Beyond the Written Constitution: a short analysis of Warren Court

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Abstract: This essay proposes an analysis about how Warren Court became one of the most particular in American History by confronting Jim Crow law, especially by applying the Bill of Rights. In this essay, we propose an analysis of how complex the unwritten Constitution is. Cases like Brown vs. Board of Education will be analyzed from a different point of view to understand the methods of the Court.

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

1. The meaning of an unwritten Constitution

The Warren Court is still today one of the most significant eras of the Supreme Court. Earl Warren, a former Republican governor and vice-presidential candidate, was one of the most notable Chief Justice in America’s history\(^1\). The Warren Court made a real revolution – especially with the project of applying the Bill of Rights against states - , but Earl Warren hadn’t done that alone: he was in companion of other two brilliant judges, Hugo Black, a former Democratic senator from the South, and William Brennan, a former Democratic state court judge from the Northeast. A lot of critics had said that Earl Warren turned the Constitution upside down, but in fact he did a great job. Brown is still today a metaphor for the American dream\(^2\).

In Brown v. Board of Education, the Court decided that Jim Crow laws and practices were unconstitutional - at least in education as a matter of interpretation - and segregation had to end\(^3\). The name Jim Crow is often used to describe the segregation laws, rules, and customs at that time, which arose after the Reconstruction ended in 1877 but continued until the mid of 1960s\(^4\). Some

\(^1\) CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS 41 (2009).
\(^3\) Id. at 195.
people says it came from a song written by Daddy Rice, an old slave and actor: "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\(^5\)."

Earl Warren wrote the Court’s opinion 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. In fact, Jim Crow laws created two hereditary classes of American with white on top and blacks on the bottom\(^6\). “Separate but equal” was a typical offense against the Preamble, Article IV and specially Article I, in which the titles of nobility are explicitly condemned. And this clause obligates the federal government as well the states and privates spheres.

It’s important to remember 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 bases of free and equal values. Jack Balkin has been calling this story of The Great Progressive Narrative, wich sees America as continually striving for democratic ideals\(^7\).

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, for example\(^8\). Although, in the old South, slaves didn’t have entitlements of workship, speak, freedom, eat and sleep as they wanted. They couldn’t even marry nor have a family as they planned\(^9\).

The merit of Warren Court was in 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\(^10\). For them, racial hierarchy is a kind of slavery. But the most important argument for the Court’s decision was in the Fourteenth Amendment because no state shall deny people equal

\(^5\) Id.
\(^6\) A\textsc{khil} R\textsc{eed} A\textsc{mar}, A\textsc{mer}ica’s U\textsc{nwritten} C\textsc{onstitution}: T\textsc{he} P\textsc{recedents} A\textsc{nd} P\textsc{rinciples} W\textsc{e} L\textsc{ive} B\textsc{y} 142–143 (2012).
\(^7\) J\textsc{ack} M\textsc{.} \textsc{et} \textsc{al.} B\textsc{alkin}, W\textsc{hat} B\textsc{rown} V. B\textsc{oard} O\textsc{f} E\textsc{ducation} S\textsc{hould} H\textsc{ave} S\textsc{aid} 4–5 (2002).
\(^8\) A\textsc{mar}, s\textsc{upra} n\textsc{ote} a\textsc{t} 148.
\(^9\) M\textsc{artin} \textsc{Jr.}, s\textsc{upra} n\textsc{ote} a\textsc{t} 4.
\(^10\) A\textsc{mar}, s\textsc{upra} n\textsc{ote} a\textsc{t} 151.
protection of the laws and no state shall abridge the privileges or immunities of citizens of United States.

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’s a black or white, male or female citizen. “Separate”, in this case, could not be associated with equality and we are not talking about a kind of sex separation like a bathroom or a gym\(^{11}\). But someone could argue that private sphere were not obligate to observe it. So, the conclusion is that government should promote integration and Congress must work to pass laws that apply to even private domains as shoppings, restaurants, pubs.

So we can affirm properly that the America’s Constitution isn’t just there in the text. That would be a great mistake. As Cass Sunstein have sustained in a recent 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\(^{12}\). Among years, the America’s written Constitution has invited us to fill their gaps, to construct a counterpart in a various ways such as Americans practices, Supreme Court opinions, American icons, presidential proclamations and congressional statutes, for example. 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\(^{13}\).

2. The terms in wich 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. As we don’t have a set of instructions that allows us discover and help the Constitution become a logical sense, we must go beyond the text. That’s 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

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\(^{11}\) Balkin, supra note at 81.


\(^{13}\) Balkin, supra note at 8.
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 a lot of examples. First of all, the text doesn’t 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 didn’t George Washington run for more than two elections if the text, in the beginning, didn’t 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, the Northwest Ordinance, Lincoln’s Gettysburg Address, the Warren’s Court’s opinion in Brown v. Board of Education, as we mentioned before, and Dr. Martin Luther King’s “I Have a dream” speech. 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\(^\text{14}\). We can’t 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)\(^\text{15}\). 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.

The Amendments are not the only textual route that invites us to the journey beyond the Constitution’s text. We have to walk 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 can’t duel against the written one’s and no Supreme Court has ever tried to disregard or overturn it.

\(^{14}\) AMAR, *supra* note.

\(^{15}\) BALKIN, *supra* note at 6–7.
And the specific provision that best exemplify the unwritten democratic values of Constitution can be understood by the expression "we the people". This expression show us the most important process in the beginning of our civilization. In 1787, the people voted and discussed a basic document, a written and simple one that could be ridden even by ordinary people, farmers.

It’s 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 hadn’t 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\(^\text{16}\).

Another interesting point was the qualifications to vote. The propriety and the religion qualifications, for example, were lowered or eliminated, although women in general couldn't vote\(^\text{17}\). They didn’t vote because they couldn’t fight in war, so that was a national security reason connected with democracy. In the other hand, poverty people could vote because they were able to fight in American Revolution. So 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 weren’t, because the Constitution wasn’t for their benefits. Those elections allowed a large number of individuals to participate on the constitution process. Before American Revolution, the world had never seen a democratic something 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 wasn’t free; they had czars, sultans, kings. They hadn’t 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.

\(^{16}\) AMAR, supra note.
\(^{17}\) MARTIN JR., supra note at 235.
In British monarchy they didn’t 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 wasn’t 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 couldn’t leave. Once they were in, they couldn’t leave for geostrategic reason.

3. Conclusion

The legacy of Brown must be understood in a cultural and legal context. Brown has gave 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 had promoted an inclusive national culture or if it hey have changed the way as americans have been understanding the Constitution. Instead, at least it is clear that Jim Crow wasn’t anymore just a “separate but equal” practice, but above all of this, it became an opportunity of changing the meaning of Constitution.

4. References


