

BEYOND THE WRITTEN CONSTITUTION:

BROWN V. BOARD OF EDUCATION AS A STARTING POINT

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ABSTRACT

This essay propose an analysis related to how Warren Court became very particular in American constitutional history by confronting Jim Crow laws, especially by applying the Bill of Rights against States. In this essay, we outline the complexity of the unwritten Constitution after Brown vs Board of Education and other specific contributions of the Warren Court. Cases like Brown vs. Board of Education will be analyzed from a different point of view to understand the Court's methods and how they affect the comprehension of fundamental rights today beyond what is the constitutional text.

KEYWORDS: Constitution. Warren Court. Bill of Rights. Brown vs. Board of Education.

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BEYOND THE WRITTEN CONSTITUTION: A SHORT ANALYSIS OF WARREN COURT

1. THE MEANING OF AN UNWRITTEN CONSTITUTION

The Warren Court is still today one of the most significant stages of the American Supreme Court.³ Earl Warren, a former Republican governor and vice-presidential candidate, was one of the most notable Chief Justices in America's history and a judge with a very insightful overview.⁴ The Warren Court made a real revolution – especially when applying the Bill of Rights against States-, but Earl Warren had not done that all alone: he was together with other two brilliant judges, Hugo Black⁵, a former Democratic senator from the South, and Willian Brennan, a former Democratic state court judge from the Northeast.⁶ Many critics had outlined that Earl Warren turned the Constitution upside down, but in fact he gave it color and life.

One example of that fact involves *Brown v Board of Education*, a case that still is considered a metaphor for the American dream.⁷ In *Brown v. Board of Education*, the Court decided that Jim Crow laws and practices were unconstitutional - at least in education issues as a matter of interpretation - and segregation had to end.⁸

The term *Jim Crow* is often used to describe the segregation laws, rules, and customs at that time⁹, which arose after the Reconstruction ended in 1877 but continued until mid 1960s.¹⁰ Some people say it came from a song written by Daddy Rice, an old slave and actor, who once wrote: "*Come listen all you galls and boys, I'm going to sing a little song, My name is Jim Crow. Weel about and turn about and do jis so, Eb'ry time I weel about I jump Jim Crow*".¹¹

Earl Warren wrote the Court's opinion in *Brown v. Board of Education* based on the argument that segregation is inherently unequal, so the Federal Government and States are not allowed to separate children's schools by their color.¹² In fact, Jim Crow laws created two

³ (TUSHNET, 1993, 1995)

⁴ (SUNSTEIN, 2009)

⁵ (QURAIISHI, 2006)

⁶ (TUSHNET, 1994)

⁷ (MARTIN JR., 1998, p. 235)

⁸ (MARTIN JR., 1998, p. 195)

⁹ *See also* (HARARI, 2014)

¹⁰ (PILGRIM, 2012)

¹¹ (PILGRIM, 2012)

¹² (TUSHNET; LEZIN, 1991)

hereditary classes of American with white on top and blacks on the bottom.¹³ According to Warren, *Separate but equal* was a typical offense against the Constitution Preamble, but also Article IV and specially Article I, which states that the titles of nobility are explicitly condemned. Nonetheless, the innovative aspect of the case regards to its enforcement, because the Court held that this clause obligates the federal government as well the states and privates spheres (*state action doctrine*).

Yet, Warren remarked that the Thirteenth Amendment abolished slavery and empowered Congress to pass anti-caste legislation. At the same time, the Fourteenth and Fifteenth Amendments made clear that the country was rebuilt on the bases of free and equal values.¹⁴ Jack Balkin has been calling this story as The Great Progressive Narrative, which sees America as continually striving for democratic ideals.¹⁵ Indeed, still today Warren's opinions gives color and life to the constitutional debate.

After *Dred Scott v. Sandford*, *Plessy v. Ferguson* and Taney's Court opinion, those amendments showed that all persons born or naturalized, black or white, jew or gentile, were American citizens, so they had the same rights of voting and freedom, as highlights Amar.¹⁶ Even though, in the old South, slaves did not have entitlements of workship, freedom of expression, and also right to eat or sleep as they wanted. They could not even marry nor have a family as they planned.¹⁷

The merits of Warren Court can be resumed on the conclusion that Jim Crow laws created an apartheid in America with two unequal classes of citizens in violation of Thirteenth, Fourteenth and Fifteenth amendments.¹⁸ For the Court, racial hierarchy is a kind of slavery that ought to be banned.

Hence, the most important argument for the Court's decision was in the Fourteenth Amendment because no state shall deny people equal protection under the law and no state shall abridge the privileges or immunities of the United States' citizens.¹⁹

As everyone born in the United States is a citizen, they have the privilege of equal protection since birth (not by *Plessy vs. Ferguson*), even if it is a black or white, male or female. *Separate*, in this case, can not be associated with general gender equality²⁰. Despite that, private sphere is also obligate to observe the equal protection clause (*state action*). So,

¹³ (AMAR, 2012, p. 142–143)

¹⁴ (TUSHNET; LEZIN, 1991)

¹⁵ (ET AL. BALKIN, 2002)

¹⁶ (AMAR, 2012, p. 148)

¹⁷ (MARTIN JR., 1998, p. 4)

¹⁸ (AMAR, 2012, p. 151)

¹⁹ (TUSHNET, 1987)

²⁰ (ET AL. BALKIN, 2002; TUSHNET, 1993)

the conclusion is that government should promote integration and Congress must work to pass laws that apply to even private domains.²¹

Thus, we can affirm properly that the America's Constitution is not just there in terms of a text.²² That would be a great mistake. As Cass Sunstein have sustained in a essay published by The Washington Post, the fact is that Constitutional Law has numerous authors, not only at a single moment in time, but also over long periods, and often with fundamentally different ideas.²³

Among years, the America's written Constitution has invited us to fulfill their gaps, to construct a counterpart in some various ways such as Americans practices, Supreme Court opinions, American icons, presidential proclamations and congressional statutes. The written and the unwritten Constitution are like the yin and yang Chinese symbols, because they are perfect halves of one whole, where each half gesture toward the other.²⁴

2. THE TERMS IN WHICH A UNWRITTEN CONSTITUTION CAN BE CONSTRUCTED

The America's unwritten Constitution not only specifies the substantive content of the written Constitution, but also clarifies the methods for determining the meaning of the text.²⁵ As we do not have a set of instructions that allows us discover and help the Constitution become a logical sense, we must go beyond the text every time. That is the reason why written and unwritten Constitution must live and go forward together. Without an unwritten Constitution of some sort, we would not even be able to properly identify official meaning of written Constitution, especially because the unwritten Constitution supports a complement to the written Constitution without supplanting it.

And we can illustrate those arguments with some examples. First of all, the text does not say anything about who presides the Vice President impeachment or how the Executive powers, that are not so specific in text as the Congressional ones (as the veto pen, the pardon pen or the power to fire cabinet) were influenced by George Washington practices. Why did not George Washington run for more than two elections if the text, in the beginning, did not mention a limit?

Another importance of the unwritten Constitution comes from the America's symbolic Constitution and the nation's icons, as the Declaration of Independence, the Federalist papers,

²¹ (TUSHNET; LEZIN, 1991)

²² (TUSHNET, 1995)

²³ (SUNSTEIN, 2015)

²⁴ (ET AL. BALKIN, 2002)

²⁵ (TUSHNET, 2009)

the Northwest Ordinance, Lincoln's Gettysburg Address, the Warren's Court's opinion in *Brown v. Board of Education*, as we mentioned before, and Martin Luther King's "I Have a dream" speech.²⁶ They are all part of an America's unwritten Constitution and does help the written one have a more perfect application and implementation.

Again, the Warren's Court had an obsession to apply The Bill of Rights against States.²⁷ We cannot forget the relevancy of *Brown vs Board of Education*, *Griswold vs. Connecticut* and *Roe vs. Wade* (privacy violations, woman rights – vote and sexual liberty), *Harper and Kramer* opinions (right to vote), *Reynolds vs Sims* and *New York Times v. Sullivan* (press and religion).²⁸ They are all components of an unwritten Constitution such as the judicial review power to create precedents (*stare decisis*), to interpret laws, to remedy violations of rights and even the number of associated judges at the Supreme Court. The Bill of Rights is another good example of an important item of the unwritten Constitution.²⁹

The Amendments are not the only textual route that invites us to the journey beyond the Constitution's text. We have to go forward a long term trail of enumerated rights that shows us a wide field of possibilities. But we must understand one big rule: the unwritten Constitution cannot duel against the written one's and no Supreme Court has ever tried to disregard or overturn it.³⁰

And the specific provision that best exemplify the unwritten democratic values of Constitution can be understood by the expression "we the people". This expression shows us the most important process in the beginning of America's democracy. In 1787, the people voted and discussed a basic document, a written and simple one that could be ridden even by ordinary people such as farmers.

It is the first time that a written Constitution was created in a fully democratic form, because in other places people just had traditions and customs. This document was the pivot of a democratic process in a continental scale that changed other political systems around the world. And no Constitution had not been adopted in this democratic way, even in Athens. A self-government that ordained and established a Constitution based on discussions and votes. At that time, States had conventions to decide whether to adopt the Constitution and it was necessary that 9 of 13 ratified to begin the Constitutional effects.³¹

Another interesting point was the qualifications to vote. The propriety and the religion

²⁶ (TUSHNET, 1993)

²⁷ (AMAR, 2012)

²⁸ (ET AL. BALKIN, 2002)

²⁹ (TUSHNET, 1994)

³⁰ (TUSHNET, 2010)

³¹ (AMAR, 2012)

qualifications, for example, were lowered or eliminated, although women in general could not vote.³² They did not vote because they could not fight in war, so that was a national security reason connected with democracy.³³ In the other hand, poverty people could vote because they were able to fight in American Revolution. Therefore people, up and down the continent, were getting to discuss and vote, with a widely freedom of speech. But who “was the people” of United States that ordained and voted? Slaves, British, Indians were not, because the Constitution was not for their benefits.³⁴ Those elections allowed many individuals to participate on the constitution process. Before American Revolution, the world had never seen something democratic like the United States Constitution.

Those democratic values were compared, for example, with the British and Swiss people, the only free countries at that time. The rest of the world was not free; they had czars, sultans, kings. They had not a self-government printed in a preamble like US Constitution. And the expression “more perfect union” showed the power of a kind of Constitution that was created by a free people.³⁵ In British monarchy they did not have something like that. The “British Constitution” had never been a written document submitted to popular vote.

Under the articles of Confederation, for example, there was not a Congress elected by the people and a Constitution submitted a popular vote, too. Senators were a kind of ambassadors. The Congress was known as a central power, but in the US Constitution it became one of the three free bodies, identified as a legislature power, elected by the people. At the Articles of Confederation the Congress was like a war council that only had certain powers, although in US Constitution the Congress has express powers and a bicameral system instead a unicameral one. The Congress was equally represented. In Articles Confederations, States were free to live the union, but in the US States, like they were constructing a more perfect union, States could not leave. Once they were in, they could not leave for geostrategic reason.

3. CONCLUSION

The legacy of Brown must be understood in a cultural and legal context. Brown has given a deeply different sense into the national sense of community, in which beliefs and values could be shared. But we can still ask if Brown and Warren’s Court could have promoted an inclusive national culture or if it hey have changed the way as Americans have

³² (MARTIN JR., 1998)

³³ (TUSHNET, 1987)

³⁴ (TUSHNET, 1987)

³⁵ (SUNSTEIN, 2009)

understood the Constitution. Instead, at least it is clear that Jim Crow was not anymore just a “separate but equal” practice, but above all of this, it became an opportunity of changing the meaning of Constitution.

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