Cultivating Counter-Narratives to Federalism

Nadiya Beckwith-Stanley

Critical Narratives of Civil Rights

December 18, 2014

Would love to see this work continued. Rich sources still to be mined.

Federalism has long been employed as an impediment to the full realization of the Reconstruction amendments and civil rights protections that organizers and activists from the abolitionist movement to today's civil and human rights movement have sought to implement. In its most basic form, Federalism is an effort to protect both states and individuals from the tyrannical power of a strong central government. In practice, however, Federalism has been used to maintain a status quo in which the federal government has limited ability to intervene in the face of even the most egregious violations of civil rights and human dignity.

Narrative holds great power in the interpretation of the law. Legislative history is in essence an exercise in narrative building. Each time a lawyer presents the law, she is telling a story. Professors Peggy Cooper Davis and Aderson Bellegarde Francois explain the critical role narrative plays in constructing and understanding the law:

> *"Law is at bottom a culture; culture's primary function is to make meaning; meaning is constructed through narratives grounded in scripts; scripts are driven by metaphors; metaphors are powerful conceptual systems that drive our understanding of the world and our actions in it by translating abstract ideas into concrete and familiar terms.*"[1]

The law is in many ways an artifact of the stories we tell ourselves about our values. Court decisions are both products and progenitors of narrative, "long after the holding and precedential rule of the case have either evolved over, or been made irrelevant by, the passage of time, the narrative, script and metaphorical elements of the case will often retain their power to construct and make meaning."[2] Narrative is central to interpreting and interrogating the law.

In order to establish a robust notion of constitutional personhood we must grapple with traditional notions of Federalism. In so doing, we must recast Federalism to include and support

---

[1] Peggy Cooper Davis & Aderson Bellegarde Francois, Critical Narratives of Civil Rights, Course Readings: Part 2, 14, emphasis original
[2] Id at 14

constitutional personhood. There are many sources of narrative and counter-narrative, which can serve as valuable source material for recasting the nature and breath of Federalism principals. One valuable source is the words and works of the United States Supreme Court. In an effort to ferret out undiscovered counter narratives to Federalism and states rights I turned to the papers of several of the Warren court Justices, as well as their memoirs.

In an effort to narrow the search, I chose to focus on the pre-1964 Civil Rights Act public accommodations cases, which contain a unique perspective on the evolution of the Supreme Court's approach to civil rights and public accommodations. These cases were the results of local action by activist organizers who sought to challenge the legality of nearly a century of segregation. They acted without the protections of the 1964 Civil Rights Act and on the belief that the Constitution of the United States, and specifically the Reconstruction amendments, could be a shield against white supremacy and the tyranny of racialized state law. In the decade between *Brown v. Board of Education* and the Civil Rights Act, the court had yet to settle on the Commerce Clause as the source of many civil rights. The opinions issued in these cases reflect the dynamic and contested nature of court's approach to civil rights and public accommodations. The unpublished materials further expose this flurry of intellectual and moral quandary.

This paper is an effort to record and distill the unique counter narratives of Federalism expressed by the Justices themselves. Part one will begin the paper with a brief discussion of the sources. Part two is a discussion of the cases and insights provided by the unpublished works of the Supreme Court Justices. Part three is an exploration of potential counter narratives that could be further developed to support an expansive and holistic understanding of constitutional personhood that is in harmony with Federalism principals. Finally, part four is dedicated to identifying potential areas of further research.

Part I: The Sources

The Supreme Court houses the papers of many Supreme Court Justices, but unlike the Presidents of the United States, the papers of Supreme Court Justices are not routinely collated or preserved. As a result, many of the existing collections are incomplete or in private hands. Many of Justice Hugo Black's notes, for example, were destroyed upon his death by his request.[3] The papers of Justice Potter Stewart are housed at Yale University,[4] Justice Clark's Papers were given to the University of Texas Law School[5] and the papers of Justice John Harlan II call Princeton University home.[6]

For this endeavor I examined the papers of Chief Justice Earl Warren, Justice William Brennan, Justice Hugo Black and Justice Arthur Goldberg. Chief Justice Warren's papers received the most attention. They include over 250,000 items ranging from personal correspondence to administrative matters of the court. Chief Justice Warren's papers also include nearly every opinion issued during his tenure, in some cases including several circulated drafts of opinions written by the Chief Justice and associate Justices, the Chief Justice's notes on cases and from conference, notes and comments between the Justices on drafts of opinions and other correspondence.[7] Justice William Brennan's papers, like those of Chief Justice Warren,

---

[3] Hugo LaFayette Black Papers: A Finding Aid to the Collection in the Library of Congress, available at http://hdl.loc.gov/loc.mss/eadmss.ms001046

[4]Potter Stewart Papers Fid Aid, available at http://drs.library.yale.edu/HLTransformer/HLTransServlet?stylename=yul.ead2002.xhtml.xsl&pid=mssa:ms.1367&clear-stylesheet-cache=yes

[5] The University of Texas has put some the papers associated with notable cases up on it's website, including several of the desegregation cases. To view the public available documents visit http://tarlton.law.utexas.edu/clark/index.html

[6] John Marshal Harlan Papers, http://findingaids.princeton.edu/collections/MC071

[7] For a full description of the contents of the Earl Warren Papers see Earl Warren Papers: Finding Aid to the Collection in the Library of Congress available at http://hdl.loc.gov/loc.mss/eadmss.ms000012

are voluminous. In addition to circulated drafts and notes, Justice Brennan's papers included many of his clerks' memos.[8] The personal correspondence files in the collection of Justice Brennan's papers have yet to opened to the public and likely contain valuable insights into a construction of Federalism that allows for a fully realized expression of constitutional personhood. The papers of Justices Black[9] and Goldberg[10] are more modest, containing 130,000 and 78,000 items respectively.

In addition to examining at the papers of the Supreme Court Justices I also briefly studied their memoirs. Chief Justice Earl Warren's memoir, aptly titled *The Memoirs of Earl Warren*, was published in 1977. The memoirs include brief reflection on the nature and impact of the Brown v. Board of Education decision and the subsequent Supreme Court decisions outlawing segregation in public accommodations. In this relatively short passage, Chief Justice Warren presents his own counter narrative of Federalism and civil rights over 20 years after the Brown decision. While Justice Hugo Black never finished his memoirs, his uncompleted manuscript was published along side the diaries of second wife Elizabeth Black in *Mr. Justice and Mrs. Black.* The pages of *Mr. Justice and Mrs. Black* also present a narrative of the civil rights struggle as it appeared before the court. These sources, while not exhaustive, are instructive. They contain unexpected narratives not only of specific cases, but of civil rights more generally and the end of legal segregation in the United States.

Part II: The Sit-In Cases

[8] Find Aid
[9] http://hdl.loc.gov/loc.mss/eadmss.ms001046
[10] Justice Golberg's Papers are focused more on his time as the ambassador to the United Nations than on his time as Justice of the Supreme court of the United States. For more information about his papers see the Arthur Goldberg Papers: A Finding Aid to the Collection in the Library of Congress, available at http://hdl.loc.gov/loc.mss/eadmss.ms003001

The Sit-In Cases as they were referred to in the Justices' papers were a set of cases heard during the 1963 Supreme Court Term. While the court eventually released unconsolidated opinions in each of the cases, they were discussed as a group. Several of the circulated opinions in the cases were consolidated into opinions combining several of the cases together. Among the sit in cases were *Maryland v. Bell,*[11] *Barr v. City of Columbia,* [12] *Bouie v. City of Columbia,*[13] *Robinson v. Florida*[14] and *Griffin v. Maryland.*[15] In the previous term the court had heard a public accommodation case, *Lombard v. Louisiana,* which they also referred to often in the written record of their deliberations. Of the Sit-In Cases, *Bell*, *Bouie* and *Barr* were the most discussed. Ultimately, *Maryland v. Bell* became the focus of much of their debate. The concurring and dissenting Justices expressed their interpretations of the law in their published opinions in *Bell* and referred to their *Bell* decisions in several of the other Sit-In Cases.[16] Because *Bell* became a focus for the Court in its consideration of a right to public accommodations omission?

Perhaps the greatest revelation contained in the Justices papers is the fact that after the initial conference on the Sit-In Cases the court was divided 5 to 4 in favor of upholding the convictions against the demonstrators.[17] The papers of the Justices reveal, and Elizabeth Black's

[11] Bell v. Maryland, 378 U.S. 226 (1964)
[12] Barr v. Columbia, 378 U.S. 146 (1964)
[13] Bouie v. Columbia, 378 U.S. 347 (1964)
[14] Robinson v. Florida, 378 U.S. 153 (1964)
[15] Griffin v. Maryland, 378 U.S. 130 (1964)
[16] For references to *Bell* in other decisions see Barr v. Columbia, 378 U.S. 146, 151 (1964), Bouie v. Columbia, 378 U.S. 347, 363 (1964) (See concurrences but Justices Goldberg, and Douglas), Robinson v. Florida, 378 U.S. 153, 157 (1964) (See concurrence by Douglas), Griffin v. Maryland, 378 U.S. 130 (1964) (See concurrence by Goldberg and dissent by Black)
[17] Justice Hugo Black, circulated opinion Maryland v. Bell, Container number 511, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C

memoirs confirm, that debate over the *Bell* and the "Sit In Cases" was contentious.[18] In a set of notes from an early conference, Chief Justice Warren recoded the initial thoughts of each of the Justices. Justice Black was second to express his opinion, after the Chief, saying that he believed that the Chief Justice's position "would overturn the Civil Rights Cases. He would be willing to overturn them if that was all [that was] involved."[19] According to the Chief Justice's notes, Justice Black was concerned that finding a right to public accommodation under the Fourteenth Amendment would blur the boundaries between public and private.[20] Justice Black's views were echoed by Justices Clark, Harlan, Stewart and White.[21] Justices Brennan and Goldberg joined the Chief Justice in the view that all of the convictions should be overturned.[22]

According to Chief Justice Warren's papers, Justice Douglas was the first to commit his position in the "Sit-In Case" to paper. A week after the cases were heard, Justice Douglas circulated a concise memo stating his view that the Sit-In Cases should be overturned under the Fourteenth Amendment.[23] In Justice Douglas' analysis of the Fourteenth Amendment, when courts upheld private segregation through public prosecutions under trespass laws they were violating the constitution. He wrote "A State expresses a policy whenever it acts through a prosecutor and a court – a policy no less clear omission? when it acts through its legislator." He went on to argue that "the question in the sit-in cases is… not whether there is state action, but whether States, in acting through their courts, can constitutionally put a racial cordon around

---

[18] Elizabeth Black*, Mr. Justice and Mrs. Black,* 91-91, 96 (1986)
[19] Chif Justice Earl Warren, Untitled notes on Sit-In Cases, Undated, Container number 511, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C
[20] Id at 2 "Makes no distinction between a home and store."
[21] Id
[22] Id
[23] Justice William O. Douglass, Memorandum to the Conference In Re: The Sit-In Cases Argued the Week of October 14, 1963, (October 21, 1963) Container number 511, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C.

business serving the public."[24] Justice Douglas closed his memo by writing that "an affirmance in these cases fastens apartheid tightly onto our society – a result incomprehensive in light of the purposes of the Fourteenth Amendment and the realities of our modern society."[25]

Justice Douglas' impassioned defense of the right to public accommodation under the Fourteenth Amendment is carried through into all of the concurrences and dissents he drafted as a part of the Court's deliberations on the Sit-In Cases. In his published concurrence in *Bell*, Justice Douglas chastised the majority for refusing to reach the constitutional issue in the case as well as the eight-month delay in issuing a decision.[26] Justice Douglas goes on to describe the segregation in public accommodations as "a relic of slavery – an institution that has cast a long shadow resulting today in a second-class citizenship in this area of public accommodations….The Black Codes were a substitute for slavery; segregation was a substitute for the Black Codes; the discrimination in these sit-in cases is a relic of slavery.[27]

Justice Douglas was not the only Justice to reach the merits of the case and find that segregation in public accommodations was illegal under the Fourteenth Amendment. In addition to concurring with Justice Douglas, Justice Goldberg also published an impassioned dissent with roots early in the deliberations of the Sit-In Cases. On April 13, 1964 Justice Goldberg circulated the first draft of what would become his concurrence in *Bell*. At the time it was dissent, which opened with a recitation of the Declaration of Independence:

> The Declaration of Independence stated the American creed: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these rights are Life Liberty and the pursuit of Happiness." This ideal was not full achieved in our Constitution of 1787 because of the hard and tragic reality of Negro slavery. The Constitution of the new Nation while

[24] Id at 3
[25] Id at 3
[26] Bell at 243
[27] Bell at 246-248

> heralding liberty, in effect, declaring all mean to be free and equal – except black men who were to be omission? free nor equal."[28]

Justice Goldberg's rousing dissent goes on to declare that the Reconstruction amendments were "designed [to]… encompass the right to non-discriminatory service in places of public accommodation."[29] The writings by Justices Douglas and Goldberg present a compelling set of counter narratives to those presented in traditional Federalist discourse.

Part III: Counter-Narratives to Federalism

While there are many sources for counter narratives to conservative federalist discourse, the deliberations of the Supreme Court over the Sit-In Cases provide a particularly cogent and clear set of responses to Federalist critiques of government intervention in service civil rights.

States as a Laboratory

One of the oft-touted benefits of Federalism is that the states can serve as laboratories, experimenting with different approaches to shared problems. Justice Douglas' characterization of segregation as a "relic of slavery"[30] casts considerable doubt on the prudence of states as laboratories. He traces the taxonomy of racial discrimination from slavery to the Black Codes and into the 1964 world of public discrimination, showing how the laboratories of the South produced a century of slavery after emancipation. Douglas' incisive analysis begs the question, when your laboratories begin in a null state of slavery and injustice how far can you truly expect them to evolve?

The State Action Requirement Under the 14th Amendment

One striking aspect of both Justice Douglas' and Goldberg's published and unpublished

---

[28] Justice Arthur Goldberg, Unpublished dissent in Bell v. Maryaland (April 13, 1964) Container number 511, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C.
[29] Id at 4
[30] See Supra note 27

writing on the Sit-In Cases is their wide view of the state action requirement of the Fourteenth Amendment. In his unpublished dissent in Bell, Justice Goldberg defines state inaction in the face of segregation as "state action" under the Fourteenth Amendment.[31] Justice Douglas takes a different approach in his memo to his colleagues. He argues that state action in the form of prosecutions by state and local prosecutors and convictions in states courts of demonstrators who defy Jim Crow is enough to constitute state action under the Fourteenth Amendment.[32] While those in favor of a robust notion of constitutional personhood, with full Fourteenth Amendment protections for civil rights, might want to abandon the state action doctrine, Justices Goldberg and Douglas articulate a characterization of state action that requires Federal intervention when states refuse to protect the rights of their citizens.

Part IV: Further Inquiries

While my limited inquiry revealed valuable counter narratives, there still many critical narratives left to uncover. The papers of Justices Harlan, Stewart, White and Clark are natural next subjects. The papers of Chief Justice Earl Warren are a treasure trove of which I have only just begun to scratch the surface. Like the Warren Papers, Justice Brennan's papers contain more than I was able to explore. It is tempting to eschew the unpublished writings as inconsequential in comparison to the options handed down by the court, but these writings contain valuable legal analysis from America's most recognized and revered jurists. While these words may not have the force of law, they are critical tools in reframing the narratives that

---

[31] Justice Arthur Goldberg, Unpublished dissent in *Bell v. Maryland*, 14, (April 13, 1964) Container number 511, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C.

[32] Justice William O. Douglass, Memorandum to the Conference In Re: The Sit-In Cases Argued the Week of October 14, 1963, 3 (October 21, 1963) Container number 511, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C.

inform our Justice system. Federalism, like any other doctrine or tenant of legal thought, is itself a narrative that can be unwound and reshaped to accommodate a fully realized notion of constitutional personhood.