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The Common Law Genius of the Warren Court

David A. Strauss*

A generation after its end, the Warren Court has, in many ways, prevailed. Decisions that were intensely controversial at the time—on racial segregation, school prayer, reapportionment, and criminal justice—are now generally, even universally, accepted. Not a single justice on the Court today accepts the view that was the leading intellectual adversary of the Warren Court’s approach—the across-the-board judicial restraint, espoused by Justice Felix Frankfurter, that asserted that the courts should invalidate legislation only in extreme cases. The political culture seems to have become comfortable with the idea that judges have a special responsibility to protect racial minorities and similar groups, including political dissidents; that conception of the judge’s role was central to the Warren Court. And even many of the Warren Court’s most bitter critics, when pressed, have difficulty naming a single major Warren Court decision that they would overrule if they could.

Despite all of that, the reputation of the Warren Court is still in some ways clouded. In particular the idea persists that what the Warren Court was doing was not really law: it was an “activist” Court that was not especially concerned with, or good at, the craft of lawyering. That view is held explicitly and emphatically by detractors of the Warren

* Harry N. Wyatt Professor of Law, The University of Chicago. I am grateful to the participants in the Harvard Law School Faculty Workshop for comments on an earlier version, and to Eleanor Arnold for excellent research assistance. This paper is adapted from a chapter of a book in progress on common law constitutional interpretation. Other fragments are: Common Law, Common Ground, and Jefferson’s Principle (in draft); The Irrelevance of Constitutional Amendments, 114 Harv. L. Rev. 1457 (2001); Freedom of Speech and the Common Law Constitution, in Lee C. Bollinger and Geoffrey R. Stone, eds.,
Court, who see the Warren Court as having been so consumed with its political and social agenda that it acted lawlessly, or nearly so.

But even people who agree with the outcomes of the major Warren Court decisions sometimes distance themselves from the Warren Court itself. The criticism typically takes the form of condemning “judicial activism of the left or the right,” with the Warren Court (or “Warrenism”) seen as an example of the former, and the current Supreme Court, the latter. And even some unabashed admirers of the Warren Court more or less agree—sometimes apologetically, sometimes defiantly—that the law took a back seat to the need to end racial segregation and oppressive police practices, government suppression of speech, malapportioned legislatures, compelled prayer in schools, and the other problems that the Warren Court addressed. When a Court is engaged in projects of such great moral importance, it has to be allowed to act in a way that is, as a matter of technical legal analysis and argument, a little questionable—so many of the Warren Court’s admirers say. The ultimate justification for the Warren Court’s most celebrated decisions, according to this line of thinking, is that those decisions were morally and politically right. If they were legally unsound, that just means that we may have to reexamine our notions of legal soundness.

It may be true that the ultimate justification of the Warren Court’s decisions is that over time they have come to be seen as right as a matter of justice and good policy. Perhaps there is a sense in which the legal soundness of a decision is, in the long run, beside the point. But whether or not that view is correct, it is wrong to say that the

Warren Court’s project was legally unsound. 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. But it does not follow that the Warren Court was deficient as a matter of legal craft.

In its major constitutional initiatives, the Warren Court was, in a deep sense, 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 Coke and Mansfield to twentieth-century American judges like Cardozo and Roger Traynor—are famous for their innovations. The Warren Court belongs to that common law tradition.

People also often think of the method of the common law as antithetical to the interpretation of authoritative texts like the Constitution or a statute. The interpretation of a text requires that one read the words of the text with great care and base the decision on those words, or on other (“structural”) clues found in the words of the text. If the words do not dictate a result, then, it is often thought, the next resort must be to the intentions of those who drafted the document. By contrast, the common law approach treats no specific text as authoritative. Instead it follows precedents that are subject to varying interpretations and that can evolve over time.
That sharp contrast between the common law and constitutional interpretation is, I believe, mistaken. But for present purposes the point is that a common law approach is not at all the same thing as what the Warren Court’s critics often accused it of doing—more or less ignoring the limitations imposed by conventional legal materials in order to do what seemed right. The common law approach, if taken seriously, imposes real limitations on what judges can do—as has been demonstrated by centuries of legal development in the familiar common law areas that we now know as contracts, torts, and property. In fact the limits are more substantial than the limits imposed by the text and the original intentions. 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 enlightened, 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*;¹ and the reform of criminal procedure, as typified by the two most celebrated criminal procedure decisions, *Miranda v. Arizona*² (which required the police to warn a suspects who were in custody before questioning them) and *Gideon v. Wainwright*³ (which required that counsel be made available to all defendants in felony cases). I will

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¹ 347 U.S. 583 (1954).
then discuss, more briefly, the reapportionment decisions, which present the common law approach in different light. Another area in which the Warren Court made important and innovative contributions—the protection of freedom of speech under the First Amendment—also illustrates the common law method in operation; I have discussed that elsewhere.\textsuperscript{4}

I. The Common Law Approach

A. The premises of the common law

If you had to say, in a couple of words, what the common law approach is, you would say: following precedent. In the run of cases that description is good enough. In the traditional common law fields, cases are decided by following precedents that have decided materially indistinguishable issues. That is also, as it happens, how most American constitutional cases are decided—they are decided on the basis of precedents, not of an examination of the text or the original understandings. But that gets ahead of the argument. The characteristic common law impulse is to look to see what has been decided before, and to use that as, at least, the starting point for deciding the current case.

Of course, sometimes it will not be clear what it means to follow precedent; the proper reading of precedent may be in dispute. And sometimes, in common law systems, the courts depart from precedent. In such instances, “follow precedent” is obviously insufficient guidance. That injunction has to be supplemented by premises that explain why following precedent is generally a good idea. Those premises therefore help decide

\footnote{3 372 U.S. 335 (1963).}
what precedent requires, when that issue is in dispute. Those premises also help identify the occasions on which one should depart from precedent. These premises of the common law approach 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.

The first of these premises is a humility about—or, more neutrally, lack of confidence in—individual human reason. 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 with a similar problem in the past. 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 heuristics 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 decisionmakers, 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. We are better off looking to the past to see what has worked and what hasn’t. If a practice seems to have worked

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4 Cited in n. *, supra.
well for an extended period of time, that is a reason to continue it, even if that practice is not easy to reconcile with abstract principles that we find appealing. By the same token, the best reason for revising or even overturning a practice is not that the practice deviates from an abstract ideal. It is that the practice has been shown, by experience, not to work well.

Of course, the judgment that a practice has or has not “worked well” necessarily refers to some kind of normative conception. But the idea is to keep the normative conception as uncontroversial as possible. If a legal doctrine, for example, leads to uncertainty and confusion about what the law is, that is a sign that it is not working well. On the other hand, if a doctrine is generally accepted by people with a wide range of views and commitments, that is sign that it is working well. None of this is necessarily dispositive in all cases, but the common law approach favors arguments of this form, rather than arguments based on theoretical conceptions alone.

The third premise of the common law approach has to do with innovation. The common law approach, as 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 gone before: that is, with due regard for the limitations of abstract reasoning and 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. 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 earlier approach just wasn’t working very well. In addition, although modest and incremental changes are the easiest to justify, a common law approach, properly understood, allows for more dramatic changes as well. The collective wisdom of the past just enjoys a presumption. A sharp, non-incremental change can be justified if you are very confident that what has gone before is badly wrong. But then, too, it is best if you can show that your conclusion about the need for change is based not just on your abstract principles but on evidence about how badly the old regime worked.

In other words, a common law approach cautions against change but does not preclude changes designed to bring about a fairer or more just world. Moreover, it is not just an 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 the empirical lesson of the old regime is that the old regime did not work very well.

These premises differentiate the common law approach from its competitors in important ways. On the one hand, the common law approach—unlike approaches that emphasize the text and the original understanding—is open about its use of moral judgments. Under the common law approach, there is no need to try to show that a decision—*Brown v. Board of Education*, for example—can be justified entirely on the
basis of distinctively legal materials without referring to the fact that segregation was wrong. On the common law approach, one can candidly say that part of the reason for reaching a certain result was one’s conviction that that result was morally right. This avoids one of the annoying features of approaches that emphasize the text and the Framers’ intentions—the persistent attribution to the Framers or to the text of the Constitution (if only you read it correctly!) views about constitutional issues that are, by one of those happy accidents of history, identical to those of the interpreter.

On the other hand, the common law approach is unlike other views—such as those that see constitutional law as a matter of developing moral conceptions in accordance with the abstract language of the text\(^5\)—because the common law approach places relatively well-defined limits on the extent to which moral judgments may play a role in interpreting the Constitution. Precedent is not infinitely manipulable, at least as long as you are trying in good faith to act according to the premises of the common law approach. This ensures that constitutional judgments will not become indistinguishable from moral judgments.

Finally, the common law approach is more systematic than approaches that treat constitutional interpretation as a matter of considering various disparate factors.\(^6\) Those approaches are candid about the need to allow normative arguments, and they recognize the need to impose limits on the use of those arguments. But the common law approach has a specific historical referent and an extensive theoretical tradition, and its premises can guide decisionmaking in the way that a multi-factor approach cannot.

\(^5\) Eg Dworkin; also early Bickel.
For essentially the same reasons, the common law approach can claim to be more systematic, and more disciplined, than theories that rest on extended notions of popular sovereignty, theories that can take a neo-republican or neo-Hamiltonian form.\textsuperscript{7} In addition, some of those theories share with originalism a difficulty in accommodating the legitimacy of moral argument; if the People are the ultimate source of constitutional law, then, as with originalism, there will always be a tendency to attribute one’s own views to the People. Alternatively, if the will of the people, or the nation’s evolving traditions, are identified with moral judgments, then the theory is faced with the problem of how to limit the use of such judgments in constitutional interpretation.

\textbf{B. Common law innovation}

The Warren Court’s most important innovations followed the common law approach. But first it may be worthwhile to see that approach in its native habitat, in one of the most famous examples of common law innovation, Cardozo’s opinion in \textit{MacPherson v. Buick Motor Co.}\textsuperscript{8}

The question in \textit{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 between the manufacturer and the consumer. The black-letter common law rule—the so-called “privity of contract” requirement—was that, as a general matter, manufacturers were not liable to any party with whom they had not contracted. Usually of course this did not include the ultimate consumer.

\textsuperscript{6} E.g. Fallon; Bobbitt. See Tribe in Scalia reply.
\textsuperscript{7} Respectively Michelman, Ackerman.
The privity of contract rule traced its origin to the English case of Winterbottom v. Wright, decided in 1842. Privity of contract was explicitly adopted in New York state in 1852, in Thomas v. Winchester. 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). 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.

For the next 60 years, New York courts decided cases under this regime, classifying various defective products as either “inherently dangerous” or not. In 1870, the New York Court of Appeals ruled that a flywheel in a machine was not such an object. 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.” 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. Three years later, in Losee v. Clute, the plaintiff was injured by a defective steam boiler; the court decided that this, too, was an ordinary object, not an inherently dangerous one.

Nine years after that, though, the Court of Appeals decided that scaffolding was in the “inherently dangerous” category. In the next two decades, intermediate appellate

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8 111 N.E. 1050 (N.Y. 1916).
9 6 N.Y. 397.
10 Loop v Litchfield, 42 N.Y. 351, xxx (1870).
courts in New York concluded that a defective building, an elevator, and a rope supplied to lift heavy goods 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; and finally, in 1909, that a large coffee urn was inherently dangerous. 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 cases did not question the authority of the earlier cases, 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 defendant. The parties presented the issue as whether the product was inherently dangerous. Cardozo’s celebrated opinion in *MacPherson* dispatched the privity requirement altogether. The court held essentially that a negligent manufacturer would be liable to anyone who could foreseeably be hurt by its negligence. Soon after *MacPherson*, the privity rule was repudiated in many other jurisdictions.

Cardozo has been criticized for not being candid in his treatment of the earlier cases, for not being explicit about the extent to which his opinion changed the law, and for not acknowledging that he was influenced by his own view that the privity rule was not good policy. But whatever the merits of those criticisms, *MacPherson* is an exemplar of how innovation can be consistent with the premises of the common law approach. While Cardozo was very circumspect, he left little doubt that he thought the privity

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11 51 N.Y. 494 (1873).
requirement was a bad idea. But he did not rest (or need to rest) his conclusion on that ground alone. 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.” But by the time of MacPherson, that distinction had broken down. Courts applying it had decided that a steam boiler was part of the ordinary intercourse of life but a coffee urn and a bottle of aerated water were “inherently dangerous.” MacPherson then presented the question of how to classify an automobile. 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.

In particular, Cardozo was able to claim that the outcomes of the earlier decisions were consistent with the principle that a manufacturer is liable for foreseeable injuries caused by its negligence. 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, coffee urn, and aerated water cases—which made much more sense if they were understood as applications of the foreseeability rule rather than the “inherently dangerous” exception.

The MacPherson opinion is famous, but its basic approach is not novel. Even the next major development in product liability law, the movement from negligence to strict

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12 See Edward Levi, An Introduction to Legal Reasoning, and sources cited; also Dworkin.
liability, was the result of opinions that, although different in emphasis and much more explicit about the role of policy, were essentially similar to Cardozo’ s. A crucial part of the argument for strict liability was that the application of the negligence standard, especially conjoined with the doctrine of res ipsa loquitur, was, in practice, increasingly but haphazardly imposing what amounted to strict liability. “It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence.” 13 In addition, explicit strict liability already existed in comparable situations, such as when there was a contract and an implied warranty and when food products were sold. That precedent-based, experiential evidence that the negligence standard was not working—coupled with the superiority of strict liability as a matter of policy—was the justification for the innovation.

In constitutional law, the famous evolution in the due process limits on personal jurisdiction—from Pennoyer v. Neff to International Shoe v. Washington—is another example of common law development on the model of MacPherson. Initially the courts applied the principle that personal jurisdiction had to rest either on the defendant’s presence in the forum or on the defendant’s consent. But the increased use of the corporate form made the notion of presence more and more fictitious. The notion of consent was stretched, and also became increasingly fictitious, to deal both with corporations and with defendants who engaged in business in the forum, or (as in the case of automobile drivers) committed an alleged tort in the forum, and then left. After decades of these increasingly fictitious constructs, the Court in International Shoe established a new principle that made personal jurisdiction depend on the nature of the

defendant’s contacts with the forum state. But the Court in *International Shoe* was able to say that the old rubrics had broken down, and that the cases decided under the old rubrics in fact were more easily understood as resting on the nature of the defendant’s contacts. Those old cases helped demonstrate the soundness of the new principle.

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*. 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. Indeed *Brown* was really known to be such when it 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—a pretty clear sign that it did not find much there 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 answer to that question, it is along these lines.\textsuperscript{14} 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 \textit{Plessy v. Ferguson}, 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. But by 1954, we knew better. We understood that separate but equal was impossible. On this account, \textit{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

\textsuperscript{14} Plurality opinion in Casey; Souter confirmation hearings. Also Dworkin, Lessig, others.
require racial equality. It all depends on what, as a moral matter, equality requires. That 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 judgment? Some defenses 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, and arguments based on moral conceptions seem to acknowledge too little in the way of constitutional restraint. There is, however, a strong common law case to be made for the result in Brown. It was a case made at the time, and in the Court’s opinion, to a degree. The common law argument for Brown relies in part on the moral wrongness of segregation. But it also relies on 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*, decided in 1896, upheld a state law requiring railroads to provide “equal but separate accommodations for the white and colored races.” Rigid racial segregation in fact had shallower roots 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. This was the argument of C. Vann Woodward’s *The Strange Career of Jim Crow*, published in 1957, and the opinion in *Brown*—perhaps adverting to this historical research—made a point of noting that “‘separate but equal’ did not make its appearance in this court until 1896.” That itself is relevant, under the common law approach.

In the two decades following *Plessy*, the Court applied the “separate but equal” principle in two cases involving education without reconsidering its validity.\(^{15}\) The Court also rebuffed, on narrow grounds, Commerce Clause challenges to laws requiring segregation in transportation. 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*,\(^{16}\) the Court dealt with an Oklahoma law requiring separate but equal railroad facilities. This law permitted a railroad to have sleeping, dining, and chair cars for whites even if it did not have

\(^{15}\) Cumming v. Bd. of Ed., 175 U.S. 528 (1899); Gong Lum v. Rice, 275 U.S. 78 (1927).

\(^{16}\) 235 U.S. 151 (1914).
supposedly equal cars for blacks. The state defended the law on the ground that there was essentially no demand from blacks for these facilities. 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.”

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. The suit (which was apparently a deliberately arranged test case) was brought by a white seller seeking specific performance of a contract to sell to a black person. 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. But the state defended the law as a permissible regulation of property, and 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. Missouri operated an all-black state university, Lincoln

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17 Id. at 161-62. See, on how these developments paved the way for *Brown*, Louis Michael Seidman, *Brown and Miranda*, 80 Cal. L. Rev. 673 (1992); Stone et al. casebook.

18 305 U.S. 337 (1938).
University, that did not have a law school. Instead, state law authorized state officials to arrange for blacks to attend law school in neighboring states and to pay their tuition.

The Court ruled that this scheme did not satisfy “separate but equal.” The Court refused to address arguments that out-of-state opportunities for the student were equal to those in Missouri. “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.”

Since 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 equal protection of the laws. The Court also relied on McCabe to dismiss Missouri’s argument that few African-Americans in Missouri sought a legal education (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 be 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

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19 Id. at 349.
20 Id. at 349-50.
21 Id. at 350-51.
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, hold the white primary unconstitutional, and rule that segregation in interstate transportation facilities violated the Commerce Clause. In 1948, Shelley v. Kraemer held that the Constitution forbade the enforcement of racially restrictive covenants. Also in 1948, in Sipuel v. Oklahoma State 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. The Court ruled that the case was controlled by Gaines.

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; 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.” Of course the newly-established school could not possibly match the University of Texas in those respects.

22 332 U.S. 631.
23 On the subsequent proceedings in Sipuel, see Hutchinson, Geo. L.J.
*McLaurin v. Oklahoma State Regents*,24 decided the same day as *Sweatt*, turned entirely on intangible factors. It 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, had to sit alone in the cafeteria, and had a special table in the library. 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.”25 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.”26

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*. After *Sweatt* and *McLaurin*, the New Republic said that segregation was “in handcuffs.” Some Southern law reviews also concluded that those cases meant the end of segregation. The briefs in *Brown*, not surprisingly, emphasized *Sweatt* and *McLaurin*. The opinion in *Brown* 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; the Court in *Brown* said “[s]uch considerations apply

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24 339 U.S. 637.

25 Id. at 641.
with added force to children in grade and high schools.” Brown’s citation of psychological research attracted much more attention, but precedent plays a larger role in the opinion.

Of course, Brown was not received as merely the formal, more or less inevitable culmination 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 parallel to MacPherson. A 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 (in 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, while making some sense under the old rubric, raised questions about what products weren’t inherently dangerous. Like MacPherson, Brown was not dictated by the earlier cases. But it could rely on the earlier cases to show,

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26 Seidman, supra note, at 708.
in effect, that the formal abandonment of the old doctrine was no revolution but just the final step in a common law development.

**B. Gideon**

*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. *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. 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 assistance of counsel for his defense,” applied to the states. In doing so, *Gideon* overruled a precedent—*Betts v. Brady*, which had held, 21 years earlier, that whether counsel must be appointed in a state prosecution was to be decided case by case, under the Due Process Clause, on the basis of the totality of the circumstances, by determining whether the failure to appoint counsel denied “fundamental fairness.”

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. Even the *Gideon* opinion did not 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 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 that preceding *Brown*, and *MacPherson*. The Court’s opinion, written by Justice Black, did discuss precedent, but not in this way; instead it argued that *Betts* itself was an “abrupt departure” from previous cases. But Justice Harlan’s concurring opinion criticized that claim, and Justice Harlan seems to have had the better of the argument. None of the pre-*Betts* cases, fairly read, really suggests an across-the-board rule requiring states to appoint counsel in all felony cases.

The better basis for *Gideon* was that—as Justice Harlan put it—the case-by-case rule of *Betts* “has continued to exist in form while its substance has been substantially and steadily eroded.” 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. 27 The Court reiterated that suggestion in dictum in 1948, and finally issued a square holding to that effect in 1961. 28

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. 29 But at the same time,

28 Hamilton v. Alabama, 368 U.S. 52.
the Court overturned convictions in several cases that presented issues that, while not entirely routine, did not seem exceptionally complex.\textsuperscript{30} Then from 1950 on, the Court, still applying \textit{Betts}, reversed in every right to counsel case that came before it. In each case, the Court identified some occasion, during the proceedings, when the defendant might have benefited from counsel—an objection counsel might have made that the pro se defendant did not;\textsuperscript{31} lines of investigation or argument that “an imaginative lawyer” might have pursued;\textsuperscript{32} or complex tactics that might at least have mitigated the sentence.\textsuperscript{33}

In this way, \textit{Gideon} follows the same common law pattern as \textit{Brown} and \textit{MacPherson}. The Court in \textit{Gideon} was 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 \textit{Betts}. \textit{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 \textit{Betts} was wrong—just as the parallel progression of cases showed that \textit{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.

\textit{Gideon}—like \textit{Miranda}, the reapportionment cases, and even, in an important sense, \textit{Brown}—overturned a discretionary, case-by-case standard for a much more strict rule. This movement to rules was another characteristic of Warren Court decisions, although

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\textsuperscript{30} See, on these developments generally, Israel, 1963 S. Ct. Rev., esp. 257-58.
\footnotesize\textsuperscript{32} See Chewning v. Cunningham, 368 U.S. 443, 446-47 (1960).
\end{flushright}
there are important exceptions. It is sometimes thought that discretionary standards, rather than rules, 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—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 by the precedents. The precedents, in seeking to apply the more flexible approach, had ended up, in fact although not in name, following a rule.

C. Miranda

Miranda v. Arizona, much more controversial than Gideon—and, unlike Brown, still under attack in some quarters—presents a more complex case of common law development. In Brown and Gideon (and MacPherson) the Court was able to say that its decision did little more than ratify a development that had already occurred. The old regime had broken down; it could not coherently 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. 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. 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 did not work very well. Something had to replace it. That conclusion—although not the actual *Miranda* rules themselves—was 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. (Subsequent cases held that statements obtained in violation of *Miranda* could be used for certain purposes, but those decisions are not the concern here.) Before *Miranda*, the admissibility of statements made in response to interrogation was determined by a “voluntariness” test derived from the Due Process Clause. That test asked whether the suspect’s “will” had been “overborne” by the interrogation.

The dissenting opinions in *Miranda* described the voluntariness test as “workable and effective,” but there was, by the time of *Miranda*, abundant evidence that it was not
(including earlier criticism by some of the *Miranda* dissenters).\(^{35}\) 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, and therefore offered insufficient guidance to the police. But the voluntariness test had other problems as well.\(^{36}\) Unlike some other notorious case-by-case approaches—that involved in the obscenity cases before *Miller v. California*, 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. 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.

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. By contrast, 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, but it would at least have provided some coherent metric. But the Court did not go in that direction; in fact, in a 1961 decision, it said that in assessing the voluntariness of a confession the courts should not even consider whether the tactics

\(^{35}\) E.g. Clark’s opinions in Reck v. Pate and Irvine v. CA

\(^{36}\) On these problems, see Schulhofer, Mich. L. Rev. 1982; Kamisar, Dissent from the Miranda dissents.
were likely to produce a false confession. The result was that the Supreme Court was repeatedly fragmented and the lower court decisions showed no coherence.

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. Several decades’ experience provided more than adequate evidence that it did not work. The destructive part of *Miranda*, so to speak, therefore 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. Conspicuously, the *Miranda* opinion justified the rules themselves as a quasi-legislative solution to the problems posed by what the Court thought were prevalent police practices.

It would certainly be possible to argue that some third approach—different from either *Miranda* or the voluntariness test—is better than either. Of course the Court acknowledged this possibility, when it invited a legislative solution and said that an adequate legislative solution could displace the rules it had adopted. It would even be possible to argue, on the merits, that for all the weaknesses of the voluntariness test, the need to obtain confessions was so great—and the *Miranda* rules were 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. The *Miranda* rules themselves

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37 Rogers v. Richmond, 365 U.S. 534, 543-44.
require (and I think can be provided) a different kind of defense, but the decision to abandon the voluntariness test was thoroughly justified under the common law approach.

D. Reapportionment

Of all the Warren Court’s important decisions, the reapportionment cases are the most difficult to fit with a 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 and Reynolds v. Sims, perhaps more than any other major Warren Court decisions, were a sharp break with past 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. 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.

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.
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 uninterrupted) expansion of the franchise. Property qualifications for voting were universal among the colonies; by the time of the Revolution, some had been eliminated. 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. 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. The movement for women’s suffrage gained speed at the beginning of the twentieth century and culminated of course in the Nineteenth Amendment, adopted in 1920. Beginning in the late 1950s, even before the Voting Rights Act, the vote was increasingly restored to blacks in the border South.

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 and succeeded in doing so. 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.”

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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. The reapportionment decisions were no doubt based in part on the Court’s views about the nature of democracy—both the view that 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. But those normative arguments, however strong they are, did not stand alone. They were backed by precedent—not judicial precedent, this time, but the repeated judgments of several generations that restrictions on the franchise should be discarded in favor of political equality.

This background was an integral part of the justification of the reapportionment decisions. The decisions would have been on weaker ground—and the claims that the Court was illegitimately overreaching would have been significantly stronger—if the decisions did not seem to be in keeping with 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 of course 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, the dominant pattern was a series of decisions, by different generations, to expand and equalize the franchise.

On common law premises, decisions of this kind—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 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.

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 interpretation 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.” The same kinds of considerations 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. The history of the expansion of the franchise did not dictate the reapportionment decisions. Other arguments, particularly the argument about the blockage in the political process, were needed. But the broader precedent-based argument—relying not just on what courts did but on what other institutions decided—is in essence a common law approach, and it is an important part of the justification for what the Court did in the reapportionment cases.
III. 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 and 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.

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