THE COMMON LAW GENIUS OF THE WARREN COURT

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Abstract

The Warren Court's most important decisions—on school segregation, reapportionment, free speech, and criminal procedure—are firmly entrenched in the law. But the idea persists, even among those who are sympathetic to the results that the Warren Court reached, that what the Warren Court was doing was somehow not really law: that the Warren Court "made it up," and that the important Warren Court decisions cannot be justified by reference to conventional legal materials.

It is true that the Warren Court's most important decisions cannot be easily justified on the basis of the text of the Constitution or the original understandings. But in its major constitutional decisions, the Warren Court was, in a deep sense, a common law court. The decisions in Brown v. Board of Education,[1] Gideon v. Wainwright,[2] Miranda v. Arizona,[3] *and even in the reapportionment cases all can be justified as common law decisions. The Warren Court's decisions in these areas resemble the paradigm examples of innovation in the common law, such as Cardozo's decision in* MacPherson v. Buick Motor Co.[4]

In all of those areas, the Warren Court, although it was innovating, did so in a way that was justified by lessons drawn from precedents. And the Warren Court's decisions were consistent with the presuppositions of a common law system: that judges should build on previous decisions rather than claiming superior insight, and that innovation should be justified on the basis of what has gone before.

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1. 347 U.S. 483 (1954).
2. 372 U.S. 335 (1963).
3. 384 U.S. 436 (1966).
4. 111 N.E. 1050 (N.Y. 1916).

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It is hard to overstate the significance of the Warren Court to American legal culture. The Warren Court's decisions—most notably, but not exclusively, *Brown v. Board of Education*,[5] which declared public school segregation unconstitutional—changed the way people thought about courts in general and the Supreme Court in particular. In the first half of the twentieth century, courts were, if anything, perceived as hostile to efforts to bring about equality and social justice;[6] after the Warren Court, the courts came to be seen by many as the natural place for people to turn to achieve these objectives.[7] The influence of the Warren Court has, moreover, spread beyond the United States. The image of courts as the institution with a special responsibility for the disadvantaged has taken root elsewhere in the world, and the paradigm is the Warren Court.[8]

Despite this record of success, though, the notion still lingers that the Warren Court was essentially lawless. Morally visionary, yes, at least on racial segregation;[9] politically astute, perhaps, in sensing the direction in which the nation was moving at the time;[10] but utterly deficient as a matter of legal craft. This view is held across the spectrum, even by people who are broadly in agreement with the Warren Court's objectives. Mainstream legal scholars during the Warren Court years—including many who were politically inclined to approve of the outcomes of the Warren Court decisions—relentlessly attacked the Warren Court in these terms. Alexander Bickel, probably the most widely respected constitutional scholar of his time, accused "the Supreme Court headed ... by Earl Warren" of having engaged in an "assault upon the legal order."[11] Philip

5. 347 U.S. 483 (1954).

6. For a general account, see ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT chs. 67-121 (4th ed. 2005).

7. *See, e.g.*, Kermit L. Hall, *The Warren Court: Yesterday, Today, and Tomorrow*, 28 IND. L. REV. 309, 327-28 (1995).

8. *See, e.g.*, The Right Honorable The Lord Woolf, *The International Impact of the Warren Court*, *in* THE WARREN COURT: A RETROSPECTIVE 366-76 (Bernard Schwartz ed., 1996).

9. See, for example, the remark by a self-proclaimed critic of the Warren Court: "It was a Court imbued with vision and courage at a time in our nation's history when vision and courage were scarce commodities." Alex Kozinski, S*pook of Earl: The Spirit and Specter of the Warren Court*, *in* THE WARREN COURT, *supra* note 8, at 377.

10. This is a principal theme of LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000).

11. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 120 (1975).

Kurland's Foreword to the Supreme Court issue of the *Harvard Law Review* in 1964 was overtly contemptuous of the Justices' performance as lawyers;[12] Kurland later derided *Brown v. Board of Education* as "the self-licensing of the Court to recreate the equal protection clause in its own image ... the beginning of the expansive neo-natural law syndrome that allows the Justices to act not merely as interpreters of the Constitution, but as its creators."[13] Herbert Wechsler, in one of the most famous law review articles of all time, made clear his opposition to segregation but nonetheless denounced *Brown* as unprincipled.[14]

The Warren Court had its defenders, but commentators like Bickel and Kurland set the terms of the debate.[15] The debate did not stop, of course, with Earl Warren's retirement. Today the Warren Court remains almost as much of a presence in public controversies about the Court as it was a generation ago. The "lawlessness" of the Warren Court—the view that the Warren Court Justices just imposed their personal ideological predilections, that they had engaged in an "assault upon the legal order by moral imperatives"[16]—has become a rallying cry for those who applaud the current, much more conservative, Supreme Court, and who think that the current Court should, if anything, go even further in undoing the Warren Court's work.[17] More strikingly, perhaps, even people who generally approve of the outcomes of the Warren Court

12. Philip B. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government",* 78 HARV. L. REV. 143, 145 (1964) (referring to "the absence of workmanlike product, the absence of right quality ... disingenuousness and misrepresentation").

13. Philip B. Kurland, *"*Brown v. Board of Education *was the Beginning": The School Desegregation Cases in the United States Supreme Court: 1954-1979*, 1979 WASH. U. L.Q. 309, 313, 316.

14. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-34 (1959).

15. *See, e.g.*, Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). Black's argument is compelling and generally accepted as correct today, but the title of the article demonstrates the extent to which the proponents of *Brown* were put on the defensive by the critics.

16. *See* BICKEL, *supra* note 11.

17. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 69-101 (1990); KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE 13, 124 (2002); Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, 19 NEW CRITERION 4, 8 (2001).

decisions often agree—sometimes apologetically, sometimes defiantly—that the law took a back seat to the need to end racial segregation and to solve the other problems that the Warren Court addressed.[18] A typical criticism takes the form of equating today's "conservative activist" Court with the "liberal activist" Warren Court: "By ignoring constitutional text [and] misrepresenting constitutional history ... the conservative justices [of today's Court] are guilty of precisely the kind of judicial activism that they rightly criticized on the Warren Court."[19]

This widespread perception that the Warren Court was lawlessly activist is wrong. But the perception is too widely held, by people with varying political views, to be dismissed as simple error. This view of the Warren Court reveals something important, not just about the critics and the Warren Court but about the nature of American constitutional law.

The Warren Court did things, in the name of the Constitution, that the text of the Constitution does not compel and that conflict with the understandings of those who drafted and ratified the Constitution. To that extent, the critics are right. In fact, the Justices of the Warren Court—unlike many others, before and since—often made no claim that their decisions rested on the original understandings of the Constitution or that those decisions were dictated by the text. Anyone who believes that the text of the Constitution and the original understandings simply *are* the law will conclude—quite naturally, and whatever their political inclinations—that the Warren Court was almost brazenly lawless,

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18. *See, e.g.*, William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 222 (1996) ("The balance of burden and benefit in the legal order of the day was not fairly struck for African-Americans; the Warren Court's arguably lawless decision [in *Brown*] inarguably pushed the balance toward greater fairness."); Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 747, 758, 762 (1992) (arguing that "the Warren Court's judgments were justified and validated by the Justices' prior experience in national politics" and their "sound judgment" rather than any "theory of constitutional interpretation"); *see also* Robin West, *The Lawless Adjudicator*, 26 CARDOZO L. REV. 2253, 2259 (2005).

19. Jeffrey Rosen, *Dual Sovereigns*, NEW REPUBLIC, July 28, 1997, at 16-17 [hereinafter Rosen, *Dual Sovereigns*]; *see also* Cass R. Sunstein, *Does the Constitution Enact the Republican Party Platform? Beyond* Bush v. Gore, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 177, 186 (Bruce Ackerman ed., 2002) ("Republicans were right to attack the undemocratic, overly ambitious rulings of the Warren Court."); Jeffrey Rosen, *Juvenile Logic*, NEW REPUBLIC, Mar. 21, 2005, at 11.

"ignoring constitutional text [and] misrepresenting constitutional history."[20]

In fact, though, the Warren Court was lawyerly in a deep and important sense. What the Warren Court understood and the critics do not is that the text and the original understandings are not the only sources of law, or even the most important sources of law, including constitutional law. In its major constitutional initiatives, the Warren Court was, in a profound way, a common law court. That might seem incongruous, because the one thing most people agree on is that the Warren Court was innovative, and the common law approach, rooted in precedent, is usually thought of as conservative and tradition-bound. But while the Warren Court did break new ground in important ways, its major decisions were not as severely cut off from tradition and precedent as one might think. And the common law, for its part, is not as hidebound as one might think. Many of the great common law judges—from seventeenth and eighteenth-century English judges like Sir Edward Coke and Lord Mansfield to twentieth-century American judges like Benjamin Cardozo and Roger Traynor—are famous for their innovations.[21] The Warren Court belongs to that common law tradition.

The mistake of the critics who think the Warren Court was lawless is that they look for constitutional law in the wrong place: they think the Constitution is the text, and perhaps the history, and little more. If you look only to those sources of law, you will not find justification for what the Warren Court did. But if you recognize that American constitutional law is more than that—that it is, in large measure, a common law system, in which precedent plays a central role—then the Warren Court is no longer lawless. It did not simply make things up, or just decide cases in accordance with its political predilections. The Justices of the Warren Court were not just enlightened (or not) judicial activists who had a good sense (or not) of how the winds of history were blowing. They were enlight-

20. Rosen, *Dual Sovereigns*, *supra* note 19, at 16-17.

21. On Coke, see, for example, JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 22-26 (1992); on Mansfield, see, for example, C.H.S. FIFOOT, LORD MANSFIELD 198-229 (1936); on Cardozo, see, for example, ANDREW L. KAUFMAN, CARDOZO 247, 358 (1998); on Traynor, see, for example, Mathew O. Tobriner, *Chief Justice Roger Traynor*, 83 HARV. L. REV. 1769, 1769 (1970) ("[I]n Traynor, the caution of the scholar is combined with the courage of the innovator ....").

ened, in my view, and they were in a sense activists, and they were in many ways on the right side of history. But they were also in their constitutional decisions squarely in the tradition of English and American common law judges.

I will try to defend this claim by considering, principally, the Warren Court initiatives that aroused the greatest contemporary controversy and the most vehement charges of lawlessness: the famous school desegregation decision, *Brown v. Board of Education*;[22] the reform of criminal procedure, as typified by the two most celebrated criminal procedure decisions—*Miranda v. Arizona*,[23] which required the police to warn suspects who were in custody before questioning them, and *Gideon v. Wainwright*,[24] which required that counsel be made available to all defendants in felony cases; and the reapportionment decisions, which revolutionized the way state legislatures were elected.[25] None of these cases can be easily squared with the original understandings, and none is dictated by the text of the Constitution. But each of them can be justified as a faithful application of the methods of the common law.[26]

I will begin, in Part I, by describing the common law approach. That approach has well-developed theoretical premises and celebrated defenders. But the easiest way to understand the common law approach is to see it in its native habitat, in one of the most famous examples of common law innovation—Judge Benjamin Cardozo's opinion in *MacPherson v. Buick Motor Co*.[27] *MacPherson* —the work of a consummate lawyer—takes an approach to the law that is, I believe, parallel—uncannily so, in some instances—to what the Warren Court did. After I discuss *MacPherson*, I will describe the common law approach in more general theoretical terms. That approach has had self-conscious practitioners and eminent theoreti-

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

23. 384 U.S. 436 (1966).

24. 372 U.S. 335 (1963).

25. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

26. For an argument that the Warren Court used the common law method to make important and innovative contributions to the protection of freedom of speech under the First Amendment, see David A. Strauss, *Freedom of Speech and the Common Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 33 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

27. 111 N.E. 1050 (N.Y. 1916).

cal defenders for hundreds of years; it is the oldest tradition in Anglo-American law.

Then I will show how the Warren Court, far from being a lawless group of judges who just imposed their own political views on society, was squarely within this ancient tradition. The Justices were not relying on the text of the Constitution or on the original understandings, in any form; if you look only there for law, the Warren Court will appear lawless. The Warren Court Justices were common lawyers. In Part II.A, I will discuss *Brown*, the Warren Court's most celebrated decision but a decision that still rests on an uncertain legal basis. In Parts II.B and II.C, I will discuss *Miranda v. Arizona*[28] and *Gideon v. Wainwright*,[29] two cases that epitomize the Warren Court's decisions protecting the rights of criminal suspects, which were perhaps the most widely unpopular decisions of the Warren Court. In Part II.D, I will discuss the reapportionment cases. *Brown* and the criminal procedure decisions parallel *MacPherson* very closely. The reapportionment cases present a more complex set of issues, but they too are within the common law tradition.

I. THE COMMON LAW APPROACH

A. Common Law Innovation in Action: MacPherson v. Buick Motor Co.

Benjamin Cardozo was probably the most celebrated American common law judge of the twentieth century,[30] and *MacPherson v. Buick Motor Co.*[31] may be his most famous opinion. *MacPherson* has become a classic in the common law canon: it has certainly had its critics, but more often it has been held out as reflecting common law reasoning in its most sophisticated form.[32]

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28. 384 U.S. 436.

29. 372 U.S. 335.

30. *See generally* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990).

31. 111 N.E. 1050.

32. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 9-27 (1949); Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 205 (1933); Address by Karl Llewellyn, *in* Report, *The Status of the Rule of Judicial Precedent*, 14 U. CIN. L. REV. 208

MacPherson was what we would now call a products liability action, but it arose at a time when it was not entirely clear that consumers could ever sue manufacturers for injuries caused by defective products. Specifically, the question in *MacPherson* was whether an automobile manufacturer that sold a defective car could be held liable, for negligence, for resulting injuries to a consumer, when there was no contract directly between the manufacturer and the consumer.[33] The black letter common law rule—the so-called "privity of contract" requirement—was that manufacturers were not liable to any party with whom they had not contracted. Usually, of course, this did not include the ultimate consumer.[34]

The privity of contract rule traced its origin to the English case of *Winterbottom v. Wright*,[35] decided in 1842. Privity of contract was explicitly adopted in New York state in 1852 in *Thomas v. Winchester*.[36] At the same time, though, New York and other jurisdictions recognized an exception for "inherently dangerous" objects (or, as it was sometimes put, "imminently dangerous" acts of negligence).[37] A plaintiff could recover for injuries caused by an inherently dangerous object, even if there was no privity of contract. *Thomas v. Winchester* itself involved such an object—a mislabeled bottle of medicine that actually contained poison—and so, notwithstanding the privity rule, the plaintiff prevailed.[38]

For the next sixty years, New York courts decided cases under this regime, in which the privity requirement barred a products liability action unless the product in question was "inherently dangerous."[39] The issue in each case was whether a particular defective product was "inherently dangerous." In 1870, the New

(1940).

33. *MacPherson*, 111 N.E. at 1051.

34. *See* RICHARD A. EPSTEIN, TORTS, §§ 15.5-6 (1999); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, 284-88 (1987); *see also* Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Ex.).

35. *Winterbottom*, 152 Eng. Rep. 402.

36. 6 N.Y. 397 (1852).

37. *E.g.*, Statler v. George A. Ray Mfg. Co., 88 N.E. 1063, 1064 (N.Y. 1909); Torgeson v. Schultz, 84 N.E. 956 (N.Y. 1908); Devlin v. Smith, 89 N.Y. 470, 477 (1882); Kahner v. Otis Elevator Co., 89 N.Y.S. 185, 188 (App. Div. 1904); Burke v. Ireland, 50 N.Y.S. 369, 372 (App. Div. 1898); Davies v. Pelham Hod Elevating Co., 20 N.Y.S. 523, 525 (App. Div. 1892), *aff'd mem.*, 41 N.E. 88 (N.Y. 1895).

38. *Thomas*, 6 N.Y. at 410-11.

39. See sources cited *supra* note 37.

York Court of Appeals ruled that a flywheel in a machine was not such an object.[40] The court explained: "Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle, or the like."[41] But the flywheel, like "an ordinary carriage wheel, a wagon axle, or the common chair in which we sit," was not inherently dangerous, so the privity requirement applied and the injured plaintiff could not recover from the manufacturer.[42] Three years later, in *Losee v. Clute*, the plaintiff was injured by a defective steam boiler;[43] the court decided that this, too, was an ordinary object, not an inherently dangerous one.[44]

Nine years after that, though, the Court of Appeals decided that scaffolding was in the "inherently dangerous" category.[45] In the next two decades, intermediate appellate courts in New York concluded that a defective building,[46] an elevator,[47] and a rope supplied to lift heavy goods[48] all fell within the exception for "inherently dangerous" objects. In 1908, the New York Court of Appeals ruled that a bottle of "aerated water" was inherently dangerous;[49] and finally, in 1909, that a large coffee urn was inherently dangerous.[50] All of these New York cases purported to apply the accepted rule that a plaintiff had to show privity of contract unless a product was inherently dangerous. The later courts did not question the authority of the earlier cases,[51] but they consistently ruled that the product was inherently dangerous and so allowed the plaintiff to recover.

MacPherson involved an automobile with a defective wheel; there was no privity of contract between the plaintiff and the manufac-

40. Loop v. Litchfield, 42 N.Y. 351 (1870).
41. *Id.* at 359.
42. *Id.*
43. 51 N.Y. 494 (1873).
44. *Id.* at 497.
45. Devlin v. Smith, 89 N.Y. 470 (1882).
46. Burke v. Ireland, 50 N.Y.S. 185 (App. Div. 1898).
47. Kahner v. Otis Elevator Co., 89 N.Y.S. 185 (App. Div. 1904).
48. Davies v. Pelham Hod Elevating Co., 20 N.Y.S. 523 (App. Div. 1892), *aff'd mem.*, 41 N.E. 88 (N.Y. 1895).
49. Torgeson v. Schultz, 84 N.E. 956 (N.Y. 1908).
50. Statler v. George A. Ray Mfg. Co., 88 N.E. 1063, 1064 (N.Y. 1909).
51. *See, e.g.*, *id.* at 1064-65; *Torgeson*, 84 N.E. at 957-58; Devlin v. Smith, 89 N.Y. 470, 477-78 (1882); *Kahner*, 89 N.Y.S. at 188-89; *Burke*, 50 N.Y.S. at 371-72.

turer of the automobile.[52] The parties presented the issue as whether the product was inherently dangerous.[53] Cardozo's celebrated opinion in *MacPherson* dispatched the privity requirement altogether.[54] The court held essentially that a negligent manufacturer would be liable to anyone who could foreseeably be hurt by its negligence.[55] Soon after *MacPherson*, the privity rule was repudiated in many other jurisdictions, and consumers were permitted to recover from manufacturers whenever they could demonstrate negligence.[56]

Although Cardozo was very circumspect, he left little doubt that he thought the privity requirement was a bad idea as a matter of policy. He did not claim that his decision was dictated by the legal materials alone.[57] If his policy views had been the sole basis for the holding in *MacPherson*, then Cardozo could fairly be accused of doing what the Warren Court supposedly did. But while Cardozo's policy views were an element of the reasoning in *MacPherson*, there was more to *MacPherson* than that. What makes the case an exemplar of common law reasoning is that Cardozo did not stop with his policy views but instead drew on the lessons provided by the earlier cases—two lessons in particular.

First, the earlier cases had demonstrated that the privity regime was no longer workable. At one time, perhaps, it was possible to distinguish between "inherently dangerous" objects and objects that were—in the words of another foundational English case—part of "the ordinary intercourse of life."[58] But by the time of *MacPherson*, that distinction had broken down. Too many things were *both* inherently dangerous *and* part of the ordinary intercourse of life.

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52. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916).

53. *See id.*

54. *See id.* at 1053.

55. *Id.* ("If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.... [I]rrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.").

56. The next step—holding manufacturers strictly liable for defective products—occurred a few decades later; it was also the product of a development resembling *MacPherson*.

57. Although the *MacPherson* opinion says only a little about the undesirability of the privity requirement as a matter of policy, Cardozo's other writings leave little doubt that this was a factor in his decision. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-137 (1921).

58. Longmeid v. Holliday, (1851) 155 Eng. Rep. 752, 755 (Ex.).

Courts applying the distinction had decided that a steam boiler was not inherently dangerous,[59] but that a coffee urn[60] and a bottle of aerated water[61] were. *MacPherson* then presented the question of how to classify an automobile.[62] The question was unanswerable; the governing rule no longer made any sense. Cardozo's conclusion that the privity rule had to be discarded was supported not just by his own views about good policy but by several decades' experience under that rule.

The second lesson of the earlier cases was that although the courts were purporting to apply the privity regime—and no doubt generally believed that they were, to the best of their ability, applying the privity regime—they were, in fact, gravitating toward a new rule. Cardozo was able to claim, plausibly for the most part, that the outcomes of the earlier decisions were consistent with the principle that a manufacturer is liable for foreseeable injuries caused by its negligence.[63] That was true even though the reasoning of the earlier cases was based on the privity regime and the "inherently dangerous" exception. It was particularly true of the more recent cases—the scaffolding,[64] coffee urn,[65] and aerated water cases[66]—which made much more sense if they were understood as applications of the foreseeability rule rather than the "inherently dangerous" exception that the courts purported to apply. Cardozo was, therefore, in a position to say that his ultimate conclusion—that the privity regime should be discarded in favor of a simple requirement of foreseeability—not only was good policy but was supported by several decades' worth of decisions, which demonstrated both that the privity regime with its "inherently dangerous" exception was not workable and that courts, perhaps without being fully aware of what they were doing, were in fact, although not in name, moving to a simple foreseeability requirement.

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59. Losee v. Clute, 51 N.Y. 494 (1873).
60. Statler v. George A. Ray Mfg. Co., 88 N.E. 1063 (N.Y. 1892).
61. Torgeson v. Schultz, 84 N.E. 956 (N.Y. 1908).
62. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1054-55 (N.Y. 1916).
63. *See id.* at 1051-55.
64. Devlin v. Smith, 89 N.Y. 470 (1882).
65. *Statler*, 88 N.E. 1063.
66. *Torgeson*, 84 N.E. 956.

The combination of explicitly normative reasoning with a reliance on the lessons of the past, along with a recognition that both are indispensable, is what makes *MacPherson* a common law exemplar. Cardozo did not claim that his views about the privity requirement were irrelevant; that would have been disingenuous. But he also did not claim the authority simply to turn those views into law. Before he could do that, he had to show that his views were consistent with what other judges had done. The conclusion that the privity regime was unworkable and should be replaced by foreseeability was not just Cardozo's alone; it was a conclusion that many judges had reached, over several decades, even though those judges were not fully aware that they were reaching that conclusion. Cardozo's innovation consisted of making that conclusion, which had been reached inexplicity in fits and starts, fully explicit.

B. The Premises of the Common Law

The *MacPherson* opinion is famous, and it provides a particularly graphic example of common law development. But there are countless other examples of innovation in the law that followed essentially the *MacPherson* pattern. The premises of Cardozo's approach in *MacPherson* have, in fact, been around for centuries. These premises of the common law were systematically articulated by the great ideologists of the common law—Hale, Coke and (in some of his writings) Burke—and they have been reiterated since, in various forms.[67]

The first of these premises is a humility about—or, more neutrally, lack of confidence in—individual human reason.[68] It is unwise to try to resolve a problem without deferring to some degree to the collected wisdom reflected in what others have done when faced

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67. For the material in the succeeding paragraphs, see *Calvin's Case*, (1608) 77 Eng. Rep. 377, 381 (K.B.) (Coke); EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J.C.D. Clark ed., Stanford Univ. Press 2001) (1790); MATTHEW HALE, REFLECTIONS BY THE LRD. CHEIFE JUSTICE HALE ON MR. HOBBES HIS DIALOGUE OF THE LAWE, *reprinted in* 5 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 500 (1924).

68. *See* BURKE, *supra* note 67, at 251 ("We are afraid to put men to live and trade each on his own stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations.").

with a similar problem in the past.[69] In more modern terms, the common law approach reflects an understanding that human rationality is bounded. The problems that judges confront are too difficult for any one individual's reason to solve, and the solutions that have evolved through earlier decisions provide at least an important starting point. This is a claim about human rationality generally, not just about judges, and the use of something like a common law approach is, of course, not limited to judges. Many other decision makers, both private and governmental, instinctively or self-consciously follow precedent in making decisions.

The second premise, related to the first, is a kind of rough empiricism. It is a mistake to approach complex issues, like those involved in major constitutional cases, just on the basis of abstract ideas about how the world should be. The problems are too complex for that, and the theories are inevitably too simplistic. Rather than trying to solve a problem by reasoning from abstractions, we are better off looking to see how people, over time, addressed that specific problem when it arose. If judges or people generally seemed to gravitate toward solving a problem in one particular way, then that is presumptively the best way to approach the problem, even if the most appealing abstract theories would dictate something different.

The third premise of the common law approach has to do explicitly with innovation. The common law approach, as many of its leading practitioners understood it, was by no means hostile to innovation. It was also not hostile to innovation undertaken frankly for reasons of what we would call justice, or fairness, or good policy —"right reason" in the language of an earlier era. There is nothing illegitimate about interpreting precedents in a way that candidly promotes good results; there is nothing even necessarily illegitimate about overruling precedents for that reason. What is required is that such innovation be undertaken with due regard for what has

69. *See Calvin's Case*, 77 Eng. Rep. at 381 ("[L]aws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have affected or attained unto.").

gone before; that is, with due regard for the limitations of abstract reasoning and for the value of experience.

This means that innovation—change self-consciously undertaken in order to bring about a morally better state of affairs—can be most solidly justified if it is rooted in the past.[70] This Burkean theme echoes throughout the ideology of the common law. To be more concrete: a change can best be justified if it is relatively modest and if events in the past show, in accordance with rough common law empiricism, that the change was already taking place in the way that specific decisions were made, even if the change had not been explicitly avowed. The best reason for discarding the old regime is that in practice, even if not avowedly, the old regime was already being discarded by many people who operated under it; and the best reason for adopting a particular new regime is that that new regime had already been adopted in practice, even though it was not fully acknowledged.

It does not follow that all changes have to be modest and incremental, although those kinds of changes are the easiest to justify. A sharp, nonincremental change can be justified if you are very confident that what has gone before is badly wrong.[71] But then, too, it is best if you show that your conclusion about the need for change is based not just on your abstract principles but on how the old regime worked—specifically, how it was already being disregarded, and the new regime brought into play.

In these ways, a common law approach cautions against change but does not preclude changes designed to bring about a more fair or more just world. Moreover, and importantly, it is not just an

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70. *See* BURKE, *supra* note 67, at 220 ("The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *a priori*.... The science of government being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or of building it up again, without having models and patterns of approved utility before his eyes.").

71. *See* CARDOZO, *supra* note 57, at 98 ("Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adopted to an end. If they do not function, they are diseased. If they are diseased, they must not propagate their kind. Sometimes they are cut and extirpated altogether. Sometimes they are left with the shadow of continued life, but sterilized, truncated, impotent for harm.").

undifferentiated, go-slow caution, but an account of what kinds of justifications are needed. You can be more confident about making changes if you can use the past against itself, as it were: if you can show that one lesson of the old regime is that the old regime was not working in the way it was supposed to work.

These premises are on display in *MacPherson*; they are also on display, to some degree, in the everyday practice of following and distinguishing precedents. And they are surprisingly—and paradoxically, in view of the Warren Court's image—integral to the work of the Warren Court.

II. THE WARREN COURT

A. Brown v. Board of Education

1. What Justifies Brown*?*

It is a commonplace now to say that any approach to constitutional interpretation, if it is to be taken seriously, must be consistent with *Brown*.[72] If a theory about the Constitution leads to the conclusion that *Brown* was illegitimate, then the theory must go. But *Brown*'s iconic character operates mostly in a negative way: it means that certain forms of originalism must be dispatched. That is because by common (although not quite universal) agreement, *Brown v. Board of Education* is inconsistent with the original understanding of the Fourteenth Amendment. The Court understood as much when *Brown* was decided: after hearing argument once in the case, the Court specifically asked for briefing on the historical background of the Fourteenth Amendment and then, in its opinion in *Brown*, essentially disavowed any reliance on original intentions.[73] That was a pretty clear indication that the Court did not find much in the original understanding to support its conclusion.

Showing that *Brown* disproves originalism, however, does not tell us what approach to constitutional interpretation *Brown* supports, or why *Brown* is correct. To the extent there is a generally accepted

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

73. *See id.* at 486; Brown v. Bd. of Educ., 345 U.S. 972 (1953) (ordering reargument).

answer to that question, it is along these lines. The Fourteenth Amendment enacted a commitment to equality. The understanding at the time it was enacted was that equality did not preclude segregation, but what was enacted was the principle of equality, not that specific understanding about segregation. At the time of *Plessy v. Ferguson*,[74] the 1896 decision that infamously upheld a state law mandating segregation, the Court (and most of the country) thought that segregation was compatible with equality. By 1954, we knew better. We understood that separate was inherently unequal. On this account, *Brown* is not really inconsistent with the original understanding, once the original understanding is characterized the right way. The disagreement with the drafters and ratifiers of the Fourteenth Amendment concerns the implementation of the principle, not the principle itself, and on that level we are not bound by what the drafters thought. Or, in a variant of the argument, the drafters and ratifiers of the Fourteenth Amendment expected that we would not be bound at that level, so that when we disagree with their conclusions about segregation, we are not really thwarting their intentions.

This kind of argument is open to a familiar objection. If the original understanding or the requirements of the text are characterized at a sufficiently high level of abstraction, then the question of what is constitutional becomes, in practice, indistinguishable from the question of what justice or good policy requires. If the Fourteenth Amendment just enacts a principle of equality—without enacting any more specific judgments about what kinds of laws are consistent with equality—then the Fourteenth Amendment can be interpreted to require equality of income or wealth, or it can be interpreted not even to require racial equality. It all depends on what, as a moral matter, equality requires. That approach gives present day interpreters too much leeway. Few people think that the Constitution imposes so few restraints.

To put the point another way, if, as seems likely, the generation that adopted the Fourteenth Amendment made a judgment that segregation was consistent with the Amendment, what basis do we have today—or did the Court have in 1954—to disagree with that

74. 163 U.S. 537 (1896).

judgment? Some arguments in defense of *Brown* seem to treat that judgment as if it were a factual question. But while an understanding of the factual nature of segregation helps, the judgment obviously has a crucial moral component. The claim that we knew segregation to be inherently unequal in 1954, although we did not know that in 1896, is not like a claim about a scientific or archeological discovery. It is a moral judgment, at least in part. The problem then is to give an account of why *Brown* is not just an instance of the Supreme Court's enforcing its moral judgments. It is not clear that the prevailing understanding of *Brown* can give that account.

2. Brown *and the Common Law Approach*

Arguments based on the text and original understandings, then, provide a very uncertain basis for *Brown*. Arguments based on moral conceptions seem to acknowledge too little in the way of constitutional restraint; in the end, they amount to saying that *Brown* is right because it was morally right to end segregation. It *was* morally right to end segregation, and it seems artificial to pretend that that fact should play no role in justifying *Brown*. But if that is all that can be said by way of justification, then it begins to look as if the critics of the Warren Court were right. The Warren Court may have done good things, but it was not doing law.

In my view, the justification for *Brown* is, in a word, that *Brown* is *MacPherson*. *Brown* is lawful according to the methods of the common law. This defense of *Brown* relies in part on the moral wrongness of segregation, but it does not rely on moral arguments alone; it crucially invokes arguments drawn from precedent. The cases leading up to *Brown*—in a development that resembled the line of cases preceding *MacPherson*—had already left "separate but equal" in a shambles. *Brown* certainly did something that no previous case had done, but *Brown* was the completion of a common law process, not an isolated, pathbreaking act.

Plessy,[75] decided in 1896, upheld a state law requiring railroads to provide "equal but separate accommodations for the white, and colored races."[76] Rigid racial segregation in fact had shallower roots

75. *Id.*
76. *Id.* at 540.

in the South than many once supposed; Jim Crow laws were not instituted systematically after the abolition of slavery but rather became widespread in the South only in the late nineteenth century.[77] The opinion in *Brown* made a point of noting that "'separate but equal' did not make its appearance in this Court until 1896."[78] That itself is relevant, under the common law approach: the Court was not faced with as longstanding an endorsement of segregation as might have appeared.

In the two decades following *Plessy*, the Court applied the "separate but equal" principle in two cases involving education without reconsidering its validity.[79] The Court also rebuffed, on narrow grounds, Commerce Clause challenges to laws requiring segregation in transportation.[80] But at the same time the Court sowed some of the seeds of the common law demise of "separate but equal."

In *McCabe v. Atchinson, Topeka & Santa Fe Railway Co.*, the Court dealt with an Oklahoma law requiring separate but equal railroad facilities.[81] This law permitted a railroad to have sleeping, dining, and chair cars for whites even if it did not have supposedly equal cars for blacks.[82] The state defended the law on the ground that there was essentially no demand from blacks for these facilities.[83] The Court rejected that argument and invalidated the statute:

> It is the individual who is entitled to the equal protection of the laws, and if he is denied ... a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.[84]

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77. This was the argument made in C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1957).

78. *Brown*, 347 U.S. at 490-91.

79. *See* Gong Lum v. Rice, 275 U.S. 78, 86 (1927); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 545 (1899).

80. *See, e.g.*, Chiles v. Chesapeake & Ohio Ry. Co., 218 U.S. 71 (1910).

81. 235 U.S. 151 (1914).

82. *Id.* at 161.

83. *Id.*

84. *Id.* at 161-62.

Three years later, in *Buchanan v. Warley*, the Court invalidated a statute that forbade whites from living in a block where a majority of the homes were occupied by blacks and vice versa.[85] The suit was brought by a white seller seeking specific performance of a contract to sell to a black person.[86] The Court's reasoning emphasized the seller's right to dispose of his property as he saw fit, rather than any right to be free from racial discrimination.[87] The state defended the law as a permissible regulation of property.[88] The tension with *Plessy* is apparent: if separate but equal is a reasonable form of regulation of one kind of economic transaction—the purchase of a railroad ticket—why isn't the checkerboard law, arguably a version of separate but equal, a reasonable regulation of real property?

Twenty years later, after the NAACP's legal campaign against Jim Crow laws had begun, the seeds sown in *McCabe* and *Buchanan* bore fruit. In *Missouri ex rel. Gaines v. Canada*, an African American student was denied admission to the all-white University of Missouri Law School.[89] Missouri operated an all-black state university, Lincoln University, that did not have a law school.[90] Instead, state law authorized state officials to arrange for blacks to attend law school in neighboring states and to pay their tuition.[91]

The Court ruled that this scheme did not satisfy "separate but equal."[92] The Court refused to address arguments that out-of-state opportunities for the student were equal to those in Missouri.[93] "The basic consideration is not as to what sort of opportunities other states provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to [blacks] solely upon the ground of color."[94] Because a black resident but not a white resident would have to leave the state for a legal education, the Court concluded, there was a denial of

85. 245 U.S. 60 (1917).
86. *Id.* at 69-70.
87. *Id.* at 78-79, 81-82.
88. *Id.* at 74-75.
89. 305 U.S. 337, 342 (1938).
90. *Id.*
91. *Id.* at 342-43.
92. *See id.* at 349-51.
93. *See id.* at 348-49.
94. *Id.* at 349.

equal protection of the laws.[95] The Court also relied on *McCabe* to dismiss Missouri's argument that few African Americans in Missouri sought a legal education.[96] (Gaines was, apparently, the only one who ever had).

There is a direct line from *McCabe*, decided in 1914, to *Gaines*, decided in 1938, and a direct line from *Gaines* to *Brown*. Theoretically, after *Gaines*, a state might still have been able to satisfy the Constitution by establishing a separate law school for blacks. But given the limited number of black applicants, that was impractical—a circumstance that *McCabe* and *Gaines* said was irrelevant. So, as a practical matter, *Gaines* left many states with no choice but to admit blacks to graduate school. Perhaps more important, by refusing to consider the argument that out-of-state law schools were as good as Missouri's, the Court was, in effect, holding that the provision of tangibly equal educational opportunities was not enough to satisfy "separate but equal." The state had to treat blacks and whites equally in some way that went beyond that. In this way, *Gaines* suggested that symbolism mattered, not just tangible equality. That principle was ultimately incompatible with "separate but equal."

In the decade after *Gaines*, the Court did not decide any more "separate but equal" cases, but it did invalidate racial discrimination in jury selection,[97] hold the white primary unconstitutional,[98] and rule that segregation in interstate transportation facilities violated the Commerce Clause.[99] In 1948, *Shelley v. Kraemer* held that the Constitution forbade the enforcement of racially restrictive covenants.[100] Also in 1948, in *Sipuel v. Board of Regents*, the Court held that Oklahoma violated the Equal Protection Clause when it excluded an African American from the University of Oklahoma Law School because she was black.[101] The Court ruled that the case was controlled by *Gaines*.[102]

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95. *Id.* at 349-50.
96. *Id.* at 350-51.
97. *See, e.g.*, Cassell v. Texas, 339 U.S. 282 (1950).
98. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953).
99. *See, e.g.*, Morgan v. Virginia, 328 U.S. 373 (1946).
100. 334 U.S. 1 (1948).
101. 332 U.S. 631 (1948).
102. *See id.* at 633.

Then, two years later, the Court effectively took away whatever breathing room *Gaines* had left for "separate but equal." In *Sweatt v. Painter*, the Court held that a law school Texas had established for African Americans was not equal to the University of Texas Law School.[103] The Court identified the substantial tangible inequalities between the two schools but went out of its way to say that "those qualities which are incapable of objective measurement but which make for greatness in a law school" were "more important."[104] Of course, the newly-established school could not possibly match the University of Texas in those respects.

McLaurin v. Oklahoma State Regents,[105] decided the same day as *Sweatt*, turned entirely on intangible factors. The Court held that "separate but equal" was not satisfied when an African American was admitted to a previously all-white graduate school but was made to sit in a certain seat in the classroom, by himself in the cafeteria, and at a special table in the library.[106] The Court explained that these conditions harmed McLaurin's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[107] After *Sweatt*, a state could not satisfy "separate but equal" by establishing a new all-black graduate school because any such school, however equal tangibly, could not possibly match the intangible assets that the white school had. After *McLaurin*, a state could not segregate African Americans within the established white school. What was left? "Given what came before, the real question is why *Brown* needed to be decided at all."[108]

Observers at the time were aware that this progression of cases had left "separate but equal" hanging by a thread. The certiorari petition in *Sweatt* cited the earlier cases and asserted that they fatally undermined *Plessy*.[109] The briefs in *Brown*, not surprisingly, emphasized *Sweatt* and *McLaurin*.[110] The opinion in *Brown*

103. 339 U.S. 629 (1950).
104. *Id.* at 634.
105. 339 U.S. 637 (1950).
106. *See id.* at 640-42.
107. *Id.* at 641.
108. Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 708 (1992).
109. *See* Petition and Brief in Support of Petition for Writ of Certiorari, *Sweatt*, 339 U.S. 629 (No. 667).
110. *See, e.g.*, Brief of Appellant at 6-13, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No.

supported its famous conclusion about the effect of segregation on the "hearts and minds" of grade school students by quoting passages from *Sweatt* and *McLaurin* that emphasized the importance of intangible factors;[111] the Court in *Brown* said "[s]uch considerations apply with added force to children in grade and high schools."[112] *Brown*'s citation of psychological research attracted much more attention,[113] but precedent plays a larger role in the opinion.

Of course, *Brown* was not received as merely the formal, more or less inevitable culmination of a common law evolution. The Justices themselves apparently did not think of *Brown* that way. *Brown* was vastly more controversial than any of the earlier decisions. There are many possible reasons for this: *Brown* involved grade schools and high schools, not postgraduate education, and the explicit rejection of "separate but equal" had tremendous symbolic significance. But on the question of the justification of *Brown*—as opposed to the symbolic or political effect it had on the South and the nation—*Brown* rested solidly on precedent.

In particular, *Brown* is strikingly parallel to *MacPherson*. In each, governing doctrine—privity of contract with the exception for inherently dangerous products, or "separate but equal"—had been the established law for some time. For a while it was applied with a degree of coherence; but then the coherence began to fray. The decisions holding that certain arrangements were unequal, *McCabe*, *Buchanan*, and *Gaines*, raised questions about exactly what would constitute equality, just as the decisions of the New York Court of Appeals about scaffolds and coffee urns,[114] while making some sense under the old rubric, raised questions about which products were not inherently dangerous.

Like *MacPherson*, *Brown* was not dictated by the earlier cases. But the decision in *Brown* could rely on the earlier cases to show, in effect, that the formal abandonment of the old doctrine was no revolution but just the final step in a common law development. The Warren Court, of course, was influenced by its views about the morality of segregation. That was entirely proper, though, because

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1), 1954 WL 82041.

111. *Brown*, 347 U.S. at 493.

112. *Id.* at 494.

113. *Id.* at 494 n.11.

114. *See supra* notes 45, 50 and accompanying text.

those views—consistent with the common law's demand for humility —were buttressed by the lessons of the past. Earlier Courts, trying to apply "separate but equal," kept coming to the conclusion that the particular separate facilities before them were not equal. In concluding that separate could never be equal, the Warren Court was, at most, taking one further step in a well-established progression. It was acting as a quintessential common law court.

B. Gideon v. Wainwright

Gideon v. Wainwright was not remotely as controversial as *Brown* when it was decided, but it was in many ways emblematic of the Warren Court's criminal procedure revolution.[115] *Gideon*, which was decided in 1963, held that state criminal defendants have the right to appointed counsel in felony cases, even if they cannot afford to hire a lawyer.[116] Like other Warren Court criminal procedure cases, *Gideon* ruled that a specific provision of the Bill of Rights, in this case the Sixth Amendment's guarantee that a criminal defendant shall have "the [a]ssistance of [c]ounsel for his defense,"[117] applied to the states.[118] In doing so, *Gideon* overruled a precedent, *Betts v. Brady*, decided twenty-one years earlier. *Betts* held that whether counsel must be appointed in a state prosecution was to be decided case by case, under the Due Process Clause, by determining whether, under the totality of the circumstances, the failure to appoint counsel denied "fundamental fairness."[119]

Like other Warren Court criminal procedure decisions, *Gideon* could not be easily justified on the basis of original understandings. There seems little doubt that the original understanding of the Sixth Amendment's right to counsel was that it gave an accused the right to have his own retained counsel, not the right to have counsel appointed at the state's expense.[120] Even the *Gideon* opinion did not

115. 372 U.S. 335 (1963).

116. *See id.* at 344.

117. U.S. CONST. amend. VI.

118. *See Gideon*, 372 U.S. at 342.

119. Betts v. Brady, 316 U.S. 455, 462, 473 (1942).

120. *See, e.g.*, WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-29 (1955); Bruce J. Winick, *Forfeiture of Attorney's Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How To Avoid It*, 43 U. MIAMI L. REV. 765, 786, 789-90 (1989).

suggest otherwise. In any event, the Sixth Amendment was intended to apply only to the federal government, and nothing in the history of the Due Process Clause of the Fourteenth Amendment suggested that that Clause was intended to create an across-the-board right to counsel in state criminal prosecutions.

If *Gideon* was not supported by the original understandings, and required that a precedent be overruled, the question of justification again arises: did *Gideon* rest on anything other than the Justices' view that appointed counsel was a good idea? In fact, *Gideon* was supported by a pattern of cases that resembled the cases preceding *Brown* and *MacPherson*. The Court's opinion, written by Justice Black, did discuss precedent, but not in this way; instead the Court asserted that *Betts* itself was an "abrupt break" from previous cases.[121] But Justice Harlan's concurring opinion criticized that claim, and Justice Harlan seems to have had the better of the argument.[122] None of the pre-*Betts* cases, fairly read, really suggests an across-the-board rule requiring states to appoint counsel in all felony cases.[123]

The better basis for *Gideon* was that—as Justice Harlan put it—the case-by-case rule of *Betts* "ha[d] continued to exist in form while its substance ha[d] been substantially and steadily eroded."[124] The erosion occurred in several stages. Even before *Betts*, the Court had suggested that there was an automatic right to appointed counsel in any capital case.[125] The Court reiterated that suggestion in dicta in 1948,[126] and finally issued a square holding to that effect in 1961.[127]

Meanwhile, in non-capital cases, the Court, while applying *Betts*, progressively narrowed the circumstances in which counsel did not have to be appointed. Between 1942, when *Betts* was decided, and 1950, the Court, on several occasions, sustained convictions of defendants who were denied appointed counsel.[128] But at the same

121. *Gideon*, 372 U.S. at 344.

122. *Id.* at 349-50 (Harlan, J., concurring).

123. *Id.*

124. *Id.* at 350.

125. *See* Avery v. Alabama, 308 U.S. 444, 445 (1940).

126. *E.g.*, Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948); Bute v. Illinois, 333 U.S. 640, 674 (1948).

127. *See* Hamilton v. Alabama, 368 U.S. 52 (1961).

128. *See, e.g.*, Quicksall v. Michigan, 339 U.S. 660 (1950); Gryger v. Burke, 334 U.S. 728

time the Court overturned convictions in several cases that presented issues that, although not entirely routine, did not seem exceptionally complex.[129] Then from 1950 on, the Court, still applying *Betts*, reversed in every right to counsel case that came before it.[130] In each case, the Court identified some occasion during the proceedings when the defendant might have benefited from counsel:[131] an objection counsel might have made that the pro se defendant did not;[132] lines of investigation or argument that "an imaginative lawyer" might have pursued;[133] or complex tactics that might at least have mitigated the sentence.[134]

In this way, *Gideon* follows the same common law pattern as *Brown* and *MacPherson*. The Court in *Gideon* would have been able to say, had it chosen to do so, that its decision was supported not just by its own ideas about the importance of counsel but by two decades' worth of experimentation with the rule of *Betts*. *Betts* had supposed that there was a significant category of trials that were fair even though the defendant who wanted a lawyer did not have one; the experience of subsequent cases showed that *Betts* was wrong—just as the parallel progression of cases showed that *Plessy* was wrong in assuming that separate could be equal. That progression, rather than the text of the Constitution or the original understandings, was the basis for the Court's decisions.

Like *Miranda*, the reapportionment cases, and even, in an important sense, *Brown*, *Gideon* overturned a discretionary, case-by-case standard in favor of a more strict rule. This movement toward rules was an important feature of Warren Court decisions in general, although there are significant exceptions. Perhaps one reason the Warren Court tended to adopt rules was that it expected that those entities responsible for implementing its decisions—

(1948); *Bute*, 333 U.S. 640; Foster v. Illinois, 332 U.S. 134 (1947).

129. *See, e.g.*, Chewning v. Cunningham, 368 U.S. 443 (1962); Hudson v. North Carolina, 363 U.S. 697 (1960); Williams v. Kaiser, 323 U.S. 471 (1945).

130. *See* Gideon v. Wainwright, 372 U.S. 335, 350-51 (1963) (Harlan, J., concurring) (finding no sustained convictions after *Quicksall*, 339 U.S. 660).

131. *Id.* at 351 ("The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts* v. *Brady* rule is no longer a reality.").

132. *See, e.g.*, Carnley v. Cochran, 369 U.S. 506 (1962).

133. *Chewning*, 368 U.S. at 447.

134. *See, e.g.*, Moore v. Michigan, 335 U.S. 155 (1957).

states that formerly practiced segregation, police departments, trial judges, and malapportioned state legislatures—would be resistant; compliance with rules is usually easier to monitor than compliance with a standard.

In any event, the choice of rules instead of discretionary standards does not affect the common law justification of the Warren Court's major decisions. It is sometimes thought that discretionary standards are characteristic of the common law. This seems to be at least an overstatement; common law courts developed a number of rules, and some prominent common law judges, notably Holmes, thought that common law courts should try to reduce discretionary standards to rules as much as possible[135]—thus anticipating, in a sense, what the Warren Court did in constitutional law.

The central point, however, is not the nature of the new regime that the Warren Court instituted, but its justification. In both *Brown* and *Gideon*, the Warren Court was on solid ground in saying that its choice of a new, more rule-like approach was justified not just by its views of morality or good policy, but also by precedent.[136] The precedents, in seeking to apply the more flexible approach, had ended up, in fact although not in name, following a rule.

C. Miranda v. Arizona

Miranda v. Arizona,[137] much more controversial than *Gideon* and, unlike *Brown*, still under attack in some quarters[138]—presents a more complex case of common law development. In *Brown* and *Gideon* (just as in *MacPherson*) the Court was able to say that its decision did little more than ratify a development that had already occurred.[139] The old regime had broken down; it could not coherently

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135. *See* Balt. & Ohio R.R. v. Goodman, 275 U.S. 66 (1927) ("[W]e are dealing with a standard of conduct, and when the standard is clear it should be laid down once and for all by the Courts.").

136. *See Gideon*, 372 U.S. at 342-44; Brown v. Bd. of Educ., 347 U.S. 483, 491-94 (1954).

137. 384 U.S. 466 (1966).

138. *See, e.g.*, Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 104-11 (1985); Edwin Meese III, *The Double Standard in Judicial Selection*, 41 U. RICH. L. REV. 369, 375-76 (2007) ("In other words, [in *Miranda*], the Justices openly read into the Constitution a meaning that they had specifically said was not there just a few decades before.").

139. *See Gideon*, 372 U.S. at 344; *Brown*, 347 U.S. at 493-94.

be followed any more. In reality it had been replaced by a new regime, and it only made sense to recognize as much.

The Court's decision in *Miranda* was more creative and, in one respect, harder to justify. In *Miranda*, too, the old regime had broken down. But it was not plausible to argue in *Miranda* that the new rules had already emerged in the cases and just needed to be recognized.[140] Still, the basic justification for *Miranda* is a common law justification. The reason for the *Miranda* rules was not that they were required by the text of the Constitution or the original understandings, obviously, but it was also not just that the Court thought they were a good idea. Rather, the justification was that experience with the old approach showed that that approach was unsound.[141] The Court had to choose something to replace it. Those conclusions—although not the actual *Miranda* rules themselves—were firmly supported by the common law-like development of precedent.

This aspect of the background of *Miranda* seems fairly well-known, better known than the comparable aspects of *Brown* and *Gideon*. *Miranda* held that statements that were the product of custodial interrogation of the accused could not be admitted in a criminal prosecution unless the accused had been given certain specific, now-famous warnings, and had waived the rights described in those warnings.[142] Before *Miranda*, the admissibility of statements made in response to interrogation was determined by a "voluntariness" test derived from the Due Process Clause.[143] That test asked whether the suspect's "will" had been "overborne" by the interrogation.[144]

The dissenting opinions in *Miranda* described the voluntariness test as "workable and effective,"[145] but there was, by the time of *Miranda*, abundant evidence that it was not, including earlier

140. *See Miranda*, 384 U.S. at 467-68 (holding that until Congress or the states devise a better approach, certain warnings must be provided as an interim requirement).

141. JOHN HART ELY, DEMOCRACY AND DISTRUST 125 (1980).

142. *Miranda*, 384 U.S. at 444-45. Subsequent cases held that statements obtained in violation of *Miranda* could be used for certain purposes but those decisions are not the concern here.

143. *See* Dickerson v. United States, 530 U.S. 428, 432-33 (2000).

144. *Miranda*, 384 U.S. at 534 (White, J., dissenting) (quoting Haynes v. Washington, 373 U.S. 503, 513 (1963)).

145. *See, e.g.*, *id.* at 506 (Harlan, J., dissenting).

criticism by some of the *Miranda* dissenters.[146] The voluntariness approach suffered from the usual problems of case-by-case approaches that examine all the circumstances: it led to unpredictable and inconsistent decisions[147] and, therefore, offered insufficient guidance to the police.[148] But the voluntariness test had other problems as well. Unlike some other case-by-case approaches—in the obscenity cases before *Miller v. California*,[149] for example—the voluntariness test depended on finding highly disputed facts. The application of the test was, therefore, hostage to a "swearing contest" between the police and the suspect.[150] Moreover, even if the facts were not in dispute, the voluntariness test, in any close case, depended on an understanding of the atmospherics and the nuances, which could determine whether police tactics went too far.[151]

Even if all of that could be reconstructed adequately, the basic inquiry of the voluntariness test was not coherently defined. The Court was never able to give any standard for judging when an interrogation tactic crossed the line from proper (indeed commendable) police work into illegal coercion.[152] There may have been coherent approaches available, in principle. For example, the approach advocated long ago by Wigmore—that the admissibility of a statement should turn on whether it was obtained by means that were likely to induce a false confession—can certainly be faulted on various grounds, including the difficulty of reconstructing the facts, but it would at least have provided some way to assess whether the police acted improperly.[153] But the Court did not go in that direction; in fact, in a 1961 decision the Court said that in assessing the voluntariness of a confession the courts should not even consider whether the tactics were likely to produce a false confession.[154] The result was that the Supreme Court was repeatedly fragmented and

146. *See* Massiah v. United States, 377 U.S. 201, 204 (1964) (holding that the voluntariness test would no longer suffice for statements elicited after the individual was indicted).

147. *Miranda*, 384 U.S. at 440.

148. *Id.* at 440-41 & n.3.

149. 413 U.S. 15 (1973).

150. *See Miranda*, 384 U.S. at 445.

151. *See id.*

152. *See id.* at 502 (Clark, J., dissenting); *id.* at 507-08 (Harlan, J., dissenting).

153. *See* 3 JOHN HENRY WIGMORE, EVIDENCE § 824, at 252 (3d ed. 1940).

154. Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

the lower court decisions showed no coherence.[155] The voluntariness approach—like the "inherently dangerous" exception and the "separate but equal" doctrine—simply could not be implemented according to its own premises. The effort to implement it demonstrated the unsoundness of those premises.

For all these reasons, by the time of *Miranda* the Court was on solid common law ground in saying that the voluntariness test should be discarded. The destructive part of *Miranda*, so to speak, rested on a secure common law justification. But the constructive part—the requirement of specific warnings and a waiver—cannot be justified on common law grounds, and the Court did not attempt to do so.[156] The best justification for that part of *Miranda* is that something had to replace the voluntariness approach—the courts could not just exclude every confession, or admit every confession—and the Supreme Court in *Miranda* did the best it could to devise a replacement. Conspicuously, the *Miranda* opinion justified the rules themselves as a quasi-legislative way of preventing involuntary self-incrimination and invited legislatures to supersede the *Miranda* rules with other approaches that would prevent coerced self-incrimination.[157]

It would certainly be possible to argue that the Court should have adopted something different from the *Miranda* rules. It would even be possible to argue that for all the weaknesses of the voluntariness test, the need to obtain confessions is so great, and the possible alternatives are such a hindrance to that effort, that the voluntariness approach is still better than *Miranda*. The characteristic attack on *Miranda*, however, was different from that kind of relatively fine-grained criticism of the merits of the decision. The characteristic attack was that *Miranda* was an act of judicial usurpation, a case in which the Warren Court went beyond the bounds of proper judicial conduct.[158] That criticism is unjustified. The decision to abandon the voluntariness test was thoroughly justified under the common law approach. The next step—adopting the *Miranda* rules themselves—could not be justified in that way, but that step was

155. *See Miranda*, 384 U.S. at 440 & n.1.
156. *See id.* at 467-68.
157. *See id.*
158. *See, e.g.*, sources cited *supra* in note 138.

taken as a matter of necessity, and only provisionally, subject to legislative change.[159]

D. The Reapportionment Cases

Of all the Warren Court's important decisions, the reapportionment cases are the most difficult to fit within the common law model. There was certainly no development of judicial precedent paralleling the disintegration of the privity of contract rule or "separate but equal." *Baker v. Carr*[160] and *Reynolds v. Sims*,[161] perhaps more than any other major Warren Court decisions, were a sharp break with past judicial decisions. The most immediate precedent, *Colegrove v. Green*, famously ruled that the Court would not enter the "political thicket" by considering claims that state legislatures were malapportioned.[162] And, like many other Warren Court decisions, the reapportionment decisions found scant support in original understandings. Section One of the Fourteenth Amendment—the basis for the decisions—apparently was not intended to apply to voting at all, and there is no evidence that the Framers of either the original Constitution or the Fourteenth Amendment meant to outlaw malapportioned legislatures.[163]

Nonetheless, the reapportionment decisions, highly controversial at the time, quickly became uncontroversial. Today the basic principle of "one person, one vote," whatever its difficulties in application, seems beyond challenge as a general matter. This relatively rapid acceptance of the core principle of the reapportionment decisions should suggest that those decisions were rooted in something deeper than—as the dissenters charged at the time—just the Court's idea of the best conception of democracy.[164]

The best common law-like justification for the reapportionment decisions is that they carried out a development that extended back to the earliest days of the Republic: the inexorable, although not

159. *See Miranda*, 384 U.S. at 467.
160. 369 U.S. 186 (1962).
161. 377 U.S. 533 (1964).
162. 328 U.S. 549 (1946).
163. *See* ELY, *supra* note 141, at 118 & 236 n.37.
164. *See Reynolds*, 377 U.S. at 590-91, 624-25 (Harlan, J., dissenting); *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

uninterrupted, expansion of the franchise. Property qualifications for voting were universal among the colonies. By the time of the Revolution, some had been eliminated.[165] Then, in several waves of reform in the early nineteenth century, property qualifications were widely abolished, and by 1840, "universal" suffrage (limited to white males) became the norm.[166] African Americans were nominally enfranchised by the Fifteenth Amendment, and in fact did vote in many places, South and North, until the last decades of the nineteenth century.[167] The movement for women's suffrage gained speed at the beginning of the twentieth century and culminated in the Nineteenth Amendment, adopted in 1920.[168] Beginning in the late 1950s, even before the Voting Rights Act, the vote was increasingly restored to blacks in the border South.[169]

This was not an uninterrupted march of progress, of course. Blacks were massively disenfranchised at the turn of the last century, and the Progressive Era was characterized by a variety of devices that were designed to limit the exercise of the vote.[170] Restrictions on voting by certain categories of individuals, notably people convicted of crimes, remain important and controversial today. Nonetheless, by the time of the reapportionment decisions, the nation had, in the words of one historian, "achieve[d] ... an essentially unrestricted national franchise."[171]

This history served as the background for the reapportionment decisions. Malapportionment did not literally disenfranchise anyone, but the effect of malapportionment was to make some votes count for more than others. That seems inconsistent with the premises of universal suffrage, as the Court's opinions noted.[172] Needless to say, the reapportionment decisions were not compelled by history alone. They were based, in part but crucially, on the Court's views about the nature of democracy—both the view that

165. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 16-20 (2000).

166. *Id.* at 52.

167. *Id.* at 103-16.

168. *See id.* at 172-218.

169. *See id.* at 257-63.

170. *See id.* at 103-16.

171. *Id.* at 284.

172. *See* Reynolds v. Sims, 377 U.S. 533, 555 & n.29 (1964); Baker v. Carr, 369 U.S. 186, 194 n.15, 244-45 (1962) (Douglas, J., concurring).

arbitrary population inequalities were wrong, and the well-known argument that the political process was in many places incapable of correcting malapportionment, so the courts had to intervene.[173] The point is, though, that those normative arguments, however strong they are, did not stand alone. They were backed by the repeated judgments of several generations, expressed through legislation and constitutional amendments,[174] that restrictions on the franchise should be discarded in favor of political equality.

This background was an integral part of the justification for the reapportionment decisions. The decisions would have been on weaker ground, and the claims that the Court was illegitimately overreaching[175] would have been significantly stronger, if the decisions had not been a continuation of the long trend toward establishing equality as the norm in political participation. That trend—the series of expansions of the franchise—was the equivalent of a series of precedents. It was precedent based not on judicial decisions but on larger movements in society. That kind of precedent is harder to work with, and claims about a society's "traditions" are notoriously subject to manipulation. But in this case the characterization of the "precedents" as generally endorsing political equality seems relatively straightforward. Although there were deviations,[176] the dominant pattern was a series of decisions by different generations to expand and equalize the franchise. Of course, this nonjudicial precedent, like many lines of judicial precedent, could have been read in more than one way. But the Court's implicit reading—that the expansion of the franchise over nearly two centuries supported the conclusion that malapportioned legislatures were unconstitutional—was a legitimate reading.

On common law premises, decisions of this kind—whether made by legislatures, constitutional conventions, or other political processes—should also be allowed to justify an innovation like the reapportionment cases. These past decisions, like judicial precedents, help overcome the bounded rationality problems that the

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173. *See* ELY, *supra* note 141, at 117-25.

174. *See, e.g.*, U.S. CONST. amends. XV, XIX.

175. *See, e.g.*, *Reynolds*, 377 U.S. at 590-91, 624-25 (Harlan, J., dissenting); *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

176. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 556 (1946) (declining to enter the "political thicket" and reapportion voting districts).

common law approach identifies, and they provide a broad base of experience. They can, at least potentially, limit the kinds of innovations that may be undertaken. Indeed, many common lawyers throughout history have viewed statutes as part of the common law; not in the sense that judges are free to overrule them but in the sense that judges should view them as the basis for further extension, in the way that precedents might be extended.[177] The reapportionment cases can be seen as taking this approach to the various decisions—by state legislatures, state constitutional conventions, and federal constitutional amendments (federal statutes were not yet an important part of the picture)—to enforce political equality.

When James Madison changed his mind and decided that the Bank of the United States was constitutional—one of the most striking instances of evolutionary constitutional intepretation in our history, given Madison's prominence as a Framer—he did so because of the "repeated recognitions under varied circumstances of the validity of [the Bank] in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."[178] The same kinds of considerations that Madison cited should be available to courts, and in the case of the reapportionment decisions, they provide substantial support for what the Warren Court did. As before, this is certainly not to say that the Court's decision could be justified on this ground alone. Other arguments, particularly the argument about the blockage in the political process, were needed.[179] The Court's decision to adopt a strict, rule-like requirement of equality was, as many have noted,[180] the product of institutional concerns; a less strict regime would have been more difficult to implement. But that was, relatively speaking, a detail.

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177. A classic example is Justice Harlan's opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). See *id.* especially at 390-91 ("Th[e] legislative establishment of policy carries significance beyond the scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law."). I am indebted to Thomas Grey for this point.

178. James Madison, Veto Message on the National Bank (Jan. 30, 1815), *available at* http://www.millercenter.virginia.edu/scripps/digitalarchive/speeches/spe_1815_0130_madison.

179. *Baker*, 369 U.S. at 259 (Clark, J., concurring).

180. *See, e.g.*, ELY, *supra* note 141, at 124.

The crucial decision was the decision that some form of equality in voting was a constitutional requirement. That decision had a strong precedent-based foundation, relying not just on what courts did but on what other institutions decided.

CONCLUSION

Many questions about the Warren Court remain very much subject to debate. Did its initiatives really accomplish very much, or were they at most symbolic? Was its moral and political vision a good one? Did it have the right conception of the role of a court in a democracy? Was it just the product of the elite culture of a particular era, so that it is pointless to hold it up as a model? But the notion that the Warren Court was lawless should be put to rest.

That notion may have gained currency for a number of different reasons, among them the implicit premise that lawfulness must consist of fidelity to an authoritative text or to the revered Framers. The fundamental legal soundness of the Warren Court's major decisions becomes clear, though, once one recognizes that there is another conception of what it means to follow the law. The common law account emphasizes humility, caution, and building on the past, but without denying the value of innovation and the necessity of making moral judgments. The common law approach can combine these elements without becoming unsystematic. Judged by that conception of lawfulness—which has as strong a claim as any to be the right approach to American constitutional law—the reputation of the Warren Court, on this count at least, should be secure.