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Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory

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I. INTRODUCTION

West Virginia State Board of Education v. Barnette,[1] *Brown v. Board of Education*,[2] *Gideon v. Wainwright*,[3] and *Reynolds v. Sims*[4] are among the most renowned cases in American history. Although controversial when decided, these cases are now considered part of the essential fabric of American constitutional law. Like the Constitution itself, these decisions have iconic stature in our political culture. And like the Constitution itself, they are celebrated as hallmarks of American liberty by both the left and the right.

Barnette, *Brown*, *Gideon*, and *Reynolds*, however, share another trait. They are products of progressive constitutionalism. They could not have been decided

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[1] 319 U.S. 624 (1943).
[2] 347 U.S. 483 (1954).
[3] 372 U.S. 335 (1963).
[4] 377 U.S. 533 (1964).

the way they were had the Court in those cases adhered to conservative theories of constitutional interpretation such as originalism or judicial restraint. *Barnette*, *Brown*, *Gideon*, and *Reynolds* therefore raise potential challenges to the viability of conservative constitutional theory. Generally, the validity of an interpretive theory should rest on its internal merits, not its external results. But if a particular theory cannot explain decisions that are universally considered to be both correct and integral to the American system of justice, the question necessarily arises as to whether there is something lacking in that theoretical account.

This Article explores the significance of *Barnette*, *Brown*, *Gideon*, and *Reynolds* as a basis for evaluating theories of progressive and conservative constitutionalism as methods of constitutional interpretation, focusing most specifically on the relationship between these decisions and originalism. Does the universal acceptance of these cases as hallmarks of American liberty suggest that a method of constitutional interpretation, such as originalism, that rejects these decisions is thereby inherently flawed?

Part II of this Article provides the necessary background by outlining what is meant by progressive and conservative constitutionalism. Part III examines *Barnette*, *Brown*, *Gideon*, and *Reynolds* and explains how the decisions follow from progressive, but not conservative, constitutionalism. Part IV then takes a closer look at the relationship between the four decisions and originalism. The section first investigates whether the decisions can be reconciled with originalism as either appropriate exceptions to the originalist account or as precedents that are so deeply embedded in constitutional culture that they might escape originalist scrutiny. Concluding that such reconciliation is unlikely, the section then tackles the central question: What do non-originalist decisions such as *Barnette*, *Brown*, *Gideon*, and *Reynolds* reflect about the legitimacy of originalism as an interpretive theory?

II. CONSERVATIVE AND PROGRESSIVE CONSTITUTIONALISM

A. *Conservative Constitutionalism*

Conservative constitutionalism has two primary strands.[5] The classic version is judicial restraint, in which courts are seen to have only a limited role in constitutional decision making.[6] This strand of conservative thought was

[5] For a detailed discussion of the differing meanings of "conservative," see Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1181–1203 (2002). This Article employs the more commonly understood uses of the term in relation to approaches to constitutional interpretation.

[6] *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 314–15 (1996); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 207–08, 211 (1985); J. Harvie Wilkinson III, *Is There a Distinctive Conservative Jurisprudence?*, 73 U. COLO. L. REV. 1383, 1383 (2002).

most prominent in the years after the Warren Court[7] and in the wake of such controversial cases as *Roe v. Wade*.[8] In reaction to such decisions, conservatives[9] argued that the Court should be far more deferential to political actors.[10] As the judicial constraint conservatives saw it, judicial invalidation of the acts of elected officials was improperly counter-majoritarian because it substituted the decisions of courts for the decisions of the people acting through their representatives.[11]

Perhaps recognizing that too great a commitment to restraint abdicates the essential role of the courts,[12] conservatives in the 1980s, led by Robert Bork, Edwin Meese, and Antonin Scalia, developed a second strand of conservative constitutionalism that quickly became dominant in conservative legal thought.[13] That theory, of course, is "originalism."[14] Under this theory, courts should exercise judicial restraint unless the "original meaning" of the text requires

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[7] *See* Geoffrey R. Stone, Citizens United *and Conservative Judicial Activism*, 2012 U. ILL. L. REV. (forthcoming Mar. 2012) (manuscript at 14–18) (on file with the *Ohio State Law Journal*) (discussing conservative political reaction to the Warren Court).

[8] 410 U.S. 113 (1973).

[9] To be sure, this criticism was also joined by some liberals. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 208–09 (1962).

[10] *Id.* at 214–15. It is worth noting that in addition to their being inconsistent with originalism, *Barnette*, *Brown*, *Gideon*, and *Reynolds* are also in tension with the principle of judicial restraint because all four cases overturned the decisions of politically accountable bodies. *See infra* Part III.

[11] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting) (stating that courts should not create new rights because they are "impatient of democratic change").

[12] *See* Geoffrey R. Stone & William P. Marshall, *The Framers' Constitution*, DEMOCRACY: J. IDEAS, Summer 2011, at 61, 62–63, *available at* http://www.democracyjournal.org/pdf/21/the_framers_constitution.pdf ("The Framers intended courts to play a central role in addressing these concerns. When proponents of the original Constitution argued in 1789 that a bill of rights would be pointless because political majorities would run roughshod over its guarantees, Thomas Jefferson responded that this argument ignored 'the legal check' that could be exercised by the judiciary. When James Madison faced similar concerns when he introduced the Bill of Rights in the first Congress, he maintained that 'independent tribunals of justice will consider themselves . . . the guardians of those rights [and] . . . will be naturally led to resist every encroachment' upon them. And in *Federalist 78*, Alexander Hamilton stated that constitutional protections and limitations could 'be preserved in practice no other way than through the medium of courts of justice,' which must 'guard the Constitution and the rights of individuals from the effects of those ill humours which . . . sometimes disseminate among the people themselves.'").

[13] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 82–83 (1990); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

[14] *See generally* ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

judicial intervention.[15] Such an approach, conservatives argue, both sets forth the Constitution as a document that creates binding law[16] and constrains judges from using the law to effectuate policy preferences.[17] (Because originalism now holds such preeminence in conservative legal thought, this Article refers to that strand of conservative constitutionalism unless otherwise noted.)

B. *Progressive Constitutionalism*

There are probably as many accounts of progressive constitutionalism as there are progressives,[18] and I do not pretend to offer the definitive account here. In presenting the progressive account, however, I will rely on an essay entitled *The Framers' Constitution*[19] that Geoffrey Stone and I recently published because it presents an approach that is commonly associated with the progressive account.[20]

The constitutional theory that we identify has two major components. The first traces back almost two centuries to Chief Justice John Marshall when he stated in *McCulloch v. Maryland*[21] that "we must never forget, that it is *a constitution* we are expounding,"[22] and it is "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[23] As Marshall recognized, the Framers were visionaries who understood that the application of the principles they established would necessarily evolve over time. Accordingly, they strived "to establish the foundational principles that would sustain and guide the new nation into an uncertain future,"[24] and were not, as the originalist account implies, so shortsighted that they sought "only to address the specific challenges facing the

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[15] Scalia, *supra* note 13, at 854.

[16] *Id.*

[17] *See* Holland v. Florida, 130 S. Ct. 2549, 2576 (2010) (Scalia, J., dissenting).

[18] *Cf.* P.J. O'BRIEN, WILL ROGERS: AMBASSADOR OF GOOD WILL, PRINCE OF WIT AND WISDOM 162 (1935) (quoting Will Rogers's famous line, "I am not a member of any organized party—I am a Democrat.").

[19] Stone & Marshall, *supra* note 12, at 61. I use *The Framers' Constitution* with some trepidation because our effort in authoring the piece was not to create a theory of "progressive constitutionalism" as much as it was to identify the theory that most accurately captures the Constitution's design and purpose. I understand, however, that those not swayed to the notion that our essay accurately reflects the Framers' vision might be inclined to view our account as progressive.

[20] For a progressive theory of constitutionalism based upon originalist principles, see James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011). *See also* Doug Kendall & Jim Ryan, *The Case for New Textualism*, DEMOCRACY: J. IDEAS, Summer 2011, at 66, 71, *available at* http://www.democracyjournal.org/pdf/21/the_case_for_new_textualism.pdf.

[21] 17 U.S. (4 Wheat.) 316 (1819).

[22] *Id.* at 407.

[23] *Id.* at 415.

[24] Stone & Marshall, *supra* note 12, at 61.

nation during their lifetimes."[25] For this reason, Geoffrey Stone and I suggest, the Framers deliberately used broad language such as "freedom of speech,"[26] "due process of law,"[27] and "equal protection of the laws"[28] in order to entrust "future generations [with] the responsibility to draw upon their intelligence, judgment, and experience to give concrete meaning to these broad principles over time."[29] The first component of progressive constitutionalism then is the understanding that "[t]he principles enshrined in the Constitution do not change over time. But the application of those principles must evolve as society changes and as experience informs our understanding."[30]

The second component of *The Framers' Constitution* addresses how courts should provide concrete meaning to the Constitution's open-textured provisions. Proceeding from Chief Justice Marshall's understanding in *McCulloch*, as well as the Court's decision in *Carolene Products*[31] and the work of John Hart Ely,[32] Stone and I contend that this answer has two elements. First, because the Constitution is based upon principles of democratic government, "courts must generally defer to the preferences of the majority."[33] Second, when there are specific reasons to question majoritarian action, such as laws that adversely affect minorities who may otherwise not have a fair chance to succeed in the democratic process, or laws that call into question the legitimacy of the democratic processes themselves, heightened judicial scrutiny is required.[34]

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[25] *Id.*

[26] U.S. CONST. amend. I.

[27] *Id.* amend. V; *id.* amend. XIV, § 1.

[28] *Id.* amend. XIV, § 1.

[29] *Id.*

[30] *Id.*

[31] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities[;] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (internal citations omitted)).

[32] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 3–9, 135–36 (1980).

[33] Stone & Marshall, *supra* note 12, at 62.

[34] *Id.* ("[R]espect for the Framers' Constitution requires us to recognize that although the Framers thought majority rule to be the best system of government, they knew it to be imperfect. They understood that political majorities may be tempted to enact laws that entrench their own authority; that in times of crisis people may panic and too readily sacrifice both fundamental freedoms and structural limitations; and that prejudice, hostility,

Progressive constitutionalism, then, is based upon the understanding of when the democratic process requires judicial intervention. In most circumstances, judicial intrusion is not necessary. But when the product of the democratic processes may be suspect, judicial involvement is required.

C. *Progressive and Conservative Constitutionalism Contrasted*

The previous discussions might suggest that progressive constitutionalism has more in common with its conservative counterparts than is normally thought. First, like the conservatives' judicial restraint account, progressive constitutionalism recognizes the constitutional importance of courts deferring to the actions of elected officials. It only suggests that courts should also be attuned to when such deference is not warranted. Second, like originalism, progressive constitutionalism recognizes that the principles enshrined in the Constitution are constant. Unlike originalism, however, progressive constitutionalism recognizes that fulfilling the Framers' vision requires recognizing that the application of those principles may change over time.

Some commentators have described this difference as essentially one involving levels of abstraction.[35] Conservatives interpret constitutional provisions at a relatively narrow level of abstraction, tying their analyses to close readings of the text and so-called original meaning, while progressives interpret the provisions in light of broader principles.[36] But the difference between the two approaches can be very substantial. Consider the question of whether the Equal Protection Clause should apply to women. Conservatives such as Justice Scalia argue that it should not because the record is relatively clear that the Framers of the Fourteenth Amendment did not intend to include women within its protections.[37] Progressives, in contrast, look to the

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and intolerance may at times lead governing majorities to give short shrift to the legitimate needs and interests of political, religious, racial, and other minorities.").

[35] *See, e.g.*, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1084–85 (1981); Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1926–28 (1995).

[36] *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986) ("For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.").

[37] Justice Scalia made this point recently in an interview with Hastings law professor Calvin Massey:

> Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date. All you need is a legislature and a ballot box.

commitment to equality expressed in the Fourteenth Amendment and conclude that, in a society in which the gender distinctions that prevailed in nineteenth century America no longer exist, the Fourteenth Amendment's commitment to equality cannot be fulfilled unless it is interpreted to include women.[38]

III. *BARNETTE*, *BROWN*, *GIDEON*, AND *REYNOLDS*

One of the most trenchant conservative criticisms of progressive constitutionalism is that it is driven by results.[39] Liberal judges, according to this critique, are less interested in applying the rule of law than in reaching decisions they believe to be just or compassionate.[40] This approach, it is argued, suffers from two central infirmities. First, it is not properly described as law because it is not driven by rules.[41] Second, it overly empowers the unelected members of the judiciary to substitute their beliefs as to what is just or compassionate for those of democratically elected actors.[42]

As it turns out, despite their protestations, the accusation of result-oriented jurisprudence can be as easily directed at conservatives.[43] Cases such as *Adarand Constructors, Inc. v. Pena*,[44] striking down federal affirmative action,[45] or *Citizens United v. FEC*,[46] finding a First Amendment right of corporations to spend unlimited funds to influence elections,[47] for example, cannot be supported either by principles of judicial restraint[48] or by any comprehensible theory of originalism.[49] Yet both anti-affirmative action and

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The Originalist, CAL. LAW., Dec. 2010–Jan. 2011, at 33, 33, *available at* http://www.callawyer.com/story.cfm?eid=913358&evid=1 (selected transcript of interview with Justice Antonin Scalia).

[38] *See* United States v. Virginia, 518 U.S. 515, 532 (1996) (The equal protection principle requires that women have "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.").

[39] *See* Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 287 (1996).

[40] *See* J. Harvie Wilkinson III, *Why Conservative Jurisprudence Is Compassionate*, 89 VA. L. REV. 753, 757 (2003).

[41] Holland v. Florida, 130 S. Ct. 2549, 2576 (2010) (Scalia, J., dissenting).

[42] *Id.*

[43] *E.g.*, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 89 (2009); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1223 (2002). Even some conservatives appear to share this assessment. *See* RICHARD A. POSNER, OVERCOMING LAW 245 (1995) ("[O]riginalism is the legal profession's orthodox mode of justification."); BeVier, *supra* note 39, at 287 (suggesting that conservatives should be consistent).

[44] 515 U.S. 200 (1995).

[45] *Id.* at 230.

[46] 130 S. Ct. 876 (2010).

[47] *Id.* at 886.

[48] In both cases, the Court invalidated the actions of an elected body.

[49] The easy answer to the conservatives' assertion in *Adarand* that federal affirmative action is unconstitutional is that the Equal Protection Clause does not apply to the federal

anti-campaign finance regulation are core features of the conservatives' constitutional agenda.[50]

But the failure of conservatives to live up to their own critique does not dispel that critique's legitimacy. The implication that courts are guided only by outcomes *is* inconsistent with the rule of law because it suggests legal decision making is based upon the variable of a judge's individual choice.[51] Further, if there is no "law" outside judges' outcome preferences, there *is* no reason why the decisions of unelected judges should prevail over the decisions of elected actors.[52]

Nevertheless, simply because results alone should not control constitutional decision making does not mean they are irrelevant to assessing the validity of a constitutional theory.[53] Suppose one constitutional theory leads to a set of

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government. There is also no historical evidence indicating that the Framers of the original constitutional or the Civil War Amendments were concerned with preventing federal racial discrimination. *E.g.*, Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 432 (1997); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 590 (1998).

Similarly, in *Citizens United*, there is no basis from which to assert that the original meaning of the First Amendment included the right of corporations to spend unlimited funds to influence federal elections. The Framers greatly distrusted corporations. *See Citizens United*, 130 S. Ct. at 949 (Stevens, J., dissenting) ("It was 'assumed that [corporations] were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare.'" (quoting RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855, at 5 (1982)); 1 JAMES D. COX & THOMAS LEE HAZEN, THE LAW OF CORPORATIONS § 2:3 (3d ed. 2010) (noting that corporate charters were very limited and the activities of corporations tightly monitored during the founding era).

[50] Other examples of result-oriented conservative jurisprudence include *Lucas v. South Carolina Coastal Council*, in which Justice Scalia argued that his rule prohibiting regulatory takings was supported by something he termed "constitutional culture," 505 U.S. 1003, 1028 (1992), and *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, which recognized a theory of judicial takings although the Framers of the Takings Clause would have never recognized the principle, 130 S. Ct. 2592, 2601–02 (2010) (plurality opinion).

[51] As Judge Richard Posner has noted, "If changing judges changes law, it is not even clear what law is." RICHARD A. POSNER, HOW JUDGES THINK 1 (2008).

[52] *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 134–35 (1893). *But see* Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 855 (2008) (contending that judicial review performs the institutional function of providing an additional check on government action).

[53] *See* Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. PA. L. REV. 153, 168–69 (1986) (contending that outcome is not irrelevant to legitimacy). Of course, as a practical matter, as Sandy Levinson tells us, "When all is said and done, we place far greater emphasis on whether we substantively like the outcomes, than on their legal pedigree." Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation*

results that are broadly conceived to be not only correct but also landmark decisions reflecting the best of the American justice system, while another theory would suggest that those cases were wrongly decided. Does that set of results reflect upon the validity of the underlying theories? Should it? Focusing upon *Barnette*, *Brown*, *Gideon*, and *Reynolds* as representative examples,[54] the following sections examine these issues.

A. West Virginia State Board of Education v. Barnette *(1943)*

West Virginia State Board of Education v. Barnette[55] is rightly celebrated as one of the greatest First Amendment decisions in American history.[56] Addressing no less an incendiary issue than American patriotism, *Barnette* held that, under the Free Speech Clause, Jehovah's Witnesses could not be compelled to salute the flag and recite the Pledge of Allegiance in the public schools.[57] The fact that the case was decided at the height of World War II only added to the strength and courage of the decision.

Barnette stands as a landmark decision for a number of reasons. First, the case is a testament to our Nation's commitment to freedom of speech even in the most dire circumstances such as war.[58] Second, the decision is the first to recognize that the right to speak should include the right to not speak.[59] As the Court explained, compelled speech "invades the sphere of intellect and spirit

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Proclamation Constitutional? Do We/Should We Care What the Answer Is?, 2001 U. ILL. L. REV. 1135, 1150.

[54] *Barnette*, *Brown*, *Gideon*, and *Reynolds* do not present an exhaustive list. There are numerous other landmark Supreme Court decisions that cannot be readily justified on originalist grounds but are nonetheless considered unassailable. *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970) (ruling that the Due Process Clause requires that the state must prove guilt beyond a reasonable doubt in criminal cases); Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding that anti-miscegenation laws violate equal protection); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (finding a right of marital privacy); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264 (1964) (concluding that First Amendment protections apply to libel suits between private parties); Baker v. Carr, 369 U.S. 186, 203–04 (1962) (determining that redistricting cases are justiciable); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (deciding that parents have a constitutional right to direct the upbringing of their children). I selected *Barnette*, *Brown*, *Gideon*, and *Reynolds* for discussion in this Article, however, because they are particularly illustrative in demonstrating the tension between originalism and landmark cases.

[55] 319 U.S. 624 (1943).

[56] Gregory L. Peterson et al., *Recollections of* West Virginia State Board of Education v. Barnette, 81 ST. JOHN'S L. REV. 755, 755 (2007).

[57] *Barnette*, 319 U.S. at 642.

[58] For a less sanguine analysis of America's commitment to free speech during times of crisis, see generally GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004).

[59] *Barnette*, 319 U.S. at 634 (stating that freedom of speech must not protect just the right of the individual to "speak his own mind" but also the right of the individual to be free from compulsion "to utter what is not in his mind").

which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[60] Third, *Barnette* stands for the powerful proposition that the government may not impose a forced orthodoxy on its citizenry.[61] As Justice Jackson wrote:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[62]

Justice Jackson's opinion in *Barnette* has been described as "one of the greatest statements on civil liberties ever written."[63] But it was not originalist. The text of the First Amendment mentions only the right to speak and not the right *not* to speak.[64] Furthermore, there is no historical evidence of which I am aware that suggests that the Framers of either the First or Fourteenth Amendments would have found compelled speech to be constitutionally problematic. The Constitution, for example, forbids religious test oaths for public office[65] and compelled self-incrimination[66] but does not impose any other restrictions on compulsory speech. The Fourteenth Amendment, in turn, was enacted against a background of loyalty oaths being imposed on Southern citizens[67] and public schools having compulsory prayer.[68] There is little to suggest that the Fourteenth Amendment's Framers would have seen these practices as unconstitutional.

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[60] *Id.* at 642.

[61] *Id.* The decision is further notable in that, in so deciding, the Court overturned a decision less than three years old. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599–600 (1940).

[62] *Barnette*, 319 U.S. at 642.

[63] KERMIT L. HALL & JOHN J. PATRICK, THE PURSUIT OF JUSTICE: SUPREME COURT DECISIONS THAT SHAPED AMERICA 101 (2006).

[64] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[65] *Id.* art. VI ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

[66] *Id.* amend. V ("No person . . . shall be compelled . . . to be a witness against himself . . . .").

[67] *See* HAROLD MELVIN HYMAN, ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION 13 (1954) (discussing post-Civil War loyalty oaths).

[68] *See* Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 782 (1986) (noting that in the nineteenth century, "[s]tate colleges and universities as well as elementary and secondary schools required the reading of the Bible and singing of hymns and saying of prayers"); *see also* Donahoe v. Richards, 38 Me. 379, 413 (1854) (upholding the school board's expulsion of a Catholic student from public school for refusing to read a Protestant translation of the Bible).

Barnette, however, is consistent with progressive constitutionalism. First, it follows from *Carolene Products* in at least two respects: it protects religious minorities,[69] and it protects freedom of speech, the freedom that goes directly to the ability of the democratic processes to effectuate political change.[70] Indeed, some writers have noted that Chief Justice Stone's dissent in *Gobitis*, the case that *Barnette* overturned, was actually an extension of the *Carolene Products* opinion that he had authored the previous year.[71]

Second, *Barnette* exemplifies progressive constitutionalism in that it shows how societal experience can lead to changes in how freedom of speech principles are applied. The idea that "[n]ational unity is the basis of national security"[72] may seem innocuous as a justification for requiring school children to salute the flag. But this rationale takes on an entirely different connotation in the face of a war against a totalitarian regime. Against the background of Nazism, the reason why compelled flag salutes are such a threat to individual freedom becomes graphically clear.[73] Accordingly, under this understanding, when *Barnette* strikes down compulsory flag salutes (even though an originalist would not do so), it is not rewriting the First Amendment. It is instead recognizing that applications of the First Amendment must change to accommodate the lessons learned through the experience of history.

B. Brown v. Board of Education *(1954)*

The centrality of *Brown v. Board of Education*[74] to our constitutional system is, of course, indisputable, and its significance cannot be overstated. As Judge J. Harvie Wilkinson states, "*Brown* may be the most important political, social, and legal event in America's twentieth-century history. Its greatness lay in the enormity of injustice it condemned, in the entrenched sentiment it

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[69] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that heightened scrutiny should be applied to statutes directed at religious minorities).

[70] *Id.* (noting that heightened scrutiny should be applied to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," such as "restrictions upon the right to vote," "restraints upon the dissemination of information," "interferences with political organizations," and prohibitions "of peaceable assembly"); *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 63 (1948) (noting the critical role of freedom of speech in self-government).

[71] Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 409, 418 (Michael C. Dorf ed., 2d ed. 2009).

[72] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595 (1940).

[73] The *Barnette* Court's concern with totalitarianism may not have been the only factor that influenced its decision. The Court may also have been affected by the outbreak of vigilante violence against the Jehovah's Witnesses that took place in the wake of *Gobitis*. *See* Blasi & Shiffrin, *supra* note 71, at 420–21.

[74] 347 U.S. 483 (1954).

challenged, in the immensity of law it both created and overthrew."[75] As such, the decision is rightly celebrated as having "epoch-making significance in the evolution of constitutional democracy."[76]

The legal correctness of the decision is also beyond dispute. As Stephen Carter states, "*Brown* is the single unimpeachable opinion of our times; no constitutional theory that denies its correctness will be admitted to the mainstream."[77] Indeed, the case has become so central to our understanding of race and equal protection that the Court's recent debate over whether a city program designed to promote integration in its public schools was unconstitutional was reasoned more on the basis of whether that program was consistent with *Brown* than whether the program was consistent with the Equal Protection Clause.[78]

Unlike the other cases discussed in this section, some commentators have attempted to argue that *Brown* can be explained on originalist grounds. The consensus among legal scholars and academics, however, is that these efforts have not succeeded.[79] Consider the efforts of Robert Bork. In *The Tempting of America*, Bork concedes that "[t]he inescapable fact is that those who ratified the amendment did not think it outlawed segregated education or segregation in any aspect of life."[80] But recognizing the moral rightness of the decision, Bork goes on to argue that *Brown*'s result was nevertheless compelled by the original

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[75] J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 6 (1979).

[76] Alfred H. Kelly, *The School Desegregation Case*, *in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 307, 333 (John A. Garraty ed., 1987).

[77] Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759, 777 (1991); *see also* Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183 (2011).

[78] Compare Chief Justice Roberts's majority opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, which cites *Brown* for the proposition that race cannot be used to assign children to the public schools, 551 U.S. 701, 746–47 (2007), with Justice Stevens's dissenting opinion contending that the Chief Justice fundamentally misunderstood the *Brown* decision, *id.* at 798–99 (Stevens, J., dissenting). *See also, e.g.*, Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts's Reinterpretation of* Brown, 69 OHIO. ST. L.J. 791, 792–93 (2008) (noting the efforts of the majority opinion in *Parents Involved* to tie its conclusion that benign race-based classifications were impermissible to the principles enunciated in *Brown*); Mark A. Graber, *The Price of Fame:* Brown *as Celebrity*, 69 OHIO ST. L.J. 939, 1004–06 (2008) (noting more broadly the attempts of the Justices to rely heavily on *Brown* in deciding equal protection cases).

[79] *See* Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 436 (1998). Ironically, as David Strauss argues, the conservatives may face a greater problem in defending originalism if they had successfully demonstrated that *Brown* was compelled by originalist principles. David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 971 (2008). If so, Strauss asks, then why did it take so long after the enactment of the Fourteenth Amendment for the Court to uncover the originalist understanding? *Id.*

[80] BORK, *supra* note 13, at 75–76.

understanding of the Fourteenth Amendment's Equal Protection Clause.[81] But where does that original understanding come from if the conclusion that the Fourteenth Amendment's Framers did not intend to outlaw segregation was "inescapable"? Bork's answer is that it was clear by the time *Brown* was decided that "segregation rarely if ever produced equality," so the Court had to step in to further equality goals.[82] In other words, Bork argues that the meaning of equality had to be reinterpreted in light of the understanding of equality of the society at the time of the *Brown* decision rather than the understanding that existed at the time of the ratification of the Fourteenth Amendment. The notion that the meanings of constitutional provisions change over time, however, is not originalism.[83]

Although *Brown* cannot be readily defended on originalist grounds, if at all, it is easily characterized as an example of progressive constitutionalism. To begin with, it stands as virtually the paradigm case under *Carolene Products* because it addresses government action directed against racial minorities[84] and, in fact, *Brown* has been described in the literature as such.[85]

It also stands as a paradigmatic case as to how the meaning of constitutional provisions can change as societal circumstances evolve. Racial segregation had always been reprehensible but its grotesqueness became even clearer after a war

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[81] *Id.* at 82.

[82] *Id.*

[83] Michael McConnell has also attempted to defend *Brown* on originalist grounds. Focusing on congressional debates in the 1870s concerning the passage of the Federal Civil Rights Act of 1875, McConnell demonstrates that many of the legislators who voted for the Fourteenth Amendment subsequently supported school desegregation. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 984–86 (1995). As Michael Klarman explains, however, there are a number of weaknesses in McConnell's argument that this evidence establishes that the original understanding of the Fourteenth Amendment prohibited segregation. Klarman, *supra* note 35, at 1884. First, the debates over the Civil Rights Act were not contemporaneous with the enactment of the Fourteenth Amendment, and there may have been some change in sentiment between the proposal of the Fourteenth in 1866 and the votes on the Civil Rights Act in 1875. *Id.* Second, McConnell does not explain why the key evidence in determining the underlying intent of the Fourteenth Amendment should be congressional votes on a subsequent statute rather than an account of popular sentiment regarding segregation or the beliefs of the state legislators who ratified the amendment. *Id.* Third, McConnell looks only at the congressional members' statements of legal principle rather than the actual practice of segregation that existed at the time. *Id.* Fourth, Klarman argues that it is not clear that the language debated in the Civil Rights Act providing that blacks could not be denied "full and equal enjoyment" meant mandatory desegregation. *Id.*

[84] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that heightened judicial scrutiny should be applied to statutes directed at particular religious, national, or racial minorities).

[85] *See* David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251, 1251 ("The theory of the *Carolene Products* footnote unifies some of the greatest successes in the Court's history: *Brown v. Board of Education*, the 'one person, one vote' decisions, and the expansion of the free speech rights of political dissidents.").

in which American soldiers of all colors fought in common cause against an enemy defined by its commitment to racial subordination.[86] If the meaning of equal protection of the laws had ever supported a notion of separate but equal, it could not continue do to so in post-World War II America.[87] Equality could no longer be understood to mean "separate but equal" because the meaning of equality had changed.

C. Gideon v. Wainwright *(1963)*

In *Gideon v. Wainwright*,[88] the Supreme Court held that the Sixth Amendment requires that criminal defendants be given state-appointed counsel.[89] *Gideon* is the stuff of legend. The case's compelling facts—the story of an innocent prisoner litigating his own case[90]—inspired both a book[91] and a motion picture.[92]

But the significance of the case extends far beyond the story's drama.[93] The case has become the central decision in our conception of American justice. As David Cole explains:

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[86] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 174 (2004) ("[R]evulsion against fascism had impelled many Americans to reconsider the meaning of democracy, with unavoidable racial implications. The commitment of Nazis to Aryan supremacy helped 'give racism a bad name' in the United States.").

[87] By the time of *Brown*, President Truman had already ordered the desegregation of the U.S. Armed Forces. *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

[88] 372 U.S. 335 (1963).

[89] *Id.* at 342–43.

[90] Clarence Earl Gideon was arrested and charged with breaking and entering with intent to commit petty larceny based only on one witness's testimony. *See* Anthony Lewis, *The Case of the Florida Drifter*, *in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION, *supra* note 76, at 335, 335–36. He requested a court-appointed attorney and was denied. *Id.* He defended himself and was convicted and sentenced to five years in prison. *Id.* Using the prison library, he hand-wrote his appeals to the Supreme Court. *See id.* at 341–42. He was then assigned a prominent attorney (Abe Fortas) for the appeal who later became a Supreme Court Justice. *Id.* When Gideon was later tried with the assistance of a court-appointed lawyer, he was acquitted. *See id.* at 347.

[91] ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

[92] *Hallmark Hall of Fame: Gideon's Trumpet* (Hallmark Hall of Fame Productions Apr. 30, 1980). Details about the motion picture may be found at *Gideon's Trumpet*, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt0080789/ (last visited Sept. 10, 2011).

[93] Geoffrey Hazard, for example, described the case as the leading decision of the 1960s—a decade that included, among others, *Miranda*, the reapportionment cases, the school prayer decisions, and *New York Times Co. v. Sullivan*. Hazard, *supra* note 53, at 157. To be sure, Chief Justice Warren may not have agreed with Professor Hazard's assessment that *Gideon* was the most important case of the 1960s, as Warren is noted to have stated that the reapportionment cases were the most significant of his tenure. HALL & PATRICK, *supra* note 63, at 139.

> [T]he right recognized in *Gideon* is critical to perhaps the central premise of the American criminal justice system—the promise of equal treatment. As long as the rich could hire lawyers and the poor had to do without, the promise that all are "equal before the law" was patently illusory.[94]

To be sure, *Gideon* did not create a right to court-appointed counsel from whole cloth. *Powell v. Alabama*[95] had suggested that such a right existed in capital cases,[96] and *Betts v. Brady*[97] indicated that a right to counsel might exist depending upon the circumstances of the case.[98] Moreover, because *Johnson v. Zerbst*[99] had already held that there was a right to court-appointed counsel in federal cases,[100] the actual question in *Gideon* was only the relatively narrow issue of whether that right should be incorporated to apply against the states under the Fourteenth Amendment.[101] *Gideon*, of course, held that it did.[102]

Although enjoying some precedential support, *Gideon* was not originalist.[103] The Sixth Amendment's provision allowing a right to counsel was enacted in response to an English common law rule that had provided that felons could not have counsel,[104] not that the state had an affirmative obligation to provide such counsel.[105] Any right to court-appointed counsel, as the Court had noted in *Betts*, "was dealt with by statute rather than constitutional provision," and even at that there were very few instances where such assistance was provided.[106]

Gideon, however, is another instance of progressive constitutionalism. To be sure, the class of criminal defendants that the case represents is not explicitly mentioned in *Carolene Products*. But it does comfortably fit within the

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[94] David Cole, Gideon v. Wainwright *and* Strickland v. Washington*: Broken Promises*, *in* CRIMINAL PROCEDURE STORIES 101, 102 (Carol S. Steiker ed., 2006).

[95] 287 U.S. 45 (1932).

[96] *See id.* at 71.

[97] 316 U.S. 455 (1942).

[98] *Id.* at 473.

[99] 304 U.S. 458 (1938).

[100] *Id.* at 463.

[101] Gideon v. Wainwright, 372 U.S. 335, 340 (1963).

[102] *Id.* at 341.

[103] Perhaps, for this reason, the conservative endorsement of *Gideon* has not always been whole-hearted. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1495 (2010) (Scalia, J., dissenting) ("*Even assuming the validity* of [*Gideon*], I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create." (emphasis added)).

[104] *See* Powell v. Alabama, 287 U.S. 45, 60 (1932) ("Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest.").

[105] *Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting) ("The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel." (citing United States v. Van Duzee, 140 U.S. 169, 173 (1891))).

[106] Betts v. Brady, 316 U.S. 455, 467 (1942).

Carolene Products description of the type of discrete and insular minority entitled to heightened judicial review.[107] As Geoffrey Hazard argues, *Gideon* involved the legal claim of a person "in a legally second class position, a position that was the product of social disparagement reinforced by legal institutions."[108]

Gideon also reflects the progressive understanding of how constitutional guarantees should be applied to meet existing conditions. The record in *Gideon* indicated that the defendant may not have been convicted if he had had the services of a lawyer because he (Gideon) did not raise objections to the prosecution's evidence or take other procedural actions that would have benefitted his case in his self-representation. [109] Gideon's conviction, in short, was based more on his lack of resources than whether he was guilty or innocent. The broad question the case posed before the Court, then, was whether the fairness of the American justice system should rest on whether a defendant had the ability to hire a lawyer. The Court held that it could not: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . [L]awyers in criminal courts are necessities, not luxuries."[110]

As noted above, this understanding of what was required for a fair trial was not originalist. Indeed, Gideon's counsel, Abe Fortas, did not even attempt to contend otherwise.[111] It did, however, reflect reality. As Anthony Lewis writes, "originally the Sixth Amendment was almost certainly not designed to reach the problem of a person too poor to retain a lawyer. But by the twentieth century that *was* the problem."[112] At the time of Gideon's appeal, for example, 5093 of the 7836 prisoners in custody in Florida had been tried without the benefit of counsel.[113] The adversary system upon which American justice is based, in short, could not accurately be characterized as fair—or even adversarial—because only the prosecution's side had the necessary resources.[114] As such, the actual state of the American justice system did not reflect the principles of fairness and equality before the law that the Constitution requires.[115] *Gideon*, then, sought to promote fealty to these principles by requiring a right to counsel even though there was no originalist basis to do so.[116]

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[107] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that heightened scrutiny should apply to legislation directed at discrete and insular minorities).

[108] Hazard, *supra* note 53, at 157.

[109] *See* Lewis, *supra* note 90, at 342.

[110] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[111] Lewis, *supra* note 90, at 346.

[112] *Id.* at 338.

[113] *Id.* at 343.

[114] *See id.* at 344.

[115] *See id.*

[116] *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

D. Reynolds v. Sims *(1964)*

Reynolds v. Sims[117] adopted the principle of one person, one vote[118] as the central legal framework from which to evaluate the constitutionality of legislative apportionment,[119] and in doing so rewrote the rules of American democracy.[120] Along with its companion cases, *Reynolds* called into question ninety percent of the districts in the federal House of Representatives and a vast majority of the seats in all of the state legislatures.[121]

Not surprisingly, the decision was highly controversial. Everett Dirksen, the highly respected Republican Senate Leader, for example, proposed that the case be overturned by constitutional amendment.[122] But the outcry over *Reynolds* was relatively short-lived. As Lucas Powe notes, "*Reynolds* went from debatable in 1964 to unquestionable in 1968."[123] And today, as David Strauss writes, "'one person, one vote' might seem like a natural, even inevitable requirement of the Constitution."[124]

Reynolds, however, cannot be defended on originalist grounds. As Justice Harlan stated in his dissent:

> The history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as they saw fit. Moreover, the history demonstrates that the intention to leave this power undisturbed was deliberate and was widely believed to be essential to the adoption of the Amendment.[125]

Harlan's point is well-taken. To begin with, state legislative districts were not equally apportioned at the time of the passage of the Fourteenth

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[117] 377 U.S. 533 (1964).

[118] *See id.* at 568. *Reynolds* does not actually use the term "one person, one vote" in its opinion, although that is the effect of its ruling. The actual language actually comes from a different case, *Gray v. Sanders*, in which the Court stated: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." 372 U.S. 368, 381 (1963).

[119] *Gray*, 372 U.S. at 380–81.

[120] *See* Stephen Ansolabehere & Samuel Issacharoff, *The Story of* Baker v. Carr, *in* CONSTITUTIONAL LAW STORIES, *supra* note 71, at 271, 296 (*Reynolds*, when decided, "was an earth-shattering decision."). Equally significant to *Reynolds* in reframing the American electoral landscape was *Baker v. Carr*, the precursor case to *Reynolds* holding that reapportionment issues were justiciable. 369 U.S. 186, 203–04 (1962).

[121] Ansolabehere & Issacharoff, *supra* note 120, at 296.

[122] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 254 (2000).

[123] *Id.* at 255.

[124] Strauss, *supra* note 85, at 1260.

[125] Reynolds v. Sims, 377 U.S. 533, 595 (1964) (Harlan, J., dissenting).

Amendment, and that did not appear to raise any constitutional concern.[126] State legislators, moreover, were also not likely to vote to ratify a constitutional amendment that would place their seats at risk.

Equally significantly, the structure of the Constitution itself makes it clear that one person, one vote was not in the original design.[127] The United States Senate, for example, is not apportioned according to population. This means that a voter in Wyoming, according to the recent census, will have sixty-six times more voting power over who becomes her next senator than will a voter of the state of California.[128] Similarly, neither the Electoral College system[129] nor the Twelfth Amendment's provision governing the election of the President when no candidate receives a majority of the electoral votes[130] meets one person, one vote standards.

Finally, *Reynolds* is also not originalist in that it is not even clear that the Framers of the Fourteenth Amendment thought that it even applied to voting. After all, if the Fourteenth Amendment protected the right of every citizen to vote equally, there would have been no need to promulgate the Fifteenth Amendment.[131] *Reynolds*, then, according to the originalists, must assuredly be wrong.[132]

But *Reynolds v. Sims* is correct under progressive constitutionalism. To begin with, it involves the problem with majoritarian entrenchment specifically

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[126] Strauss, *supra* note 85, at 1260. As Justice Harlan stated: "Can it be seriously contended that the legislatures of these States, almost two-thirds of those concerned, would have ratified an amendment which might render their own States' constitutions unconstitutional?" *Reynolds*, 377 U.S. at 603 (Harlan, J., dissenting).

[127] The Senate apportionment set forth in the original Constitution was reaffirmed by the Seventeenth Amendment, which in providing for the direct election of senators by the people, continued to apportion two senators for each state. *See* U.S. CONST. amend. XVII.

[128] As of the 2010 census, Wyoming has a population of 563,626 and California has 37,253,956 people, but both states have the same number of senators. *See Resident Population Data*, U.S. CENSUS BUREAU, http://2010.census.gov/2010census/data/apportionment-pop-text.php (last visited Nov. 17, 2011).

[129] South Dakota's three electoral votes for a population of 814,180 give it more voting power in the Electoral College per capita than does the state of Texas with a population of 25,145,561 and thirty-eight votes in the Electoral College. Hence, a voter in South Dakota, under the Electoral College, has over twice the voting power as a voter in Texas. *See id.*

[130] The Twelfth Amendment provides that if no presidential candidate received a majority of electoral votes, the election is sent to the House of Representatives where each state is entitled to one vote. *See* U.S. CONST. amend. XII. This means that California and Wyoming will have exactly the same voting power to elect the President despite their difference in population.

[131] *See id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

[132] *See* BORK, *supra* note 13, at 89–90 (stating that one person, one vote was "illegitimate constitutional law").

addressed in the *Carolene Products* footnote.[133] The political reality is that legislators would likely never remedy the process that solidifies their hold on their seats without external judicial involvement.[134]

Furthermore, *Reynolds*, like *Brown*, is an example of the Court responding to changes in the meaning of equality triggered by societal change. The idea that voting equality could mean one person, one vote would not have been apparent to the Framers. There were too many restrictions on the franchise. At the time of the framing, for example, the right to vote was limited by numerous criteria such as race, gender, age, and property ownership, meaning that a major portion of even the white male population could not vote.[135] Women did not receive the right to vote until the passage of the Nineteenth Amendment in 1920.[136] African-Americans, meanwhile, were not given the right to vote until 1870 through the passage of the Fifteenth Amendment.[137] But even then this right was more theoretical than real. Because of the black disenfranchisement that occurred throughout the South in the late nineteenth century,[138] the actual right of blacks to vote was not truly secured until the 1960s.[139]

The achievement of universal suffrage that culminated in the 1960s, however, did more than expand the franchise. It also made the voting disparities inherent in malappropriation more obvious. If every person had the right to vote, then it followed from the mandate of the Equal Protection Clause that all persons should be entitled to vote equally. One person, one vote may not have been originalist, but it did reflect the most logical view of voting equality in a society committed to universal suffrage.[140]

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[133] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (Heightened scrutiny should be applied to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" such as "restrictions upon the right to vote.").

[134] *See* Strauss, *supra* note 85, at 1261 (contending that *Reynolds* and the reapportionment cases are amongst the great success stories of *Carolene Products*).

[135] *See* Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 4. Universal white male suffrage was not realized until the middle of the nineteenth century. *Id.*

[136] *See* U.S. CONST. amend. XIX.

[137] *See id.* amend. XV, § 1.

[138] *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 90 (rev. 2d ed. 2002) ("[B]y the first decade of the twentieth century, virtually all black voters had been eliminated from the rolls across the South, through a combination of force and the imposition of restrictive (and often fraudulently administered) voting qualifications. In Louisiana, for example, there were 127,923 black voters and 126,884 white voters on the registration rolls in 1888 (the population of the state was about fifty percent black); by 1910 only 730 blacks (less than 0.5 percent of the adult male population) were still registered.").

[139] *See* Auerbach, *supra* note 135, at 4.

[140] As President John F. Kennedy stated, "The right to fair representation and to have each vote count equally . . . is, it seems to me, basic to the successful operation of a democracy." BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 425 (1983) (internal quotation marks omitted).

IV. CAN *BARNETTE*, *BROWN*, *GIDEON*, AND *REYNOLDS* BE RECONCILED WITH ORIGINALISM?

As discussed in Part III, *Barnette*, *Brown*, *Gideon*, and *Reynolds* are not originalist decisions. Yet all four cases are hailed as among the most important and foundational decisions in American constitutional history.[141] This leads to two obvious questions: Can these landmark decisions somehow be reconciled with originalism, and, if not, does the fact that originalism does not support decisions that lie at the heart of our constitutional understanding suggest that the interpretive theory is fundamentally flawed? The following subsections discuss these issues.

A. Barnette, Brown, Gideon, *and* Reynolds *Are Examples of Judicial Exceptionalism*

A first response might be to argue that *Barnette*, *Brown*, *Gideon*, and *Reynolds* and originalism are actually not in conflict and can be reconciled by an understanding of judicial exceptionalism. For better or worse, in exigent circumstances, courts are sometimes called upon to do more than apply the law.[142] Judge Posner, for example, has defended *Bush v. Gore*[143] on exactly these grounds, contending that the Court may have decided to act as it did in order to avoid the impending chaos that would have faced the nation had the results of the presidential election continued to remain in doubt.[144]

If we accept the possibility that courts must or may occasionally act outside the bounds of legal strictures in order to effectuate "rough justice,"[145] to use

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[141] This is not to say that the cases are free from all criticism. Some have argued, for example, that *Brown* may have slowed the progress of civil rights by creating a backlash, *see* KLARMAN, *supra* note 86, at 350; that the promise of equal justice in *Gideon* remains only a promise because the courts have failed to assure that court-appointed counsel are actually effective, *see* Cole, *supra* note 94, at 128; that *Reynolds*'s mathematical reliance on one person, one vote undermines the ability of the state to protect group interests through the apportionment process, *see* Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 883–84 (1995); and that *Barnette* overstates the limitation on the authority of the government to promote community hegemony, *see* Steven D. Smith, Barnette*'s Big Blunder*, 78 CHI.-KENT L. REV. 625, 630–32 (2003).

[142] *See* William P. Marshall, *The Supreme Court,* Bush v. Gore*, and Rough Justice*, 29 FLA. ST. U. L. REV. 787, 788–89 (2001).

[143] 531 U.S. 98 (2000) (per curiam).

[144] *See* Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 46. As Judge Posner explains, a continued and unresolved recount would have led to "a real and disturbing potential for disorder and temporary paralysis." *Id.* (emphasis omitted).

[145] *See id.* at 60 (contending that *Bush v. Gore* may be an example of a case in which the Court majority may have attempted to achieve "rough justice" rather than strictly applying legal doctrine). *Bush v. Gore* may not be the only such example. As I have written elsewhere, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), might be understood more

Judge Posner's term, then an argument could be constructed that originalism and *Barnette*, *Brown*, *Gideon*, and *Reynolds* are reconcilable if the particular demands of these cases were such that they required the Court to engage in judicial exceptionalism. If so, the correctness of those cases does not mean that originalism is invalid. It only means that a court, in exceptional circumstances, may veer from an otherwise jurisprudentially-sound philosophy.[146]

Certainly there are reasons that support why a court could believe that *Barnette*, *Brown*, *Gideon*, and *Reynolds* were exceptional cases requiring extraordinary legal measures. All four cases are, after all, exceptional—especially *Brown*—because of their moral and political imperatives.[147] Indeed, that is why they are universally celebrated.[148]

More specific reasons also support the proposition that these cases raised particularly compelling reasons for judicial intervention. The malapportionment addressed in *Reynolds*, for example, likely never would have been resolved without judicial review. Political bodies, after all, are unlikely to change the rules that secure their own entrenchment.[149] *Brown* and *Barnette*, in turn, had major implications for United States foreign relations. *Brown* was arguably necessary to send a message to the world at the height of the Cold War about the commitment of the United States to civil liberties and racial justice,[150] thereby undercutting Soviet propaganda efforts to bring the third world into its

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as an effort of the Court to effectuate rough justice by protecting news media from debilitating damage verdicts in order to preserve the viability of the civil rights movement in the South than as a dispassionate First Amendment assessment of libel laws. *See* Marshall, *supra* note 142, at 791–94.

[146] Larry Alexander and Frederick Schauer make a similar point in reference to Abraham Lincoln's rejection of the rule of law in suspending habeas corpus:

> *If* it was important for winning the Civil War that Lincoln suspend habeas corpus and infringe on other civil liberties, then the moral importance of winning the war was sufficient to justify his actions. Reaching this conclusion . . . does not mean that suspending habeas corpus was right. It just means that this wrong was outweighed by the greater wrong that would have occurred had the war been lost.

Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1382 (1997) (footnote omitted); *see also* Levinson, *supra* note 53, at 1135 (discussing the constitutionality of the Emancipation Proclamation).

[147] Robert Bork, for example, called *Brown* "the greatest moral triumph constitutional law had ever produced." BORK, *supra* note 13, at 77. Earl Warren, in turn, stated that *Reynolds*, along with *Baker v. Carr*, were "the most important ones decided during his sixteen years as the chief justice." HALL & PATRICK, *supra* note 63, at 139.

[148] *See supra* Part III.

[149] *Cf.* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 757 (1991) ("It is difficult to imagine a more compelling case for judicial intervention on political process grounds than [a reapportionment case]."). Klarman's quote refers specifically to *Baker v. Carr*, the pre-*Reynolds* decision that held apportionment issues were justiciable. 369 U.S. 186, 203–04 (1962).

[150] *Cf.* Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1245 (2006).

orbit.[151] *Barnette* sent the wartime message to World War II allies and enemies just exactly what was at stake in the conflict: In stark contrast to the totalitarian practices of Hitler's Germany, American citizens had the constitutional freedom to refuse to submit to compelled allegiance.[152] In both cases, then, a court might believe that extraordinary legal action was needed in order to further American interests abroad at critical moments in American history. Even *Gideon* communicated a message of an alternative to a world considering communism as a method to redress enormous wealth inequalities. As one writer said of *Gideon*, "No tale so affirmed the American democracy. No story broadcast around the world so clearly proclaimed that not just the rich received justice in American courts."[153]

Reconciling *Barnette*, *Brown*, *Gideon*, and *Reynolds* with originalism under a theory of judicial exceptionalism, however, seems awkward. To begin with, one of the major attractions of originalism is that it rigidly purports not to bend to the demands of exigency.[154] Suggesting that originalism allows for courts to pursue rough justice, then, is inconsistent with originalism's basic conviction.

Second, the premise of judicial exceptionalism, in turn, is that it should be employed in only the rarest of instances.[155] *Barnette*, *Brown*, *Gideon*, and *Reynolds*, however, cover vast expanses of constitutional law territory. To contend that those cases stand as exceptions to what constitutional law normally requires is to suggest that much of constitutional law is based upon exceptions to what the law actually requires.

B. Barnette, Brown, Gideon, *and* Reynolds *Are Super Precedents*

A second argument might suggest that our four cases and originalism are not in conflict because their "correctness" is not based upon legal principle but upon the status that they have attained as precedents.[156] That is, the decisions in the cases may have not been legally correct when decided, but their universal acceptance ex post makes them unassailable. Viewing the decisions in this manner brings to mind Michael Gerhardt's discussion of "super precedents," or "foundational decisions," that are less susceptible to being overruled precisely

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[151] *See* KLARMAN, *supra* note 86, at 291 ("The ensuing Cold War pressured Americans to reform their racial practices in order to convince nonwhite Third World nations that they should not equate democratic capitalism with white supremacy.").

[152] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

[153] ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 405–06 (1997).

[154] *See* Wilkinson, *supra* note 40, at 758–60. *But see* William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355, 364–70 (2004) (presenting examples where conservative jurists have bent the rules in order to reach conservative results).

[155] *Bush v. Gore*, for example, went out of the way to limit the scope of its decision indicating that the precedential effect of the case might be "limited to the present circumstances." *See* Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam).

[156] Indeed, some support for this proposition may be found from the fact that the cases were not considered uncontroversial when decided.

because of the special role they play in the constitutional culture.[157] Gerhardt describes the class of super precedents as follows:

> Supreme Court decisions on discrete questions of constitutional law that (1) have endured over time; (2) political institutions repeatedly have endorsed and supported; (3) have influenced or shaped doctrine in at least one area of constitutional law; (4) have enjoyed, in one form or another, widespread social acquiescence; and (5) are widely recognized by the courts as no longer meriting the expenditure of scarce judicial resources.[158]

As he explains, such precedents become so deeply enmeshed in the social landscape, and there has been so much social, political, and economic reliance upon them, that overturning them, even if it is believed that they were wrongly decided, becomes "unthinkable."[159]

One can debate whether our four cases qualify as super precedent under Gerhardt's criteria. *Brown* (certainly yes), *Reynolds* (likely yes in some form), *Gideon* (maybe), *Barnette* (maybe not), but the more interesting question is whether a recognition of these cases as super precedents reconciles them with originalism. At a superficial level, of course, it does. If cases can be legally wrong under originalism but still be an accepted part of the constitutional fabric, then the validity of originalism is not undermined. It just means that "wrong" cases can be grandfathered in.

Originalists, however, should not be satisfied by this answer.[160] Originalism does not turn out to be much of a constraint if "wrong" decisions can be turned into correct ones by the virtue of the passage of time or social acceptance, even if that acceptance becomes deeply ingrained in the constitutional culture. Furthermore, although the intellectual validity of originalism may not be undermined by construing the four cases as super precedents, the strength of the jurisprudential commitment to implementing the theory is weakened by an account that suggests the theory's strictures can be effectively bypassed.

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[157] Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1208–09 (2006). Gerhardt's excellent piece also recognizes two other types of super precedent beyond the foundational decisions discussed below. The first type encompasses cases like *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that establish foundational institutional practices such as judicial review. Gerhardt, *supra*, at 1209. The second type encompasses cases that establish foundational doctrine such as the decisions establishing the incorporation doctrine. *Id.* at 1210. His third category, the one of concern here, covers "foundational decisions," meaning cases deeply ingrained in political and constitutional culture. *Id.* at 1213.

[158] Gerhardt, *supra* note 157, at 1213.

[159] *Id.* at 1214. Gerhardt uses the *Legal Tender Cases*, 79 U.S. (12 Wall) 457, 553–54 (1871), upholding the constitutionality of paper money, as his prime example for demonstrating this point. Gerhardt, *supra* note 157, at 1213–14.

[160] *Cf.* Barnett, *supra* note 150, at 1233 (arguing that if a case was wrongly decided it should be overturned no matter how deeply embedded in the culture).

C. Barnette, Brown, Gideon, *and* Reynolds *Are Wrong*

The final response is the most direct. *Barnette*, *Brown*, *Gideon*, and *Reynolds* may be considered hallmark cases, but that is beside the point. What makes cases right or wrong is not societal acceptance, but correctness as a matter of law.[161] Accordingly, if the cases cannot be justified on originalist grounds, they must be considered wrong, and their iconic status does not matter.

This is not an insubstantial argument. After all, as Randy Barnett points out, there have been times in our constitutional history when now-universally-condemned Supreme Court opinions had iconic stature.[162] Does that mean that those cases were legally correct at the time? The difficulty is that if the fact that a decision is universally engrained in one generation's political culture makes that decision *legally* correct, then any court decision could presumably attain legally correct status, depending only upon the perception of that decision by the attendant generation. Stated more simply, if the reason why *Brown* is considered legally correct at the beginning of the twenty-first century is because of its universal societal acceptance, then a case such as *Plessy* would have to be considered equally correct at the beginning of the twentieth century, assuming that the case held similar status during that period.[163] Tying the legal correctness of a decision to universal societal approbation can lead to bad results as well as good.

All of this, of course, is true. The status of icons can change over time. But if conservative constitutionalism is to reject cases such as *Barnette*, *Brown*, *Gideon*, and *Reynolds*, it must incur a heavy price. First, it must live with the results. A constitutional landscape that does not prohibit the government from demanding that its citizens swear oaths of allegiance regardless of their religious or moral objections, does not outlaw de jure segregation, does not grant criminal defendants the resources to have a fair trial, and does not provide each voter with an equal voice in her democratic institutions is a landscape that is bleak and unforgiving.

Second, originalism must recognize that rejecting these cases means rejecting the most persuasive accounts (other than an assessment of what the Framers may have believed) as to what a constitutional provision means.[164] Maybe the Equal Protection Clause in 1868, for example, did not mean one person, one vote, but by the 1960s, the best understanding of voting equality was precisely that. Perhaps in 1791 compulsory flag salutes would not have

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[161] Robert Bork explicitly makes this point in *The Tempting of America*: "It is no answer to say we like the results . . . , for that is to say that we prefer an authoritarian regime with which we agree to a democracy which we do not." BORK, *supra* note 13, at 78.

[162] Barnett, *supra* note 150, at 1245 (referring to Plessy v. Ferguson, 163 U.S. 537 (1896)).

[163] For a discussion of the status of *Plessy* in American constitutional culture during the early part of the twentieth century, see KLARMAN, *supra* note 86, at 22–23.

[164] Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 85 (2010) (arguing that originalism leads to anachronistic results).

been seen to implicate the First Amendment, but by 1943, in the face of Nazism, that implication was clear. This objection is not, I should point out, an argument that originalism may lead to bad policy choices. Rather, it is an argument that originalism may lead to bad *legal* choices because it forces legal decisions to be made out of context.

Third, originalism must concede that it projects the Framers in a surprisingly unfavorable light. To begin with, it suggests that the Framers were so shortsighted that they would have approved of this bleak constitutional landscape simply because the society that they lived in did not yet understand the fuller implications of their (the Framers') commitment to the principles of equal protection of the laws, free speech, and the right to counsel that *Barnette*, *Brown*, *Gideon*, and *Reynolds* subsequently brought to fruition.[165] And it further ignores that the Framers were steeped in a common law tradition that presumed that reason, observation, and experience would allow us to increase our understanding over time about the principles they set forth in the Constitution.

Originalism does all this, moreover, with very little benefit. The perceived virtue of originalism, of course, is that it ostensibly constrains legal decision making. But originalism has not proved to be much of a constraining factor. To begin with, there is little, if any, indication that in the hands of conservative jurists, originalism has actually served to constrain. The governing rule of originalism seems only to be that it must be applied rigidly in every case—except when it isn't.[166]

More fundamentally, there is little likelihood that originalism could serve to substantially constrain even if consistently applied. The Framers, after all, had no precise agreed-upon meanings of such terms as "freedom of speech,"[167] "due process,"[168] "equal protection,"[169] Commerce . . . among the several States,"[170] or other such provisions.[171] Their political beliefs were as diverse as our own, and the document they produced was a product of compromise, not unanimity. Originalism thus offers only a false hope of determinacy.[172] And that is a very thin reed upon which to sacrifice cases like *Barnette*, *Brown*, *Gideon*, and *Reynolds*.

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[165] H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886–88 (1985).

[166] Marshall, *supra* note 43, at 1229.

[167] U.S. CONST. amend. I.

[168] *Id.* amend. V; *id.* amend. XIV, § 1.

[169] *Id.* amend. XIV, § 1.

[170] *Id.* art. I, § 8, cl. 3.

[171] *See* Scalia, *supra* note 13, at 856 (noting that the historical record as to original meaning is often ambiguous).

[172] A prime example of how originalism cannot definitively resolve constitutional issues is *District of Columbia v. Heller*, in which both the majority and dissent were able to present sound historical arguments as to whether the Second Amendment created an individual right to bear arms. *Compare* 554 U.S. 570, 598–605 (2008), *with id.* at 652–62 (Stevens, J., dissenting).

IV. CONCLUSION

Constitutional theory, it is generally agreed, should not be driven by results. The test of the validity of any constitutional theory should be in its internal integrity. But what does it say about a constitutional theory if its application leads to a pattern of results that are problematic? One answer, of course, is to conclude those results are wrong. The other is to conclude that the pattern of results stands as evidence that the theory itself is somehow misguided.

Originalism faces a significant challenge under this calculus because so many of the results to which it leads are inconsistent with decisions that are considered to be foundational in the American constitutional system including, as this Article suggests, *West Virginia State Board of Education v. Barnette*, *Brown v. Board of Education*, *Gideon v. Wainwright*, and *Reynolds v. Sims.*

That originalism is at odds with these cases does not definitively prove originalism to be invalid, although it certainly points in that direction. But it does demonstrate that the costs of relying on that theory may far exceed its benefits. *Barnette*, *Brown*, *Gideon*, and *Reynolds* are iconic for a reason. They reflect and bring meaning to the Constitution's fundamental values of equality, freedom, and democratic participation. They treat the Framers as John Marshall treated them: as visionaries who authored a Constitution, not scriveners who drafted a set of rules. Any theory that would excise these decisions from our constitutional culture must ask, what is left in the vision of the Constitution that remains?