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From *Brown* to *Casey*

The U.S. Supreme Court and the Burdens of History

One of the most important lessons of the U.S. Supreme Court's resolution of *Brown v. Board of Education*[1] (*Brown I*)—both for the Court itself and for attentive commentators—is the clear and indeed almost explicit manner in which *Brown* signifies and symbolizes the post-1954 Court's repudiation of historical intent and meaningful evidence of historical intent[2] in its reading and application of the reach and meaning of the Fourteenth Amendment—both, in *Brown*, with regard to the Equal Protection Clause, and, in later cases, with respect to the Due Process Clause as well.[3]

Brown I was, of course, both constitutionally inevitable and *morally* correct, in much the same way that we now almost universally recognize both *Korematsu v. United States*[4] and *Bowers v. Hardwick*[5] as morally *repugnant* to any judicially unbiased reading of the Fourteenth Amendment. But the *Brown I* opinion was and is readily criticizable because of the narrowly and exclusively integrationist vision it articulated. Some African American commentators rightfully criticize this vision as being largely if not wholly blind to the possibility or certainty of independent, *separate* black success—without exposure to or integration with white people—in elementary and secondary schooling and other venues if public authorities actually were to provide *truly equal* resources and incentives.[6]

But separatist critiques of *Brown*, valid as they are, in our context are tangential to a full appreciation of how *Brown* for better or worse—and I *do* believe we can still find some reluctant rug rats, no matter how shy, who privately if not publicly believe the latter—single-handedly marks the advent of the "modern" or present-age Supreme Court. Many people have grown up

believing that while *Marbury v. Madison*[7] is of course *the* formative U.S. Supreme Court decision of all time, *West Coast Hotel Co. v. Parrish*[8]—perhaps in conjunction with Chief Justice Stone's (or Louis Lusky's) famous footnote 4 in *Carolene Products*[9]—signals the beginning of the judicial modern age.

But that belief—a belief that was inculcated in at least two successive generations of American judicial scholars—is now all but indisputably out of date, for not only does *Brown* rather than the "constitutional revolution" of 1937 demarcate our modern era, but *Brown* also—just as importantly—paved the way toward the Warren Court's two other landmark antihistorical rulings—*Baker v. Carr*[10] and *Griswold v. Connecticut*[11] (and to their even better known progeny, *Reynolds v. Sims*[12] and *Roe v. Wade*[13])—which dramatically expanded the constitutional scope of the Fourteenth Amendment. Absent *Brown*, decisions with *Baker* and *Reynolds*'s muscularity are difficult to imagine; absent the most important of *Brown*'s own immediate progeny, namely *Cooper v. Aaron*,[14] the Warren Court's *Marbury*, much of the post-1954 Court's understanding of its own role—a role that at present has culminated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[15]—would have evolved in a decidedly different fashion. In short, *Brown I*, in tandem with *Cooper*, not only marks the beginning of modern America's official condemnation of racial discrimination, it also marks the beginning of a wide-ranging transformation of modern American life, brought about by a host of High Court decisions that have all relied on the Justices's dramatically expansive—and aggressively antihistorical—reading and application of the Fourteenth Amendment's Equal Protection and Due Process Clauses. From schooling to electoral districting to abortion, modern America is to a significant degree the product of muscular judicial utilization of the Fourteenth Amendment. It is also the product of constitutional analysis that has jettisoned the constraints of history, and—from *Brown* through *Baker* and *Reynolds* to *Griswold*, *Roe*, and *Casey*—I believe we can persuasively argue that it is a *better* America, precisely because of how the Court *has ignored* the Constitution's historical limitations in fashioning a Fourteenth Amendment jurisprudence that is responsive to the present day rather than to the institutional burdens of history.[16]

Careful students of *Brown* can of course easily recall how the Supreme Court initially hoped—and sought—to find clear Fourteenth Amendment historical support for resolving the fundamental question that *Brown* and its companion cases[17] presented. Following the first oral arguments in the *Brown* cases, the Court formally propounded five questions to the parties' attorneys. The first two questions asked for historical evidence regarding whether the framers of the amendment intended, or did not intend, for it either to prohibit, or to allow for the future prohibition of, racially segregated public schooling. The third question, however, voicing a presumption that the answers to the first two would "not dispose of the issue," posed the core issue bluntly: "[I]s it within the judicial power, in construing the [Fourteenth] Amendment, to

abolish segregation in the public schools?"[18] Eleven months later, on May 17, 1954, the Court baldly—but compellingly—declared that indeed it was.

As we now know, the NAACP Legal Defense and Educational Fund litigators—and their many scholarly collaborators—were at first deeply (and justifiably) concerned by the Court's preliminary focus on historical queries whose answers would not hasten, and might well hinder, judicial acceptance of the NAACP's basic contention.[19] But by the time of *Brown* et al.'s reargument in December of 1953, the Justices themselves privately no longer regarded the answers to those two historical queries as being potentially determinative. Felix Frankfurter had had one of his outgoing law clerks, Alexander M. Bickel, prepare an exhaustive historical research memo, and Frankfurter had distributed the impressive product to all his colleagues. Although counsel at the time were quite unaware of how Bickel's handiwork had firmly directed the Justices away from any potential history-based solution to their American dilemma, we nowadays—thanks in part to Mark Tushnet's careful analysis—can fully appreciate how by that December the historical questions "were no longer that important" to the Court itself.[20]

Even though there was (thanks to Robert Jackson and particularly Stanley Reed) no internal consensus on *how* to decide *Brown* when the Justices met for their decisive conference on December 12, 1953, there nonetheless *was* an unspoken consensus that the fundamental question before them was the previous June's "question three"—"[I]s it within the judicial power . . . to abolish segregation in the public schools?"[21] And, when Earl Warren delivered the Court's impressively unanimous opinion in *Brown* five months later, there again—and now for the whole country to see—was an explicit consensus that the core of this question, like others yet to come, concerned not evidence or documentation of "historical intent" but instead the nature and reach of "the judicial power."

Warren's opinion, in two early paragraphs that understandably are not among *Brown*'s best-remembered passages but that latter-day scholars should not overlook, deftly but decisively dismissed the decisional relevance of the Fourteenth Amendment's own history. Warren noted how *Brown*'s reargument "was largely devoted to the circumstances surrounding" the Fourteenth Amendment's 1868 adoption. "It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive."[22]

"An additional reason for the inconclusive nature of the Amendment's history" vis-à-vis school segregation, Warren added, was the relatively undeveloped state of public education, especially in the South but also in the North, in 1868. "As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education."[23]

So ended the *Brown* Court's analysis—and dismissal—of whether its constitutional adjudication of governmentally imposed racial segregation in public schools was or should in any way be bound by the constraints of history. Taken at their relatively modest face value, most readers pass over those two paragraphs without attributing any special import to them, and such an evaluation—within the four actual corners of the *Brown* opinion—is perfectly appropriate. In a more long-range frame of reference, however—one that encompasses particularly the years from 1962 (*Baker*) through 1973 (*Roe*)—the *Brown* Court's affirmative jettisoning of the Fourteenth Amendment's historical tie-lines marked the onset of a period of judicial freedom (and, some correctly would say, judicial *sovereignty*) that dramatically transformed American life for the better.[24]

In 1954 itself, nothing highlighted the Court's Farragut-like approach to mandating constitutional rights[25] more than its companion ruling in the fifth of the *Brown* family of cases, Washington, D.C.'s *Bolling v. Sharpe*. Since the Fourteenth Amendment applied its Equal Protection Clause only to the states, and not to the federal government, the *Brown* Court found itself having to identify some non–Fourteenth Amendment constitutional grounds for avoiding the utterly incongruous paradox of striking down *state*-mandated school segregation while not being able to void identical governmental policy imposed by *federal* authorities. With a doctrinal dexterity that again may be more significant in historical retrospect than it appeared to be in 1954, the Court—lacking any federally applicable equal protection language—unanimously turned to the Fifth Amendment's Due Process Clause. "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive," Chief Justice Warren wrote. While "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' . . . discrimination may be so unjustifiable as to be violative of due process."[26]

Without expressly acknowledging that the Due Process Clause's key word was of course "liberty," the *Bolling* opinion, while conceding that the Court to date had not defined "'liberty' with any great precision," nonetheless went on to emphasize that the concept was "not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children in the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."[27] Any commentators inclined to allege that the new era—or "Second Reconstruction"—of substantive due process first began to rear its assertedly ugly head only in *Griswold v. Connecticut*[28] had best be reminded that as early as May, 1954, *Bolling*'s quite uncontroversial language signaled that a highly expansive approach to due process–based constitutional liberty could well go forward hand in hand with *Brown*'s heralding of a new era of equal protection.[29]

Even more so than anything in *Brown* itself, the almost explicit point of

Bolling is that the traditions and niceties of doctrine *do not matter*—or, at the very most, matter relatively little—when and where the Court becomes convinced that a fundamental, moral holding needs to be made. But *Brown* and *Bolling* historically should not be weighed or evaluated apart from their most immediate and important progeny, namely the unprecedented "joint" opinion in the 1958 Little Rock school case of *Cooper v. Aaron*.[30] But, much as we today ought to remind each other that 1992's *Planned Parenthood v. Casey*[31] was not *just*—or perhaps even *principally*—about abortion, likewise we need to remember that *Cooper* was not just—or primarily—about school desegregation. Instead, *Cooper*, like *Casey*—and, I think one can argue, also like *Brown*—was fundamentally about the constitutional authority *and* the political role of the Supreme Court itself.

Cooper's most important paragraph spoke to what the Court called "some basic constitutional propositions which are settled doctrine":[32]

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury* v. *Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[33]

Cooper is arguably the Court's most important declaration of its own authority and role since *Marbury*, but at least a small fringe of critical commentators, even some who cannot bring themselves to publicly attack *Brown* or *Bolling*, nonetheless feel able to denounce *Cooper*—and particularly that crucial passage in *Cooper*—as one of the Warren Court's "most troubling opinions" because of how it posited "a radical new notion of the status of judicial decisions."[34] *Cooper*, these critics allege, "was not the fulfillment of *Marbury* but rather its perversion,"[35] but the contrarian novelty of such a facially fallacious contention may best be understood as having more to do with *Cooper*'s own most important progeny—namely the 1992 "trio" opinion of Justices O'Connor, Kennedy, and Souter in *Casey*[36]—then perhaps with *Cooper* itself.

But the substantive expansiveness of *Brown*'s application of equal protection was merely the first installment in a new, multipart constitutional scenario. *Colegrove v. Green*[37] should perhaps not be spoken of in the same sentence as *Plessy v. Ferguson*,[38] but if any decision since 1954 can be seen as equal to *Brown* in long-term historical significance, then—as Earl Warren himself repeatedly said[39]—*Baker v. Carr*[40] is certainly the case. Justice Brennan's opinion for the *Baker* Court undeniably took far greater care in clearing away the preexisting judicial underbrush than had Warren's in *Brown*, but the full flowering of equal protection application to the principle of "one person, one vote"—and the Court's explicit citation of *Brown* as helpful precedent for that holding[41]—only came two years later in Warren's opinion for the Court in *Reynolds v. Sims*.[42] The Equal Protection Clause, Warren and five of his colleagues held in *Reynolds*, "guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, *Brown* v. *Board of Education*, 347 U.S. 483. . . ."[43]

Baker, *Reynolds*, and *Reynolds*'s companion cases[44] all strive far more assiduously than *Brown* and *Bolling* to comport themselves in seeming accommodation with existing precedents. But both textually and historically, *Baker* and *Reynolds*—and perhaps *Reynolds* all the more so, in light of its unwillingness to accept or apply a "federal analogy" whereby only the lower chamber of a bicameral legislature would have to be apportioned into equally populated districts[45]—stand in even more undeniable tension with any intent-based reading of the Fourteenth Amendment's Equal Protection Clause than does *Brown*.[46]

But if critical acceptance of *Brown* is now universal, and approval of *Baker* and *Reynolds* widespread but not unanimous,[47] dissent with regard to *Bolling*'s best known (but rarely if ever acknowledged) descendant, *Griswold v. Connecticut*, is still treated with professional respect, if only because of the undeniable line of derivation that then leads from *Griswold* to *Roe v. Wade*. *Griswold*, like *Brown* and *Baker*, is accepted as *morally* correct even by those who reject its doctrinal grounding, but *Griswold*'s mottled reputation is largely the result not of William O. Douglas's widely recognized compositional shortcomings,[48] but of a far more significant jurisprudential legacy—namely the ignominious heritage of *Lochner v. New York*[49]—that until recently only *Bolling*, of all the new, noneconomic substantive due process liberty decisions of the past forty years, has escaped from unscathed.

This issue may well be the most important and indeed defining constitutional question of the present age, the question that ought to, and hopefully will, separate this present generation of commentators—namely, people who have come to academic maturity in the years since 1973—from the two generations (both children of 1937) that have preceded us.

Perhaps the rudest way in which to pose the question is also the most revealing: Why for more than a half-century has *Lochner v. New York* been almost universally viewed as a far more infamous constitutional precedent than, say, *Korematsu v. United States*?[50] *Lochner*, as most everyone well knows, is widely accepted as *the* symbolic ruling of the "old" conservative Court that prevailed from at least as early as 1895[51] through 1936[52] until it was vanquished in the early months of 1937.[53] *Lochner* and its many progeny were resoundingly routed by the constitutional revolution of 1937 (or, more correctly, by the constitutional revolution that began in 1937 and culminated in

1941–1942),[54] but the universally acknowledged *ghost* of *Lochner* survived in buoyant health well into the 1960s.[55] Only perhaps in 1973, and then far more certainly in 1992, did clear and convincing evidence finally appear that *Lochner*'s ghost was no longer badly frightening the occupants of America's most exalted judicial corridors.

In *Griswold*, of course, the Court in form if not in substance shied away from any prospect of encountering *Lochner*'s ghost in language that epitomizes how powerful and long-lasting the jurisprudential overreaction of the 1937 revolution proved to be. As Justice Douglas warned,

> Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner* v. *New York* . . . should be our guide. But we decline that invitation as we did in *West Coast Hotel Co.* . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.[56]

In *Griswold*, however, Connecticut's anticontraception statute "operate[d] directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation,"[57] and hence Douglas, along with six of his eight colleagues, fled from *Lochner*'s ghost only in form rather than in substance. But even eight years later, in *Roe v. Wade*, only one member of *Roe*'s seven-Justice majority, Potter Stewart (a *Griswold* dissenter), was willing to explicitly concede the self-obvious point that *Griswold* of course was and always had been a substantive due process liberty decision.[58] While William O. Douglas, a true child of 1937 if ever there was one, still sought to deny what was self-obviously undeniable,[59] the *Roe* majority simply chose to elude the point.[60]

Hence only two decades later, in 1992's *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[61] did a Supreme Court majority directly and explicitly confront the fundamental doctrinal issue that had been sidestepped in both *Griswold* and *Roe*. The *Casey* "trio" opinion of Justices O'Connor, Kennedy, and Souter—joined also in its major parts by Justices Blackmun and Stevens—indicated no hesitation whatsoever, and no lingering fear of *Lochner*'s ghost, in straightforwardly announcing that "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment." Stressing that "[t]he controlling word in the case before us is 'liberty,'" the *Casey* majority noted that

> [a]lthough a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, at least since *Mugler v. Kansas*, 123 U.S. 623 (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986).[62]

Quoting both Louis Brandeis's 1927 concurrence in *Whitney v. California*[63] and John M. Harlan's now-famous 1961 dissent in *Poe v. Ullman*[64] in further support of that point, the *Casey* majority went on to explain that

> [i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* v. *Virginia*, 388 U.S. 1 (1967).[65]

Most centrally of all, the *Casey* majority forthrightly held that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects"[66]—a holding that of course spoke not only to the elusions of *Roe* and *Griswold* but also to the substantive essences of *Brown* and *Bolling* as well. Quoting again twice at some length from the Harlan dissent in *Poe*, the *Casey* majority willingly acknowledged that "[t]he inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office." Some of the century's best-known jurists, such as Learned Hand and Felix Frankfurter, no doubt would have advised just such a course.[67]

Led by Justice Souter, the *Casey* majority presented perhaps the Court's most extended discussion of the concept of precedent in this century, reviewing not only how *West Coast Hotel Co.*, by overruling *Adkins v. Children's Hospital*,[68] had "signalled the demise of *Lochner*,"[69] but also the manner in which *Brown* had vanquished *Plessy*. The heart of Souter's analysis, and the heart of *Casey* itself, however, focused upon the institutional and historical grounds as to why *Roe v. Wade* should not and *could not* be overruled. Any such reversal, Souter warned,

> would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.[70]

Alluding to the old saw about how the judiciary commands neither the purse nor the sword, the *Casey* majority reiterated that the Court's actual power lies very largely "in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."

> The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[71]

Then, in a core section that actually spoke more about *Brown* than *Roe*, Souter and his *Casey* colleagues put forward in five paragraphs the most institutionally important statement made by the Court since *Cooper* and the most substantively significant declaration about the role and function of the U.S. Supreme Court since the time of John Marshall:

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.
>
> The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. Cf. *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*) . . . .[72]

The *Casey* majority took note of the costs imposed upon those who were closely identified with controversial watershed decisions:

> The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise the Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.[73]

"Like the character of an individual," the *Casey* majority warned,

> the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible.

"The Court's duty in the present case is clear," they concluded.

> In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.[74]

Casey of course vindicated *Roe v. Wade*, committing the Court to constitutional protection for abortion in a manner unlikely ever to be undone. *Casey* also offered an extended and significantly intensified reprise of *Cooper* and the powerful historic legacy of *Marbury*, and went at least a very long way toward fully elevating *Roe* into the tiny pantheon of American constitutional precedents that perhaps otherwise is peopled only by *Marbury*, *Brown*, and possibly *Baker*.

But in elevating *Roe* to *Brown*-like stature, *Casey* also did—or ratified—something even far more significant as well, something that so far, some four years after the event, has received stunningly little attention or discussion. The *Casey* Court formally and explicitly buried *Lochner*'s ghost. Substantive due process *is*—as it *should be*—a fundamental and fully accepted aspect of present-day American constitutional doctrine.

Casey may well represent the culmination (and conclusion) of a constitutional era that began so dramatically with *Brown* and *Bolling*. Although some conservative scholars now seek to make *Brown* into a badly miscast constitutional poster child for their jurisprudence of "original intent,"[75] such efforts to rebut the interpretive (and doctrinal) radicalism of *Brown* (and *Bolling*) is unlikely to win many followers outside of certain narrow precincts. *Brown*

heralded not only the Court's explicit freeing of itself from the constraints of historically bounded constitutional "originalism," but also a newly expansive application of the Fourteenth Amendment that energetically encompassed both equal protection and due process. *Brown* opened the institutional door for *Baker* and *Reynold*'s revolutionary expansiveness involving equal protection, and *Bolling v. Sharpe* represented the first salvo in a reconstruction of fundamental due process liberty that quietly prepared the doctrinal ground for *Griswold* and for the eventual burial of *Lochner*'s ghost in *Roe* and *Casey*.

Brown and *Casey* are hence bookends to the twofold rereading that the Court has accorded the Fourteenth Amendment—both, in *Brown* (and in *Baker*) with regard to the Equal Protection Clause, and, in *Casey* (as in *Griswold* and *Roe* before it) with regard to a new rebirth of the Due Process Clause—over these past forty years. If we justifiably celebrate the political revolution(s) heralded by *Brown* (and *Baker*), and if we further celebrate or at least accede to the way in which the *Brown* Court reached above and beyond the Fourteenth Amendment's historical fetters to blot the stain of *Plessy*, so too does *Casey* call upon us to acknowledge if not applaud the manner in which the modern Court has similarly expanded due process—like equal protection before it—to hasten another revolution as well. As *Brown* and *Casey* both signify, the modern-day meanings of American constitutional protections should not be—and happily are not—fettered by the burdens and limitations of history.

Notes

1. 347 U.S. 483 (1954).

2. For a survey of conceptual distinctions and specifications concerning "intent," see John G. Wofford, "The Blinding Light: The Uses of History in Constitutional Interpretation," 31 *University of Chicago Law Review* (1964), 502, 502–03, Charles A. Miller, *The Supreme Court and the Uses of History* (Cambridge: Harvard University Press, 1969), 20–28, 153–55, 165–66, and William M. Wiecek, "Clio as Hostage: The United States Supreme Court and the Uses of History," 24 *California Western Law Review* (1988), 227, 228–32.

3. See Poe v. Ullman, 367 U.S. 497, 522 (Harlan, J., dissenting) (1961), Griswold v. Connecticut, 381 U.S. 479, 499 (Harlan, J., concurring in the judgment) (1965), and Roe v. Wade, 410 U.S. 113, 167 (Stewart, J., concurring) (1973).

4. 323 U.S. 214 (1944).

5. 478 U.S. 186 (1986).

6. See Harold Cruse, *Plural But Equal* (New York: William Morrow, 1987), and Alex M. Johnson, Jr., "Bid Whist, Tonk, and *United States v. Fordice*: Why Integration Fails African-Americans Again," 81 *California Law Review* (1993), 1401, esp. 1402 ("*Brown* was a mistake."). Cf. David J. Garrow, "A Contrary View of Integration," *Boston Globe*, May 31, 1987, at B14–B16; and Drew S. Days III, "*Brown* Blues: Rethinking the Integrative Ideal," 34 *William & Mary Law Review* (1992), 53. Note as well Pamela J. Smith, "All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education," 66 *Tulane Law Review* (1992), 2003; and Richard Cummings, "All-Male Black Schools: Equal Protection, the New Separatism and *Brown v. Board of Education*," 20 *Hastings Constitutional Law Quarterly* (1993), 725. See also especially Missouri v. Jenkins, 63 U.S.L.W. 4486, 4498 (1995) (Thomas, J., concurring); and David J. Garrow, "On Race, It's Thomas v. an Old Ideal," *New York Times*, July 2, 1995, at IV-1, IV-5.

7. 5 U.S. 137 (1803).

8. 300 U.S. 379 (1937).

9. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). See also Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* (New York: Viking Press, 1956), 513–14, Louis Lusky, *By What Right? A Commentary on the Supreme Court's Power to Revise the Constitution* (Charlottesville, Va.: Michie Co., 1975), 108–12, and Lusky, *Our Nine Tribunes: The Supreme Court in Modern America* (Westport, Conn.: Praeger, 1993), 119–32, 177–90.

10. 369 U.S. 186 (1962).

11. 381 U.S. 479 (1965).

12. 377 U.S. 533 (1964).

13. 410 U.S. 113 (1973).

14. 358 U.S. 1 (1958).

15. 112 S. Ct. 2791 (1992).

16. See also generally William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard University Press, 1988), 4–11, Nelson, "The Role of History in Interpreting the Fourteenth Amendment," 25 *Loyola of Los Angeles Law Review* (1992), 1177, Judith A. Baer, "The Fruitless Search for Original Intent," in Michael W. McCann and Gerald L. Houseman eds., *Judging the Constitution* (Glenview, Ill.: Scott, Foresman, 1989), 49, and Mark V. Tushnet, "The Warren Court as History: An Interpretation," in Tushnet ed., *The Warren Court in Historical and Political Perspective* (Charlottesville, Va.: University Press of Virginia, 1994), 1, 17–18.

17. See Brown v. Board of Education, 98 F. Supp. 797 (D. Kan.) (1951); Briggs v. Elliott, 103 F. Supp. 920 (E.D.S.C.) (1952); Davis v. County School Board, 103 F. Supp. 337 (E.D. Va.) (1952); Gebhart v. Belton, 91 A.2d 137 (Del. Sup. Ct.) (1952); cf. Bolling v. Sharpe, 347 U.S. 497 (1954).

18. 345 U.S. 972 (1953). See also Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York: Vintage Books, 1976), 614–16.

19. See Kluger, supra note 18, at 618–41; Mark V. Tushnet, *Making Civil Rights Law* (New York: Oxford University Press, 1994), 196–99; Jack Greenberg, *Crusaders in the Courts* (New York: Basic Books, 1994), 177–88. As Kluger comments, "[T]he historical evidence seemed to demonstrate persuasively that neither the Congress which framed the Fourteenth Amendment nor the state legislatures which adopted it understood that its pledge of equal protection would require the end of segregation in the nation's public schools." Kluger, supra note 18, at 634. See also Alexander M. Bickel, "The Original Understanding and the Segregation Decision," 69 *Harvard Law Review* (1955), 1, Alfred H. Kelly, "The Fourteenth Amendment Reconsidered: The Segregation Question," 59 *Michigan Law Review* (1956), 1049, and Kelly, "The Congressional Controversy Over School Segregation, 1867–1875," 64 *American Historical Review* (1959), 537. Cf. Nelson, *The Fourteenth Amendment* 6–7. Also note Michael W. McConnell's iconoclastic (and generally unpersuasive) argument, "Originalism and the Desegregation Decisions," 81 *Virginia Law Review* (1995), 947, and Michael J. Klarman's rejoinder:

"Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell," 81 *Virginia Law Review* (1995), 1881.

20. Tushnet, supra note 19, at 203–04. See also Alfred H. Kelly, "Clio and the Court: An Illicit Love Affair," 1965 *Supreme Court Review* 119, 142–45, and Kluger, supra note 18, at 653–55, 668–76.

21. See Kluger, supra note 18, at 678–83, and Tushnet, supra note 19, at 209–11.

22. 347 U.S. 483, 489 (1954).

23. Id. at 489, 490.

24. Cf. Robert H. Bork, *The Tempting of America* (New York: Free Press, 1990), 76–77, 81.

25. After David Glasgow ("Damn the torpedoes! Full speed ahead!") Farragut (1801–1870). See Alfred T. Mahan, *Admiral Farragut* (New York: D. Appleton, 1982), and Charles L. Lewis, *David Glasgow Farragut*, 2 vols. (Annapolis, Md.: U.S. Naval Institute, 1941, 1943).

26. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

27. 347 U.S. 483, 499–500. "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools," the *Bolling* opinion added, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Id. at 500.

28. 381 U.S. 479 (1965).

29. Cf. Bork, supra note 24, at 83–84.

30. 358 U.S. 1 (1958). See also Daniel A. Farber, "The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited," 1982 *University of Illinois Law Review* 387, and Tony Freyer, *The Little Rock Crisis* (Westport, Conn.: Greenwood Press, 1984).

31. 112 S. Ct. 2791 (1992).

32. 358 U.S. at 17.

33. Id. at 18.

34. Eugene W. Hickok & Gary L. McDowell, *Justice vs. Law* (New York: Free Press, 1993), 165, 167.

35. Id. at 168.

36. 112 S. Ct. 2791.

37. 328 U.S. 549 (1946).

38. 163 U.S. 537 (1896).

39. See William J. Brennan, "Chief Justice Warren," 88 *Harvard Law Review* (1974), 1, 3; Earl Warren, *The Memoirs of Earl Warren* (Garden City: Doubleday, 1977), 306; G. Edward White, *Earl Warren* (New York: Oxford University Press, 1982), 238; and Bernard Schwartz, *Super Chief* (New York: New York University Press, 1983), 410. See also John Hart Ely, "The Chief," 88 *Harvard Law Review* (1974), 11, 12.

40. 369 U.S. 186 (1962).

41. See 377 U.S. 533, at 566 (1964).

42. 377 U.S. 533. See also Gray v. Sanders, 372 U.S. 368 (1963), and Wesberry v. Sanders, 376 U.S. 1 (1964). On *Baker* and *Reynolds*, see especially Richard C. Cortner, *The Apportionment Cases* (Knoxville, Tenn.: University of Tennessee Press, 1970). More generally, also see Robert B. McKay, *Reapportionment: The Law and Politics of Equal Representation* (New York: Twentieth Century Fund, 1965), and Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* (New York: Oxford University Press, 1968).

43. 377 U.S. at 566.

44. WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); and Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964).

45. See 377 U.S. at 572–73.

46. See Kelly, supra note 20, at 135–37, Miller, supra note 2, at 119–48, esp. 128–38, and Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Journal* (1971), 1, 18: "The principle of one man, one vote . . . runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula." See also Bork, supra note 24, at 84–87.

47. See Miller's accurate observation that "the apportionment decisions . . . have been accepted as law in a way that other momentous exercises of judicial review have not been." Miller, supra note 2, at 119. But see Alex Kozinski, "The Warren Court—A Critique," Remarks delivered at the conference "The Warren Court: A Twenty-Five Year Retrospective," University of Tulsa College of Law, October 13, 1994.

48. See David J. Garrow, *Liberty and Sexuality* (New York: Macmillan, 1994, 245–46).

49. 198 U.S. 45 (1905).

50. 323 U.S. 214 (1944).

51. See United States v. E. C. Knight Co., 156 U.S. 1 (1895), and Pollock v. Farmer's Loan and Trust Co., 157 U.S. 429 (1895).

52. See Carter v. Carter Coal Co., 298 U.S. 238 (1936), and Morehead v. New York *Ex rel.* Tipaldo, 298 U.S. 587 (1936).

53. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), and National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

54. See, e.g., United States v. Darby, 312 U.S. 100 (1941), and Wickard v. Filburn, 317 U.S. 111 (1942).

55. See Helen Garfield, "Privacy, Abortion, and Judicial Review: Haunted By the Ghost of *Lochner*," 61 *Washington Law Review* (1986), 293.

56. 381 U.S. 479, 481–82 (1965).

57. Id. at 482.

58. 410 U.S. 113, 167–69 (1973).

59. Doe v. Bolton, 410 U.S. 179, 212 n.4 (Douglas, J., concurring) (1973).

60. 410 U.S. 113, 153.

61. 112 S. Ct. 2791 (1992).

62. Id. at 2804.

63. 274 U.S. 357, 373 (1927).

64. 367 U.S. 497, 541 (1961).

65. 112 S. Ct. 2791, 2805.

66. Id. at 2805.

67. Id. at 2806. See also Gerald Gunther, *Learned Hand* (New York: Knopf, 1994), and David J. Garrow, "Doing Justice," 260 *The Nation*, Feb. 27, 1995, 278.

68. 261 U.S. 525 (1923).

69. 112 S. Ct. at 2812.

70. Id. at 2814.

71. Id. at 2814. See also Tom R. Tyler & Gregory Mitchell, "Legitimacy and

the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights," 43 *Duke Law Journal* (1994), 703, 796–98, and James Boyd White, *Acts of Hope: Creating Authority in Literature, Law, and Politics* (Chicago: University of Chicago Press, 1994), 168–83.

72. 112 S. Ct. at 2815.
73. Id. at 2815–16.
74. Id. at 2816.
75. See McConnell, supra note 19.

II

RACIAL DISCRIMINATION AND ANTIDISCRIMINATION LAW