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BROWN V. BOARD OF EDUCATION
Why Do We Need Constitutional Rights?

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The outcome in *Brown v. Board of Education*[1] was highly uncertain when the case first came before the Supreme Court. Although the Court had invalidated several racial segregation laws because they did not meet the "equal" standard of *Plessy v. Ferguson*,[2] no Justice had ever questioned the continuing validity of *Plessy* itself.

The Court first heard oral arguments in *Brown* in the fall of 1952. The Justices' notes from the conference suggest they were divided about the outcome and that there was not a majority in favor of ending racial segregation in public schools. In all likelihood, the Justices who were inclined not to overrule *Plessy* were hesitant to do so because they were doubtful that the drafters of the Fourteenth Amendment affirmatively intended to forbid racial segregation, concerned about overruling a well-known precedent, worried that such a decision would generate a furious and hostile reaction against the Court—especially in the South, and hesitant to engage in what might be perceived as unwarranted "judicial activism."

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

2 Plessy v. Ferguson, 163 U.S. 537 (1896). For examples, see McCabe v. Atchison, Topeka and Santa Fe R.R., 235 U.S. 151 (1914) (holding that railroad companies that provided first-class cars for white people had to do the same for Black people); Buchanan v. Warley, 245 U.S. 60 (1917) (holding that racially segregated neighborhoods were unconstitutional); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (holding that it was unconstitutional for Missouri to deny Gaines admission to all law schools in the state even if it was willing to pay for him to attend a law school in another state); Sweatt v. Painter, 339 U.S. 629 (1950) (holding that a separate but unequal law school for Black students was unconstitutional); McLauren v. Okla. State Bd. of Regents, 330 U.S. 637 (1950) (holding that requiring a Black student in a state law school to sit apart from white students was unconstitutional). On a related issue, see Smith v. Allwright, 321 U.S. 649 (1944) (holding white primaries unconstitutional).

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Therefore, in June of 1953, the Justices decided to put off a decision in the case and give themselves more time to reflect by ordering another round of briefing and argument for the following Term. In light of the virtually unquestioned celebration of *Brown* today, the very fact that the Justices were uncertain about how to decide *Brown* at the time speaks volumes about the relatively cautious nature of constitutional law seventy years ago.

In the summer of 1953, though, Chief Justice Fred Vinson died and President Dwight Eisenhower replaced him with California Governor Earl Warren. Warren, who had been an exceptionally effective Republican politician, is often credited with having brought about the unanimous decision in *Brown*—an extraordinarily bold and courageous decision at the time.

As some of the Justices feared, *Brown* triggered bitter and often violent and terrifying responses, especially across the South, and led to unprecedented condemnation of the Court as an unprincipled and illegitimate institution of government. In early 1956, for example, roughly eighty percent of the members of the South's congressional delegation signed the "Southern Manifesto," which denounced the *Brown* decision as a "clear abuse of judicial power" and called on people to "resist forced integration."[3]

Nonetheless, and despite the often brutal resistance to *Brown*, in the seventy years since the decision no Justice has ever suggested that *Brown* was wrongly decided, and over that time *Brown* has come to be accepted by the vast majority of the American people as one of the Supreme Court's greatest achievements of all time.

What was especially striking about the decision is that in the century before *Brown* and, indeed, from the very founding of our nation, the Supreme Court had decided only a handful of cases in which it had protected—much less boldly protected—the constitutional rights of vulnerable minorities or defended the integrity of our democratic process against aggressive majoritarian abuse.[4]

My thesis in this essay, in short, is that although the Court was quite cautious in enforcing *Brown* in the years after the decision, as illustrated by *Brown II*,[5] which called for compliance with *Brown* with "all deliberate speed," *Brown* arguably inspired a bold new approach to the constitutional protection of individual rights. This approach led the Court, at least for a while after *Brown*, to be much more assertive in meeting its core responsibility of protecting our nation's most fundamental constitutional rights than ever before in history. That profound shift in the understanding of our Constitution, and of

3 Jane Dailey, Building the American Republic, Vol. 2: A Narrative History from 1877, at 233–34 (2018).

4 For a few examples of such decisions, see Near v. Minnesota, 283 U.S. 697 (1931) (holding unconstitutional a state law that authorized prior restraints against the press); Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding unconstitutional a state law that authorized the sterilization of criminals); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding unconstitutional a policy requiring students to recite the pledge of allegiance at the beginning of each school day).

5 Brown v. Bd. of Educ., 349 U.S. 294 (1955).

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the appropriate role of the Supreme Court, was perhaps *Brown*'s most important contribution to our nation.

Of course, many conservative lawyers, judges, and legal scholars insist that, even if *Brown* was rightly decided, what I maintain was its broader impact on constitutional interpretation was flat-out misguided and led to a serious abuse of the Court's constitutional authority, especially during the Warren Court years. As should already be evident, I strongly disagree with this view.

I.

An interesting question in a democracy is why there is a need for guaranteed constitutional rights. After all, even without constitutional constraints, people are unlikely to enact laws that violate what they regard as their *own* freedom of speech, freedom of the press, freedom of religion, freedom from unreasonable searches and seizures, right to due process of law, privilege against compelled self-incrimination, right to counsel, freedom from cruel and unusual punishment, right to equal protection of the laws, right to vote, and so on. Indeed, why would anyone support a law that denied them any of those rights? If the point of guaranteeing individual rights in the Constitution is to ensure that government won't violate those rights, then isn't that concern wholly superfluous because the "people" will refuse to enact laws that deny them their fundamental rights even in the absence of such constitutional guarantees?

I know this sounds silly. After all, even if people wouldn't deny such rights to *themselves*, that doesn't mean they wouldn't deny them to *others*. That is the primary reason for guaranteeing these rights in the Constitution: to protect us from those who have the power to make laws that deny others their fundamental rights while preserving those same rights for themselves. Think, for example, of freedom of speech or freedom of religion or the right to due process or the right to counsel or the freedom from unreasonable searches and seizures or the freedom from cruel and unusual punishment or the right to equal protection of the laws, and so on.

If these rights were not protected by the Constitution, then those in power could easily craft laws that would deny those rights to others but not to themselves. After all, that might be in their own self-interest. It would be easy, for example, for the majority to criminalize speech they dislike while protecting their own speech, or to punish religions they disdain while protecting their own religion, or to disadvantage people of other races while advantaging themselves, or to deny equal public education to the children of those they regard as the "other," or to deny the right to vote to those they disagree with, and on and on and on. The challenge is how to prevent such behavior if we believe protecting those "rights" for *all* persons is essential to a principled and well-functioning democracy. We know that, human nature being what it is, without such constraints we won't have a fair, just, or equal society.

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The obvious solution is to prohibit those in power at any given moment from denying these rights to others while preserving them for themselves. But how do we achieve this? The seemingly obvious answer, of course, is to guarantee these rights in the Constitution. But with that in mind, it is important to remember that the original Constitution did not have a Bill of Rights. That's why the rights guaranteed in the Constitution were all *amendments* that were later adopted. But why was that so?

That question calls to mind a fascinating and extraordinarily enlightening exchange between Thomas Jefferson and James Madison.

II.

When the Constitution was first drafted, James Madison, perhaps the most important of the Framers, did not believe a Bill of Rights would serve any purpose. He was confident that, human nature being what it is, political majorities would interpret those rights in any way that suited their own self-interest and that guaranteeing rights in the Constitution would therefore lead only to cynicism, injustice, and disillusion. On December 20, 1787, though, Thomas Jefferson, who was then serving as our minister to France, wrote to Madison that after reviewing the proposed Constitution, he regretted "the omission of a bill of rights." In response, Madison expressed his doubt that a bill of rights would "provide any meaningful check on the passions and interests of popular majorities." He maintained that "experience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State" that already had a bill of rights. In such circumstances, he asked Jefferson, "What use . . . can a bill of rights serve in popular Governments?"[6]

Jefferson's answer was clear: the courts, he said, can ensure that a constitutional guarantee of such rights is effective. "Your thoughts on the subject of the Declaration of Rights," he told Madison, fail to address one consideration "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body which if rendered independent . . . merits great confidence for their learning and integrity" and for their ability to protect the most fundamental values of our nation.[7]

6 Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* The Papers of Thomas Jefferson, Main Series, Vol. 12: August 7, 1787—March 31, 1788, at 440 (Julian P. Boyd ed., 1955); letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* The Papers of James Madison, Congressional Series, Vol. 11: March 7, 1788—March 1, 1789, at 297 (Charles F. Hobson et al. eds., 1978); *see also* Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 328–29 (1996).

7 Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* The Papers of Thomas Jefferson, Main Series, Vol. 14: October 8, 1788—March 26, 1789, at 659 (Julian P. Boyd ed., 1958).

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This exchange apparently helped persuade Madison. On June 8, 1789, Madison proposed a bill of rights to the House of Representatives. Echoing Jefferson's letter, Madison said that if these rights are "incorporated into the constitution, independent tribunals of justice will consider themselves . . . the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights" guaranteed in the Constitution.[8]

But even if we accept Jefferson and Madison's understanding of fundamental constitutional rights and of the judiciary's critical responsibility to serve as "an impenetrable bulwark" to protect vulnerable individuals against majoritarian abuse, the question remains how the judiciary can know when there is in fact a risk of majoritarian abuse. After all, not all laws restricting rights "guaranteed" in the Constitution pose this danger.

The question, then, is how does a court know when it needs to be *especially* careful to protect the nation against constitutional abuses by "popular majorities." Consider, for example, a law prohibiting the use of loudspeakers in residential neighborhoods after 10:00 at night; a law allowing the police to search a person without a warrant if they see him running away from a murder scene carrying a gun; or a law prohibiting people under the age of twelve from voting. Do such laws pose the sorts of risks of "majoritarian abuse" that Jefferson and Madison were concerned about with respect to the meaning of the First Amendment or the Fourth Amendment or the Equal Protection Clause or other rights guaranteed in the Constitution? Surely, they do not. To make meaningful the core concerns of Jefferson and Madison, a central question in interpreting and applying these vague and open-ended provisions of the Constitution is to understand *when* there is a serious risk of majoritarian abuse of government power.

In 1938, after many decades of largely avoiding this question, the Court, in footnote four of its opinion in *United States v. Carolene Products*[9]—the most famous footnote in Supreme Court history—declared that although in a democracy courts must give reasonable deference to legislative judgments even when constitutional rights are at issue, "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" must "be subjected to more exacting judicial scrutiny," and that "prejudice against discrete and insular minorities" calls "for a . . . more searching judicial inquiry."

In short, reflecting at least implicitly the concerns addressed by Jefferson and Madison in 1789, footnote 4 identified two of the most important situations in which courts must be especially attentive to the risks of constitutional violation: when majorities manipulate

8 The Papers of James Madison, Congressional Series, Vol. 12: March 2, 1789—January 20, 1790 with Supplement October 24, 1775—January 24, 1789, at 206–07 (Charles F. Hobson et al., eds. 1979).

9 U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

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the political process to distort the goals and values of a democracy to preserve their own authority, and when majorities discriminate against members of society who are viewed by the majority as the “other” and who cannot reasonably protect themselves in the democratic process.

It is for these reasons that courts must be especially skeptical of the constitutionality of laws that, for example, manipulate who is eligible to vote; discriminate against the expression of certain points of view; disadvantage racial, religious, political, and other minorities; and so on. It is these sorts of situations in which the concerns voiced by Jefferson and Madison when the Bill of Rights was adopted are most powerful and that the Court must be especially focused on to effectively and courageously protect our nation’s most fundamental constitutional rights when they are most in jeopardy.

As evidenced by *Brown*, this was the vision the Warren Court embraced. This vision gave the Court a role that was consistent with a commitment to democracy and equality and that enabled the Court to insist that our government must operate in a fair and open manner. In that way, *Brown* set the stage for much of what the Warren Court did later, and it helped define a principled role for the Supreme Court to play in American government.

Indeed, at least in my view, *Brown* illustrates the genius of our constitutional system. Constitutional principles are not frozen in time; they evolve as society changes and as experience informs our understandings. The drafters of the Fourteenth Amendment did not affirmatively believe they were outlawing school segregation, but they did have a vision of equality, and the Warren Court courageously carried forward that vision and adapted it for our time, not only protecting the rights of a discrete and insular minority that had been subject to centuries of discrimination but also noting that “education is perhaps the most important function of state and local governments” and that “it is the very foundation for good citizenship.” As the Court observed, “in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education,” and “such an opportunity . . . is a right that must be provided to all on equal terms.”[10]

III.

It was, I would argue, this special responsibility for making our constitutional rights a reality—rather than, in Madison’s words, a mere “parchment barrier”—that animated the Warren Court’s bold, courageous, and profoundly controversial decision in *Brown*. It would have been easy for the Justices to have avoided the furious opposition and controversy they triggered either by simply not deciding the case at all or by handing down a

10 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

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much more cautious and modest decision. But they chose not to do so. Instead, they lived up to the highest aspirations of our Constitution. Or did they?

An alternative explanation of the Justices' reason for deciding *Brown* as they did might be that this was in fact a highly partisan decision designed to gain political power for the Democratic Party. After all, at the time *Brown* was decided, eight of the nine Justices—all but Earl Warren—had been appointed by Democratic presidents. Perhaps, then, *Brown* was not a "principled" and courageous decision but rather a highly partisan decision driven by the political interests of the Democratic Party. Perhaps, then, it was no different than the Roberts Court's decision in *Dobbs*.[11]

Nothing, though, could be further from the truth. In the 1952 presidential election, shortly before the decision in *Brown, all* of the nine states won by Adlai Stevenson, the Democratic candidate, aggressively compelled racial segregation of their public schools: Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and West Virginia. These were the *only* states won by the Democratic candidate. Clearly, the Justices in *Brown* were not interpreting the Constitution to pander to their party's supporters.

Perhaps even more telling, in the year when *Brown* was decided, thirty of the thirty-four senators from the seventeen states that required racial segregation in their schools were members of the Democratic Party. Undermining the political support of their own party in those states could hardly have been an easy thing for the Justices to do. It took a deep commitment to judicial independence and to political courage.

What this clearly suggests is that *Brown* was definitely *not* a decision driven by the partisan interests of the Justices. To the contrary, it was a decision made by the Justices even though it eventually led to almost all states that required racial segregation before *Brown* moving from the Democratic to the Republican Party.[12] This was hardly in the partisan interest of the Justices who decided the case. It was, instead, clearly a courageous and principled decision consistent with the aspirations of Jefferson and Madison at the time the Bill of Rights was adopted.

IV.

Before the decision in *Brown*, school districts in seventeen states required Black children to go to different schools than white children. In twenty-seven states, it was illegal for a

11 Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

12 Those seventeen states were Alabama, Arkansas, Delaware, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia. In the 2020 presidential election, fourteen of the seventeen states that had racially segregated schools when *Brown* was decided voted for the Republican candidate, Donald Trump, and today twenty-five of the thirty-four senators from those states are members of the Republican Party, compared to only four of the thirty-four in 1954.

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Black person to marry a white person. Every state in the nation violated the principle of "one person, one vote." Government officials could sue their critics for ruinous damages for inaccurate statements, even if the critics acted in good faith. Married couples could be denied the right to use contraception. Public school teachers led their classes in overtly religious prayers. Police officers could interrogate suspects without telling them their rights. Criminal defendants who could not afford a lawyer had no right to a public defender, and on and on and on. In all of these situations, and in many others as well, the Warren Court held these practices unconstitutional.[13] None of this was obvious or inevitable.

It was the courageous decision in *Brown* that led the Justices to embrace this bold understanding of our Constitution and of the most fundamental responsibilities of the Supreme Court. Before *Brown*, few if any of these decisions would have been made by the Court. Indeed, it was *Brown*, I would argue, that inspired these revolutionary decisions in no small part because, with its decision in *Brown*, the Court finally confronted our nation's greatest evil: centuries of severe and pervasive racial discrimination against Black Americans. The Court's willingness to address this evil in *Brown* opened the door to a broader and more compelling understanding of the Court's most fundamental responsibility: to preserve and protect the essential principles of American democracy.

It is worth noting, by the way, that the Justices who decided *Brown* had not been appointed to the Court because of any expectation that they would embrace such a bold approach to constitutional interpretation. Indeed, most of the Justices who joined the unanimous decision in *Brown* were not what we today would call "liberal" Justices. For Justices Reed, Frankfurter, Jackson, Burton, Clark, and Minton in particular, *Brown* was a decision that went well beyond their usual approach to constitutional jurisprudence. The fact that even these Justices saw the necessity for courageous judicial engagement in *Brown* speaks powerfully not only about the decision but also about the shift *Brown* triggered in the Court's overall jurisprudence.

Moreover, although the often bitter public controversy caused by the decision in *Brown* might well have led the Justices who decided *Brown* to embrace a much more cautious approach to constitutional interpretation—even with respect to the protection of minorities and the democratic process—the Warren Court moved ahead in a bold and courageous manner.

It was, I maintain, the Justices' decision to resolve *Brown* as they did, and their decision to move beyond the furious response to *Brown*, that gave these Justices and their

13 *See* Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage); Reynolds v. Sims, 377 U.S. 533 (1964) (one person, one vote); N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (libel of public officials); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception for married couples); Engel v. Vitale, 370 U.S. 421 (1967) (prayer in public schools); Miranda v. Arizona, 384 U.S. 436 (1966) (warnings for arrested persons); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to lawyer if defendant cannot afford one).

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successors on the Warren Court this fundamentally new, robust, and (in my view) profoundly correct understanding of their responsibilities.

Thus, in no small part because of *Brown*, the Justices of the Warren Court had a profound vision of the role the Supreme Court should play in our American democracy. Today, especially, it is important to see that the often vitriolic criticisms of the Warren Court were wrong then, and they are wrong now.

V.

Since 1969, the Supreme Court has become ever more "conservative" and moved sharply away from the vision of the Warren Court. Indeed, Republican presidents have appointed fifteen of the last twenty Justices, even though Republican presidential candidates have won the popular vote in only five of the last thirteen elections, and they have increasingly done so to politicize the Court in a direction inconsistent with the spirit of *Brown*.

When Richard Nixon appointed Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist to replace four of the Warren Court Justices, they were understood at the time to be quite "conservative." Indeed, as Nixon made clear, a central reason for nominating them was that they would reject the Warren Court's approach to constitutional law.

Living up to Nixon's expectations, his nominees often took much more conservative positions than the Justices of the Warren Court would have taken. To cite just five of *many* possible examples, in *San Antonio Independent School District v. Rodriguez*,[14] with all four Nixon-appointed Justices in the majority and four of the five remaining Warren Court Justices in dissent, the Burger Court held that a state public-school financing system that led to significantly more money being spent on public schools in predominantly white school districts than in predominantly minority school districts did not violate the Equal Protection Clause.

In *Milliken v. Bradley*,[15] with all four Nixon-appointed Justices in the majority and four of the five Warren Court Justices in dissent, the Court held that school desegregation mandates need apply only to schools within a *single* school district and not to schools across district lines, thus sharply limiting the effectiveness of *Brown* in residentially segregated states.

In *Frontiero v. Richardson*,[16] four of the five Warren Court Justices argued that, in light of the long and persistent history of discrimination against women in our nation and the continuing underrepresentation of women in government, laws that expressly discriminate against women must be held to be unconstitutional unless they satisfy the Equal Protection Clause's strict scrutiny standard, while all four of the Nixon appointees declined to apply strict scrutiny to such laws.

14 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

15 Milliken v. Bradley, 433 U.S. 267 (1977).

16 Frontiero v. Richardson, 411 U.S. 677 (1973).

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In *Bowers v. Hardwick*,[17] in a five-to-four decision, with four of the five Justices in the majority appointed by Republican presidents, the Court held that the Constitution does not confer "a fundamental right to engage in homosexual sodomy" and therefore upheld the conviction of two men for engaging in same-sex sex.

Finally, in *First National Bank of Boston v. Bellotti*,[18] the Court, in another five-to-four decision, this time with five of the six Nixon-Ford appointed Justices in the majority (by this time President Ford had appointed Justice Stevens to replace Justice Douglas) and the three remaining Warren Court Justices in dissent, the Court, overruling prior precedent, held for the first time that corporations have a constitutional right to make political expenditures, thus initiating a set of decisions that over time would seriously distort our democratic process.

These decisions are merely representative of the many ways in which the Burger Court addressed constitutional issues in a manner inconsistent with the vision the Court had embraced in *Brown*. But all things are relative, and even the Nixon appointees were not unequivocally indifferent to the sorts of concerns that led to the decision in *Brown*.

Perhaps most dramatically, in *Roe v. Wade*,[19] the Burger Court, in a seven-to-two decision, with four of the five Warren Court Justices and three of the four Nixon appointees in the majority, held that women have a constitutional right to abortion and to control their own bodies and their own destinies. Moreover, the majority opinion was written by Justice Blackmun, a Nixon appointee.

To cite one other example, in *Regents of the University of California v. Bakke*,[20] the Court, in a five-to-four decision, with three of the four remaining Warren Court Justices and only two of the five Nixon-Ford appointed Justices in the majority, held that affirmative action in college admissions is not unconstitutional. Significantly, though, Justice Powell, who wrote the plurality opinion, justified affirmative action on the ground that having a racial diversity of students enriches the educational process—perhaps especially for white students—whereas the three remaining Warren Court Justices and Justice Blackmun argued that affirmative action is constitutional because of our nation's long history of severe racial discrimination and because of the continuing effects of that history. This was obviously a justification much more in line with the jurisprudence embraced by the Court in *Brown*.

VI.

In the years since the end of the Burger Court, there has consistently been a substantial majority of Republican-appointed Justices on the Court. Although some of these Justices,

17 Bowers v. Hardwick, 478 U.S. 186 (1986).

18 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

19 Roe v. Wade, 410 U.S. 113 (1973).

20 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

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such as Sandra Day O'Connor, Anthony Kennedy, and David Souter, have fairly been characterized as moderate conservatives, most of them, such as Antonin Scalia, Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, Amy Coney Barrett, and, perhaps until recently, John Roberts, have fairly been characterized as extreme conservatives. By "extreme" conservative I do not mean a commitment to judicial restraint but rather a vigorous approach to constitutional interpretation that largely abandons the fundamental principles of footnote 4 and of the *Brown* decision. Instead, the current Court's decisions too often reflect an approach to constitutional interpretation that embraces a reestablishment of the privileges and powers of the majoritarian regime and that uses the Constitution to protect and preserve certain goals and values that are clearly antithetical to the more principled approach embraced by the Court in *Brown*.

To cite just a few examples, this approach, in both the Rehnquist and Roberts Courts, has increasingly been used to interpret the First Amendment to expand dramatically and in an unprecedented manner the right of corporations and of millionaires and billionaires to spend limitless amounts of money to shape and distort our political and democratic process; [21] to construe the Second Amendment right to "keep and bear arms" in a manner that vastly expands that right, causing the loss of many thousands of lives, especially of poor people and minorities;[22] to dramatically expand the constitutional protection of commercial speech in an unprecedented manner;[23] to uphold the constitutionality of laws that significantly restrict the voting rights of racial and other minorities;[24] to award the 2000 presidential election to George W. Bush;[25] and on and on and on.

To be clear, none of this, in my view, is the product of any principled approach to constitutional interpretation, whether it is called judicial restraint, originalism, textualism, or whatever. When examined as a whole, the work of these Justices (at least when viewed in terms of their most controversial and influential decisions) is clearly consistent with their own personal and political views. I know this is very harsh, but unlike the Court's decision in *Brown* and the subsequent decisions of the Warren Court, this jurisprudence surely would not make Jefferson and Madison proud.

Having said this, at least a few decisions of the post-Burger Court are clearly inconsistent with my very harsh critique. I will mention four of them. First, there was the Rehnquist Court's 1992 decision in *Planned Parenthood v. Casey*,[26] in which three of the Republican-appointed Justices (O'Connor, Kennedy, and Souter) refused, in a plurality

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21 *See*, *e.g.*, Citizens United v. Fed. Elections Comm'n, 558 U.S. 310 (2010).

22 *See*, *e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

23 *See*, *e.g.*, Sorrell v. IMS Health, 564 U.S. 552 (2011).

24 *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

25 Bush v. Gore, 531 U.S. 98 (2000).

26 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

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opinion, to overrule the Burger Court's 1973 decision in *Roe*. They did, however, replace *Roe*'s strict-scrutiny standard with a less stringent undue-burden standard, giving states more leeway to place restrictions on abortion rights. The other two Justices in the majority—Ginsburg and Breyer—would have flat-out reaffirmed *Roe*. All of the four dissenting Justices—Rehnquist, Scalia, Kennedy, and Thomas—were appointed by Republican presidents and voted to overrule *Roe*.

Second, there was the Rehnquist Court's 2003 decision in *Grutter v. Bollinger*,[27] in which the Justices, in a sharply divided five-to-four decision, with three of the seven Republican-appointed Justices in the majority (O'Connor, Kennedy, and Souter), reaffirmed the Burger Court's 1978 decision in *Bakke* and held once again that affirmative action is constitutional. All four of the dissenting Justices who called for *Bakke* to be overruled had been appointed by Republican presidents.

Of course, it's not at all clear whether the Republican-appointed Justices who voted not to overrule *Roe* and *Bakke* would have decided those cases the way they did if there weren't clear precedents in place in both cases. After all, there is always supposed to be a strong presumption in favor of following even precedents with which one disagrees. Would the Republican-appointed Justices in the majority in *Casey* and *Grutter* have decided those cases as they did but for the doctrine of precedent? Who knows?

Then there is the issue of sexual orientation. Seventeen years after the Burger Court's decision in *Bowers*, the Roberts Court stunningly overruled *Bowers* in *United States v. Windsor*.[28] With four of the five Justices in the majority appointed by Democratic presidents (Ginsburg, Breyer, Sotomayor, and Kagan) and all four of the dissenting Justices (Roberts, Scalia, Thomas, and Alito) appointed by Republican presidents, the Court overruled *Bowers* and held that the Constitution does, indeed, protect the right of individuals to engage in same-sex sex. Justice Kennedy, who had been appointed by President Reagan, was the key swing vote in the case. Once again, though, the partisan differences in the voting were quite striking.

And then, in *Obergefell v. Hodges*,[29] with four of the five Justices in the majority having been appointed by Democratic presidents (Ginsburg, Breyer, Sotomayor, and Kagan), and four of the five Republican-appointed Justices in dissent (Roberts, Scalia, Thomas, and Alito), and with Justice Kennedy once again casting the deciding vote, the Court held that the Constitution protects the right of two people of the same sex to marry.

These four decisions, although quite out of the ordinary for the Rehnquist and Roberts Courts, were quite consistent with the fundamental spirit of *Brown*.

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27 Grutter v. Bollinger, 539 U.S. 306 (2003).

28 U.S. v. Windsor, 570 U.S. 744 (2013).

29 Obergefell v. Hodges, 576 U.S. 644 (2015).

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VII.

And that brings me to the present. With Donald Trump's appointment of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, the Court has moved even further away from the Court's vision in *Brown*. Indeed, with those Justices now on the Court, the new Roberts Court has overruled both the Burger Court's decision in *Roe* and the Rehnquist Court's decision in *Casey*,[30] thus eliminating a woman's constitutional right to abortion, and it has overruled both the Burger Court's decision in *Bakke* and the Rehnquist Court's decision in *Grutter*,[31] thus holding affirmative action to be unconstitutional. And these are likely to be just the first two large steps in the Roberts Court's new direction. Who knows what it will do with *Windsor* and *Obergefell*, to say nothing about many of the Court's other precedents protecting our democracy and the rights of the powerless and disadvantaged?

One final question: What do you think the current Republican-appointed Justices would have done had they been on the Court at the time *Brown* was decided?

30 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

31 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023); Students for Fair Admissions v. Univ. of N.C., 600 U.S. 181 (2003).

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