

NELCO
NELCO Legal Scholarship Repository

New York University Public Law and Legal Theory
Working Papers

New York University School of Law

6-1-2011

The Gravitational Pull of Race on the Warren Court

Burt Neuborne
NYU School of Law, burt.neuborne@nyu.edu

Follow this and additional works at: http://lsr.nellco.org/nyu_plltwp



Part of the [Civil Rights and Discrimination Commons](#)

Recommended Citation

Neuborne, Burt, "The Gravitational Pull of Race on the Warren Court" (2011). *New York University Public Law and Legal Theory Working Papers*. Paper 280.
http://lsr.nellco.org/nyu_plltwp/280

This Article is brought to you for free and open access by the New York University School of Law at NELCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Public Law and Legal Theory Working Papers by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

THE GRAVITATIONAL PULL OF RACE
ON THE WARREN COURT

The fiftieth anniversary of the *Supreme Court Review* lends itself to “looking backward”¹ to the ferment in constitutional law that began in 1952 with the first oral argument in *Brown v Board of Education*,² and ended twenty-one years later with the plaintiffs’ loss in *San Antonio Independent School District v Rodriguez*³—a ferment that led to the founding of this distinguished journal in 1960 and led me to a career at the American Civil Liberties Union (ACLU).⁴ Much of my work for the ACLU in those heady days was driven by three concerns: (1) opposition to discrimination against black Americans, especially in the South; (2) a perception that many state judges were unable or unwilling to confront issues of racial injustice; and (3) the spectacle of white bureaucracies, especially white police forces,

Burt Neuborne is Inez Milholland Professor of Civil Liberties, New York University Law School.

¹ Edward Bellamy, *Looking Backward: 2000–1887* (Riverside, 1926) (1887), online at <http://www.gutenberg.org/files/25439/25439-h/25439-h.htm>. I cannot promise that my exercise in looking backward is more accurate than Bellamy’s.

² *Brown v Board of Education*, 347 US 483 (1954). The classic history of the *Brown* litigation is Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Racial Equality* (Knopf, 2d ed 2004).

³ 411 US 1 (1973) (rejecting Equal Protection challenge to unequal school funding). The refusal to treat education as a “fundamental right,” *id* at 37, or poverty as a “suspect classification,” *id* at 18–19, 40, marked the end of the Warren Court’s egalitarian surge.

⁴ I served from 1967–74 and 1981–86 as a staff lawyer for the American Civil Liberties Union, the last five years as National Legal Director. Since 1995, I have served as founding Legal Director of the Brennan Center for Justice at NYU Law School.

interacting with black citizens, condescendingly, at best; violently, too often.

My thesis in this article is that concern over racial injustice and state institutional failure was so intense during these twenty-one “Warren years” that it played a significant role in shaping many of the most important constitutional decisions of the Supreme Court in areas as diverse as federalism; separation of powers; criminal law and procedure; freedom of speech, association, and religion; procedural due process of law; and democracy. I believe, as well, that at least some of the changes in constitutional doctrine that have taken place in the post-Warren era, such as the erosion of the exclusionary rule,⁵ the rebalancing of federal-state power,⁶ and the easing of restrictions on aid to parochial schools,⁷ reflect both a decrease in the intensity of the Court’s concern over racial injustice, and an increase in the legal system’s confidence in state and local institutions to act fairly in racially charged settings.

I begin with a summary of selected aspects of Warren Court constitutional doctrine having nothing directly to do with race, arguing that the Justices’ concerns over racial injustice and regional failure to deal fairly with race exercised a gravitational pull on the evolution of constitutional doctrine. I then turn briefly to whether such a gravitational pull should be cause for celebration, condemnation, or a shrug of the shoulders. Finally, I ask why, once the gravitational pull of race had ebbed, certain Warren Court constitutional precedents that appear to owe their genesis, at least in part, to concern over racial injustice and regional failure have flourished, while others have melted away.

⁵ See, for example, *United States v Leon*, 468 US 897 (1984) (creating good-faith exception to exclusionary rule).

⁶ See, for example, *United States v Lopez*, 514 US 549 (1995) (holding that Commerce Clause did not grant the federal government the power to adopt the Gun-Free School Zones Act of 1990).

⁷ See, for example, *Mitchell v Helms*, 530 US 793 (2000) (overruling two prior precedents to find that parochial schools in Louisiana could receive federal aid under Chapter 2 of the Education Consolidation and Improvement Act of 1981).

I. THE GRAVITATIONAL PULL OF RACE ON THE WARREN COURT

Despite the election of President Obama, we do not live in a postracial society.⁸ Significant disparities in earnings,⁹ employment,¹⁰ criminal convictions,¹¹ sentencing,¹² health care,¹³ infant

⁸ The election in 2008 of Barack Obama as the nation's first nonwhite president triggered an outpouring of comment and disagreement over whether America has finally moved beyond race. Much of the discussion is deeply emotional and takes place on the Internet. For a sample of this discussion, compare the views of Dr. John H. McWhorter, contributing editor to the Manhattan Institute's *City Journal*, online at <http://www.manhattan-institute.org/html/mcwhorter.htm>, with views aired at the Aspen Festival Ideas Conference, Ta'Nehisi Coates et al, *Post Racial America: Is Obama a Symbol of the New American Dilemma?* online at http://www.aifestival.org/audio-video-library.php?menu=3&title=603&action=full_info (panel discussion at the 2010 Aspen Ideas Festival), and Lloyd Grove, *We're Not Post-Racial Yet*, Daily Beast (July 8, 2010), online at <http://www.thedailybeast.com/blogs-and-stories/2010-07-08/america-not-yet-post-racial-the-verdict-from-the-aspen-ideas-festival/> (summarizing panel discussion).

⁹ The average per capita income for blacks, Hispanics, and Native Americans in 2009 was 57.1 percent, 48.3 percent, and 52.1 percent of the average for non-Hispanic whites. See US Census Bureau, *S1902: Mean Income in the Past 12 Months (in 2009 Inflation-Adjusted Dollars)*, online at http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2009_1YR_G00_S1902&-ds_name=ACS_2009_1YR_G00_-&-lang=en&-redoLog=false&-CONTEXT=st. In 2009, the median household income of individuals who reported to be white only and non-Hispanic was \$54,461, while the median household income of individuals who reported to be black only was \$32,584. See Carmen DeNavas-Walt, Bernadette D. Proctor, and Jessica C. Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2009* (US Census Bureau, Sept 2010), online at <http://www.census.gov/prod/2010pubs/p60-238.pdf> 35–36.

¹⁰ Unemployment rates for blacks are consistently nearly twice as high as for whites. *Table A-2. Employment Status of the Civilian Population by Race, Sex, and Age* (US Bureau of Labor Statistics, Oct 8, 2010), online at <http://www.bls.gov/news.release/empsit.t02.htm>.

¹¹ Largely because of the nation's drug policies, approximately one-third of all black men in the United States were under the supervision of an aspect of the criminal justice system in 1995. See Marc Maurer and Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later* (Sentencing Project, Oct 1995), online at http://www.sentencingproject.org/doc/publications/rd_youngblack_5yrslater.pdf 3.

¹² As of 2007, 2.1 million men were incarcerated in American prisons: 35.4 percent were black, 32.9 percent were white, and 17.9 percent were Hispanic. The general male population in 2007 was 68 percent white, 12.5 percent black, and 14.5 percent Hispanic. See William J. Sobol and Heather Couture, *Prison Inmates at Midyear 2007*, Bureau of Justice Statistics Bulletin (US Department of Justice, June 2008), online at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim07.pdf>. American blacks are imprisoned at nearly six times the rate of whites. Marc Maurer and Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* (Sentencing Project, June 2007), http://sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf, 3. Nearly 12 percent of the black male population in the United States is currently incarcerated. *Id.* at 4.

¹³ In 2009, 12.0 percent of non-Hispanic whites, 21.0 percent of blacks, and 32.4 percent of Hispanics lacked health insurance. DeNavas-Walt et al, *Income, Poverty, and Health Insurance Coverage* at 26 (cited in note 9). American whites have a life expectancy five years longer than that of blacks. See *Health, United States, 2008* (National Center for Health Statistics, March 2009), online at <http://www.cdc.gov/nchs/data/hus/hus08.pdf> 203 (noting that a white person born in 2005 is expected to live to 78.3 years, while a black person born in 2003 is only expected to live 73.2 years).

mortality,¹⁴ teen pregnancy,¹⁵ and education¹⁶ tell a bleak story of continued racial inequality in America. But, neither do we live in the formally and pervasively racist America that existed in 1952. Remember what our legal world looked like before the Supreme Court intervened in *Brown*.¹⁷ In 1953, the state of Texas forbade

¹⁴ According to the Center for Disease Control's National Center for Health Statistics, the black infant mortality rate is nearly 2.4 times higher than white infant mortality. T. J. Mathews and Marian F. MacDorman, *Infant Mortality Statistics from the 2006 Period Linked Birth/Infant Death Data Set*, 58 Natl Vital Statistics Rep 17 (Natl Vital Statistics System, Apr 30, 2010), online at http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_17.pdf 4 (showing the infant mortality rate is 5.58 percent for babies born to non-Hispanic white mothers but 13.35 percent for babies born to non-Hispanic black mothers). Black infants are almost four times more likely to die from complications associated with low birth weight. *Id.* at 25 (showing a mortality rate related to short gestation and low birthrate of 76.8 per 100,000 live births for babies born to non-Hispanic white mothers and 301.8 per 100,000 live births for babies born to non-Hispanic black mothers). Shockingly, among mothers with at least thirteen years of education, black infant mortality is almost three times as high as comparable white mortality. See *Health, United States, 2008* (cited in note 13) (noting that, in the surveyed states, the infant mortality rate was 4.1 percent for babies born to non-Hispanic whites with at least thirteen years of education but 11.4 percent for babies born to non-Hispanic blacks with at least thirteen years of education). See also Paula Braverman, *Racial Disparities at Birth: The Puzzle Persists*, Issues in Science and Technology (University of Texas at Dallas, Winter 2008), online at http://www.issues.org/24.2/p_braverman.html (discussing possible explanations for why "the black/white birth-outcome disparities have persisted even after taking into account mothers' educational attainment or family income around the time of pregnancy").

¹⁵ Teen pregnancy among blacks decreased more than 45 percent from 1990 to 2005, but was still more than 2.4 times the rate of whites in 2005. See *U.S. Teen Pregnancies, Births and Abortions: National and States Trends and Trends by Race and Ethnicity* (Guttmacher Institute, Jan 2010), online at <http://www.guttmacher.org/pubs/USTPTrends.pdf> 6 (showing pregnancy rates among women ages 15–19).

¹⁶ As of 2003, there were "racially correlated disparities in K–12 education [for] grades, test scores, retention and dropout rates, graduation rates, identification for special education and gifted programs, extracurricular and cocurricular involvement, and discipline rates." Roslyn Arlin Mickelson, *When Are Racial Disparities in Education the Result of Racial Discrimination? A Social Science Perspective*, 105 *Teachers College Record* 1052, 1055 (Aug 2003). See also Thomas D. Snyder, Sally A. Dillow, and Charlene M. Hoffman, *Digest of Education Statistics: 2008* (National Center for Education Statistics, March 2009), online at <http://nces.ed.gov/pubs2009/2009020.pdf>, 25 (showing racial disparity in achievement of bachelor's degrees and high school completion); *id.* at 87 (showing that whites are classified as gifted and talented students more than twice as often); *id.* at 169 (showing a higher black high school dropout rate than white high school dropout rate); *id.* at 178 (showing a higher average reading score for whites than blacks); *id.* at 194 (showing a higher mathematics score for whites than blacks); Susan Aud et al, *The Condition of Education 2010* (National Center for Education Statistics, May 2010), online at <http://nces.ed.gov/pubs2010/2010028.pdf>, 171, 177 (showing that reading and mathematics gap continued in 2009).

¹⁷ The following description of representative pre-*Brown* state apartheid statutes is drawn from Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 *Mich L Rev* 1, 25–26 (1984). I drew heavily on the Choper article for my 2004 speech to the New York State Judiciary on the fiftieth anniversary of *Brown*. Burt Neuborne, *Brown at 50* (American Bar Association), online at <http://www.abanet.org/publiced/lawday/finch/2ndplacefinch04.pdf> (speech given at the New York State Supreme

interracial boxing matches. In Florida, black and white students were forbidden to use the same edition of a school textbook. In Arkansas, black and white voters could not enter a polling place in each others' company. In Alabama, a white nurse was forbidden to care for a black male patient. Six states required separate bathroom facilities for black and white employees. In six states, black and white prisoners could not be chained together. In seven states, tuberculosis patients of different races could not be treated together. In eight states, all forms of public recreation—from parks to beaches to ball fields to movie theaters—were racially segregated by law. Ten states required segregated waiting rooms for public transportation. Eleven states required blacks to ride in the back of the bus. Fourteen states segregated railroad passengers by race. Seventeen states mandated racial segregation in public education, while four additional states and the District of Columbia permitted it. A black family thinking about a vacation had to buy a guide to local places where they could eat and sleep.¹⁸ Black musicians and baseball players kept lists of restaurants where they could buy food at the back door.¹⁹ Entire categories of employment were closed to blacks.²⁰ Racially motivated violence directed at blacks was rampant, especially if they sought to vote in the South.²¹ Lynchings of blacks

Court's Annual Law Day Ceremony on May 7, 2004). For studies of American Apartheid, see generally Jerrold M. Packard, *American Nightmare: The History of Jim Crow* (St. Martin's, 2002); C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford, 1955). For a comprehensive description of the massive segregation of southern society in 1950, where 70 percent of American blacks then lived, see Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 Harv L Rev 973, 986, 1006–29 (2005), refuting the contention in Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford, 2004), that pre-*Brown* race relations in the South were progressing well and were disrupted by *Brown*.

¹⁸ See *Heart of Atlanta Motel Inc. v United States*, 379 US 241, 252–53 (1964) (describing legislative finding about a special guidebook blacks used to travel); Brief for Appellees, *Heart of Atlanta Motel Inc. v United States*, No 515, *39–46 & n 31 (filed Sept 28, 1964) (describing legislative hearings on the effects of segregation on travelers and noting existence of a guidebook).

¹⁹ *Id.*

²⁰ See *Griggs v Duke Power Co.*, 410 US 424 (1971) (describing racially tracked employment categories).

²¹ See 1 *1961 Report of the U.S. Commission on Civil Rights* 5 (GPO, 1961), online at <http://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk1.pdf> (“In some 100 counties in eight Southern States there is reason to believe that Negro citizens are prevented—by outright discrimination or by fear of physical violence or economic reprisal—from exercising the right to vote.”); *id.* at 27 (noting threat of violence and activity of the Klan in Monroe County, Alabama); *id.* at 28–29 (describing that “[c]rosses were burned and fire bombs hurled” at registered blacks in Liberty County, Florida); *id.* at 30 (noting “threat of physical violence” in Lee County, Florida); *id.* at 31 (noting “economic or physical

were recorded as late as 1964, bringing the shameful documented total to more than 1,500 during the twentieth century.²²

For many Americans in 1952, racial discrimination was a cancer threatening to destroy the nation. Some perceived American racism as a betrayal of the generation that had fought Nazism and had sacrificed so much for American ideals. I remember my father and his friends angrily asking each other why they had gone to war if not to end racism. Some correctly perceived pervasive racial injustice as a threat to national security. Domestically, the Communist Party was able to expand its allure by highlighting its stand against racism.²³ With the Cold War, it became clear that the Soviets were willing and able to use American racism as a powerful weapon against the United States in the worldwide struggle for supremacy.²⁴

In 1947, Jackie Robinson and Branch Rickey integrated major league baseball.²⁵ In 1948, President Truman desegregated the armed forces by executive order,²⁶ and the Supreme Court outlawed

reprisals, or threats of such reprisals” to disenfranchise blacks in Mississippi); *id.* at 180 (“[I]n five of seventeen nonvoting counties there were specific incidents of police brutality against Negroes [I]n four counties reports were received of incidents involving violence against Negroes in which police (apparently deliberately) refused to take action.”).

²² See Douglas Linder, *Lynchings: By Year and Race* (University of Missouri–Kansas City School of Law), online at <http://www.law.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html>. Some consider these numbers to be “conservative.” Robert A. Gibson, *The Negro Holocaust: Lynching and Race Riots in the United States, 1880–1950*, Themes in Twentieth Century American Culture, 1979, vol II (Yale–New Haven Teachers Institute), online at <http://www.yale.edu/ynhti/curriculum/units/1979/2/79.02.04.x.html>.

²³ The American Communist Party exploited appalling racial incidents like the Scottsboro case to appeal to Americans who had little interest in, or understanding of, the party’s economic or revolutionary rhetoric. See generally James Goodman, *Stories of Scottsboro* (Vintage, 1st ed 1995). My experience with representing a number of Communist Party members in the 1960s and 1970s was that militant opposition to domestic racial discrimination was the party’s most effective recruiting device.

²⁴ See generally Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, 2000).

²⁵ My longtime colleague at the ACLU, Ira Glasser, has prepared a useful summary of the events leading up to Rickey’s decision. Ira Glasser, *Branch Rickey and Jackie Robinson: Precursors to the Civil Rights Movement* (The World & I Online, March 2003), online at <http://www.worldandi.com/specialreport/2003/March/Sa22948.htm>. For a more conventional biography, see Arnold Rampersad, *Jackie Robinson: A Biography* (Borzoi, 1997).

²⁶ 13 Fed Reg 4313 (1948) (Executive Order 9981). The events leading up to the Executive Order and the struggle to give it effect are usefully captured in a time line prepared by the Harry S. Truman Library and Museum, online at http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/index.php?action=chronology. Issuing the Executive Order was the beginning of a fifteen-year effort to provide black servicemen with equal access to voting, housing, and recreation. See generally Morris J. Macgregor, Jr., *Integration of the Armed Forces, 1940–1965* (Center of Military History, United States Army, 1985), online at <http://www.history.army.mil/books/integration/iaf-fm.htm>, for documentation of the reaction to integration.

the enforcement of racially restrictive real estate covenants.²⁷ In 1950, the Court outlawed racially segregated state law schools.²⁸ In 1952, the Supreme Court began the process of ending public school segregation in *Brown*, ushering in an era during which the issues of race and regional failure were catapulted to the center of the nation's consciousness.

Brown triggered an explosion of legal energy that dismantled American apartheid. In 1954, segregated municipal facilities on public land were banned.²⁹ Segregated public beaches were banned in 1955.³⁰ Laws requiring blacks to ride in the back of the bus were banned in 1956.³¹ Segregated parks and playgrounds were invalidated in 1958,³² and the Supreme Court (with three new members) formally and unanimously reiterated its commitment to *Brown* in an opinion signed by all nine Justices.³³ In 1959, laws banning interracial boxing were invalidated.³⁴ In 1962, segregation in airport restaurants was struck down.³⁵ In 1963, segregated courtrooms were outlawed.³⁶ In 1964, racial designations on the ballot³⁷ and separate voting and property tax records were banned.³⁸ Public libraries were integrated in 1966.³⁹ Laws banning interracial marriage were banned in 1967.⁴⁰ Racial segregation in prisons was banned in

²⁷ *Shelley v Kraemer*, 334 US 1 (1948).

²⁸ *Sweatt v Painter*, 339 US 629 (1950).

²⁹ *Muir v Louisville Park Theatrical Association*, 347 US 971 (1954) (remanding for consideration in light of *Brown*). In the months after *Brown*, the Court issued a series of per curiam orders affirming lower court decisions outlawing segregated facilities. See Vincent James Strickler, *Green-Lighting Brown: A Cumulative-Process Conception of Judicial Impact*, 43 Ga L Rev 785, 825–27 (2009), for a description and listing of the per curiam opinions. The last of the per curiam orders was the 1956 order in *Gayle v Browder*, 352 US 903 (1956), ending racial segregation in public transportation in Montgomery, Alabama.

³⁰ *Mayor of Baltimore v Dawson*, 350 US 877 (1955).

³¹ *Gayle*, 352 US at 903.

³² *New Orleans City Park Improvement Association v Detiege*, 358 US 54 (1958). See also *Holmes v Atlanta*, 350 US 879 (1955) (municipal golf courses).

³³ *Cooper v Aaron*, 358 US 1 (1958).

³⁴ *State Athletic Commission v Dorsey*, 359 US 533 (1959).

³⁵ *Turner v Memphis*, 369 US 350 (1962).

³⁶ *Johnson v Virginia*, 373 US 61 (1963).

³⁷ *Anderson v Martin*, 375 US 399 (1964).

³⁸ *Virginia Board of Elections v Hamm*, 379 US 19 (1964).

³⁹ *Brown v Louisiana*, 383 US 131 (1966).

⁴⁰ *Loving v Virginia*, 388 US 1 (1967). See also *McLaughlin v Florida*, 379 US 184 (1964) (invalidating laws banning interracial cohabitation).

1968,⁴¹ and the Court held that the mandate of the post-*Brown* cases was that “racial discrimination would be eliminated root and branch.”⁴² By the time Earl Warren retired in 1969, Jim Crow was dead.

But the judicial energy released by *Brown* was not confined to ending Jim Crow. *Brown* sparked a remarkable nonviolent movement, centered in the South, aimed at achieving racial equality.⁴³ Much of the Warren Court’s constitutional jurisprudence having nothing formal to do with race was in response to, and in defense of, this struggle for racial justice. When the charismatic influence of the civil rights movement waned—in part, a tribute to its own success;⁴⁴ in part, a victim of excesses by others;⁴⁵ in part, the result of the assassination of its three great national leaders, John Kennedy, Robert Kennedy, and Dr. King; and in part, a victim of the stubborn persistence of racism⁴⁶—post-Warren Court constitutional doctrine often turned back toward pre-Warren standards.

A. RACE AND FEDERALISM

The gravitational pull of race is nowhere more evident than in

⁴¹ *Lee v Washington*, 390 US 333 (1968).

⁴² *Green v County School Board of New Kent County*, 391 US 430, 437–38 (1968).

⁴³ The classic three-volume history of the civil rights movement is Taylor Branch, *Parting the Waters: America in the King Years: 1954–63* (Simon and Schuster, 1988); Taylor Branch, *Pillar of Fire: America in the King Years: 1963–65* (Simon and Schuster, 1998); Taylor Branch, *At Canaan’s Edge: America in the King Years: 1965–68* (Simon & Schuster, 2006). See also Juan Williams, *Eyes on the Prize: America’s Civil Rights Years, 1954–1965* (Viking, 1987), drawn from the six-hour PBS documentary produced by Henry Hampton chronicling the civil rights movement in the South from 1954 to 1965.

⁴⁴ In the wake of President Kennedy’s assassination, Congress enacted comprehensive federal laws banning discrimination in employment, housing, voting, and access to federally funded programs. See Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC §§ 1971, 1975a–1975d, 2000a–2000h–6; Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 437, codified as amended at 42 USC §§ 1971, 1973–1973bb; Fair Housing Act of 1968, Pub L No 90-284, Title VIII, 82 Stat 81, codified as amended at 42 USC §§ 3601–19, 3631. We live in the better world those statutes made.

⁴⁵ Urban riots in Harlem (1964), Los Angeles (Watts) (1965), Newark (1967), and Detroit (1967) badly eroded national support for the civil rights movement. Lacking effective national leadership after the assassinations of Dr. King and Robert Kennedy, the movement’s political influence waned. For a description of the urban riots, see generally *Report of the National Advisory Commission on Civil Disorders* (GPO, 1968) (Kerner Commission).

⁴⁶ See Thomas Powell, *The Persistence of Racism in America* (Littlefield Adams, 1993) (describing connections between bases for American thought and racism); Eduardo Bonilla-Silva, *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States* (Rowman & Littlefield, 2d ed 2006) (arguing that white articulation of color blindness is a tool to mask and continue white supremacy).

the Warren Court's federalism decisions. In the years after *Brown*, a national consensus emerged that legally reinforced racism was unacceptable; but pockets of intense resistance persisted at the local level, especially in the states of the old Confederacy.⁴⁷ Because one of the principal purposes of federalism is to protect local majorities that are out of step with a national majority, the civil rights movement in the South was often on a collision course with federalism. The federalism decisions of the Warren Court, which consistently favored national over state or local institutions, were deeply influenced by the Court's mistrust of the willingness of state and local officials to deal fairly with racially charged issues.

The Warren Court's race-driven federalism cases begin with *Thompson v City of Louisville*,⁴⁸ which reversed a Louisville police court loitering conviction because of the absence of any evidence of guilt. While the Court's opinion speaks in the racially anodyne language of the Due Process Clause, the Court knew from the briefs that *Thompson* was a paradigm example of white cops rousting a poor black who then had the effrontery to fight back in court.⁴⁹ All too often, state courts were useless in dealing with such race-driven issues—and the Warren Court knew it.

Thompson could be invoked only when there was absolutely no evidence of guilt in the record.⁵⁰ When some evidence existed

⁴⁷ Senator Harry F. Byrd's call for "massive resistance" issued on February 24, 1956, is an example of the intensity of local resistance to *Brown*. See *Brown v. Board of Education: Virginia Responds: The State Responds: Massive Resistance* (Library of Virginia, Dec 2003), online at <http://www.lva.virginia.gov/exhibits/brown/resistance.htm>. See also 102 Cong Rec 4460–61 (March 12, 1956) (statement of Sen. George) (reading into the record "The Southern Manifesto," promising defiance of *Brown*, signed by nineteen of twenty-two southern senators and a large majority of representatives); Cong Rec 4515–16 (March 12, 1956) (statement of Rep. Smith of Virginia) (same). Five southern states—Alabama, Georgia, Mississippi, South Carolina, and Virginia—enacted similar resolutions. See 1 Race Rel L Rep 437–47 (1956) (reprinting the material). Southern governors competed with one another in promising defiance.

⁴⁸ 362 US 199 (1960).

⁴⁹ You can scour the unanimous opinion in *Thompson* in vain for any mention of Sam Thompson's race, but Louis Lusky's elegant Supreme Court brief notes that the incident begins with Thompson's decision to contest two earlier unjustified arrests, including a warrantless arrest for vagrancy and loitering in the "colored" waiting room of a Louisville bus station. Brief for Petitioner, *Thompson v City of Louisville*, No 59, *8–10 (filed Sept 21, 1959) (available on Westlaw at 1959 WL 101527).

⁵⁰ The Court invoked *Thompson* to reverse the breach-of-the-peace convictions of lunch-counter sit-in demonstrators in *Garner v Louisiana*, 368 US 157 (1961), noting that there was no evidence of breach of the peace in the record. *Id.* at 163–64, 170–74. See also *Brown v Louisiana*, 383 US 131 (1966) (relying on the framework in *Garner*, which was based on *Thompson*, to invalidate a breach-of-peace conviction for a library sit-in).

supporting the conduct of the police, hostile or indifferent state courts remained free to ignore the racist nature of police behavior, and, too often, that is precisely what they did. Because the Supreme Court's institutional ability to review such fact-bound cases on appeal was limited, *Thompson* was quickly followed in 1961 by *Monroe v Pape*,⁵¹ and, in 1963, by *Townsend v Sain*⁵² and *Fay v Noia*,⁵³ broadly opening the politically-insulated federal district courts to constitutional claims, especially in settings requiring fact-finding. As in *Thompson*, there is no reference to race in the majority opinion in *Monroe v Pape*, other than a discussion of the origins of the Fourteenth Amendment.⁵⁴ The majority opinion in the case describes an unlawful Chicago police entry into a home at 4:00 a.m., during which a husband and wife were required to stand naked for an extended period of time, after which the husband was held at the police station for 10 hours on so-called "open" charges.⁵⁵ But the briefs (and Justice Frankfurter's dissent) reveal that, while being forced to stand naked, Mr. Monroe was called a "nigger" and was referred to as "black boy."⁵⁶

The petitioners in *Townsend v Sain* and *Fay v Noia* appear to have been white. Noia had been convicted of felony murder in 1942, and had declined to appeal because a retrial might have subjected him to the death penalty.⁵⁷ His two codefendants appealed and ultimately secured a federal court ruling that their confessions had been unconstitutionally coerced.⁵⁸ New York courts refused to entertain a postconviction application by Noia, holding that his failure to appeal foreclosed state postconviction relief.⁵⁹ In the Supreme Court, the Kings County District Attorney conceded that Noia had been convicted on the basis of an unlaw-

⁵¹ 365 US 167 (1961).

⁵² 372 US 293 (1963).

⁵³ 372 US 391 (1963).

⁵⁴ See, for example, *Monroe*, 365 US at 173–74, 178 (Douglas). Justice Douglas wrote for the Court, with Justices Harlan and Stewart concurring. Justice Frankfurter dissented.

⁵⁵ *Id.* at 169 (Douglas).

⁵⁶ *Id.* at 203 (Frankfurter); Brief for Petitioners, *Monroe v Pape*, No 39, *4–5 (filed Aug 25, 1960) (available on Westlaw at 1960 WL 63600) ("Monroe Brief"). The brief also notes that the officers hit Mr. Monroe several times and hit four of Monroe's six children. *Monroe Brief* at *4–5.

⁵⁷ *Noia*, 372 US at 394, 396–97 n 3.

⁵⁸ *Id.* at 394–95.

⁵⁹ *Id.* at 394.

fully obtained confession, but argued that by failing to appeal in 1942, he had waived his right to federal habeas corpus review.⁶⁰ While race plays no overt role in the case, it is telling that Justice Brennan's decision relaxing the waiver rules relied on the fact that one of the major aims of the 1867 habeas corpus statute was to protect the constitutional rights of newly freed slaves against hostile state judiciaries.⁶¹ Similarly, after Townsend's apparently drug-induced confession was found voluntary by the Illinois state courts, Chief Justice Warren's opinion opened the door to widespread federal oversight over state court fact-finding in constitutional contexts.⁶²

Monroe v Pape, *Townsend v Sain*, and *Fay v Noia* ushered in a judicial version of Reconstruction, during which federal district judges exercised front-line supervisory authority in racially charged settings over state and local institutions including criminal courts, police departments, detention facilities, highway departments, firefighters, transportation facilities, parks, public schools, and public housing authorities.⁶³

The Warren Court's extremely broad view of Congress's power to enforce individual rights under the Commerce Clause and to enforce the Reconstruction Amendments was also driven by concerns over race. In 1964, in *Katzenbach v McClung*,⁶⁴ the Court employed an expansive vision of the Commerce Clause to uphold the application of the federal ban on racial discrimination in access to public accommodations to a small restaurant (Ollie's Barbecue) located eleven blocks from an interstate highway.⁶⁵ Similarly, in *Heart of Atlanta Motel Inc. v United States*,⁶⁶ the Court upheld the

⁶⁰ Id at 395–96; Brief of Attorney General of New York, Amicus Curiae, in Support of Reversal, *Fay v Noia*, No 84, *2–3 (filed Dec 3, 1962) (available on Westlaw at 1962 WL 115489).

⁶¹ *Noia*, 372 US at 415–17.

⁶² See *Townsend*, 372 US at 315–18 (discussing when a federal district court will have to have a hearing to review facts from state courts).

⁶³ In *Adickes v S. H. Kress & Co.*, 398 US 144 (1970), the Court reinforced *Monroe* with generous pleading rules. The crucial role of the federal district courts in the South in the struggle for racial equality is described in J. W. Peltason, *58 Lonely Men: Southern Federal Judges and School Desegregation* (1961).

⁶⁴ 379 US 294 (1964).

⁶⁵ See id at 298–305 (holding Congress had power under Commerce Clause and Necessary and Proper Clause to pass Title II of the Civil Rights Act of 1964); id at 296 (describing the restaurant).

⁶⁶ 379 US 241 (1964).

application of the public accommodations statute to a motel “readily accessible to” two interstate highways and two state highways.⁶⁷ As in *McClung*, the Court in *Heart of Atlanta* relied on the Commerce Clause, rather than taking on the difficult question whether Section 5 of the Fourteenth Amendment authorized federal legislation against racially discriminatory private action.⁶⁸ Two years later, in *United States v Guest*⁶⁹ and *United States v Price*,⁷⁰ the Court upheld indictments charging private persons with interfering with the enjoyment of federal constitutional rights. In *Guest*, a black Army Reserve officer was murdered in Georgia while returning home to Washington, D.C.⁷¹ The defendants were acquitted of murder in a Georgia court and then indicted under 18 USC § 241 for conspiring to deprive a black citizen of the right to interstate travel and of equal enjoyment of state-operated facilities.⁷² Justice Stewart, writing for the Court, ducked the issue of Congress’s power under Section 5, ruling instead that the indictment adequately charged state involvement by alleging that the defendants had filed false reports of illegal activities by the victim.⁷³ Six Justices held that the allegations implied cooperation by state officials in acting on the false reports, and the remaining three were willing to assume state action.⁷⁴ I have defended more than a few criminal cases in my time, but I have never seen a more generous reading of an indictment.⁷⁵

⁶⁷ See *id* at 243 (describing the motel).

⁶⁸ See *id* at 253–38 (determining Commerce Clause gave Congress power to pass Title II of the Civil Rights Act of 1964). I thought then, and think now, that it was a mistake to have avoided the Section 5 issues raised in the public accommodations cases. It was a shame to have wasted the votes when we had them.

⁶⁹ 383 US 745 (1966).

⁷⁰ 383 US 787 (1966).

⁷¹ Michal R. Belknap, *The Legal Legacy of Lemuel Penn*, 25 *Howard L J* 467, 467 (1982) (briefly describing murder victim Penn and his murder). For the factual background of the case, see generally *id*.

⁷² *Guest*, 383 US at 746–47 (noting indictment); *id* at 747–48 n 1 (noting that two of the defendants were found not guilty in state court).

⁷³ *Id* at 756–57 (noting that indictment alleges state action strongly enough to prevent dismissal).

⁷⁴ *Id* (Stewart); *id* at 761–62 (Clark, J, joining the opinion and agreeing with Stewart’s indictment construction); *id* at 762 (Harlan, J, concurring and dissenting) (concurring with Part II in which Stewart found enough state action); *id* at 776 n 1 (Brennan, J, concurring and dissenting) (assuming that the entire indictment could “be construed to show discriminatory conduct by state law enforcement officers”).

⁷⁵ Justice Harlan, who dissented from Part III in *Guest*, agreed that the indictment

In addition, Justice Stewart recognized a constitutional right to interstate travel that was not dependent on the Fourteenth Amendment, and held that a conspiracy formed with the purpose of interfering with interstate travel fell comfortably within Congress's power to regulate private behavior.⁷⁶ In separate opinions, six of the Justices went even further, noting that Congress possesses power under Section 5 of the Fourteenth Amendment to enforce Section 1 rights against private interference.⁷⁷ Congress subsequently read the six concurring votes in *Guest* as resolving the issue in favor of congressional power.⁷⁸

Price was an easier federalism case, involving indictments of three local law enforcement officials and fifteen private persons for conspiring to murder three young civil rights workers, Andrew Goodman, Mickey Schwerner, and James Chaney, in Philadelphia, Mississippi, in 1964.⁷⁹ The conspiracy involved falsely arresting the civil rights workers, releasing them from jail in the middle of the night, and murdering them as they left town.⁸⁰ The Court ruled unanimously that joint public-private behavior aimed at denying constitutional rights was both action "under color of law" for the purposes of 18 USC § 242, and satisfied the Fourteenth Amendment's state action requirement.⁸¹ Finally, in *Griffin v*

implied cooperation by state officials. See *id* at 762–63, 774 (Harlan, J, concurring and dissenting).

⁷⁶ *Id* at 757–60 (discussing right to travel, recent cases such as *Heart of Atlanta Motel* and *McClung*, and Congress's power to protect against specific intent to interfere with that right).

⁷⁷ *Id* at 762 (Clark, J, concurring and dissenting) ("[I]t is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."); *id* at 782 ("§ 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.").

⁷⁸ In 1968, Congress enacted the Civil Rights Act of 1968, Pub L No 90-284, Title 1, 82 Stat 73, codified at 18 USC § 245 as amended, explicitly reaching certain private conspiracies to interfere with the enjoyment of rights protected under Section 1 of the Fourteenth Amendment.

⁷⁹ Mickey Schwerner was a Cornell classmate. We each graduated in 1961. I went to Harvard Law School. Mickey went to social work school, and, in 1963, headed south to register black voters. I dedicate this piece to his memory.

⁸⁰ *Price*, 383 US at 790.

⁸¹ *Id* at 792–96 (finding the defendants' action would be "under color" of law for § 242 in all counts of the indictment); *id* at 794–95 n 7 (finding that § 242's "under color" requirement is the same as the Fourteenth Amendment's state action requirement).

*Breckenridge*⁸² a unanimous Court invoked Section 2 of the Thirteenth Amendment to uphold the application of 42 USC § 1985(3) to a conspiracy to deny blacks “basic rights that the law secures to all free men.”⁸³ The case involved a brutal attack on a group of black passengers in a car near the Mississippi-Alabama border.⁸⁴

In *South Carolina v Katzenbach*,⁸⁵ the Warren Court relied on Section 2 of the Fifteenth Amendment to uphold the constitutionality of provisions of the Voting Rights Act of 1965. The Court upheld the complex trigger mechanism for the Voting Rights Act,⁸⁶ as well as the suspension of literacy tests in covered subdivisions for a five-year period,⁸⁷ and the dramatic preclearance remedy requiring a covered subdivision to secure federal permission from the Department of Justice before changing any aspect of its election laws.⁸⁸ In effect, the preclearance provisions of Section 5 of the Voting Rights Act declared the southern states to be in moral bankruptcy when it came to allowing blacks to vote, and placed them under federal receivership. The Court went further in *Katzenbach v Morgan*,⁸⁹ invoking Section 5 of the Fourteenth Amendment to uphold Congress’s suspension of an English-language literacy test in New York that operated to disenfranchise Spanish-speaking voters from Puerto Rico.⁹⁰ There is even language in

⁸² 403 US 88 (1971).

⁸³ *Id.* at 105. Justice Stewart relied, as well, on the right to interstate travel. *Id.* at 105–07.

⁸⁴ *Id.* at 94–96 (quoting petitioners’ complaint).

⁸⁵ 383 US 301 (1966).

⁸⁶ The trigger required recent use of a “test or device” (like a literacy test) to measure the right to vote, coupled with sub-50 percent participation in recent elections. An escape hatch existed permitting a covered subdivision to escape by demonstrating that no taint of racial discrimination in voting was taking place within its borders. See generally *Northwest Austin Municipal Utility District Number One v Holder*, 129 S Ct 2504 (2009) (describing the history of the Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 438, codified at 42 USC 1973 et seq).

⁸⁷ *South Carolina v Katzenbach*, 383 US 30 (1966). Justice Douglas, writing for a unanimous Court in *Lassiter v Northampton County Election Board*, 360 US 45 (1959), had upheld the constitutionality of North Carolina’s literacy test under the Fourteenth Amendment. In 1970, a fragmented Court unanimously upheld Congress’s power to suspend literacy tests throughout the United States. *Oregon v Mitchell*, 400 US 112 (1970). But see *City of Boerne v Flores*, 521 US 507 (1997) (finding that the Religious Freedom Restoration Act exceeded Congressional authority).

⁸⁸ See *Allen v State Board of Elections*, 393 US 544, 565–70 (1969), for the Warren Court’s broad construction of Section 5.

⁸⁹ 384 US 641 (1966).

⁹⁰ The Warren Court consistently treated activity harmful to Hispanics as a racial issue. See, for example, *Hernandez v Texas*, 347 US 475 (1954).

Katzenbach v Morgan suggesting a “one way ratchet,” enabling Congress to go beyond Section 1 of the Fourteenth Amendment in enacting remedial legislation under Section 5.⁹¹

In *Jones v Alfred H. Mayer Co.*,⁹² and *Sullivan v Little Hunting Park*,⁹³ the Warren Court ended the decade by construing the Civil Rights Act of 1866⁹⁴ broadly to provide federal remedies against private racial discrimination in the sale or lease of housing. The Court upheld the act under Section 2 of the Thirteenth Amendment. In *Runyon v McCrary*,⁹⁵ the Court extended the 1866 statute to ban racial discrimination in entry to private, commercially operated nonsectarian schools.⁹⁶

The Warren Court’s treatment of “state action” also reflected the gravitational pull of race. Even before Warren’s appointment, the Court had adopted a broad view of state action in order to deal with private agreements to exclude blacks from voting and buying a home.⁹⁷ In *Evans v Newton*,⁹⁸ the Court refused to permit Macon, Georgia, to substitute private trustees to operate a white-only park under a 1911 will. The park had been administered by Macon authorities.⁹⁹ In *Burton v Wilmington Parking Authority*,¹⁰⁰ the Court struggled to find state action in routine financial support for private commercial facilities. In *Norwood v Harrison*,¹⁰¹ the

⁹¹ *Katzenbach v Morgan*, 384 US 641, 649 (1966).

⁹² 392 US 409 (1968).

⁹³ 396 US 229 (1969).

⁹⁴ Civil Rights Act of 1866, 14 Stat 27 (1866), codified at 42 SC §§ 1981 and 1982.

⁹⁵ 427 US 160 (1976).

⁹⁶ The *Runyon* Court did not apply the 1866 statute to religiously affiliated white-only schools. See text accompanying notes 109–12 for a discussion of the Supreme Court’s refusal of tax deductible status to “charitable” contributions to such schools in *Bob Jones University v United States*, 461 US 574 (1983).

⁹⁷ See, for example, *Shelley v Kraemer*, 334 US 1 (1948); *Barrows v Jackson*, 346 US 249 (1953); and *Terry v Adams*, 345 US 461 (1953).

⁹⁸ 382 US 296 (1966).

⁹⁹ In *Evans v Abney*, 396 US 435 (1970), the Court’s ingenuity ran out, and it upheld a Georgia ruling under the *cy pres* doctrine that since the terms of the 1911 bequest had become unenforceable, the property reverted to the heirs of the testator. Given the Court’s decision the next term in *Palmer v Thompson*, 403 US 217 (1971), upholding a decision to close a municipal swimming pool rather than operate it on an integrated basis, the final denouement in *Evans* is more properly seen as a substantive judgment than a state action case. See also *Bell v Maryland*, 378 US 226 (1964) (avoiding a ruling on whether the enforcement of trespass laws against sit-in demonstrators constituted state action).

¹⁰⁰ 365 US 715 (1961).

¹⁰¹ 413 US 455 (1973).

Court struck down Mississippi's provision of free textbooks to all schools, both public and private, noting that the technique imperiled the enforcement of *Brown* by funneling state aid to segregated private schools.¹⁰² In short, the Warren Court's Federalism decisions reflect an unremitting suspicion of state and local institutions in any setting involving race.

B. RACE AND THE SEPARATION OF POWERS

The Warren Court's separation of powers cases also reflect the gravitational pull of race. In *Cooper v Aaron*,¹⁰³ confronted by a refusal to desegregate a high school in Little Rock, Arkansas, the Court issued the most sweeping assertion of judicial power in the nation's history, insisting that state officials are obliged to comply with the Supreme Court's reading of the Constitution—even in the absence of a court order directing compliance. In *Cooper*, Little Rock school officials acknowledged a duty to comply with court-ordered desegregation. If, however, a black student sought to enroll without a court order, officials often refused admission because, in their opinion, *Brown* had been wrongly decided. Since, prior to the emergence of the modern class action, it was impossible to supply every black schoolchild with an individual court order, such passive resistance posed a severe hurdle to the implementation of *Brown*. The Warren Court met the challenge by issuing an opinion signed by all nine Justices reaffirming the Court's support for *Brown* and treating its reading of the Fourteenth Amendment as the definitive statement of the Constitution's meaning, denying state officials the authority to justify failure to comply with Supreme Court precedent. The adoption of Rule 23(b)(2)¹⁰⁴ in 1966 solved the *Brown* enforcement problem by authorizing a "civil rights" class action in which one or two students, acting as named plaintiffs, could obtain a court order on behalf of all similarly situated students.¹⁰⁵ But the Court's imperial

¹⁰² See also *Gilmore v City of Montgomery*, 417 US 556 (1974) (enjoining exclusive use of public athletic facilities by segregated private schools because it eroded enforcement of *Brown*, 347 US 483 (1954); remand to determine whether nonexclusive use imperiled implementation of *Brown*).

¹⁰³ 358 US 1 (1958).

¹⁰⁴ FRCP 23(b)(2).

¹⁰⁵ Certification of a Rule 23(b)(2) class, which does not require notice or an opportunity to opt out, was designed to be virtually automatic to facilitate its use in the South. See John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?* 24 Miss

pronouncement in *Cooper* continues to echo in cases like *City of Boerne*¹⁰⁶ and *Dickerson*.¹⁰⁷

The Warren Court's decision to dispense with traditional standing requirements in *Flast v Cohen*¹⁰⁸ was also driven, at least in part, by concerns over race. *Flast* authorized a taxpayer to challenge government funding of parochial schools without the necessity of satisfying the usual injury-in-fact requirements. While a principled argument can be made that requiring a plaintiff to allege an injury-in-fact in connection with an Establishment Clause challenge risks pitting religions against each other, the Court's decision to dispense with traditional standing in *Flast* was designed to counter a key strategy in the South's massive resistance campaign, which was to establish and fund private alternatives to integrated public education.¹⁰⁹ While direct government funding of the "white academies" was quickly found unconstitutional, and indirect funding was ended by cases like *Norwood v Harrison*,¹¹⁰ segregationists had two more government-funding strings to their bow—tax deductible private contributions to segregated educa-

Col L Rev 323 (2005). Without the gravitational pull of race, some have suggested that the Due Process Clause requires notice and opt-out in a (b)(2) setting, especially if incidental damages are available. *Phillips Petroleum Co. v Shutts*, 472 US 797 (1985).

¹⁰⁶ *City of Boerne v Flores*, 521 US 507 (1997).

¹⁰⁷ *Dickerson v United States*, 530 US 428 (2000). Once the gravitational pull of race is removed, mutterings of discontent are heard in the land about the scope of the Court's pretension. See, for example, Gary Apfel, *Whose Constitution Is It Anyway? The Authority of the Judiciary's Interpretation of the Constitution*, 46 Rutgers L Rev 771 (1994); Steven G. Calabresi, *Thayer's Clear Mistake*, 88 Nw U L Rev 269, 272–76 (1993); Frank H. Easterbrook, *Presidential Review*, 40 Case W Res L Rev 905 (1990); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L J 217 (1994); Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 Minn L Rev 1 (1996); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford, 2004). At a minimum, the President asserts an independent power to construe the Constitution in deciding whether to veto a bill, issue a signing statement, or decline to enforce an unconstitutional law. See Walter E. Dellinger III, *Memorandum for Bernard Nussbaum, Counsel to the President*, 48 Ark L Rev 333 (1995). More controversially, in areas involving exercise of the Commander-in-Chief power, some argue that there is an independent presidential power to construe relevant provisions of the Constitution. See also *United States v Mendoza*, 464 US 154 (1984) (United States not bound by affirmative nonmutual collateral estoppel). The widespread administrative practice of "respectfully non-acquiescing" in binding circuit precedent is criticized in Joseph E. Weis, *Agency Non-Acquiescence—Respectful Lawlessness or Legitimate Disagreement?* 48 U Pitt L Rev 845 (1986–87). See *Hutchinson for Hutchinson v Chater*, 99 F3d 286 (8th Cir 1996) (criticizing nonacquiescence policy).

¹⁰⁸ 392 US 83 (1968).

¹⁰⁹ See *Allen v Wright*, 468 US 737, 743–45 (1984) (describing establishment of segregated private schools in response to *Brown*).

¹¹⁰ See note 101.

tional institutions, and government assistance to segregated religious schools.

The battle against tax deductible white academies careened through *Runyon v McCrary*,¹¹¹ invalidating racially discriminatory commercial private school admissions criteria; *Bob Jones University v United States*,¹¹² denying tax deductible status to segregated private schools, and *Allen v Wright*,¹¹³ denying standing to black parents seeking to force the IRS to enforce *Bob Jones* more aggressively.

Government assistance to religiously affiliated white academies was even more difficult to counter because it was bound up with the general question of aid to parochial education, and was often disguised as assistance to the free exercise of religion. *Flast* was designed to make it as easy as possible to challenge state aid to the white religious academies. It turns out that the Catholic parochial schools in *Flast* may have just been in the wrong place at the wrong time.

The scope of judicial oversight by the Warren Court over the internal workings of the legislative branch was also affected by concerns about race. Ordinarily, it is next to impossible to persuade the Court to involve itself in the internal workings of the legislature. That is why it would be so hard to mount a credible legal challenge to current Senate filibuster rules that allow forty-one senators representing approximately 15 percent of the population to block legislation favored by fifty-nine senators representing approximately 85 percent of the population.¹¹⁴ During the Warren Court years, though, when racial justice was implicated, the Court overturned the refusal of the Georgia legislature to seat a black legislator, Julian Bond, for supporting draft resisters,¹¹⁵ and blocked Congress's effort to expel Adam Clayton Powell, Jr., a

¹¹¹ 427 US 160 (1976).

¹¹² 461 US 574 (1983).

¹¹³ 468 US 737 (1984).

¹¹⁴ I derive the figures from my approximation of the number of people represented in 2009 by fifty-seven Democratic senators (plus the two independents who usually voted with them) and forty-one Republican senators during the debate over legislation providing for disclosure of corporate campaign expenditures.

¹¹⁵ *Bond v Floyd*, 385 US 116 (1966). The legislature argued that Bond's opposition to the Vietnam War rendered it impossible for him to swear the loyalty oath required of all Georgia legislators.

black congressman from Harlem, for financial misconduct.¹¹⁶

C. RACE AND FREE SPEECH¹¹⁷

The Warren Court's race-sensitive First Amendment jurisprudence began in 1958 in *NAACP v Alabama*,¹¹⁸ with Justice Harlan's invention of freedom of association in order to protect the vulnerable civil rights movement.¹¹⁹ In 1928, in *New York v Zimmerman*,¹²⁰ a unanimous Supreme Court had upheld New York's demand for the membership list of the Ku Klux Klan. Writing for a unanimous Court in *NAACP v Alabama*, Justice Harlan distinguished *New York v Zimmerman*¹²¹ and rejected Alabama's insistence that government inspection of the National Association for the Advancement of Colored People (NAACP) membership list was needed to assure compliance with the state's foreign corporation registration law. *NAACP v Alabama* was quickly applied by a unanimous Court in *Bates v Little Rock*¹²² to strike down Arkansas's demand for the statewide NAACP membership list in connection with enforcement of the state's occupational license tax. In *Louisiana v NAACP*,¹²³ the Court rejected Louisiana's demand for the NAACP membership list in connection with an investigation of possible infiltration by the Communist Party.¹²⁴

¹¹⁶ *Powell v McCormack*, 395 US 486 (1969). Powell had been expelled for financial dishonesty in dealing with Congressional funds. The Court held that Congress lacked power to add new qualifications to the age, citizenship, and residency requirements set forth in US Const, Art I, § 2, cl 2.

¹¹⁷ I am not the first to note the close link between the Warren Court's First Amendment cases and the civil rights movement. The classic study is Harry Kalven, *The Negro and the First Amendment* (Ohio State, 1965).

¹¹⁸ 357 US 449 (1958).

¹¹⁹ The idea of freedom of association did not spring into being in *NAACP v Alabama*, id. *DeJonge v Oregon*, 299 US 353 (1937), had prefigured it. But, until *NAACP v Alabama*, no Supreme Court case had explicitly recognized free association as an independent right.

¹²⁰ 278 US 63 (1928).

¹²¹ Justice Harlan was careful not to overturn *New York v Zimmerman*, arguing that the Klan's penchant for lawless action and its refusal to release any information about its activities distinguished the case. He noted that the NAACP foreswore violence and was willing to release the names of its officers and staff members. See *NAACP v Alabama*, 357 US 449 at Part III (1958).

¹²² 361 US 516 (1960).

¹²³ 366 US 293 (1961).

¹²⁴ By the time *Louisiana v NAACP*, id. was decided, Justice Harlan was beginning to waver. He and Justice Stewart declined to join Justice Douglas's opinion for the majority, concurring only in the result. Justices Frankfurter and Clark also concurred in the result.

In *Shelton v Tucker*,¹²⁵ the Court invalidated an effort to require an Arkansas teacher to disclose his membership in the NAACP. In *Gibson v Florida Legislative Investigation Committee*,¹²⁶ the Court rejected demands by Florida legislative officials to produce state-wide NAACP membership lists in an effort to determine whether fourteen alleged communists were members of the Miami branch of the NAACP. Finally, in *NAACP v Button*,¹²⁷ the Court extended First Amendment associational rights to the NAACP's practice of referring potentially fee-paying civil rights cases to cooperating attorneys.

The gravitational pull of race on the Warren Court's First Amendment cases continued in *Talley v California*,¹²⁸ the modern origin of the right to speak anonymously. In *Talley*, the Court invalidated a California law requiring that handbills contain the name of the sponsor. Not coincidentally, the handbill at issue called for a boycott of stores engaging in racial discrimination in hiring.¹²⁹ In *Edwards v South Carolina*,¹³⁰ the Court upheld the First Amendment right of civil rights marchers to demonstrate, picket, and parade, even in the face of significant hostility by onlookers and the police. The break with the past was dramatic. As recently as 1951, the Court had upheld the conviction of a left-wing speaker who had refused to stop addressing a hostile crowd in upstate New York.¹³¹ In *Edwards*, the Court reversed the conviction of 187 black student demonstrators who had walked along the South Carolina State House grounds carrying signs protesting racial segregation, and who refused to disperse after a large crowd of hostile onlookers had gathered. Two years later, in *Cox v Louisiana I*¹³² and *II*,¹³³ the

¹²⁵ 364 US 479 (1960).

¹²⁶ 372 US 539 (1963).

¹²⁷ 371 US 415 (1963).

¹²⁸ 362 US 60 (1960).

¹²⁹ *Id.* Justice Harlan concurred, noting the lack of a legislative record indicating a need for the blanket ban on anonymity. Justices Clark, Frankfurter, and Whittaker dissented.

¹³⁰ 372 US 229 (1963).

¹³¹ *Feiner v New York*, 340 US 315 (1951).

¹³² 379 US 536 (1965). *Cox I* was unanimous in finding the breach-of-the-peace statute facially unconstitutional.

¹³³ 379 US 559 (1965). *Cox II* was 5–4 in overturning convictions for blocking the public way, with the dissenting Justices stressing the fact-intensive nature of the as-applied issue and the difficulty of substituting the Court's post hoc fact-finding for the reasonable fears of the police.

Court reversed the convictions of 2,000 black student demonstrators who had refused to end a demonstration, in the vicinity of a courthouse, protesting the arrests of twenty-three students for picketing stores with segregated lunch counters. In *Gregory v Chicago*,¹³⁴ confronted with a fact pattern considerably more incendiary than in *Feiner*, Chief Justice Warren found it an “easy case” to reverse the convictions of eighty-five civil rights marchers, led by comedian Dick Gregory, who peacefully marched in support of public school desegregation from City Hall to the home of Mayor Daley, and then refused a police order to disperse when confronted by a crowd of 1,000 hostile “unruly” onlookers.¹³⁵ These decisions revolutionized First Amendment doctrine.

*New York Times v Sullivan*¹³⁶ also evidenced the Warren Court’s concern with race and the First Amendment. *Times v Sullivan* dealt with an Alabama libel judgment arising out of the publication of an advertisement in the *New York Times* seeking financial support for Dr. Martin Luther King, Jr. The advertisement contained allegedly false statements about the treatment of civil rights demonstrators by Alabama law enforcement personnel. Libel actions like *Times v Sullivan*, tried before hostile southern juries, threatened to drive national media from covering the extraordinary events in the South during the height of the civil rights movement. As if to bring home the point, Dr. King attended the oral argument. (A star-struck Justice Goldberg asked King to autograph a recent book.)¹³⁷ There is no doubt that one of the Supreme Court’s most important First Amendment decisions, described by Alexander Meikeljohn as a cause for dancing in the streets,¹³⁸ was inspired in no small part by the Court’s understanding of the importance of the decision for the continued viability of the civil rights movement.¹³⁹

¹³⁴ 394 US 111 (1969).

¹³⁵ As Justices Harlan, Black, and Douglas noted, *Gregory*, *id.* was an “easy case,” not because the facts could not have supported a conviction, but only because Illinois had not enacted a law governing refusal to comply with a reasonable order to disperse.

¹³⁶ 376 US 254 (1964).

¹³⁷ See Seth Stern and Stephen Wermeil, *Justice Brennan: Liberal Champion* 222 (Houghton Mifflin Harcourt, 2010).

¹³⁸ See Harry Kalven, *The New York Times Case: A Note of the Central Meaning of the First Amendment*, 1964 Supreme Court Review 191 (1964) (reporting the Meikeljohn quote and heaping praise on the opinion).

¹³⁹ See also the Court’s agonized effort to protect sit-in demonstrators in *Hamm v City of Rock Hill*, 379 US 306 (1964). See also *Brown v Louisiana*, 383 US 131 (1966) (protecting

In *Street v New York*,¹⁴⁰ the Court stretched the record to protect a black protestor who had burned his American flag on a Brooklyn street corner to protest the shooting of James Meredith. Realizing that there were not yet five votes to treat flag burning as protected First Amendment expression, Justice Harlan converted what had been viewed as a flag-burning case into one dealing with verbal criticism of the flag. The decade ended with the Court's protection of an eighteen-year-old who, during a discussion sponsored by the W. E. B. DuBois Club, had hyperbolically threatened to kill President Johnson for trying to draft him and force him to kill his "black brothers."¹⁴¹ Can you imagine a similar decision today in a case threatening a terrorist act?

The only significant First Amendment rebuff to the civil rights movement during the Warren Court years was *Walker v City of Birmingham*,¹⁴² in which five members of the Court refused to permit civil rights marchers to violate a facially valid state court injunction. Even then, the majority was at pains to confine *Walker* to good faith, plausible exercises of state judicial power, and had already provided civil rights marchers with a powerful weapon to win the race to the courthouse by obtaining advance federal judicial protection of proposed marches.¹⁴³

Often, a Warren Court First Amendment opinion that appears unconnected to race was actually aimed at making it easier for the Court to protect civil rights demonstrators. For example, in *Coates v City of Cincinnati*¹⁴⁴ and *Gooding v Wilson*,¹⁴⁵ cases having nothing overtly to do with race, the Court laid the foundation for the modern First Amendment vagueness and overbreadth doctrines, which enabled federal district judges to protect civil rights pro-

civil rights sit-in at public library). But see *Adderley v Florida*, 385 US 39 (1966) (upholding conviction of demonstrators on jail premises) and *Grayned v City of Rockford*, 408 US 104 (1972) (upholding ban on demonstrating near a school). When the gravitational pull of race was removed, the needle dramatically moved back to protecting property rights. See, for example, *Lloyd Corp. v Tanner*, 407 US 551 (1972), and *United States v Kokinda*, 497 US 720 (1990).

¹⁴⁰ 394 US 576 (1969).

¹⁴¹ *Watts v United States*, 394 US 705 (1969).

¹⁴² 388 US 307 (1967).

¹⁴³ *Dombrowski v Pfister*, 380 US 479 (1965) (allowing pre-event access to federal court to prevent "chilling effect" on civil rights demonstration). When you subtract the gravitational pull of race from *Dombrowski*, you get *Younger v Harris*, 401 US 37 (1971), and its progeny.

¹⁴⁴ 402 US 611 (1971).

¹⁴⁵ 405 US 518 (1972).

testors by invalidating state loitering and disorderly conduct statutes on their face, making it unnecessary for federal judges to engage in battles about state court fact-finding that had proved so fractious in *Cox II*, and sidestepping the inability of federal courts to construe state statutes narrowly to protect civil rights demonstrators. *Shuttlesworth v Birmingham*,¹⁴⁶ invalidating a standardless local demonstration permit statute on its face, shows the doctrines in action, but the real bite of the vagueness and overbreadth doctrines was felt in federal district courts throughout the South where demonstrators, invoking jurisdiction under *Dombrowski v Pfister*, could seek advance judicial protection for civil rights marches.

When issues of racial justice were not in the picture, either directly or indirectly, the Warren Court was somewhat less likely to strike an aggressive pose in defense of free speech. Justice Brennan's much criticized obscenity opinion in *Roth*,¹⁴⁷ and the Court's subsequent "keystone cops" effort to define obscenity, is but one example. Similarly, the Court was unmoved by the associational rights argument in *Terry v Adams*,¹⁴⁸ and was not particularly zealous in protecting the associational freedom of radical leftists.¹⁴⁹ Finally, when you remove the gravitational pull of race, the Warren Court was much less protective of "speech brigaded with conduct."

¹⁴⁶ 394 US 147 (1969).

¹⁴⁷ *Roth v United States*, and *Alberts v California*, 354 US 476 (1957) (defining obscenity as nonspeech); *Ginzburg v United States*, 383 US 463 (1966) (upholding conviction on pandering theory).

¹⁴⁸ 345 US 461 (1953). In the absence of the gravitational pull of race, the post-Warren Court has both accepted and rejected associational claims. Compare *Roberts v United States Jaycees*, 468 US 609 (1984); *Board of Directors of Rotary International v Rotary Club of Duarte*, 481 US 537 (1987); and *New York State Club Ass'n, Inc. v City of New York*, 487 US 1 (1988) (rejecting associational rights argument); with *Boy Scouts of America v Dale*, 530 US 640 (2000) (accepting associational rights argument).

¹⁴⁹ Compare *Elfbrandt v Russell*, 384 US 11 (1966) (invalidating loyalty oath); and *Keyishian v Board of Regents of the University of the State of New York*, 385 US 589 (1967) (same); with *Konigsberg v State Bar of California*, 366 US 36 (1961) (upholding denial of bar admission on basis of refusal to answer questions on membership or belief); *In re Stolar*, 401 US 23 (1971) (same); and *Law Students Civil Rights Research Council, Inc. v Wadmond*, 401 US 154 (1971) (same). Perhaps the most striking discontinuity was Justice Brennan's withdrawal of the offer of a Supreme Court clerkship to Michael Tigar, who had been active in a number of left-wing student groups at Berkeley. Justice Brennan sought to defuse criticism of the offer by asking Tigar to list his past political associations. When Tigar declined as a matter of principle, Brennan withdrew the clerkship offer. Professor Tigar went on to a distinguished academic and practice career. Many years later, he graciously acknowledged the institutional dilemma faced by Justice Brennan. The incident is described in Stern and Wermeil, *Justice Brennan* at 264-74 (cited in note 137).

It is impossible to reconcile the solicitude of the Warren Court for civil rights marchers in *Edwards* and *Cox I* and *II* with its unanimous cavalier treatment of draft-card burners in *United States v O'Brien*.¹⁵⁰

D. RACE AND THE LAW OF DEMOCRACY

Although the Supreme Court had historically made sporadic efforts to protect black voters from particularly egregious efforts to disenfranchise them,¹⁵¹ concerns over separation of powers and federalism had rendered judicial protection of the right of blacks to vote in state and local elections largely ineffective.¹⁵² Where racially discriminatory purpose was evident, as in *Terry v Adams*¹⁵³ and *Gomillion v Lightfoot*,¹⁵⁴ the Court was able to provide relief. In the many cases where discriminatory racial purpose was not self-evident, however, proving it was virtually impossible, especially in settings where sophisticated officials took pains to cover their tracks.¹⁵⁵ Faced with massive disenfranchisement of blacks in the South, and the difficulty of proving discriminatory purpose, the Warren Court pushed the reset button.¹⁵⁶ In *Carrington v Rash*,¹⁵⁷ Texas forbade soldiers assigned to duty in the state from voting, creating a conclusive presumption that they were not bona fide residents of Texas. It was no coincidence that so many of the

¹⁵⁰ 391 US 367 (1968). Justice Douglas's dissent in *O'Brien* questioned the constitutionality of the draft, not the free speech aspects of the case, *id.* at 389 (Douglas, J., dissenting).

¹⁵¹ *Ex parte Siebold*, 100 US 371 (1879); *Ex parte Yarbrough*, 110 US 651 (1884); *Guinn v United States*, 238 US 347 (1915); *United States v Mosely*, 238 US 383 (1915); *Nixon v Herndon*, 273 US 536 (1927); *Nixon v Condon*, 286 US 73 (1932); *Lane v Wilson*, 307 US 268 (1939); *United States v Classic*, 313 US 299 (1941); *Smith v Alkwright*, 321 US 649 (1944); *United States v Saylor*, 322 US 385 (1944).

¹⁵² See, for example, *Giles v Harris*, 189 US 475 (1903); *Giles v Teasley*, 193 US 146 (1904); *Pope v Williams*, 193 US 621 (1904); *Grove v Townsend*, 295 US 45 (1935); *Breedlove v Suttles*, 302 US 277 (1937).

¹⁵³ The gravitational pull of race is particularly obvious in *Terry*, because it was at virtually the same moment that the Court was providing intense associational protection to the NAACP, while denying it to the Texas Jaybirds.

¹⁵⁴ 364 US 339 (1960).

¹⁵⁵ See *Arlington Heights v Metropolitan Housing Development Corp.*, 429 US 252 (1977).

¹⁵⁶ The pre-Warren Court had consistently refused to develop a general right to vote. *Minor v Happersett*, 88 US 162 (1874).

¹⁵⁷ 380 US 89 (1965).

soldiers were black.¹⁵⁸ Lacking proof of discriminatory purpose, it was impossible to bring a successful Fifteenth Amendment challenge to the Texas ban. So, the Warren Court started down the road of “fundamental rights” jurisprudence, enabling the Court to protect minority voting rights by imposing strict scrutiny on any effort to selectively apportion the franchise. The Warren Court repeated the process in *Harper v Virginia Board of Elections*,¹⁵⁹ which invalidated Virginia’s \$1.50 poll tax. Once again, a Fifteenth Amendment challenge would have failed in the absence of proof of discriminatory purpose. *Harper* was particularly difficult because, in 1937, the Court had unanimously upheld the constitutionality of state poll taxes in *Breedlove v Suttles*,¹⁶⁰ and the Twenty-Fourth Amendment, which abolished poll taxes in federal elections, had refrained from extending the ban to the states, creating an *inclusio unis* textual problem. Indeed, Justice Stewart, who wrote for the Court in *Carrington*, dissented in *Harper*. But the Warren Court’s majority sensed a “one-two” punch in *Carrington* and *Harper* that would eliminate the traditional impediments to black voting without requiring proof of discriminatory purpose.¹⁶¹

A similar process led to *Baker v Carr*.¹⁶² Although the one-person one-vote cases say nothing explicit about race, the issue that drove the cases was pervasive legislative malapportionment throughout the South—and parts of the North—that dramatically overrepresented rural whites at the expense of underrepresented urban and rural blacks.¹⁶³ In *Gomillion*, the Court confronted an obvious racial

¹⁵⁸ Once President Truman had desegregated the armed forces, a military career became relatively attractive to many black Americans because civilian employment continued to struggle with racism. Moreover, the military draft during the 1960s tended to overrepresent black youths, since student and other deferments were more easily obtained by middle- and upper-class whites. Jonathan Sutherland, 2 *African Americans at War: An Encyclopedia* 502 (ABC-CLIO, 2006).

¹⁵⁹ 383 US 663 (1966).

¹⁶⁰ 302 US 277 (1937).

¹⁶¹ The Warren Court quickly built on *Carrington*, 380 US 89 (1965), and *Harper*, 383 US 663 (1966), to announce a general constitutional right to vote and to run for office in *Williams v Rhodes*, 393 US 23 (1968), *Kramer v Union Free School Dist. No. 15*, 395 US 621 (1969), and *Dunn v Blumstein*, 405 US 330 (1972).

¹⁶² 369 US 186 (1962).

¹⁶³ See C. Herman Pritchett, *Equal Protection and the Urban Majority*, 58 *Am Pol Sci Rev* 869, 869–71 (arguing that the Supreme Court’s decisions on legislative districting and apportionment must be taken in the context of a predominantly black urban majority and are a continuation of its 1950s decisions on racial inequality). See also Richard C. Cortner, *The Apportionment Cases* (Tennessee, 1970); Robert G. Dixon, Jr., *Democratic*

gerrymander, making it possible to invoke the Fifteenth Amendment. But the facts of *Baker v Carr* made it impossible to apply the Fifteenth Amendment. The result was the development of the doctrine of one-person one-vote, enforceable without any need to prove a racially discriminatory purpose. Indeed, it is the gravitational pull of race that explains why, despite the analogy to the United States Senate, the Court was adamant in *Reynolds v Sims*¹⁶⁴ in denying Alabama's effort to apportion one house of its bicameral state legislature to reflect geographical or other non-population-based factors. The Court's effort to assure black citizens fair legislative representation would have been derailed if one house of the state legislature was permitted to remain a malapportioned bastion of white power.¹⁶⁵

E. RACE, FREEDOM OF RELIGION, AND DUE PROCESS OF LAW

The Warren Court determination to enforce *Brown* also played a role in shaping its Establishment Clause jurisprudence. As we have seen, *Flast v Cohen* eliminated standing as a barrier to the effective enforcement of the ban on government aid to segregated white academies masquerading as religious parochial schools. Justice Brennan's influential concurring opinion in *Abington v Schempp*¹⁶⁶ sought to build an impermeable wall through which government funds could never pass to a racially segregated private religious school.

Race also may have exercised a gravitational pull on Warren Court Free Exercise jurisprudence. It was no coincidence that the plaintiff in *Sherbert v Verner*¹⁶⁷ was a Seventh Day Adventist from South Carolina seeking employment benefits. *Sherbert* fits closely with *Goldberg v Kelly*,¹⁶⁸ the Warren Court's principal procedural

Representation: Reapportionment in Law and Politics (Oxford, 1968); Nelson W. Polsby, ed, *Reapportionment in the 1970s* (California, 1971).

¹⁶⁴ 377 US 533 (1964).

¹⁶⁵ In *Wesberry v Sanders*, 376 US 1 (1964), the one-person one-vote principle was imposed on Georgia's apportionment of Congressional districts through Article 1, Section 2 of the Constitution. It is no coincidence that the first major reapportionment cases emerged from Tennessee, Alabama, and Georgia. Once the Court had the bit between its teeth, the same rules were applied to the North. See *Lucas v 44th General Assembly of the State of Colorado*, 377 US 713 (1964); *Kirkpatrick v Preisler*, 394 US 526 (1969).

¹⁶⁶ 374 US 203 (1963) (Brennan, J, concurring).

¹⁶⁷ 374 US 398 (1963).

¹⁶⁸ 397 US 254 (1970).

due process decision. Both opinions by Justice Brennan were designed to empower a black underclass deeply dependent on government benefits that too often were administered by unsympathetic or even racist white bureaucracies.

The introduction of procedural due process guaranties into school disciplinary proceedings in *Goss v Lopez*¹⁶⁹ was also driven by concerns over race. My first federal trial involved an ugly attempt to prevent the integration of a New York City high school by expelling large numbers of black students for alleged truancy. I could not prove racially discriminatory purpose, although the situation reeked of racism. Instead, I argued successfully that the expelled students had been denied procedural due process of law.¹⁷⁰ This lesson was not lost on the Supreme Court when it decided *Goldberg v Kelley* and *Goss v Lopez*.

F. RACE AND CRIMINAL LAW AND PROCEDURE

Perhaps the clearest evidence of the gravitational pull of race on Warren Court constitutional doctrine was in the areas of criminal law and procedure. It is hard to overstate the sense of urgency driving the Court's concern over racial discrimination in the enforcement of the criminal law. The perception—and, too often, the reality—was of white police forces applying racially discriminatory standards in daily street encounters with black citizens, the widespread discriminatory use of force, and the selective prosecution of crime. The sense of crisis was particularly acute in the urban ghettos, which eventually burst into open rebellion.¹⁷¹

We have already seen how the notion of white law enforcement officials unfairly treating black citizens played out in the specialized world of the First Amendment.¹⁷² The Warren Court generalized the response in a series of cases designed to limit the power of the police to initiate street encounters in the absence of a legitimate law enforcement justification. *Thompson v Louisville*¹⁷³

¹⁶⁹ 419 US 565 (1975). *Goss* was decided in the shadow of *Dixon v Ala. State Bd. of Education*, 294 F2d 150 (5th Cir 1961) (invoking procedural due process to reverse the expulsion of black students for engaging in civil rights protests).

¹⁷⁰ *Knight v Board of Education*, 48 FRD 108 (EDNY, 1969); *Knight v Board of Education*, 48 FRD 115 (EDNY, 1969).

¹⁷¹ See note 45.

¹⁷² See text accompanying notes 120–56.

¹⁷³ 362 US 199 (1960).

is one example of the Court's response. But *Thompson*, standing alone, was unlikely to make a serious dent in the problem. In cases beginning with *Papachristou v City of Jacksonville*,¹⁷⁴ the Court turned to the Due Process Clause to invalidate vague ordinances that provided the police with carte blanche to stop blacks on the streets, especially in white areas.

The Warren Court's most dramatic responses to law enforcement's interaction with the black population were the Court's efforts in *Mapp v Ohio*¹⁷⁵ to prevent the use of illegally obtained evidence in criminal proceedings, and in *Miranda v Arizona*¹⁷⁶ to impose prophylactic rules on police interrogations. Race was not far from the surface of either case. In *Terry v Ohio*,¹⁷⁷ the Court sought to split the difference between the loitering and vagrancy decisions and the strict Fourth Amendment probable-cause test by authorizing the police to make investigatory street stops on less than probable cause, but only if they can demonstrate an "articulable suspicion" of unlawful activity. Finally, the right to counsel cases from *Gideon* to *Argersinger* were driven, in part, by concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanics.¹⁷⁸

II. POST-WARREN COURT JURISPRUDENCE: WHEN GRAVITY EBBED

In the post-Warren Court years, once the gravitational pull of race and regional institutional mistrust had ebbed, much, but not all, of the jurisprudence described in Part I lost its vitality. In the federalism area, *Thompson v Louisville*¹⁷⁹ became a one-of-a-

¹⁷⁴ 405 US 156 (1972). See also *Kolender v Lawson*, 461 US 352 (1983). See generally Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U Pa L Rev 67 (1960).

¹⁷⁵ 367 US 643 (1961). In fact, it has been suggested that the real target of the *Mapp* search was Don King, then a prominent black gambling figure who went on to fame and fortune as a boxing promoter. See Leonard A. Stevens, *Trespass! The People's Privacy vs. the Power of the Police: Great Constitutional Issues, the Fourth Amendment* (Coward, McCann & Geoghegan, 1977).

¹⁷⁶ 384 US 436 (1966). Justice Clark, who had written for the Court in *Mapp*, dissented in *Miranda*.

¹⁷⁷ 392 US 1 (1968).

¹⁷⁸ See cases at note 262.

¹⁷⁹ 362 US 199 (1960).

kind curiosity, *Monroe v Pape*¹⁸⁰ found itself enmeshed in a labyrinthine procedural morass,¹⁸¹ and the broad vision of federal supervisory habeas corpus in *Townsend* and *Fay v Noia* was mugged by Supreme Court and Congressional hostility.¹⁸² Without the gravitational pull of race, state action doctrine largely reverted to pre-Warren Court standards,¹⁸³ and the Warren Court's extremely broad vision of Congressional power to protect individual rights contracted in cases like *United Brotherhood of Carpenters v Scott*,¹⁸⁴ *Bray v Alexandria Women's Health Clinic*,¹⁸⁵ and *United States v Morrison*,¹⁸⁶ which resemble pre-Warren Court decisions like *United States v Williams*¹⁸⁷ and *Collins v Har-*

¹⁸⁰ 365 US 167 (1961).

¹⁸¹ While *Monroe v Pape*, *id.*, continues to provide immediate access to a federal court to enforce federal constitutional guaranties against state and local authorities, today's prospective § 1983 plaintiff must survive preclusion (*Allen v McCurry*, 449 US 90 (1980)) and find the narrow space between a sufficiently crystallized controversy satisfying ripeness and standing requirements and the commencement of state or local enforcement proceedings that trigger *Younger* abstention. See Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* (Aspen, 2d ed 2008). Qualified immunity and good faith defense often make it virtually impossible to invoke a credible damage remedy. See *Weise v Casper*, 131 S Ct 7 (mem) (Oct 12, 2010) (Justices Ginsburg and Sotomayor dissenting from denial of certiorari).

¹⁸² The Warren Court's initial conception of habeas corpus as a shift of power to federal courts is described in J. Skelly Wright and Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L J 895 (1966). The erosion of federal habeas corpus review of state criminal convictions is described in Charles Alan Wright, Arthur Raphael Miller, and Edward H. Cooper, 17 *Federal Practice and Procedure* (West Supp 2010). See generally *Wainwright v Sykes*, 433 US 72 (1977); *Teague v Lane*, 489 US 288 (1989); *McCleskey v Zant*, 499 US 467 (1991). Congress reacted in the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub L No 104-132, 110 Stat 1214 (1996).

¹⁸³ *Moose Lodge No. 107 v Irvis*, 407 US 163 (1972) (grant of liquor license does not generate state action); *Jackson v Metropolitan Edison*, 419 US 345 (1974) (public utility not state action); *Lloyd Corp. v Tanner*, 407 US 551 (1972) (privately owned shopping center not open to First Amendment activity); *Hudgens v NLRB*, 424 US 507 (1976) (privately owned shopping center not open to labor picketing); *Rendell-Baker v Kohn*, 457 US 830 (1982) (private school for maladjusted children not state action despite receipt of substantial public funding); *Blum v Yaretsky*, 457 US 991 (1982) (private nursing home not state action despite pervasive regulation and receipt of federal Medicaid funds); *San Francisco Arts & Athletics, Inc. v United States Olympic Comm.*, 483 US 522 (1987) (United States Olympic Committee not state action). Race, however, still has some bite. See *Edmonson v Leesville Concrete Co.*, 500 US 614 (1991) (private lawyer exercises state action when uses racially driven peremptory challenge in choosing civil jury); *Georgia v McCollum*, 505 US 42 (1992) (private defense attorney in criminal trial an agent of state for purposes of racially driven peremptory challenges).

¹⁸⁴ 463 US 825 (1983).

¹⁸⁵ 506 US 263 (1993).

¹⁸⁶ 529 US 598 (2000).

¹⁸⁷ 341 US 70 (1951).

dyman.¹⁸⁸ Similarly, the post-Warren Court rejected the one-way ratchet concept of *South Carolina v Katzenbach*,¹⁸⁹ returning to the more traditional view that Section 5 enforcement statutes must be closely tethered to Section 1 rights.¹⁹⁰ Several members of the post-Warren Court expressed buyer's remorse about the broad construction of the Civil Rights Act of 1866.¹⁹¹ Indeed, with the success of the Voting Rights Act in enfranchising and empowering black voters, several members of the current Court have called for a reexamination of the constitutionality of the preclearance rule of Section 5 and the Congressionally imposed effects test of Section 2.¹⁹²

As with the federalism cases, once the gravitational pull of race ebbed, post-Warren Court separation-of-powers decisions tended to revert to pre-Warren Court standards. The Establishment Clause standing rules tightened,¹⁹³ and the Court reverted to its traditional "hands off" stance when asked to interfere with the internal workings of the political branches.¹⁹⁴

In the First Amendment and democracy areas, without the gravitational pull of race, the Court, over Justice Brennan's dissent, declined to extend *Times v Sullivan*¹⁹⁵ to speech about public issues,¹⁹⁶ wobbled on its commitment to anonymity,¹⁹⁷ rediscovered

¹⁸⁸ 341 US 651 (1951). Both *Williams*, 341 US 70 (1951), and *Hardyman*, 341 US 651 (1951), evidence the pre-Warren Court's much more equivocal approach to Congress's power to reach private behavior in the absence of a racial component.

¹⁸⁹ 383 US 301 (1966).

¹⁹⁰ See *City of Boerne v Flores*, 521 US 507 (1997); *United States v Morrison*, 529 US 598 (2000).

¹⁹¹ *General Building Contractor's Ass'n v Pennsylvania*, 458 US 375 (1982) (requiring proof of intentional racial discrimination); *Patterson v McLean Credit Union*, 491 US 164, 171–72 (1989) (expressing doubt concerning correctness of *Runyon*, and declining to recognize claim for racial harassment).

¹⁹² *Northwest Austin Municipal Utility District v Holder*, 129 S Ct 2504, 2511–13 (2009); id at 2519 (Thomas, J, dissenting in part).

¹⁹³ See, for example, *Elk Grove Unified School Dist. v Newdow*, 542 US 1 (2004); *Valley Forge Christian College v Americans United for Separation of Church and State, Inc.*, 454 US 464 (1982); *Salazar v Buono*, 130 S Ct 1803 (2010).

¹⁹⁴ *Goldwater v Carter*, 444 US 996 (1979) (declining to decide whether unilateral Presidential abrogation of treaty is constitutional); *United States v Nixon*, 506 US 224 (1993) (refusing to review Senate procedure for impeachment of judges).

¹⁹⁵ 376 US 254 (1964).

¹⁹⁶ *Gertz v Robert Welch, Inc.*, 418 US 323 (1974). See also *Time, Inc. v Firestone*, 424 US 448 (1976); *Hutchinson v Proxmire*, 443 US 111 (1979); *Wolston v Reader's Digest Association Inc.*, 443 US 157 (1979) (narrowly construing "public figure").

¹⁹⁷ *Buckley v Valeo*, 424 US 1 (1976) (rejecting anonymity involving campaign contributions); *Citizens United v FEC*, 558 US 50 (2010) (same); *John Doe No. 1 v Reed*, 130 S

the right of members of a political party to exclude outsiders,¹⁹⁸ declined to consider the constitutionality of massive political gerrymanders,¹⁹⁹ and eased the standards on state and local apportionment.²⁰⁰ In *Shaw v Reno*,²⁰¹ a Supreme Court majority with a very different view of the relationship between constitutional doctrine and the achievement of racial justice forbade the drawing of legislative lines designed to favor formerly disenfranchised black voters. The fault line between the majority and dissent in *Shaw* was whether the effort to achieve racial justice would continue to exercise a gravitational pull on constitutional doctrine. Five Justices in *Shaw* said no.

Without the gravitational pull of race, substantial government aid is now available to religious schools,²⁰² we are on the cusp of overturning *Flast*,²⁰³ the Court's toleration of vague and arguably overbroad statutes has markedly increased,²⁰⁴ and the Court has systematically loosened the constitutional bonds limiting search-and-seizure and police interrogation.²⁰⁵

Some might object at this point that the Justices' differing perceptions about race and regional failure had little or nothing to do with the shift in constitutional doctrine in the post-Warren years. All that happened, they might argue, was that President Lyndon Johnson and Justice Abe Fortas badly botched the succession when

Ct 2811 (2010) (rejecting facial demand for anonymity by petition signers). But see *McIntyre v Ohio Elections Commission*, 514 US 334 (1995) (protecting anonymity).

¹⁹⁸ See, for example, *Rosario v Rockefeller*, 410 US 752 (1973); *Timmons v Twin Cities Area New Party*, 520 US 351 (1997); *California Democratic Party v Jones*, 530 US 567 (2000); *Clingman v Beaver*, 544 US 581 (2005); *New York State Board of Elections v Lopez-Torres*, 552 US 196 (2008).

¹⁹⁹ *Vieth v Jubelirer*, 541 US 267 (2004); *League of United Latin American Citizens v Perry*, 548 US 399 (2006).

²⁰⁰ Compare *Burns v Richardson*, 384 US 73 (1966); *Mahan v Howell*, 410 US 315 (1973); and *Brown v Thomson*, 462 US 835 (1983); with *Karcher v Daggett*, 462 US 725 (1983).

²⁰¹ 509 US 630 (1993).

²⁰² *Zelman v Simmons-Harris*, 536 US 639 (2002).

²⁰³ 392 US 83 (1968).

²⁰⁴ See, for example, *Young v American Mini Theaters*, 427 US 50 (1976); *National Endowment for the Arts v Finley*, 524 US 569 (1998); *Holder v Humanitarian Law Project*, 130 S Ct 2705 (2010).

²⁰⁵ See, for example, *Stone v Powell*, 428 US 465 (1976) (Fourth Amendment factual issues not reviewable on habeas corpus); *United States v Leon*, 468 US 897 (1984) (recognizing good faith defense to exclusionary rule). *Miranda* survived an effort at Congressional overruling in *Dickerson v United States*, 530 US 428 (2000), but has been narrowly applied once the gravitational pull of race waned. *Beckwith v United States*, 425 US 341 (1976); *Oregon v Mathiason*, 429 US 492 (1977).

Chief Justice Warren announced his resignation in 1968,²⁰⁶ handing President Nixon four Supreme Court appointments and the chance to reconstitute the Court's political and philosophical underpinnings.²⁰⁷ That's all true, of course. But it does not alter my point on the shift in the gravitational pull of race and regional failure. A Justice's political orientation and judicial philosophy are, after all, merely shorthands for underlying beliefs (often intuitively held) about things like the relative importance of equality and autonomy, the relative spheres of democratic decision making and principled judicial articulation, the relative risks and benefits of central and local power, the relative effectiveness of collective and individual action, the relative weight of environmental determinism and individual effort, the relative importance of procedural regularity and substantive outcome, and the relative costs and benefits of government and private regulation. When President Nixon appointed four new Justices with new (and mutually different) value orientations, he inevitably changed the intellectual prism through which the gravitational pull of the nation's struggle for racial justice, especially in the South, operated on the Supreme Court. That, in turn, affected the evolution of constitutional doctrine.

By the mid-1970s, many believed that *Brown* and its progeny,²⁰⁸ coupled with Congressional enactment of much of the civil rights agenda during the 1960s,²⁰⁹ had ameliorated the worst of the nation's racial crisis, and that generational change had rendered state institutions more willing and able to shoulder the burden of acting responsibly in dealing with racially charged issues. Thus, even if the Supreme Court's membership had remained stable, I suspect that at least several Justices might have become more skeptical over whether the quest for racial justice should continue to play such a dominant role in constitutional analysis across the board.²¹⁰ But the

²⁰⁶ The failed effort to elevate Justice Fortas to the Chief Justice position and his forced resignation from the Court is described in Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* (William Morrow, 1988).

²⁰⁷ President Nixon nominated Warren Burger in 1969 to replace Earl Warren, Harry Blackmun in 1970 to replace Abe Fortas, William Rehnquist in 1972 to replace John Marshall Harlan, and Lewis Powell on the same day in 1972 to replace Hugo Black.

²⁰⁸ See above at nn 29–42.

²⁰⁹ See above at n 44.

²¹⁰ While Justice Brennan, often joined by Justice Marshall and by one or two other Justices, consistently dissented from the constitutional backsliding, I wonder if they would have been as wedded to the body of 1960s precedent if they had been in a position to tweak it to their liking.

Court's membership did not remain stable. The newly appointed Justices viewed the already somewhat weakened argument for continuing to place racial justice and regional failure at the center of the Court's constitutional agenda through their own political and philosophical filters, and virtually zeroed out the search for racial justice and the fear of regional failure as significant tie-breaking factors in developing new constitutional doctrine. I do not suggest that the new Justices were unconcerned about racial justice; merely that their perception of the diminished intensity of the nation's racial crisis, factored through the new Justices' hierarchically ordered value systems, did not impel them in the direction of shaping constitutional doctrine with an eye to its effect on the civil rights struggle.

Given my value orientation, I think the new Justices gave up too soon on the primacy of achieving racial justice, and overvalued the willingness and ability of local institutions to deal effectively with racially charged issues. The Warren Court repeatedly treated the achievement of equality, principally racial equality, as its prime constitutional value. In the post-Warren era, Justice Brennan's dissents continued to do so, describing a constitutional world that might have been, not just for racial minorities, but for women and other historically subordinated groups—a world in which a benign local majority could actively help the minority to achieve real equality,²¹¹ and where politically weak groups could appeal from hostile or unconcerned local majorities to a more responsive national majority.²¹² My disagreement with many of the post-Warren Court decisions rejecting that world, often by narrow 5–4 majorities, does not spring from a belief that Justice Brennan was objectively correct, or that the post-Warren majority Justices were objectively wrong. While Justice Brennan continued to place equality—especially racial equality—at the top of the constitutional tree, the post-Warren Court majority increasingly turned toward autonomy as its prime constitutional value. Both approaches are defensible efforts at con-

²¹¹ *Parents Involved in Community Schools v Seattle School District No. 1*, 551 US 701 (2007) (Breyer, J, dissenting); *Shaw v Reno*, 509 US 630, 658 (1993) (White, Blackmun, and Stevens, JJ, dissenting); *id* at 679 (Souter, J, dissenting); *Gratz v Bollinger*, 539 US 244 (2003); *Metro Broadcasting Co. v FCC*, 497 US 547 (1990), *rev'd Adarand Constructors, Inc. v Pena*, 514 US 200 (1995).

²¹² *Morrison v United States*, 529 US 598, 628 (2000) (Souter, Stevens, Ginsburg, and Breyer, JJ, dissenting); *Bray v Alexandria Women's Health Clinic*, 506 US 263, 288 (1993) (Souter, J, dissenting in part); *id* at 307 (Stevens and Blackmun, JJ, dissenting); *id* at 345 (O'Connor, J, dissenting).

struing the Constitution. Indeed, over time, one would expect equality and autonomy, two of the leading candidates for prime constitutional value (procedural regularity being the third), to co-exist uneasily with each other. Who is to say for certain which one should trump the other at any given point in the nation's history? As many have noted, since plausible arguments that almost always exist on both sides of a hard constitutional case, insistence on so-called objectively correct answers rooted in textual literalism, or law-office history often do little more than mask a Justice's choice of a prime value. That is why I find shrill assertions that externally mandated, objectively correct "originalist" answers exist in the Constitution's text and history so unpersuasive—and so intellectually dishonest.²¹³ That is also why winning presidential elections is so important to the evolution of constitutional law.

III. So WHAT?

If I am right that concerns over racial injustice and regional failure significantly influenced the Warren Court's constitutional decision making, at least three reactions are possible²¹⁴—condemnation, praise, or the less elegant "so what." Some observers would undoubtedly condemn the Warren Court's willingness to shape constitutional doctrine in aid of racial justice as an unprincipled exercise in political jurisprudence.²¹⁵ Others would view the Court's race-conscious constitutional jurisprudence as judicial statesmanship of the highest order.²¹⁶ Most, I believe, would shrug their shoulders

²¹³ For a summary of the seemingly endless debate over originalism, see Steven G. Calabresi, ed, *Originalism: A Quarter Century of Debate* (Regnery, 2007). For a useful recent symposium on originalism, see <http://www.harvard.jp.com?archive/#313>.

²¹⁴ Another response, of course, is to reject my hypothesis about the gravitational pull of race as wrong, or, more charitably, unproven. I concede that I have not attempted to control for other variables that might explain changes in constitutional doctrine as the Court's personnel altered, like increases or decreases in legal acumen, changes in judicial philosophy, and shifts in political orientation. I have argued above that the altered political views and judicial philosophies of the new Justices merely provided the intellectual lens through which they measured whether racial injustice and regional breakdown continued to be important enough to outweigh other factors in forging constitutional doctrine. See text accompanying notes 212–15.

²¹⁵ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1 (1959), is the classic critique. See also Philip Kurland, *Politics, the Constitution, and the Warren Court* (Chicago, 1973); Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv L Rev 1 (1955); and Robert Bork, *The Tempting of America* (Free Press, 1973).

²¹⁶ Charles Black, *The Lawfulness of the Segregation Decision*, 69 Yale L J 421 (1960), is the classic defense. See also Charles Fairman, *The Supreme Court 1955 Term—Foreword*:

at what they would see as the inevitability of this process.²¹⁷ This is not the place to rehash either the lament over the decline of “neutral principles” in *Brown* or the defense of the Court’s role in helping the nation to begin its redemption from racism. Nor is it the place to rehash the argument over whether the Constitution’s text or history actually provide binding commands to the Justices in hard cases. Suffice it to say that, today, even the most committed formalists embrace constitutional doctrine requiring a pragmatic, fact-bound balancing of public need against private right. Whether one looks at the First Amendment’s weighted balancing test,²¹⁸ the notions of “reasonableness” underlying the Fourth Amendment,²¹⁹ or the varying iterations of Equal Protection scrutiny,²²⁰ today’s judges are knee deep in factual assessments of the impact of constitutional doctrine on the real world.

Three comparatively recent events must have—and should have—had a significant influence on the Supreme Court’s reading of the Constitution. The first was the Great Depression. It is now commonly accepted that constitutional doctrine evolved during the Depression in response to a crisis in which market failure appeared to cry out for federal regulation, in part because of problems of scale, in part because the states were trapped in a regulatory race to the bottom in pursuit of a shrinking pool of jobs and investment. The result was the evolution of constitutional doctrine from *Lochner*,²²¹ *Hammer v Dagenhart*,²²² and *Carter Coal*²²³ to *Jones & Laughlin*,²²⁴ *United States v Darby*,²²⁵ and *Wickard v Filburn*.²²⁶ At the same

The Attack on the Segregation Cases, 70 Harv L Rev 83 (1956); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U Pa L Rev 1 (1959); Edmund Cahn, *Jurisprudence*, 30 NYU L Rev 150 (1955).

²¹⁷ Richard Posner has made the classic case for the inevitability of pragmatic judicial reasoning. See Richard A. Posner, *Pragmatism and Democracy* (Harvard, 2003); Richard A. Posner, *How Judges Think* (Harvard, 2008).

²¹⁸ Compare *Dennis v United States*, 341 US 494 (1951), with *Brandenburg v Ohio*, 395 US 444 (1969). See *Citizens United v FEC*, 558 US 50 (2010).

²¹⁹ See, for example, *Terry v Ohio* 392 US 1 (1968).

²²⁰ See, for example, *Korematsu v United States*, 323 US 214 (1944); *Shaw v Reno*, 509 US 630 (1993).

²²¹ *Lochner v New York*, 198 US 45 (1905).

²²² 247 US 251 (1918).

²²³ 298 US 238 (1936).

²²⁴ 301 US 1 (1937).

²²⁵ 312 US 100 (1941).

²²⁶ 317 US 111 (1942).

time, the old model of strict separation of powers gave way to a crisis-driven embrace of the administrative state.²²⁷ Once the twin pressures of economic crisis and perceived state regulatory incapacity abated, constitutional doctrine began taking federalism, separation-of-powers, and regulatory immunity claims more seriously again.²²⁸

The second was World War II (WW II) and the Cold War, with the nation struggling, first, for military survival; and, then, for worldwide ascendancy during a half century of almost uninterrupted international conflict that demanded a strong national government and led many to argue for the subordination of individual rights. The result was cases like *Gobitis*,²²⁹ *Korematsu*,²³⁰ *Yakus*,²³¹ and *Dennis*.²³² It is fashionable today to feign astonishment that the Court could have gotten *Korematsu* so wrong, but that is because the gravitational pull that led Justice Black to write the *Korematsu* opinion, and Justice Douglas to join it, has long since disappeared.²³³

²²⁷ Obvious examples are the judiciary's loss of fact-finding power in many settings (*Crowell v Benson*, 285 US 22 (1932)), and Congress's delegation of law-making power to administrative agencies. In the seventy-five years since *Schechter Poultry Corp. v United States*, 295 US 495 (1935), the Court has not invalidated a single Congressional delegation of power to an administrative agency.

²²⁸ For example, *United States v Lopez*, 514 US 549 (1995); *United States v Morrison*, 529 US 598 (2000); *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579 (1952).

²²⁹ *Minersville School Dist. v Gobitis*, 310 US 586 (1940) (upholding compulsory flag salute). *Gobitis* was overruled by *West Virginia Board of Education v Barnette*, 319 US 624 (1943), largely because recognition of a right not to salute the flag was a virtually costless way to draw a bright line between the nation's commitment to freedom and Nazi totalitarianism. *Barnette* is a magnificent case. It was also excellent propaganda.

²³⁰ *Korematsu v United States*, 323 US 214 (1944) (upholding wartime internment of Japanese Americans).

²³¹ *Yakus v United States*, 321 US 414 (1944) (upholding denial of judicial review in wartime price stabilization case). See also *Bowles v Willingham*, 321 US 503 (1944). Remove the wartime context and you get cases like *United States v Mendoza-Lopez*, 481 US 828, 839 n 15 (1987), and *Adamo Wrecking Co. v United States*, 434 US 275 (1978).

²³² *Dennis v United States*, 341 US 494 (1951) (upholding imprisonment of leaders of American Communist party).

²³³ Black and Douglas were the swing votes in *Korematsu*. Justices Roberts, Murphy, and Jackson dissented. Judge Posner has argued that *Korematsu* was rightly decided. Richard Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton, 2001). Judge Posner articulated the gravitational pull of the Cold War on First Amendment cases and the continuing viability of the gravitational pull theory: "[J]udges who in the 1950s believed that the nation was endangered by Communist advocacy of violent revolution did not think themselves compelled by the vague language of the First Amendment. . . . When the danger posed by subversive speech passes, the judges become stricter in their scrutiny of legislation punishing such speech. . . . But they are likely to change their tune when next the country feels endangered." Richard A. Posner, *Pragmatism versus Purposivism in First Amendment Analysis*, 54 Stan L Rev 737, 741 (2002).

The third was the moral crisis over race relations that gripped the nation in the aftermath of WW II. The result was *Brown* and many of the Warren Court's decisions discussed above.

Whether or not one agrees with the Supreme Court's reactions to these three crises, I find it impossible to imagine (much less be part of) a constitutional regime that claims to operate in splendid isolation from the existential crises that swirl about it. Bruce Ackerman has constructed a theory of implied constitutional amendment to explain and legitimate the Court's response to the Depression.²³⁴ My colleagues Richard Pildes and Samuel Issacharoff have suggested the existence of an implied emergency switch in the Constitution, analogous to the explicit emergency clauses in many European constitutions that justify altered constitutional doctrine during a national security crisis.²³⁵ Finally, David Strauss has persuasively argued that the Warren Court's approach to constitutional adjudication was driven by the same forces that cause the common law to evolve.²³⁶

My "gravitational pull" approach could be shoehorned into either Ackerman's idea of a "constitutional moment," or the Pildes/Issacharoff idea of implied emergency power. I prefer, however, to avoid formal claims that the Constitution itself changes in response to external events in favor of a weaker claim closer to David Strauss's that the Justices' reading of ambiguous constitutional provisions in hard cases will inevitably reflect pragmatic responses to perceived crises. For me, the harder issues raised by the Warren Court's response to racial injustice and regional failure are: (1) how to decide when circumstances or events are sufficiently critical to exert a legitimate gravitational influence on constitutional decision making, (2) how to decide when such a gravitational pull is no longer warranted, and (3) what to do with precedents that have emerged, at

²³⁴ Bruce Ackerman, *The Living Constitution*, 120 Harv L Rev 1737 (2007). For the complete theory, see Bruce Ackerman, *We the People, Vol. 1: Foundations* (Belknap, 1993), and Bruce Ackerman, *We the People, Vol. II: Transformations* (Belknap, 2000).

²³⁵ See Samuel Issacharoff and Richard Pildes, *Between Unilateralism and the Rule of Law: An Institutional Process Approach to Rights During Wartime*, 5 Theoret Inq in L 1 (2004); Samuel Issacharoff and Richard Pildes, *Emergency Contexts Without Emergency Powers*, 2 Intl J Const L 296 (2004). See also Richard A. Posner, *Not a Suicide Pact: The Constitution in Time of National Emergency* (Oxford, 2006).

²³⁶ See David A. Strauss, *The Living Constitution* (Oxford, 2010); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877 (1996); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 Wm & Mary L Rev 845 (2007). See also Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 Cal L Rev 959 (2004).

least in part, under the influence of a gravitational pull that has ebbed or ceased entirely.

I find the first two questions fascinating, but ultimately beyond the lawyer's craft. The question of when a national crisis achieves sufficient social mass to justify exerting a significant gravitational pull on constitutional doctrine cannot be reduced to a legal formula. It depends on the perceptions of the Justices and the ethos of the community. Racial discrimination in the 1930s was just as important to the nation and just as morally reprehensible as it was in the 1950s, but it took the psychological impact of a costly war against Nazi racism,²³⁷ a major internal and external threat from the Soviet Union, and the growth of a great national political movement for the concepts of racial injustice and regional failure to coalesce to the point where a national crisis over race exercised a sustained gravitational pull on constitutional doctrine. Most national issues, even when passionately felt and argued, are comparative tempests in teapots, unlikely to generate the sustained public passion and judicial concern that are needed to fuel a significant impact on judge-made constitutional doctrine.²³⁸

The closely related question of whether (and when) a crisis has ebbed sufficiently to lose its power to influence constitutional doctrine is also incapable of formal legal measurement. I believe passionately that many Justices turned away from the pursuit of racial justice too soon. But the choice between "benign neglect" and affirmative action was, at bottom, fundamentally political. For good or ill (and for many reasons), American society lost its intense focus on racial injustice and its intense mistrust of regional southern justice. Once that happened, the gravitational pull of the quest for racial justice on constitutional doctrine inevitably ebbed in ways that left lawyers like me largely out of the equation.

²³⁷ The losses suffered by ordinary Americans in the struggle to defeat Hitler and Imperial Japan were very substantial. The United States suffered 131,000 battle deaths, and an additional 400,000 war-related deaths, to say nothing of the maiming and pain of more than 500,000 battle wounds. See Michael Clodfelter, *Warfare and Armed Conflicts: A Statistical Reference to Casualty and Other Figures, 1500–2000* (McFarland, 2002). A people will seek to give meaning to losses of such magnitude by infusing the struggle with moral teaching that shapes the post-loss society—at least for a while. Witness the post-Civil War fervor that resulted in the Thirteenth, Fourteenth, and Fifteenth Amendments, and the post-Great War idealism that gave rise to the League of Nations.

²³⁸ See generally Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux, 2009).

But that raises a closely related question—should a Justice acknowledge the influence of a crisis on the decisional process? In those settings where a crisis operates under a Justice’s conscious radar, it is meaningless to talk of acknowledgment. There is nothing to acknowledge. In many cases, though, I think that the Warren Court knew exactly what it was doing. The Justices’ opinions—especially the factual recitations—occasionally signal to an attentive reader that race and the fear of regional failure are playing roles in the Justices’ reasoning.²³⁹ Sometimes, though, the Justices’ opinions are completely silent about the racial context of a case, even when the briefs must have made the racial implications clear.²⁴⁰ Most importantly, almost never does a Justice openly acknowledge that concerns about an opinion’s impact on race or regional failure are playing a role in the case’s outcome.²⁴¹ In retrospect, I believe that the Warren Court’s jurisprudence in many areas would have been more convincing and less controversial if the Court had acknowledged a crisis-bound necessity for reading the Constitution to avoid regional breakdown in the struggle for racial justice. During the Depression, the Court explained why it was impossible to retain the old federalism and separation-of-powers models. Candor over the impact of wartime crisis on judicial thinking is the only good thing I can say about *Korematsu*. A little of that candor would have strengthened the Warren Court. Justices who claim the power to construe a “living Constitution” should explain why their Constitution has adopted a particular lifestyle.

The third question—how to deal with constitutional precedent that appears to have been influenced by some event or crisis once the gravitational pull has ebbed—is, however, largely a lawyers’ issue. Post-Warren Court decisions in at least five areas—freedom of speech, freedom from religion, federalism, separation of powers, and criminal law and procedure—may shed some light on the issue. While Warren Court free speech doctrine has prospered, going on

²³⁹ See, for example, *United States v Price*, 383 US 745 (1966); *United States v Guest*, 383 US 787 (1966).

²⁴⁰ See, for example, *Thompson v City of Louisville*, 363 US 199 (1960); *Monroe v Pape*, 365 US 167 (1961).

²⁴¹ I suspect it is because they were bluffed away from the table by Herbert Wechsler and friends. It is the same self-protective but ultimately hypocritical behavior that has led all Supreme Court nominees since Robert Bork to engage in the charade of the modern Senate confirmation hearing, where the nominees fervently promise to apply the law, but duck questions about how they will determine what the law is in hard cases.

to protect commercial advertisers,²⁴² flag burners,²⁴³ hate speech,²⁴⁴ and corporations intent on spending unlimited sums to affect the outcome of elections,²⁴⁵ the Warren Court's constitutional law of federalism was largely abandoned once the gravitational pull of race was removed from the judicial equation.²⁴⁶ Establishment Clause doctrine has also seen a marked decrease in the intensity of constitutional protection.²⁴⁷ Finally, the post-Warren Court years have seen a significant relaxation of the exclusionary rule²⁴⁸ and *Miranda*,²⁴⁹ but have also experienced a powerful reaffirmation of the Warren Court's due process, jury trial, right to counsel, and error-deflection norms.²⁵⁰

My tentative explanation for the staying power of the free speech and criminal law and procedure precedents and the relative erosion of the Establishment Clause, exclusionary rule, and federalism precedents turns on the nature of the original decisions. I acknowledge, however, a substantial bias in attempting to find a principled explanation for the changes in doctrine other than exclusive reliance on the political preferences of a new Supreme Court majority. While I do not subscribe to the myth that constitutional adjudication is a value-free application of objective commands rooted in text, history, and precedent,²⁵¹ I believe that constitutional adjudication in a system genuinely committed to the rule of law cannot simply be a matter of raw judicial preference. Constitutional adjudication in hard cases is an untidy mix of choice and constraint. One of the principal constraints is respect for precedent. Where, however, the most plausible explanation for a Warren Court precedent is an instrumental response to the crisis of race and regional failure, I

²⁴² *Virginia Pharmacy Board v Virginia Citizens Consumer Council*, 425 US 748 (1976).

²⁴³ *Texas v Johnson*, 491 US 397 (1989).

²⁴⁴ *R.A.V. v City of St. Paul*, 505 US 377 (1992).

²⁴⁵ *Citizens United v FEC*, 558 US 50 (2010).

²⁴⁶ See text accompanying notes 184–97.

²⁴⁷ See text accompanying notes 207–10.

²⁴⁸ See note 210.

²⁴⁹ *Id.*

²⁵⁰ For example, *Blakely v Washington*, 542 US 296 (2004); *United States v Booker*, 543 US 220 (2005).

²⁵¹ A generation of bitterly contested 5–4 decisions disagreeing over which “correct” objective norm to apply in a hard constitutional case has rendered the idea that only one objectively correct norm exists in hard cases transparently false to all but the ideologically deaf and blind.

would neither expect nor wish the precedent to outlive the crisis. Don't get me wrong. I do not suggest that the Warren Court's race-driven decisions were wrong. They were necessary to deal with a genuine breakdown in the rule of law. I do suggest, though, that several were crisis-driven and crisis-bound. Where, however, the Warren Court's intense concern over racial justice and regional failure operated as a magnifying glass,²⁵² sharpening the Justices' perception of the necessity for principled constitutional protection against government overreaching, the decisions deserve, and have received, respect long after the crisis about race and regional failure that gave them life has subsided.

In the free speech, criminal law, and due process cases, the Justices' concern over race and regional failure often acted as just such a magnifying glass, assisting the Court in recognizing the extent to which government behavior was deviating in important ways from the purpose of a given constitutional provision. In cases like *Times v Sullivan*,²⁵³ *In re Winship*,²⁵⁴ *Goldberg v Kelly*,²⁵⁵ *Gideon v Wainwright*,²⁵⁶ and *Papachristou v Jacksonville*,²⁵⁷ the Warren Court rooted its race-sensitive decisions in principled and persuasive intellectual models that reflected the underlying purpose of the relevant constitutional text. As a consequence, those opinions have had staying power long after the Court's concern over racial injustice has—rightly or wrongly—passed into history. On the other hand, several federalism and Establishment Clause decisions that appear to have been almost wholly instrumental have lacked sustained staying power once the gravitational pull of race diminished.²⁵⁸

For example, *Times v Sullivan*²⁵⁹ almost certainly was influenced in the short term by a desire to protect the civil rights movement in the South, but was rooted in a free marketplace of ideas model of the First Amendment that, while contestable, resonated with our constitutional traditions and advanced the First Amendment's basic

²⁵² I am grateful to Geoff Stone for the metaphor.

²⁵³ 376 US 254 (1964).

²⁵⁴ 397 US 358 (1970).

²⁵⁵ 397 US 254 (1970).

²⁵⁶ 372 US 335 (1963).

²⁵⁷ 405 US 156 (1972).

²⁵⁸ As I have noted, I believe that the Court turned away from the gravitational pull of racial equality much too soon.

²⁵⁹ 376 US 254 (1964).

purpose. Not surprisingly, long after the short-term need to protect the civil rights movement had passed, *Times v Sullivan* continues to serve as an animating precedent driving First Amendment doctrine toward a free market in ideas.²⁶⁰ It does not hurt that protection of free speech fits so neatly into the post-Warren Court's embrace of autonomy as its prime constitutional value.

Similarly, long after Rule 23(b)(2) solved the short-term dilemma that precipitated *Cooper v Aaron*,²⁶¹ the opinion's wise and pragmatic recognition that a stable theory of separation of powers requires respect for the Supreme Court's reading of the Constitution by state and federal officials continues to dominate the field, especially if you ask the Supreme Court.

Many of the Warren Court's criminal procedure decisions also tapped into a powerful intellectual model embedded in the Constitution. Warren Court opinions (1) assuring indigent defendants a right to appointed counsel in criminal prosecutions,²⁶² (2) requiring the government to prove guilt beyond a reasonable doubt in a criminal case,²⁶³ (3) preserving a fair and representative jury,²⁶⁴ (4) assuring a fair hearing before adverse government action,²⁶⁵ and (5) preventing wholly discretionary arrests and investigatory stops²⁶⁶ have transcended the crisis over race and regional failure that may have influenced the decisions.

On the other hand, it is very difficult to square certain of the Warren Court's federalism cases with any coherent theory of federalism. They were purely instrumental responses to a crisis about

²⁶⁰ Ironically, while the case's marketplace-of-ideas model has powered First Amendment jurisprudence for almost fifty years, in the absence of the gravitational pull of race, Justice Brennan could not persuade the post-Warren Court to take the opinion to its logical conclusion of protecting speech on public issues. *Gertz v Robert Welch, Inc.*, 418 US 323 (1974). On the other hand, the core holding has survived and prospered. See *Philadelphia Newspapers v Hepps*, 475 US 767 (1986) (plaintiff must bear burden of proving malice); *Anderson v Liberty Lobby, Inc.*, 477 US 242 (1986) (clear and convincing standard applicable at summary judgment stage); *Bose Corp. v Consumers Union*, 466 US 485 (1984) (de novo appellate review of whether malice proved with sufficient clarity).

²⁶¹ 358 US 1 (1958).

²⁶² *Gideon v Wainwright*, 372 US 335 (1963); *Argersinger v Hamlin*, 407 US 25 (1972). See also *Klopfer v North Carolina*, 386 US 213 (1967) (speedy, public trial); *Pointer v Texas*, 380 US 400 (1965) (confrontation); *Washington v Texas*, 388 US 14 (1967) (compulsory process).

²⁶³ *In re Winship*, 397 US 358 (1970).

²⁶⁴ *Duncan v Louisiana*, 391 US 145 (1968).

²⁶⁵ *Goldberg v Kelly*, 397 US 254 (1970).

²⁶⁶ *Papachristou v Jacksonville*, 405 US 156 (1972); *Terry v Ohio*, 392 US 1 (1968).

race and regional failure; rightly decided for their time, but time- and crisis-bound. Once states appeared ready to shoulder the burden of race, the post-Warren Court quickly gave them back many of their traditional powers.²⁶⁷ Similarly, once the Establishment Clause was no longer seen as necessary to protect *Brown*, it was only a matter of time before *Flast*, which was largely instrumental, was put into play. Finally, as police forces integrated and state judiciaries turned over generationally, the crisis-driven prophylactic norms announced in *Mapp* and *Miranda* evolved. *Mapp* and *Miranda* operate on two levels. As dramatic prophylactic responses to an institutional breakdown in the relationship between local police forces and black citizens, both cases are rooted in a time and place.²⁶⁸ Both opinions were, however, also rooted in a deeply principled constitutional understanding of the relationship between the state and the individual, an understanding that forbids the state from benefiting from its own wrongdoing. That important constitutional principle fuels the enduring staying power of both cases and explains why, once the gravitational pull of race ebbed, both cases have evolved toward requiring blameworthy conduct by a government official.

IV. CONCLUSION

I have tried to tell a story of the evolution of race-driven constitutional doctrine during and after the Warren Court in three stages: (1) a fully warranted response to a national crisis about race and regional failure, (2) the time-bound nature of those primarily instrumental decisions seeking to deal with the crisis, and (3) the staying power of constitutionally principled responses. While my story is a far cry from contemporary fantasies of objective commands unambiguously embedded in the constitutional text and history, or overarching theories of constitutional meaning, it reflects my day-to-day experiences as a foot soldier in the constitutional trenches for forty-six years and more than 500 constitutional cases. Of course, my trench-bound perspective may have blinded me to the grand designs of the general staff. But maybe there is no general staff,

²⁶⁷ See text accompanying notes 184–212.

²⁶⁸ I believe that the Court has seriously underestimated the continuing need for prophylaxis in dealing with police interactions with racial minorities, but that's just me arguing for the continued gravitational pull of race.

and no grand designs. Maybe, just maybe, all there is are lawyers and judges plying their craft, trying to do justice as they see it in an imperfect world.