posed the question whether a state might make criminal the effective planning of one's family—whether married people might be arrested, prosecuted, and sent to jail for using such means as seemed to them good for having or not having children.

This is not so much a case that the law tests as a case that tests the law. If our constitutional law could permit such a thing to happen, then we might almost as well not have any law of constitutional limitations, partly because the thing is so outrageous in itself, and partly because a constitutional law inadequate to deal with such an outrage would be too feeble, in method and doctrine, to deal with a very great amount of equally outrageous material. Virtually all the intimacies, privacies and autonomies of life would be regulable by the legislature—not necessarily by the legislature of this year or last year, but, it might be, by the legislature of a hundred years ago, or even by an administrative board in due form thereunto authorized by a recent or long-dead legislature.

This case created what many thought to be a methodological crisis in constitutional law. This was illustrated in an article published while the case was pending, by Professor Norman Redlich.<sup>68</sup> Let me refresh your memories briefly on the nature of this crisis.

67. 381 U.S. 479 (1965).

68. Redlich, *Are There "Certain Rights . . . Retained by the People?"* 37 N.Y.U.L. REV. 787 (1962). While I have said what I have to say in my own way, my great debt to this article will be clear. (It is appropriate to add here that I have benefitted generally from discussion of all points in this lecture with students at the Yale Law School. It is impossible to recall and cite all such conversations, but I might particularly mention William M. Young, Jr., Yale Law 1970, who has done a paper for me on a "privacy" question.)

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Crudely stated, it was that nothing in the Constitution said in so many words that the state might not make contraception a crime. Somewhat more subtly put, and put in a manner more correspondent to past reality, many believed that no provision or set of provisions written in the Constitution could by any far-reaching process of “interpretation” be thought to refer to contraception. This difference is crucial to an understanding of where we stood before *Griswold*, for a constitutional law which insisted that only those governmental acts were forbidden which were spelled out with entire and specific clarity in the text would have had almost no protective force at all. In law, the absolutely fixed and rigorously bounded is little but a challenge to circumvention. Long, long before *Griswold*, the process of “interpretation” had vastly expanded many of the most important constitutional liberties. A man who flew a red flag was “speaking.”<sup>69</sup> A man who had to produce his own papers or see a case go against him was both being subjected to “search and seizure” and being compelled to be a witness against himself in a criminal case.<sup>70</sup> The process of textual “interpretation,” sometimes supposed to be the only sound method in constitutional law, was wobbling under the load put on it. Nor was this true only as to the Bill of Rights. “Commerce among the several states” included the movement of one indigent person from one state to another,<sup>71</sup> and the interstate transmission of birthday telegrams<sup>72</sup> or rock-and-roll music<sup>73</sup>—hardly things that would be called into the mind by the word “commerce” in normal discourse. Dress designs and motion pictures were either “writings” or “discoveries.”<sup>74</sup> A license tax on the importer’s occupation was a tax on imports.<sup>75</sup> The Air Force was part of the “land and naval” forces.<sup>76</sup> Making noise was “taking property.”<sup>77</sup> And so on *ad infinitum*.

But the evidences of strain went beyond mere breadth, however

69. *Stromberg v. California*, 283 U.S. 359 (1931).

70. *Boyd v. United States*, 116 U.S. 616 (1886).

71. *Edwards v. California*, 314 U.S. 160 (1941).

72. *Pensacola Telegraph Co. v. Western Union*, 96 U.S. 1 (1878).

73. *Fisher’s Blend Station v. State Tax Commission*, 297 U.S. 650 (1936).

74. *See Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911); *Gorham Co. v. White*, 81 U.S. (14 Wall.) 511 (1872).

75. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

76. I cannot put my hand on a case squarely so holding; certainly the governance of the Air Force is based on this assumption.

77. *United States v. Causby*, 328 U.S. 256 (1946).

great, in interpretation, and extended to sheer juggling with the text. The most conspicuous and important of these jugglings was the virtual dropping out of the words "without due process of law" in the fourteenth amendment, when the freedoms of speech and religion were "incorporated" as against the states.<sup>78</sup> The job was by most thought satisfactorily done when the obvious fact was pointed out that "liberty," in the fourteenth amendment, included freedom of speech and of religion. Yet, as the federal government may not (so far as the words go) infringe these freedoms at all, and the states are forbidden to tamper with them "without due process of law," the prohibitions lying on the states and on the nation respectively could be equated only if "without due process of law" were taken either to mean nothing or to mean "except to the same extent that the federal power may." This last may be a reasonable and beneficial gloss; for my part, I think it is, in the main.<sup>79</sup> But it is a gloss written on the words only because it is thought reasonable and beneficial, and without warrant in any common meaning of the "due process" phrase or of any part thereof. It is a wonderful illustration of the "normative power of the actual"<sup>80</sup> that judges and writers who accept this gloss without question, just because it was affixed to the text in 1925<sup>81</sup> and has stayed there unerasd, are so squeamish about any new gloss, or new method, though the credentials of the new be just as good as the original credentials of the old and acceptably worn.

Having given a date, so often an instructive thing to do, I want parenthetically to expatiate on it a little. It was only forty-five years ago when, against all seeming, this particular gloss I have mentioned was written. It was only thirty-four years ago that the first state criminal conviction was reversed by the Supreme Court because of the defects—in the very case, gross torture—in the mode by which a con-

78. See C. BLACK, PERSPECTIVES IN CONSTITUTIONAL LAW 77, 90 (Rev. ed. 1970).

79. I see a good deal in Mr. Justice Harlan's suggestion that state power and federal power over obscenity ought to be differently measured. *Roth v. United States*, 354 U.S. 476, 496 (1957) (dissenting opinion). In any case, any system of doctrine and remedy which frequently brings the Supreme Court to the basement to watch a movie and judge of its naughtiness has, in my view, been subjected to a pragmatic *reductio ad absurdum*. Other ways ought to be looked for, but that is another story.

80. This powerfully explanatory concept is from Jellinek, but I cannot find a precise citation. I think I am here not using the concept quite as Jellinek meant it, but even the internal "actualities" of a legal system have their force, and come to seem right because they are there.

81. *Gitlow v. New York*, 268 U.S. 652 (1925).

fession was procured.<sup>82</sup> It was only forty-six years ago that the Supreme Court first held impermissible the absolutely official white Democratic primary<sup>83</sup>—so palpably a state-organized fraud on the Constitution that we now stand amazed that anyone could have dreamed it could succeed. These extensions of federal protection to rights now thought so obvious as to require no discussion have occurred within the active working lives of men now vigorously practicing law. Hugo Black was an experienced lawyer near middle age when the first of them occurred. We ought to wonder less at radical constitutional innovations occurring in later years. Major change is not a thing for past generations only. Let us recognize, as we face new constitutional doctrines and methods, that major change is normal, and almost never will seem incontestably right to the expert in the older techniques.

I have been talking about the methodological change toward which the Court seemed pushed by the *Griswold* case, and discussing some of the previous loosening of the “textual interpretation” method which preceded it. The most remarkable and paradoxical thing remains to be noted—the same methodological problem had already arisen and been solved almost sub silentio, forty-one years before *Griswold* and twenty-nine years before the appointment of Earl Warren. In an exceptionally well-argued and carefully considered case, *Pierce v. Hill Military Academy*,<sup>84</sup> a private school sued to enjoin enforcement of a state statute requiring all children to go to public school. (I use as an example the military school rather than the church school involved in a companion case, because no “free exercise” clause then confuses the issue). The opinion was written by the conservative Justice McReynolds, for a unanimous Court containing Holmes, Brandeis, and Stone. It was made clear that what was at stake was the right of the *parents* to send their children to any adequate school they wished (Of course, there was present no issue of fraudulent evasion of the constitutional claims of others). No such right is named in the Constitution, or discoverable by mere “interpretation” of any text in the Constitution. Yet both liberals and conservatives joined in finding such a right and enforcing it. The decision implied, as clearly as may be,

82. *Brown v. Mississippi*, 297 U.S. 278 (1936).

83. *Nixon v. Herndon*, 273 U.S. 536 (1927).

84. 268 U.S. 510 (1925).

that some rights are there and are judicially enforceable, though they could have been found in the text only by absolute fiat, transcending all feasible lexicographic operations. The case remained latent a long time; it is cited in *Griswold*, and even Mr. Justice Black, in dissent, recognized its applicability. But the methodological issue was not in this earlier time faced up to with clarity.

Meanwhile, there had been slowly making its way a general idea adequate to explain the case just discussed, and to furnish the means for growth into new fields—the idea that the “due process” clauses embodied a “concept of ordered liberty” of indefinite content, not limited by the first eight amendments.<sup>85</sup>

The Court, then, reached the question in *Griswold* against a most complex background. First, there was a common professional assumption that constitutionally protected rights must be named in the text. Secondly, the process of textual “interpretation,” induced by this assumption, had generated major strains. Thirdly, in at least one leading case, a very important right had been protected that was not textually named in any recognizable way. Fourthly, a general concept, that of “ordered liberty,” seemed to offer possibilities as a parameter for growth and generalization. A system in such a state is ready for shift toward integration and simplification of its methodologic canons. The birth-control case was a possible catalyst.

The “ordered liberty” concept, taken generally, might have sufficed; in the event it did suffice for one concurring Justice.<sup>86</sup> The feeling of the need for expansion in method may therefore have been a function rather of a drive on the part of the system to simplify and integrate for the future, than of the imperatives of *Griswold*. In any case, the need was felt and it came about that a new look was taken at the ninth amendment. Let me read you its text:<sup>87</sup>

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Now it is easy to use this amendment as the basis of what mathematicians call an existence proof, establishing that there are to be some

85. Professor Redlich succinctly summarizes this process, *supra* note 68, at 798-802.

86. Mr. Justice Harlan.

87. U.S. CONST. amend. IX.

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judicially protected rights not named in the first eight amendments. Nor, if one has accepted the *Gillow* doctrine, bringing the religion and speech guarantees to bear against the states, can it be much of a step to conclude that the states are, after the fourteenth amendment, forbidden to infringe these ninth amendment rights, and so to perform a corollary existence proof as to non-enumerated rights good against the states, for it is fairly plain that ninth amendment rights must be as "fundamental" as first amendment rights. What remains to be performed is a set of constructive proofs, establishing what these ninth amendment rights are to be.

In a most absorbing article,<sup>88</sup> Professor Mitchell Franklin has developed the thesis that the *Griswold* case in effect constitutes an adoption by the Court of the civil law method of reasoning by analogy from statute and statute-law.

I want to say here, emphatically, that I have read next to nothing on civil-law method,<sup>89</sup> and that I approach the task of summarizing Professor Franklin's thesis with all appropriate misgivings. What I have to say about it may nevertheless have a value if it be taken not as an adequate treatment of his ideas, but rather as an example of how they look to a lawyer trained in and only in Anglo-American law, with a strong specialization in American constitutional law, for it is only as they filter through the understandings and even the misunderstandings of such persons that the ideas of the civil law can have influence on our own constitutional law. We will never, as a class, become civilians. So, not presenting my misunderstandings as typical, but as an honestly taken sample, I will say that Professor Franklin seems to me, essentially, to be telling us that, in the methodology of the civil law, a statute, or a group of statutes, or a written code, serves much as the decided case, or the group of decided cases, serves with us. If a statute, for example, provides that women may vote, we would, in our legal culture, take its force to be spent when its literal command was obeyed; if the question before the court were whether women could also serve on juries, as against an antecedent state common-law

88. Franklin, *The Ninth Amendment As Civil Law Method and Its Implications For Republican Form of Government*, 40 TUL. L. REV. 487 (1966).

89. See Casper, Book Review, 37 U. CHI. L. REV. 196 (1969) reviewing C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). I have not had time yet to mend my ways; I must still enter through the postern like a horse on his knees.

rule that they might not, we would usually regard the voting statute as of no relevance—or we might even say, under the maxim *expressio unius*, that we discerned in the statute a positive intent that women not serve on juries. In the civil law, on the other hand, it would be legitimate to argue that the underlying spirit of the law was the political emancipation of women, that service on juries was a right of citizenship analogous to voting, and that the effect of the statute therefore, mediated by this analogy, was to grant them the latter right. This argument would be particularly forceful, I take it, if a number of statutes had been passed removing various civil disabilities of women, though juries were nowhere mentioned.

Now it seems true that Mr. Justice Douglas, speaking for the Court, is doing something like this in *Griswold* and he does in some way link the process to the ninth amendment. Let me read the crucial passage:<sup>90</sup>

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Surely the method of analogy has some relevance to our constitutional law as it stands. If it were sought, for example, compulsorily to quarter civilian federal workers in people’s houses in a small town adjoining their place of work, I should think a legal system to be quite evidently methodologically deficient that could regard the third amendment as irrelevant—as ours in its classically pure form could do.

I should suppose, also, that if the method of analogy with the very thing covered by the text is to work, it must admit not only of affirma-

90. 381 U.S. 479, 484 (1965).

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tive analogies but of distinctions. A “fair housing” statute which forced a homeowner to rent his one vacant room to a member of a race he disliked would evidently be put in doubt by analogic reasoning from the third amendment. But, equally, forbidding racial discrimination in multi-unit housing, would present opportunity for distinction. Indeed, in the example I first gave (regarding women’s rights), I should suppose that not only the similarities but the differences between voting and jury service would have to be talked about and evaluated. The point is that the civil law culture contains, as ours formally does not, the *possibility* of reasoning to binding law by analogy with, rather than by mere “interpretation” of, the positive commands of statute law. Whether any suggested analogy will be persuasive is another matter.

I can illustrate, again, from a case in which I was of counsel nearly twenty years ago, *Public Utilities Commission v. Pollak*.<sup>91</sup> We sought protection from unwanted radio broadcasts on buses. Under the then state of the law—or, rather, of legal method—we had to argue first, that the infliction of unwanted speech violated the guarantee of “freedom of speech”—reading “of” to mean “with respect to”—and, secondly, that we were suffering the taking of “liberty”—the liberty of not listening—without due process of law. These arguments (though I believed in them then and do now) were lexicographically close-hauled. After *Griswold*, I surely would have argued—using the civil law method as best a common law lawyer can understand it—that being forced to listen to what one regards as offensive trash is an affront to one’s dignity *analogous* to being forced to keep one’s thoughts to oneself, and to other textually forbidden constitutional wrongs. I would have liked that, and I would like it now, because I like a legal method that lets you talk sense, open, unpuzzling sense, and *that* was actually the full sense of the argument and of the issue.

It seems to me that here I touch on the cardinal virtue of the method described by Professor Franklin. It enables the lawyer and the court to talk sense, instead of stretching a text beyond easy recognition. With great deference, I instance the opinions of Justices Douglas and Black in *Rochin v. California*.<sup>92</sup> In that case, the defendant’s stomach was pumped and found to contain contraband. What the fifth amendment

91. 343 U.S. 451 (1952).

92. 342 U.S. 165 (1952).

says is that no man "shall be compelled in any criminal case to be a witness against himself." In no colloquial sense, only in the most highly poetic sense, was Rochin being compelled "to be a witness against himself." Yet Black and Douglas found violation of this provision. How much more room for common-sense discussion of the facts and the issues there would be, if discussion frankly focused on the question whether what was done to Rochin was soundly to be *analogized* to that which the Constitution forbade! Once Professor Franklin put this idea in any mind, I have seemed to find the United States Reports full of opinions in which acceptance of the new method might have taken away the feeling that some verbal legerdemain had been performed.

I believe the laity would readily accept this method, cautiously applied and extended. I think it would accept it more readily than what I may call, not too unkindly, I hope, the method of textual pretense. I think that the public acceptance of the authority of the Supreme Court rests on the belief that the Court is expounding a system—a whole system—of protections against the overreachings of governmental power. I think the laity, for example, would better understand the school-prayer decisions<sup>93</sup> if they were frankly expounded as forbidding affronts to children's immunity from religious interference by public power very closely analogous to what the first amendment forbids, instead of their being treated as exercises in the discovery of the unknowable primary "meanings" of the actual clauses. The utterly illusory certainty of the purely textual method may inspire confidence on the surface, but if you go below the surface confidence tends to be weakened instead.

The cautious use of this civil-law method would perform the valuable office of bringing craft-technique into line with institutional reality, as now seen by all serious students of the Court. All modern perceptions of the Court's role as enunciator of principles, and as teacher, sit uneasily with the technical assumption, still of immense power, that all the Court is doing or ought to do is to interpret particular texts. The shift in method would often enable a Justice to feel, and the public to feel, that technique and political function were marching along together—that, for example, a constitutional guarantee could be justified

93. Cases cited at note 30, *supra*.

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technically on much the same grounds as those that justify it politically—surely a symmetry most desirable on the merits as well.

A few years ago, I went down to Baton Rouge and gave some lectures with the self-explanatory title, *Structure and Relationship in Constitutional Law*.<sup>94</sup> My thesis was that many existing and many possible rules of constitutional law might best be deduced from the whole structure of the Constitution, from what the text creates rather than from what the text literally commands. I prepared these lectures, I may say, in a Garden-of-Eden state of total innocence of civil-law method, and therefore of any connection my thoughts could have with that method.<sup>95</sup> But the University of Louisiana Law School, as you know, is full of keen civil-law people, and the first lecture, in which I presented my main theme, was no sooner done than several people said to me, "Why you are talking about the way the civil law thinks!" I suppose I was; I shall have to take their word for it. If there is to be an altogether new thing under the sun of constitutional law, I think I should be sorry to have put it forward, for I am sure it would not be accepted and almost sure that it shouldn't be. Certainly, as what I then said showed, I was aware that I was not talking about anything new even in our own system, for I illustrated my thesis with some very old cases. And I may add that since the delivery of the lectures I am constantly finding instances of the settlement of constitutional points by the method of inference from structure and relation, rather than from textual exegesis.

The point I am leading up to here is that we already have an abundance of case law either applying the methods of reasoning from structure or from analogy, or so dealing with texts as closely to approximate those methods. We have an abundance of opinions whose total recasting in terms of those methods would make them more convincing. If we are now to face up consciously to the fact that the needs of constitutional law can only be served by recourse to these non-literal methods, we must not think of ourselves as doing so from a fresh beginning, of doing so as we would have had to do in 1790. We ought at this time to compound a durable alloy of our case-law method and the method of *Griswold* and of the civil law. We may see

94. C. BLACK, note 27, *supra*.

95. See Casper, note 89, *supra*.

analogy with the textual command as a permissible method, but we ought to see it as a method to be used in entire coaction with the method of reasoning from precedent. These methods do not contradict but rather support one another, as the whole history of the common law copiously illustrates. We have plenty of precedents from which to reason; when the new analogical argument is tendered, it should be responsibly confronted with all the case-law; analogy to the text of the fourth amendment ought to be restated as analogy to the fourth amendment cases. And of course a new case applying the analogic method ought itself to be a precedent to be dealt with. I believe that by this amalgam we could prevent the analogic method from producing unbearable disturbance in our system as it stands.

I should say, moreover, that a frank use of the analogic technique need not make impossible or unsuitable resort to the "ordered liberty" concept employed by Mr. Justice Harlan in his *Griswold* concurrence. These methods are not contradictory. They quite clearly overlap, for *our* "ordered liberty" is defined at least in part by the Bill of Rights and by the values subjacent to the Bill of Rights. What the "ordered liberty" concept might usefully do is to legitimate a spaciousness of analogizing from the Bill of Rights guarantees, and at the same time to furnish a last resort of constitutional equity.

I can expand and generalize the points just made by saying that, if the civil-law method of analogy is to help form our constitutional law, more visibly than in the past, it would be more accurate to speak in terms of convergent evolution than in terms of adoption. It would also, I must add, be far better rhetoric; our Supreme Court's use of the term *Rechtsanalogie* in justification of one of its judgments might bring about what two centuries of political thunder have not—the downfall of the Court! But in strict accuracy, rhetoric and levity aside, convergent evolution is the preferable term. Long before *Griswold*, as I have reminded you, our system had developed a set of tools that were capable of producing, and in one famous case<sup>96</sup> actually had produced, results in every way comparable to those attainable by civil-law analogical reasoning. It is surely noteworthy, on this, that the careful traditionalism of Mr. Justice Harlan did not prevent his concurring in *Griswold* on the ground, home-grown in our system, that

96. *Pierce v. Hill Military Academy*, 268 U.S. 510 (1925).

the fourteenth amendment imposes on government an obligation not to transgress rights fundamental to a scheme of ordered liberty. Finally (as Professor Franklin seems impliedly to recognize and as Professor Redlich illustrates) the ninth amendment, which is of our own creation, could best be given content by the method of analogy to more specific constitutional guarantees, even if the civil-law method had never existed.

What we ought to do, therefore, is to accept the fact that we have come to employ—indeed in many ways, long have employed—a method of our own growth which can be compared to the methods of *Gesetzanalogie* and *Rechtsanalogie*. We ought to think of the parallel and conscious development of this method in the civil law as strongly tending to validate our own development toward it; it has already been found viable in a healthy sister-system.

I must add here, though compelled to do so briefly, the very important point that, quite outside constitutional or even public law, our private law system has been tending toward the use of the method of analogy with statute. Pound discerned and approved this trend as early as 1908.<sup>97</sup> Harlan Fiske Stone in 1936 deplored the slowness with which it was developing,<sup>98</sup> but in 1955 Judge Walter Schaefer saw and applauded a quickening of pace.<sup>99</sup> Now this is most important, both predictively and normatively. The name of our subject, constitutional law, implies the commitment of certain decisions about governmental power to the methods of law. Our constitutional judges are trained and inveterate in the methods of our whole legal culture and they will and should move, methodologically, with the legal culture as a whole. There neither can nor should be a watertight bulkhead between constitutional law method and the general methods of law.

A good long time ago, I was asked, by someone who had the right to inquire, whether I had constructed a satisfactory rationale for the *Griswold* case. I had to say no, for I was thinking in terms of common professional assumptions. As I have thought further (helped along by Professors Redlich and Franklin, and many others), I believe I

97. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

98. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 14 (1936).

99. W. SCHAEFER, PRECEDENT AND POLICY (1956), quoted in H. BERMAN & W. GREINER, THE NATURE AND FUNCTIONS OF LAW, 473 (1966).

have seen, first, that those professional assumptions were not accurate as to the pre-*Griswold* law, and, secondly, that our law has reached the point at which, without disturbing discontinuity, it can and ought frankly to adopt a method of analogical reasoning which it can easily be seen as having created for itself, but which is also to be found in the civil law. That method takes in *Griswold* without difficulty.

Now I have talked about the *Griswold* case, but I have been talking as well about something more general and more important—about a major item in the unfinished business of the Warren Court. The Warren years have been breathtakingly crowded. Like all public men, the Justices have less time for reflection and systematization than is ideally called for by the Court's work. Insofar as it may be regarded as a whole, the Warren Court has been (as I said in my first lecture) possessed by a vision of full citizenship. But in the press of business it has not succeeded in giving to that vision the wholeness and roundedness of Marshall's vision of a nation. It has accumulated the materials for a *corpus juris* of human rights, but it has not given them the needful conceptual unity.

In great part, this is a function of the far greater difficulty and intricacy of the subject-matter. The juristic outline of nationhood is grandly simple; Marshall's achievement was after all more rhetorical—and how nobly so!—than intellectual. On the other hand, the soul of the nation—the goals which national power exists to serve—can never be given entirely clear lines.

But an indispensable step toward all the clarification we can have may be acceptance of a methodology needful to justify *Griswold*. That methodology must take all the guarantees in the constitution together, work to fill in the arbitrary and irrational blank spaces between them, and listen continually for their harmony and overtones. The ninth amendment, I think, does validate this method—and the method is the means of filling in the content of the ninth amendment. The stone the builders rejected may yet be the cornerstone of the temple. Nor let us despair, those of us who are still around, if the odds on this are rated poor twenty-five years from now; John Marshall's ideas seemed "irrelevant" in 1860.

Indeed, it seems to me that the method is all there is to the thing itself. The best way we ever will be able to define the master-scheme is to say that our polity has bound itself to respect all those rights

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which can be thought to stand in sound analogy to the rights named in the Constitution, as these may be read and reasoned from in the light of our concept of ordered liberty. Here, too, in another sense than the one I intended in my first lecture, the search, once the means of searching are rightly defined, may be the Grail.