THE WARREN COURT

A Retrospective

EDITED BY
BERNARD SCHWARTZ

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WHAT THE WARREN COURT HAS MEANT TO AMERICA

DAVID J. GARROW

This chapter's title succinctly states the question that I have been asked to address. To answer it most directly and most specifically, I can say that the most appropriate response comes in four parts, three of which are readily visible and apparent. First, the Warren Court meant racial equality. Second, as Judge Kozinski has already discussed in the context of *Baker v. Carr*,[1] the Warren Court also meant political equality in the form of "one person, one vote." Third, and somewhat more prospectively, vis-à-vis *Griswold v. Connecticut*,[2] the Warren Court additionally meant sexual liberty and gender equality. And then, fourth and finally, in a point that other essays in this volume have not touched upon as much as they might, the Warren Court also, especially in the context of *Cooper v. Aaron*,[3] meant judicial courage and judicial authority.

The United States of today is to a very significant extent the product of what are perhaps the three most notable and justly famous Warren Court decisions: *Brown v. Board of Education*,[4] *Baker*, and *Griswold*. However, it is also incumbent upon us to turn the assigned question around a bit, and, in addition to asking "What did the Warren Court do for America?" to inquire as well as to "What did America do for the Warren Court?" for the important changes that the Warren Court helped produce in American life between 1954 and 1969 were of course not produced solely by the Court. To this equally crucial query I believe the answer comes in three parts—one which is readily apparent, a second which is both significantly ironic and somewhat obscure, and the third which I believe—at least within our context here—is potentially at least somewhat controversial.

Whether we look at *Brown*, or at *Baker*, or at *Griswold*, or at all three cases in tandem, we must of course first remember that judges and Justices played at most only one-third of the roles that helped produce those landmark decisions. All of us who write about the Court (whether historians or journalists or law professors) need to regularly remind ourselves that we are always in danger of saying too little about the litigants and the lawyers who bring their cases before the Court and too much about the nine individuals who sit on the high bench. Thanks particularly to Richard Kluger's invaluable book on *Brown*,[5] we all know that not only did

Thurgood Marshall and his fellow NAACP Legal Defense and Educational Fund attorneys play major roles in helping to produce *Brown*, but that other, far less heralded activists, such as Clarendon County's Reverend Joseph A. DeLaine, a major initiator of the *Brown* partner case of *Briggs v. Elliott*,[6] likewise were essential—and necessary—to the cases' origination and development.[7]

The role of Reverend DeLaine, and others like him, highlights how important ordinary citizens (without law degrees) were to the process that took *Briggs* and the other cases that comprised *Brown* up to the Supreme Court. But, second, if we ask the question "Who created the constitutional revolutions represented by *Brown*, and by *Baker*, and by *Griswold*?" the answer is not simply Thurgood Marshall and Reverend DeLaine in *Brown* and *Briggs*, or political reformers in *Baker*, or Planned Parenthood activists in *Griswold*, for the other people who also contributed significantly to creating those three substantive revolutions were the opposition. In the *Brown* case, of course, those roles were played by the raft of segregation-minded public officials who had failed to make good even on the legal protection that the Court had offered them in *Plessy v. Ferguson*[8] and its less well-remembered progeny.[9] In *Baker*, and in its even better-known progeny, *Reynolds v. Sims*,[10] the political revolution that was heralded by "one man, one vote" reapportionment was tremendously *assisted* by the forces of political reaction whose officeholders had refused to redistrict so many state legislatures, and not just those in Tennessee and Alabama.[11] And crucial to *Griswold*, of course, was the Roman Catholic church hierarchy, in Connecticut and in other northeastern states such as Massachusetts, which for upwards of fifty years had refused to in any way accept or tolerate reform or repeal of the nineteenth-century statutes that criminalized any use or distribution of contraceptives.

Too often when we speak of *Brown*, of *Baker*, or of *Griswold*, we think of these cases simply as decisions written and handed down by the Supreme Court without fully appreciating or acknowledging the historical and political contexts from which those cases emerged or sprang. But, thirdly and additionally—and this is the point that I identified somewhat earlier as being potentially controversial—with regard to the internal life of the Supreme Court itself, I believe that all of us who are historians are obligated to deal very straightforwardly and very forthrightly with the fact that Supreme Court clerks, not only today but also in the "glory years" of the Warren Court, often played a very major role in the construction and crafting of the Court's opinions.

For example, especially since the Bush administration's 1989 request, in the person of outgoing solicitor general Charles Fried, that the Court in *Webster v. Reproductive Health Services*[12] jettison and reverse *Roe v. Wade*,[13] it has been especially ironic that Fried—best known to most people for his Reagan administration service—played a predominant role, as Justice John M. Harlan's clerk in the 1960 term, in crafting Harlan's exceptionally influential and now justly famous dissent in *Poe v. Ullman*.[14] The Harlan dissent in *Poe* powerfully prepared the way for the outcome four years later in *Griswold*, and undeniably opened the doctrinal door—even Professor Fried acknowledged to the *Webster* Court that Harlan's dissent was "in some sense, the root of this area of law"[15]—to the ruling in *Roe v. Wade*. Likewise, another very well-known present-day law professor, Anthony Amsterdam,

as Justice Frankfurter's clerk during that same term of Court, played a very major role in preparing both the majority opinion in *Poe* and the oft-quoted Frankfurter dissent in *Baker v. Carr* that came down nine months later.[16]

Previous papers have asserted that the Supreme Court today is both a less remarkable and decidedly less gifted body than was the Court of thirty or thirty-five years ago. With all due respect, I have to dissent from that generalization, first and foremost because the present Court has at least three members—the "three S's," one might say—who by any scholarly standard, irrespective of whether one heartily agrees or heartily disagrees with one or another Justice's jurisprudence, are intellectually the equal of any of the Justices that sat on the Warren Court. Indeed, we very much need to be critical rather than romantic when we look back at the "great Justices" of the Warren era, particularly at individual Justices such as Frankfurter, Douglas, and Black, whose doctrinal and analytical legacies have shrunk rather than grown with the passage of time. As we ought increasingly to realize and accept, the full light of history shows how some of these excessively celebrated jurists of the Warren era do not in actuality loom larger or look better than some of today's less-heralded Justices.[17]

Now, to turn, in order, to each of the three substantive areas that I highlighted at the outset—racial equality, political equality, and sexual liberty/gender equality. With regard to the landmark decision in *Brown v. Board of Education*, we nonetheless first and foremost have to acknowledge how the actual opinion in that case—just as in *Baker* and *Griswold*—is rightfully open to very significant criticism. First, and most starkly, the *Brown* opinion failed to offer as much legal ballast as it might have, particularly in failing to make use of good, existing Supreme Court precedents from the nineteenth century such as *Strauder v. West Virginia*.[18] Second, as many commentators from the black community have emphasized over the course of this past generation, the *Brown* Court—and the *Brown* opinion—also failed to appreciate or manifest any awareness of how Black America could experience—and generate—top-quality education apart from and independent of any cheek-by-jowl classroom exposure to white folks.[19]

Additionally, we often are too rosy-eyed with regard to how we speak of the Warren Court's behavior in race cases more generally. We justly celebrate *Brown*, and we correctly celebrate *Cooper v. Aaron*, but we usually fail to highlight how badly and ham-handedly the Court behaved in its two "successful" attempts to dodge *Naim v. Naim*[20] and we often fail to acknowledge how uncertain and muddled the Court was in its efforts to deal with a significant number of early 1960s Civil Rights movement protest cases.[21] We need to remember that, prior to the landmark Civil Rights Act of 1964, the Warren Court had been unable to produce five votes to affirm the principle that racial discrimination in public accommodations was constitutionally unacceptable. Likewise, we sometimes fail to point out how in its most crucial 1964 and 1966 civil rights rulings, upholding the constitutionality of first the Civil Rights Act of 1964[22] and then the Voting Rights Act of 1965,[23] the Warren Court was simply in the position of ratifying decidedly more dramatic and far-reaching legislative actions that had been initiated by successive presidents and approved by successive Congresses. Only in 1968, in a case that unfortunately is not well remembered or much cited any more, *Jones v. Alfred H. Mayer Co.*,[24] did the Court by virtue of the Thirteenth Amendment finally voice a clear constitutional declaration that racial discrimination as a badge or incident of slavery was utterly unacceptable in twentieth-century America.

When one turns from racial equality to political equality, what one sees, beginning with *Baker* to *Gray*[25] and *Wesberry*[26] and then to the entire family of cases headed by *Reynolds*,[27] is once again—just as in the *Brown* and *Briggs* set of cases—very powerful evidence of how local activists and local attorneys all across the country forced this legal agenda of revolutionary redistricting and dramatic political change upon the Supreme Court. I am reminded of a story, a story that is very nicely told in Professor Schwartz's *Super Chief*,[28] that is perhaps the most memorable aspect of *Baker*'s consideration by the Court first during the 1960 term and then again in the 1961 term. In the 1960 term, the Court, wrestling with the question of whether *Baker* would lead them to essentially reverse *Colegrove v. Green*[29] on equal protection rather then "Republican Form of Government" grounds,[30] found itself split four to four, with Justice Potter Stewart uncertain and undecided. At Stewart's initiative, *Baker* was carried over into the 1961 term for reargument, but by the beginning of that next term, Stewart had made up his mind and knew that he was going to side with Chief Justice Warren and Justices Black, Brennan, and Douglas to hold that the scale of malapportionment that existed in Tennessee presented a justiciable case under the Fourteenth Amendment's Equal Protection Clause.[31]

Following Stewart's determination, *Baker* appeared to be headed toward formal announcement as a five-to-four decision. Among the Justices who intended to dissent was Tom C. Clark. With hearty encouragement from Justices Frankfurter and Harlan, who were each also preparing dissenting opinions, Justice Clark set to work on a dissent aimed at highlighting what other alternative avenues for representational reform and remedy the Tennessee plaintiffs and other underrepresented urban voters could pursue instead of seeking a far-reaching constitutional declaration from the Supreme Court.

Much to Justice Clark's surprise, and perhaps even more so to Justice Frankfurter's deep dismay and painful embarrassment, Justice Clark, after being encouraged to pursue this mission, came to the rather quick and highly ironic conclusion that actually there were not any alternative avenues of recourse for Tennessee's urban voters.[32] And, as students of the Court and of America's phenomenally far-reaching but now somewhat forgotten reapportionment revolution may well remember, Justice Clark instead authored a quite wonderful concurrence in *Baker v. Carr* that resulted in a six- rather than five-vote majority.[33] Since I for one have grown up without the benefit of a rural upbringing or childhood work on a family farm, there are a number of phrases in Justice Clark's concurrence which I am unable to fully appreciate (or explain to puzzled, city-bred students),[34] but I nonetheless would most heartily recommend Justice Clark's concurrence to anyone who is even the least bit tempted to accept or agree with any part of Judge Kozinski's critique of *Baker* and of the constitutional necessity of the one person–one vote reapportionment revolution. Clark's twelve-page concurrence demonstrates, perhaps more persuasively than any other *Baker* opinion, how that revolution, just like the one heralded by *Brown*, was in equal protection terms nothing more or less than a matter

of simple justice; his *Baker* concurrence ought also to demonstrate to most anyone's satisfaction that Justice Clark has been an underrated Justice.

With regard to sexual liberty and gender equality, earlier chapters have made repeated reference to *Griswold v. Connecticut*. It is important to remember that *Griswold* involved the appeal from Connecticut state courts of two criminal convictions that the defendants, Estelle Griswold and Dr. C. Lee Buxton, had sustained for the crime of aiding and abetting married couples in the *use* of contraceptive devices and materials. Here again, as in *Brown*, *Briggs*, and *Baker*, the full story of the parties—both the litigants and the litigators—is a wonderfully rich history that conclusively and utterly disproves the dismissive characterizations of the *Griswold* decision that have often been offered by such commentators as former Judge Robert H. Bork.[35] But, here again, in what is perhaps the most dramatic example of the irony of which I spoke earlier concerning how crucial the opponents of change have been in post–World War II America, *Griswold* comes to pass as one of the major constitutional holdings of the Warren Court only because of the utter stubbornness with which the Roman Catholic hierarchy in Connecticut exercised its dominant political influence in the state legislature to block any liberalization of Connecticut's 1879 criminalization of birth control from 1923 right up until 1965.

Like *Brown*, *Griswold* too is, as Professor Feldman discusses in his chapter, unfortunately another good example of how the Warren Court, while rendering landmark decisions, often did not manage to propound or advance them in landmark opinions. And that is not only true of Justice Douglas's overly brief and far too hasty majority opinion in *Griswold*; it is also quite dramatically true of Justice Black's very simplistic and very unpersuasive dissent.[36] Although it is an argument that I am either hesitant and/or ambivalent about making, I am afraid that on all counts *Griswold* is a case that has to be cited against or in contradiction of anyone who seeks to contend that the "great Justices" of the 1960s were somehow intellectually superior to the Justices who sat on the Court either before their time or since.

Griswold's importance and the reason why it belongs in the same constitutional pantheon as *Brown* and *Baker*, of course, has relatively little to do with how it finally decriminalized the marital usage of birth control in Connecticut. Instead it has to do with the way in which *Griswold* opened the constitutional door to a "rights" conception that really no one in this country had ever envisioned or articulated prior to 1965: namely whether abortion, or more precisely a woman's desire to choose to have an abortion early in pregnancy, could imaginably merit constitutional protection as a constitutional "right." *Griswold*, by opening up the conceptual or intellectual space that led directly toward *Roe v. Wade* (and its equally important but often forgotten partner case of *Doe v. Bolton*,)[37] I think rather unarguably echoes forward into our time as just as significant and influential a Warren Court decision as *Brown* and *Baker*.

It bears some emphasis (although perhaps this slips beyond our 1969 Warren Court endpoint) that within the judicial context of 1970–1972, the constitutional argument that *Griswold*'s fundamental right to privacy ought to be extended to apply to the question of abortion was neither particularly controversial as a matter of doctrine (especially when one keeps in mind all of the lower court decisions in which this analysis was advanced and most oftentimes accepted, in advance of

Roe,)[38] nor—when one carefully absorbs that judicial context of 1970–1972—was the High Court's extension of *Griswold*'s privacy right to abortion in *Roe* really at all surprising.

All in all, it is very difficult to imagine the America of today without highlighting *Brown*, *Baker*, and *Griswold* as the three foremost judicial influences from the Warren Court era upon what our daily and public lives are now like. But, as mentioned at the outset, there is also a fourth utterly crucial and fundamental Warren Court legacy, one which in a certain fashion, particularly in the judicial context of this volume, is perhaps even more centrally important than *Brown*, *Baker*, and *Griswold*. That fourth legacy revolves around *Cooper v. Aaron*. *Cooper*, as many people will recall, was the 1958 resolution of the Little Rock school controversy that had been provoked exactly twelve months earlier by then Arkansas governor Orval Faubus. *Cooper*, especially when one looks at some of the latter passages in the Court's opinion,[39] is the most important and most intimate link between the Warren Court and the other great, formative Court—the Court of John Marshall.

The Warren Court in *Cooper*, in reaffirming the constitutional stature and status of *Brown*, really "pulled out all the stops" in reminding Americans, and particularly Southern segregationists like Governor Faubus, that *Marbury v. Madison*[40] was indeed the formative building block of American constitutional law and judicial authority. It is important to emphasize that *Cooper* was not just about Little Rock, or Orval Faubus, or even just simply about racial discrimination and school desegregation. *Cooper* at bottom was fundamentally about the institutional role and judicial supremacy of the Supreme Court in constitutional cases involving even intense political controversy and turmoil. In *Cooper*, it is important to remember, the Supreme Court "pulled out all the stops" not just substantively but also symbolically, for the *Cooper* opinion was presented to the American people in an utterly unique format, as jointly authored by all nine members of the Court, rather than—as is usually the case—as having been written by one Justice on behalf of his or her majority colleagues.

Cooper should be remembered as a crucial—and perhaps the utmost—legacy of the Warren Court. And, if anyone in the present day is inclined to doubt the importance of *Cooper* and what it represents, we need only refer to what a five-Justice majority did four years ago in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[41] the case in which the Court—and particularly the controlling trio of Justices O'Connor, Kennedy, and Souter—reaffirmed in a very clear and ringing manner the constitutional essence of *Roe v. Wade*. *Casey*, and *Casey*'s very intimate linkage to *Cooper*, merits mention because in the same way in which *Cooper* was not simply about race, *Casey* was not simply about abortion.

Casey, as perhaps anyone might agree after having the opportunity to carefully study the "trio" opinion, was, like *Cooper*, first and foremost about the institutional status and role and responsibility of the Supreme Court, especially in those instances where—like *Brown* and like *Roe*—constitutional precedent encounters intense and prolonged political opposition and turmoil. *Casey* not only acknowledges that substantive due process liberty is a central and inescapable part of America's constitutional guarantees of individual rights; the *Casey* majority also recognized that *Roe v.*

Wade has stood not just for Due Process Clause protection of a woman's right to choose abortion, but that *Roe* has also been absolutely essential to the realization or advancement of gender equality in the United States over the past twenty-odd years. Most particularly, *Casey* in terms of how the "trio" opinion acknowledges and articulates the importance of equal protection perspectives with regard to gender is in many ways a decided step forward from *Roe*.

But *Casey* is most important because it more than any other single recent decision is powerful present-day evidence of just how influential and significant the real legacy of the Warren Court is. Furthermore, *Casey* is also impressive evidence of how that legacy is very much a living legacy, because beyond *Brown*, beyond *Baker*, and beyond *Griswold*, what is most central to our constitutional history of the last forty-odd years is the acknowledgment—and I think it is the almost universal acknowledgment—that the Justices of the Supreme Court bear preeminent responsibility for applying and extending the fundamental constitutional guarantees of individual rights in (and into) contexts that were not fully appreciated or understood or even imagined, whether in the late eighteenth century or in the mid-nineteenth century.

Thus *Planned Parenthood v. Casey*, more than any other Supreme Court decision of the last two and one-half decades, signals and symbolizes how for us the Warren Court should not be "just" a question or topic of history, but how the Warren Court's legacy is indeed a very powerful and very real *living* presence both with the Supreme Court of today and with the Court that we will have in the future.

Notes

1. 369 U.S. 186 (1962).
2. 381 U.S. 479 (1965).
3. 358 U.S. 1 (1958).
4. 347 U.S. 483 (1954). See also Bolling v. Sharpe, 347 U.S. 497 (1954), and Brown v. Board of Education, 349 U.S. 294 (1955) ["*Brown II*"].
5. Kluger, *Simple Justice* (1976).
6. 98 F.Supp. 529, (E.D.S.C., 1951), *vacated and remanded*, 342 U.S. 350 (1952), 103 F.Supp. 920 (E.D.S.C., 1952).
7. See especially Kluger, supra note 5, at 3–26.
8. 163 U.S. 537 (1896).
9. See especially Cumming v. Richmond County Board of Education, 175 U.S. 528 (1899), and Gong Lum v. Rice, 275 U.S. 78 (1927).
10. 377 U.S. 533 (1964).
11. See also WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) [New York], Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964), Davis v. Mann, 377 U.S. 678 (1964) [Virginia], Roman v. Sincock, 377 U.S. 695 (1964) [Delaware], and Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964).
12. 492 U.S. 490 (1989).
13. 410 U.S. 113 (1973).
14. 367 U.S. 497, 522 (1961). See also Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade, 174–75, 190–91 (1994).
15. Transcript of Oral Argument, *Webster v. Reproductive Health Services*, 26 April 1989, as quoted in Garrow, id. at 675.

16. Regarding Amsterdam and Poe, see Garrow, id. at 186, 190.
17. See, e.g., Gerhardt, "A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia," 74 *B. U. L. Rev.* 25–66 (1994).
18. 100 U.S. 303 (1879).
19. See Cruse, *Plural but Equal* (1987); cf. Garrow, "A Contrary View of Integration," *Boston Globe*, May 31, 1987, at B14–B16.
20. 350 U.S. 891 (1955), 350 U.S. 985 (1956).
21. See, e.g., Griffin v. Maryland, 373 U.S. 920 (1963), and Bell v. Maryland, 378 U.S. 226 (1964); see also Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography*, 479–86, 508–25 (1983).
22. See Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964).
23. See South Carolina v. Katzenbach, 383 U.S. 301 (1966).
24. 392 U.S. 409 (1968).
25. Gray v. Sanders, 372 U.S. 368 (1963).
26. Wesberry v. Sanders, 376 U.S. 1 (1964).
27. See note 11 supra.
28. See Schwartz, supra note 21, at 422–24.
29. 328 U.S. 549 (1946).
30. See U.S. Const. art. IV, § 4.
31. Schwartz, supra note 21, at 412–18.
32. Id. at 420–21, 422–24.
33. 369 U.S. 186, 251 (1962).
34. See, e.g., "the backlash of his own bull whip" (id. at 255), and "Instead of chasing those rabbits" (id. at 258).
35. See generally Garrow, supra note 14, at 196–255, especially at 264–68; cf. Kalman, "The Promise and Peril of Privacy," 22 *Rev. in Am. Hist.* 725–31, at 727–28 (1994) (*Liberty and Sexuality* "conclusively proves the stupidity of . . . Robert Bork's characterization of *Griswold* as 'practically an academic exercise'").
36. 381 U.S. 479, 507 (1965).
37. 410 U.S. 179 (1973).
38. See generally Garrow, supra note 14, at 389–472.
39. See 358 U.S. 1, 18.
40. 1 Cranch 137 (U.S. 1803).
41. 112 S.Ct. 2791 (1992).