THE WARREN COURT: YESTERDAY, TODAY, AND TOMORROW

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I. THE REVISIONISTS' ATTACK ON LIBERAL INSTRUMENTALISM

Woody Allen once observed that "relationships are like sharks: they either move forward or they die."[1] Much the same can be said about scholars of the Supreme Court: they either revise received wisdom or they perish. There are no good insights, only new insights. The passage of time usually exacerbates this phenomenon, often to the point of making well intentioned prevaricators out of even the most skilled revisionist scholars. As the past recedes, we too often begin to believe that what was real was not, only to discover, upon reflection at anniversaries such as this one marking the quarter century since Earl Warren's retirement, that it really was.

This practice of creative interpretation has become pronounced in the scholarship treating the Warren Court. President Richard Nixon understood the Court and the political stakes created by its work better than many scholars do today. Nixon exclaimed repeatedly in the course of the 1968 campaign that the Court's decisions had "gone too far in weakening the peace forces as against the criminal forces of this country."[2] Nixon promised to select only strict constructionists, Justices who would stop the coddling of criminals, restore the proper place of the states in the federal system, and promote respect for family values. Yet today we seem to have forgotten Nixon's simple lesson. We have so disentangled the Warren Court and its jurisprudence from their historical contexts that we fail to appreciate that Court's singular place in the American constitutional experience.

The traditional, consensus approach to the Warren Court, like Nixon, took the Justices' liberalism seriously. Scholars such as Martin Shapiro, Robert Dahl, Anthony Lewis, Archibald Cox, Bernard Schwartz, and G. Edward White, while addressing the Warren Court in somewhat different ways, nonetheless concluded that it was instrumental in its aims, policy making in its decisions, and committed to enhancing the rights of historically underepresented groups.[3] This liberal, instrumental interpretation held that the Warren Court shared a general commitment to social ends such as efficiency, humanitarianism, equality of economic opportunity, and equal treatment before the law. According to this interpretation, the Warren Court was an engine of modern liberal reform

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1. ANNIE HALL (United Artists 1977).

2. GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 409 (1977).

3. MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT (1964); Shapiro, *The Constitution and Economic Rights, in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES (M. Judd Harmon ed., 1978); Shapiro, *Judicial Activism, in* AMERICA IN THE TWENTY-FIRST CENTURY (S. Lipset ed., 1979); Shapiro, *The Supreme Court: From Warren to Burger, in* THE NEW AMERICAN POLITICAL SYSTEM (Anthony King ed., 1978); Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values, in* THE BURGER COURT: THE COUNTER REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983); Robert Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Anthony Lewis, *Earl Warren, in* 4 LEON FRIEDMAN & FRED L. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT (1969); LEWIS, GIDEON'S TRUMPET (1964); LEWIS, MAKE NO LAW (1991); ARCHIBALD COX, THE WARREN COURT (1968); COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976); BERNARD SCHWARTZ, SUPER CHIEF (1983); G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE (1982).

powered by a substantive jurisprudence that stressed results and gave only modest attention to *polity* principles.

Three schools of revisionist scholarship have sharply challenged this liberal-instrumentalist view. Conservatives argue that political bias and problematic scholarship characterized the Warren Court. Gary McDowell and Raoul Berger, among others, condemn Warren and his colleagues for faulty constitutional reasoning, a muddled reading of the founding generation and its fidelity to the Constitution, and usurpation of legislative authority.[4] The conservatives agree with the liberals that the Warren Court was instrumental, but they insist that this instrumentalism had ruinous results, both in terms of public policy and the authority of the Court. The Justices, according to these scholars, ran amuck in their own liberalism and welfare stateism.

A second body of scholars, the so-called civic republicans, view the Warren Court from a perspective at once sympathetic with, yet critical of, the Justices. Michael Perry, Mark Tushnet, and Sanford Levinson, for example, while differing on the particulars, agree that there is no necessary connection between constitutional choices and good moral values, and that each choice, therefore, must be analyzed with regard to moral theory and outcomes.[5] This view holds that politics and law should not be based on raw power and preferential self-interest; instead, it posits that both should respond to and protect the public good.

The civic republicans take exception to the level of success achieved by the Court and to the grounds upon which the liberal majority rested its position. If anything, the Warren Court acted *too* instrumentally, failing to anchor its policy positions in concern about the common good and in exalting individual rights at the expense of community interests. The Warren Court erred because it presumed to do those things in politics which its power, and the power of any judicial body, could never reach legitimately. According to the civic republicans, the appropriate means of social transformation resides in the political branches, and not in the courts.

A third revisionist interpretation not only blends elements of the other two, but succeeds in standing the Warren Court on its head in doing so. This "constitutive" interpretation asserts, with a remarkable historical flourish all too familiar in much of the scholarship dealing with modern constitutional jurisprudence, that "[i]t is important to note that the Warren Court's genius was not of its own making."[6] Ronald Kahn, for example, argues that the Warren Court was neither concerned with rights nor due process; instead, its approach was "constitutive," not "instrumental." The Justices of the Warren Court well understood the limits of their powers and realized that their most important task was to find the best way to constitute the political and legal communities, to take doctrinal debates seriously, and to disregard the pressure of the ballot box for such change. The Warren Court, it turns out, really was not politically motivated; instead, it was overwhelmingly a legal institution, one in which the rule of law—the Constitution,

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4. GARY L. MCDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY (1985); RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977).

5. MICHAEL J. PERRY, MORALITY, POLITICS AND LAW (1988); MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

6. RONALD KAHN, THE SUPREME COURT AND CONSTITUTIONAL THEORY (1994).

precedents, and fundamental rights and legal principles—influenced judicial decisionmaking. The Warren Court fashioned only modest adjustments in the constitutional landscape and its most important contributions were only fully realized under the leadership of Warren's successor, Warren Burger. The constitutive interpretation, by focusing so fully on constitutional theory and jurisprudence, drains the Warren Court of life.

These revisionist interpretations tend to diminish the Warren Court's stature and to deny the singular nature of social and political change in the 1950s and 1960s. They rob the Warren Court of either its legitimacy or its energy, and in some cases both. Kahn, for example, tells us that in the past quarter century life has become more complex, leaving a sense that the Warren Court in some ways faced a challenge less daunting than does our own time. The conservatives crudely argue bad faith and a lack of principle on the part of the Justices. The civic republicans admire the Warren Court's efforts but find the Court unable to offer a coherent theory of constitutional politics.

No doubt each of these views has some merit, yet each of them make the Warren Court something less than the major historical force it was. On this twenty-fifth anniversary of Earl Warren's retirement, it seems appropriate to shift our attention from matters of theory and jurisprudence and recall what the Warren Court did—to put it in historical perspective. One of the best ways to do so is by listening to the times *and* by heeding what contemporary critics of the Justices, like Richard Nixon, had to say.

II. THE WARREN COURT IN THE HISTORY OF THE SUPREME COURT

Perhaps nowhere is such an approach more important than on the simple question of whether the Warren Court really existed. A good number of revisionist scholars apparently have doubts. Some scholars have not only questioned the proposition that there was a Warren Court, but have concluded that naming Supreme Court epochs after Chief Justices is problematic at best and misleading at worst. There has often been considerable overlap in the Associate Justices on the Court even after the Chief leaves the bench. More than seventy percent of all Associate Justices appointed to the High Court outlast the Chief Justice serving at the time of their appointment. That was certainly the case with the Warren Court. Of the eight Associates appointed during Warren's term, only one, Charles Whittaker, left before Warren's retirement. Two leading scholars take the position that the Warren Court should be called the Brennan Court. Dennis Hutchinson argues that "[t]o the extent that the Court over which Warren presided has any intellectual legacy that is accessible to those trained in doctrine and not in ethics, it is Brennan who is responsible."[7] Robert Post proposed that the Warren years really should be called the "Brennan Court" era because Associate Justice William Brennan, who only missed participating in one landmark decision, *Brown v. Board of Education*,[8] outlived Warren and was the most effective banner carrier for liberal jurisprudence from the 1960s to the early 1990s.[9]

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7. Dennis Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 924 (1983).

8. 349 U.S. 294 (1955).

9. Hutchinson, *supra* note 7, at 924; Robert C. Post, *Justice William J. Brennan and the Warren Court,*

Some Chief Justices did not stay long enough to have much of an impact on the Court. Such was certainly the case with John Jay, John Rutlege, and Oliver Ellsworth early in the history of the Court; the same was true with Harlan Fiske Stone and Fred Vinson more recently. Chief Justices can also stay too long; their influence becomes diminished when transformations in the political culture bring appointees to the Court either not of the same political generation nor of the same ideological views as the Chief. Both John Marshall and his successor, Roger B. Taney, faced similar fates because Andrew Jackson, in the case of the former, and Abraham Lincoln, in the case of the latter, placed members on the High Court whose views were radically at odds with those of the Chief Justice. By the time of their deaths, both Marshall and Taney had essentially lost control of their respective courts.[10] Both of these Chief Justices served more than double Warren's sixteen years on the bench.

Warren's term as Chief Justice was about average, and, even more importantly, he had enormous good luck in the way that appointments fell during his time on the bench. Within three years of taking the position of Chief Justice, the composition of the Court underwent radical change. Four of the Associate Justices left: Stanley Reed, Robert H. Jackson, Harold H. Burton, and Sherman Minton. Either Presidents Franklin D. Roosevelt or Harry Truman appointed all of these Justices. None of them, with the exception of Jackson, was much of a force on the Court. Their replacements were not only more talented jurists but political moderates of a comparable if not quite similar ideological stripe to that of Warren.[11]

This ideological continuity was a central feature of the Warren Court, and its presence, along with Warren's leadership, helped to define the era. Republican President Dwight Eisenhower made four appointments to the bench in addition to Warren. He selected John Marshall Harlan, III, in 1955, William J. Brennan, Jr., in 1956, Charles Whittaker in 1957, and Potter Stewart in 1958. Only Harlan and Stewart emerged as anything like the representative voice of the constituency that elected Ike. Brennan became an important liberal voice on the Court; Whittaker served only four years. Byron White, one of President Kennedy's two appointments to the High Court, replaced Whittaker. Eisenhower concluded that in the cases of Warren and Brennan, he had made his two biggest political mistakes. Even Harlan was a moderate conservative. The other appointments were all made by Democratic presidents and the major holdovers, Hugo Black, William O. Douglas, and Felix Frankfurter, were selected by Democratic President Franklin D. Roosevelt. In short, there was a strong ideological predisposition in favor of liberal instrumentalism that came to typify the Warren Court.[12]

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8 CONST. COMMENTARY 11 (1991) *reprinted in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 123 (Mark Tushnet ed., 1993).

10. The best historical discussion of the office of Chief Justice is contained in ROBERT J. STEAMER, CHIEF JUSTICE 219-57 (1986). Concerning the effect of a too-long tenure on Marshall and Taney, *see* KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 26, 89 (1968).

11. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 251-295 (3d ed. 1992).

12. *Id.* There was greater ideological continuity on the Warren Court than on the Court under Burger although they shared many of the same values. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 331 (1993); Vincent Blasi, *The Rootless Activism of the Burger Court, in* THE BURGER COURT (Vincent Blasi ed., 1983).

Warren's contribution to the Court was his ability to lead this liberal majority toward important changes in public policy. If he had not done so, then the case for the Warren Court would be less persuasive. His major biographer, G. Edward White, explained that Warren succeeded through his leadership in investing "his Court with a discernible character, if not necessarily a coherent jurisprudence."[13]

Scholars today disagree about what attributes contribute to the success of a Chief Justice.[14] Some argue that technical proficiency in the law is more important than result orientation. For example, many students of the High Court believe Charles Evans Hughes was the greatest Chief Justice of the twentieth century because he commanded his colleagues by force of intellect and technical legal ability. Justice William O. Douglas concluded that in sheer legal talent "Warren was closer to Hughes than any others. Burger was close to Vinson. Stone was somewhere in between."[15] Hughes, however, exercised that leadership through a photographic memory, authoritative demeanor, and personal charisma. Hughes, according to Stone, conducted conferences "much like a drill sergeant."[16]

Warren shaped and defined his court in an entirely different way. His style was reminiscent of John Marshall, who depended on charm, an even temperament, an ability to have others warm to him, and on a vision of the Court's role.[17]

Warren, however, was not a legal scholar; he was a former governor and district attorney. He was a "politician, a big bear of man with great personal charm."[18] Justice Potter Stewart once commented that "[w]e all loved him."[19]

Warren also possessed great self-confidence. Initially, he relied on this quality to compensate for his lack of experience with the High Court, and it served him well throughout his tenure, especially in dealing with Felix Frankfurter who tried and ultimately failed to bring Warren under his influence. Warren turned Frankfurter's imperious style to his advantage by successfully building strong personal relations with the other Justices, most notably William J. Brennan.[20] Warren was smart enough to understand that he and Brennan shared similar views on important matters and that together they were likely to build the level of support necessary to reach those goals on the High Court. Commentators today, who concentrate on Brennan's twenty-year career after Warren retired, tend to read too much into the relationship when the two of them were on the Court together.[21] Like Brennan, Warren shared a result-oriented view of the Court's business.

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13. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 318 (1976).

14. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 186-89 (1986).

15. *Id.* at 186 (quoting WILLIAM O. DOUGLAS, THE COURT YEARS 223, 226, 227 (1980)).

16. *Id.* at 187 (quoting memorandum of Howard Westwood, Stone Papers, Box 48, LC).

17. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 365-75 (1988).

18. O'BRIEN, *supra* note 14, at 188.

19. O'BRIEN, *supra* note 14, at 188.

20. Warren took to the practice of consulting with Brennan on the Thursday preceding the Friday conference. O'BRIEN, *supra* note 14, at 188.

21. G. Edward White, *Earl Warren's Influence on the Supreme Court, in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 37, 46 (Mark Tushnet ed., 1993). The case for Brennan's role is made most forcefully by Hutchinson, *supra* note 7; Post, *supra* note 9.

Warren left his mark on the Court in other ways. In managing the case load, for example, he concentrated on forging majorities. To do that he successfully directed the energy that came from the clash of competing jurisprudential attitudes wrapped up in strong personalities such as Felix Frankfurter, William Douglas, and Hugo Black.

Although the Court had a liberal majority, it did not follow that the Justices readily agreed with one another. To the contrary, dissent rates continued the steady rise that had begun during the chief justiceship of Harlan Fiske Stone.[22] There was no intellectual leader on the Warren Court, we should remember; instead, several strong figures, Black, Douglas, Frankfurter, Harlan, and Goldberg, stood in uneasy coexistence. Warren's challenge was to mold this talented but frequently quarrelsome group.

Warren did so through his power to assign opinions. "During all the years," Warren observed in retirement, "I never had any of the Justices urge me to give them opinions to write, nor did I have anyone object to any opinions that I assigned to him or anyone else."[23]

Warren made his Court work through consultation and an evenhanded distribution of opinion writing. Unlike John Marshall, who dominated his brethren by writing the bulk of his Court's opinions, Warren led through collaboration, often using the assignment of opinions as a way of guiding the Court.[24] Nowhere was the success of this approach more apparent than in *Baker v. Carr*,[25] a 1962 decision that Warren believed to be more important than any other during his time on the Court. The opinion was written by Justice Brennan, but had Warren's influence stamped all over it. Moreover, Warren assigned the opinion to Brennan because he was urged to do so by Black and Douglas, both of whom believed that Brennan's views were closer to those of Potter Stewart, the necessary fifth vote for a majority.[26]

When placed in historical perspective, Warren emerges as perhaps the most persuasive and persistent Chief Justice the Court has ever had. Warren was not a great lawyer in the mold of Taney or Hughes, not a great legal scholar like Brandeis or Frankfurter, not a supreme stylist like Cardozo or Jackson, not a judicial philosopher like Holmes or Black, not a resourceful, efficient administrator like Taft or Burger. Nonetheless, he was the most important presence on the Court from 1953 to 1969; that is why it is fair to name the Court of this period after him. He was second in institutional leadership only to Marshall, at least as measured by impartial critics of the Court.[27] As Henry Abraham wrote, Warren "was his court, *the* judicial activist Court."[28]

If it is fair to claim the existence of the Warren Court, then it is also appropriate to note that, like other eras of the Court's history, the Warren period had its own phases. There were, in fact, two Warren Courts. During the first phase, from 1953 to 1962, the

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22. William J. Dixon, *On the Mysterious Decline of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988).

23. O'BRIEN, *supra* note 14, at 247.

24. NEWMYER, *supra* note 10, at 24.

25. 369 U.S. 186 (1962).

26. O'BRIEN, *supra* note 14, at 247.

27. ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES 45 (1978); ABRAHAM, *supra* note 11, at 259.

28. ABRAHAM, *supra* note 11, at 259.

Court did not have a major public presence with the notable exception of *Brown* v. *Board of Education*.[29] In those years an imperfect match existed between the public perception of the Warren Court as liberal, largely because of its decisions in race related cases, and the day-to-day reality. The Court Warren inherited from Fred Vinson at the beginning of the 1953 term was not liberal in the realm of civil liberties. The early Warren Court was indifferent to the rights of the accused in state courts and inconsistent in its protection of First Amendment rights.[30] Moreover, not until the 1961 term did the Court begin to take such matters seriously. From 1953 to 1961 the Court's percentage of liberal civil rights and liberties decisions ranged from a low of forty-seven percent in 1953 to a high of sixty two percent in 1954. Following the 1960 term, in which fifty-four percent of these cases were decided liberally, the proportion jumped to eighty percent in the 1961 term and remained in the seventies or above for six of the remaining seven years of the Warren Court.[31]

This dramatic shift in the early 1960s is almost universally recognized, but explanations vary about why it occurred. The conventional wisdom ascribes the shift to the appointment of Goldberg at the beginning of the 1962 term.[32] The major changes in the Court's direction came because of the incapacity suffered by Justice Frankfurter as a result of a stroke and the mid-term retirement of Justice Whittaker, both developments that shifted influence to Justice Stewart.[33]

After the 1962 term, the Warren Court emerged as the powerful institution of liberal change against which Nixon and others railed. The Court routinely took a strong liberal position in eighty percent of civil liberties cases.[34]

The Warren Court was distinctive in another way. The majority of its Justices invariably adopted innovative approaches to major constitutional controversies. Warren and at least four of his colleagues, Douglas, Brennan, Fortas, and Marshall, had little sustained interest in general matters of constitutional theory. Such behavior, while not unique, certainly stood out from the practices of the nineteenth century, when Justices such as Joseph Story, Joseph Bradley, and Stephen J. Field persisted in a longstanding quest to rationalize the Court's actions with acceptable constitutional theory. The Warren Court Justices were remarkable for their lack of concern about the era's main currents of constitutional thought. Warren did not agree, he wrote in his memoirs, "with the so-called doctrine of 'neutral principles.' It . . . is a fantasy," he continued, "and is used more to avoid responsibilities than to meet them. As the defender of the Constitution, the Court cannot be neutral . . . ."[35] The great controversy over incorporation, which brewed throughout the Warren Court era, was evidence enough of precisely that lack of concern.[36]

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29. 349 U.S. 294 (1955).

30. *See, e.g.*, Breithaupt v. Abram, 352 U.S. 432 (1957); Watkins v. United states, 354 U.S. 178 (1957); Barenblatt v. United States, 360 U.S. 109 (1959).

31. Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 104 (1989).

32. *Id.* at 104 n.6.

33. *Id.* at 104.

34. *Id.*

35. EARL WARREN, THE MEMOIRS OF EARL WARREN 332-33 (1977).

36. Mark Tushnet, *The Warren Court as History, in* THE WARREN COURT IN HISTORICAL AND

In this setting, the role of a Justice was to figure out the right answer, as a matter of public necessity and not some abstract theory of justice. Underlying this approach was the belief that the Constitution was a living document, and that the Justices had a responsibility to facilitate its evolution and development.[37] Such a view set the Warren majority in sharp contrast with its predecessors, especially those eras of the Court's history that had stressed their formalist role. At the same time, the Warren Court was also notable because it managed to shift the emphasis in the developmental character of the Constitution to one that stressed individual rights.

Like Courts of other eras, the Warren Court had a reciprocal and reinforcing relationship with its own times. It reflected much of the sympathies of the New Dealers; and its liberal policies extended beyond the period of Earl Warren's chief justiceship. Still, there was without a doubt a Warren Court, an identifiable judicial entity of which we can make sense and which was distinctive in the overall history of the Supreme Court.

III. The Warren Court and Its Times

Throughout American history, constitutional law has developed in constantly changing dialogue between the Court and the country, and the Warren Court was no exception. For example, the Warren Court did not discover the issue of race and its pernicious effects on American life. That matter had been part of the original constitutional understanding, an understanding earlier Justices had enforced by countenancing first slavery and then, following the Civil War, a system of de jure segregation. By the 1930s, however, the Court had begun the tortured process of reexamining its previous decisions in this area, not so much because it wished to do so but because the newly created National Association for the Advancement of Colored People pressed it to do so. To that extent, the Warren Court's great decision in *Brown v. Board of Education*[38] built upon and expanded a line of constitutional development begun much earlier.[39] At the same time, it contributed to the constitutional elaboration of race issues during the remainder of the Warren Court and beyond. Much the same can be said in other areas of constitutional law, notably the rights of the accused, First Amendment free expression and religion cases, and the development of the idea that the political thicket was, in the end, not nearly as thorny as previous courts had believed. Each of these areas of major Warren Court constitutional development had been cultivated by earlier Courts, and once these areas were treated by Warren and his colleagues, they contributed to developments in American society.

Political Perspective 18 (Mark Tushnet ed., 1993).

37. Morton J. Horwitz, *The Warren Court and the Pursuit of Justice,* 50 Wash. & Lee L. Rev. 5 (1993).

38. 349 U.S. 294 (1955).

39. Missouri *ex rel* Gaines v. Canada, 305 U.S. 337 (1938) (denial of admission to law school); Mitchell v. United States, 313 U.S. 80 (1941) (exclusion from Pullman berth); Shelley v. Kraemer, 334 U.S. 1 (1948) (restrictive covenant); Henderson v. United States 339 U.S. 816 (1950) (exclusion from railroad dining car); Sweatt v. Painter, 339 U.S. 629 (1950) (segregated law school); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (segregated graduate school); Brown v. Board of Education, 347 U.S. 483 (1954) and 349 U.S. 294 (1955).

To recognize that the Warren Court built on the work of its predecessors merely underscores that it is in such ways that the Court works. The Warren Court stood out, however, because in each of these areas it brought about a resolution of existing law that was at once transformative and liberating.

In an era in which political outsiders pressed their case with more energy than ever before, the Warren Court responded. Doing so made it distinctive in the history of the Court, and, for the first and only time, the Justices empathized with the concerns of social and political outsiders. The Court, of course, has had a long history of protecting minority rights, but in most instances that protection has been aimed at property rights rather than at human rights. In this way, the Warren Court was notable because it concluded that discrimination was not a random, individualized act but a governmentally supported set of social preferences structured along cultural lines. Warren and his liberal colleagues were eager to attack the concept of state action through the incorporation doctrine because they realized that by doing so they held the power to redefine political and social relationships in favor of those who had previously been disadvantaged.

The Warren Court was very much *in*, not outside the stream of history, as some revisionist scholars are prone to argue. The Justices operated in a political culture in which big government had been accepted, indeed embraced. To suggest that this environment was in any meaningful way less complex and demanding than our own so woefully misses the point as to trivialize much contemporary history. The rise of legislative and executive power over economic matters was one of the enduring legacies of the New Deal, a legacy that remains firmly in place today and that shaped the actions of not only Warren but those of his colleagues and the litigants that appeared before them. It is also the source of much that is perplexing in modern economic life.

President Franklin Roosevelt's shock treatment in the Court-packing plan left little doubt that the Justices no longer had broad support to intervene in economic matters. It was a lesson learned by successor courts, especially the Court over which Warren presided. Between 1953 and 1969 the Court did not declare a single piece of federal legislation regulating property unconstitutional, and it invalidated only a few state laws regulating industry and providing welfare programs as interferences with contract or property rights. While revisionists such as Kahn have made it fashionable to believe that the High Court does not read the election returns, there is ample evidence that the post-New Deal Court, including that of Earl Warren, had no interest in refighting the battle of property rights, since that battle had been conceded to the legislative branch and the administrative state.[40]

The Warren Court, however, was a product of its time, just as were previous courts. What was embarrassingly obvious was that economic security, at least the level of security envisioned by the New Deal, was overly optimistic. The problem of raising the level of political and social rights, however, required an effort similar to that made by the federal government in securing economic rights. It also presented an entirely different, and in many ways more complicated, problem than revisionists admit, given the nation's prevailing class and race relations. Where government had exercised its authority in the past, it had done so in a way to promote differences and discrimination, whether through segregation, the poll tax, state-sanctioned religious practices, or limits on speech and

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40. PAUL MURPHY, THE CONSTITUTION IN CRISIS TIMES, 1918-1969 at 459 (1972).

press. At the time of the Warren Court, these practices were deeply embedded and entirely supportive of the existing political and social order. The quest to enhance social and political rights was a uniquely judicial and legal task, since the existing centers of political and social power were unlikely to change their behavior without some pressure. The Warren Court responded to this challenge by clearing out a legal thicket of archaic interpretations that were simply not going to be swept away through elected democratic practices.

In retrospect, conservative critics of the Warren Court argue that it should not have done what it did because it usurped power either from the other federal branches or from state and local governments.[41] Yet here again the Warren Court Justices inherited an institutional legacy that encouraged them to embrace controversial issues that could not find resolution elsewhere in the governmental structure.[42] Previous courts had been disposed more often than not to resolve such matters in favor of property rights and community rather than individual interests. For example, meaningful racial integration of public schools and other public facilities could not be achieved without removing the standing gloss of "separate but equal" on the Equal Protection Clause of the Fourteenth Amendment.[43] Congress had great difficulty accepting the limited civil rights measures proposed by the Truman administration, none of which even came close to addressing the issue of segregation. Congress was not likely to strike down local laws designed to muzzle protestors seeking a new level of individual rights nor to address, under the First Amendment, protection for religious minorities. The literal wording of the First Amendment made clear that Congress was explicitly prohibited from doing so. There was no way under existing political arrangements that Congress was going to break the long-standing practice of rural domination of state legislatures. As a matter of constitutional law and practice, crime control and policing had historically been left to state, and especially local, officials. Practices varied widely from state to state, and more often than not, varied in quality within these areas based on the races of the victims and the accused.

Perhaps as important, the Court was operating within the structure of its own constitutional purposes. Revisionists have fastened on the Warren era as the most blatant example of runaway judicial activism. The result, they insist, was the rise of an imperial judiciary.

Yet the Court had historically performed the role of construing established statutes and legal language in the context of both initial meaning, so-called original intent today, and current societal demands. The results were simply different in the Warren era. When, for example, Chief Justice Roger B. Taney and his colleagues held in *Dred Scott* that no person of African American heritage could be a citizen of the United States,[44] they were

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41. *See* sources cited in *supra* note 4. Warren was quick to dump cold water on the notion that the justices did the bidding of the public. "Every man on the Court must choose for himself which course he should take . . . . To habitually ride the crests of the waves through the constantly recurring storms that arise in a free government, always agreeing with the dominant interests, would be a serene way of life. . . . As tempting as that might be, I could not go that way." WARREN, *supra* note 35, at 332.

42. Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975); WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER (1988).

43. Plessy v. Ferguson, 163 U.S. 537 (1896).

44. Scott v. Sandford, 60 U.S. 393 (1857).

greeted with a uniform chorus of condemnation by Abraham Lincoln and the Republican Party for usurping power through judicial law making.[45] Many more Democrats, however, applauded Taney's boldness. Hence, the Warren Court was able to move legitimately toward assuring the values of equality, fairness, natural justice, and morality in individual and public relationships because the history of the Court had long since established that it could do so.

Warren and the majority of the Court also took seriously the duty imposed on them by their oath of office to "administer justice without respect to persons, and do equal right to the poor and to the rich."[46] Such a position, however, stirred one or another group to condemn most of the Court's landmark decisions. These changes in the direction of the Warren Court were important, and they belie the notions put forth by some that, on balance, the Warren Court Justices were not really liberal at all or, at the same time, that the Justices had, to cite the famous *Southern Declaration on Integration*, "undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land."[47] First its critics, and then many scholars, made a caricature of the High Court.

In the wake of *Engel v. Vitale*,[48] for example, Representative George W. Andrews of Alabama asserted: "They put the Negroes in the schools, and now they've driven God out."[49] Representative L. Mendell Rivers of South Carolina asserted that as a result of *Engel* the Court "has now officially declared its disbelief in God."[50]

These protests seem not to have phased Warren and his colleagues. Legal scholars particularly have given so much attention to the jurisprudential workings of the Warren Court that they have often missed the obvious literal-mindedness and courage of the liberal majority and especially of its Chief Justice. America had historically professed ideals of equality, fairness, and justice. Why shouldn't such ideals be supported in constitutional law and through the actions of the Supreme Court? "So many times in life," Warren wrote, "the only permanent satisfaction one can find comes from bucking an adverse tide or swimming upstream to reach a goal."[51] While some scholars have perhaps gone too far in arguing that the Warren Court was committed to a scheme of equitable jurisprudence, there is little doubt that the Warren Court majority believed that early generations of Americans had, at best, given lip service to these concepts and that it was appropriate, at this juncture in the nation's history, for the Justices to end the process by which such ideals had been compromised, qualified, and even destroyed.[52]

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45. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); HAROLD M. HYMAN & WILLIAM M. WEICEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875 at 190-92, 196-97 (1982).

46. WARREN, *supra* note 35, at 332.

47. *Southern Declaration on Integration*, March 12, 1956 *reprinted in* AMERICAN LEGAL HISTORY: CASES AND MATERIALS 514-15 (Kermit Hall et al. eds., 1991).

48. 370 U.S. 421 (1962).

49. LEO PFEFFER, THIS HONORABLE COURT 421 (1965).

50. *Id.* at 422.

51. WARREN, *supra* note 35, at 332.

52. PETER HOFFER, THE LAW'S CONSCIENCE 2-6 (1990).

In many ways, this strain of Warren Court commitment—to the reconciliation of professed values with behavior—did more than anything else to stir the ire of its critics, many of whom believed that they were being blamed for having benefitted from such hypocrisy. The Court's actions placed it squarely at odds with one of the central contradictions of the American experience, one too often ignored.[53] The majority of Americans had come to embrace the contradiction between theory and practice in many areas of life. Although millions of Americans professed this belief in freedom, liberty, and equality, they simultaneously abstained from conducting themselves according to these rules of moral behavior. In responding to this contradiction, the High Court initiated an extended educational dialogue with the American public about the extent of the Justices' responsibility to first recognize and then resolve the tension between moral thought and actual conduct.

The Warren Court's revolution in public law promoted acrimony and bitterness precisely because it empowered those who had previously not had the opportunity to exercise power. Whether we approve of their behavior or not, there is little doubt that these new groups added dramatic and often disturbing wrinkles to the contours of American society. Much of what the Warren Court did was to release dissident minorities from longstanding legal and social strictures. Critics complained that the Court was the root of the problem; it was fostering subversive action by civil rights advocates, Communist agitators, criminals, smut peddlers, and racketeers who avoided accountability by hiding behind the Fifth Amendment.

One of the more interesting yet unexplored aspects of the Warren Court was the extent to which the Justices themselves appreciated the consequences of their actions. While we can embellish the Court's actions by labelling the Justices as either interpretivists or nonintepretivists, as originalists or non-originalists, or as advocates of constitutive or polity theories of governance, the inescapable fact is that they knew what they wanted, and, often times, if they did not exactly achieve it, they came close. For example, in the case of *New York Times* v. *Sullivan*,[54] Hugo Black asked the counsel for three white city commissioners from Montgomery, Alabama if he could seriously argue that a newspaper advertisement by the supporters of Martin Luther King, Jr., which called into question Lester B. Sullivan's public conduct, would actually hurt him with his all-white political supporters.[55] The Court ultimately held that Sullivan had not been libeled as a matter of constitutional law and practical politics.

Nor was Warren so naive as to believe that what he and his colleagues wanted could be accomplished without controversy. "Every man who has sat on the Court," Warren wrote in retirement, "must have known at the time he took office that there always has been and in all probability always will be controversy surrounding that body." Warren continued:

> Accordingly, I venture to express the hope that the Court's decisions always will be controversial, because it is human nature for the dominant group in a nation to keep pressing for further domination, and unless the Court has the fiber to

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53. MURPHY, *supra* note 40, at 462-63.

54. 376 U.S. 254 (1964).

55. LEWIS, MAKE NO LAW, *supra* note 3, at 151.

> accord justice to the weakest member of society, regardless of the pressure brought upon it, we never can achieve our goal of 'life, liberty and the pursuit of happiness' for everyone.[56]

This goal, of course, is articulated in the Declaration of Independence and not the Constitution.

The constitutional revolution unleashed by the Court created serious problems which are still echoed in today's debates about the High Court. The exercise of judicial power to achieve social goals opened the Court to charges that it had departed from its traditional role and had become primarily a legislative body. In essence, critics charge, the unelected Justices substituted their views for those of elected and therefore properly representative legislators. Such an argument misses the point that many of these issues were beyond the grasp, either by law or by force of will, of the political branches of government.

Yet the Warren Court *was* often on shaky ground when it attempted to justify its conduct. The great English legal historian Sir William Holdsworth once wrote that "for certainty in the law, a little bad history is not too high a price to pay."[57] Warren and his colleagues perhaps too frequently followed Holdsworth's advice. The Justices were wildly bad historians, so misreading the historical record on such matters as freedom of conscience and race relations as to call into question the soundness of their approach to these matters. Even worse, the Justices frequently argued the fine points of history with one another and, in the process, added to the sense of illegitimacy that accompanied several of their boldest pronouncements.[58] They were no worse than their predecessors in using history, just more persistently bad at doing so.

The arguments among the Justices about history easily spilled over into serious disagreements about the nature of the judicial process and the scope of judicial review. Today we are prone to minimize the sharp debates between Black and Frankfurter over judicial activism and judicial restraint, doing so in favor of seemingly more sophisticated ideas such as originalism, noninterpretivisim, and constitutive jurisprudence.[59] Throughout the 1960s, a majority of the Warren Court supported judicial activism, even to the point that the activists had themselves come to disagree about what they could and could not do. President Lyndon Johnson's decision to replace retiring Chief Justice Warren with Abe Fortas underscored the extent to which the Court had moved toward an activist role that included direct involvement by Fortas in the day-to-day business of the White House while he was a sitting Justice.[60]

Still, a critical minority on the bench, led by Justice Harlan, complained repeatedly that his brethren acted far beyond the traditional and understood boundaries set for Justices in our constitutional system. Harlan explicitly warned that recent history demonstrated the virtues of judicial restraint. Harlan and others argued that the Supreme

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56. WARREN, *supra* note 35, at 334-35.

57. HOLDSWORTH, ESSAYS IN LAW AND HISTORY 24 (1946).

58. *See, e.g.*, the debate between Frankfurter and Black over religion in Engel v. Vitale, 370 U.S. 421 (1962); *see also* CHARLES MILLER, THE SUPREME COURT AND THE USES OF HISTORY 100-148 (1969).

59. *See supra* notes 3-6.

60. O'BRIEN, *supra* note 14, at 125-133; LAURA KALMAN, ABE FORTAS 310-18 (1991); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 270-73 (Kermit Hall ed., 1992).

Court before 1937 demonstrated repeatedly what the Justices should not do: interfere in areas that were properly not theirs to begin with.

Even more fundamental to this critique was the view that such interference actually sapped the democratic process of its vitality. It bred a sense of distrust in popular elected forms of government while placing too much trust in a judiciary that lacked the means even to command obedience to its decisions and that made its decisions in secret.[61] Felix Frankfurter explained in his dissent in *Baker v. Carr* that "[d]isregard of inherent limits in the effective exercise of the Court's 'judicial power' may well impair the Court's position as the ultimate organ of 'the supreme Law of the land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce."[62] Justice Harlan added an additional note when taking exception to the Court's later decision in *Reynolds* v. *Simms*, which introduced the concept of "one person, one vote." Harlan wrote:

> These decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act.[63]

Earlier Chief Justice Harlan Fiske Stone and Justice Robert H. Jackson had warned against the Court taking on too great a role. Jackson summed the matter up neatly by observing that a "4,000-word eighteenth-century document or its nineteenth-century Amendments" could not provide "some clear bulwark against all dangers and evils that today beset us internally."[64]

Faced with this attack, the majority on the Warren Court found it necessary to offer a different explanation for its actions. Chief Justice Warren, for example, insisted that the Court merely acted at the call of those parties bringing cases before it. Warren stated:

> There are many people, and I fear some lawyers, who believe that whenever the Court disapproves of some facets of American life, it reaches out and decides the question in accordance with its desires. We can reach for no cases. They come to us in the normal course of events or we have no jurisdiction.[65]

Justices Black and Douglas made clear, as well, that they were not going to be bound by precedent, and their attitude toward it fostered even more contention. For example, in the case of *Gideon* v. *Wainwright*, Harlan pleaded with the majority, which included Black and Frankfurter, that by refusing to abide by precedent the Court refused to recognize that in most matters it was more important that the applicable rule of law be settled than that it be settled right.[66]

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61. TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN 149-53 (1992).

62. 369 U.S. 186, 267 (1962).

63. Reynolds v. Simms, 377 U.S. 533, 620 (1964).

64. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 57-58 (1955).

65. LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 452 (1967).

66. 372 U.S. 335 (1963). While Harlan was willing to overrule precedent, he believed it deserved at

The Warren Court had little difficulty finding new areas to explore. To many of Warren's critics, his belief that the Court merely waited for cases to come to it was disingenuous. After all, the Warren Court revolution was not just substantive; it was procedural as well. The Justices significantly loosened such historical limitations on access to it as standing to sue,[67] and, perhaps most dramatically in *Baker v. Carr*, political questions.[68] Placed against this background, the Warren Court majority went well beyond simply responding to the wishes of the litigants.

Warren's argument nonetheless fitted the new reality of the 1950s and 1960s. The Warren Court benefitted from a long term development in which it emerged as the agency most likely to afford protection to minorities that could find no other avenue. Special interest group litigation predated the Warren Court by at least fifty years, but it matured during the 1950s and 1960s. One of the important historical developments of the first half of the twentieth century was the rise of so-called special interest litigation groups that expected to accomplish goals through the judicial process that were otherwise out of reach to them through the political process, susceptible as it was to prevailing shifts in public sentiment.

The American Civil Liberties Union, the National Association for the Advancement of Colored People, the National Lawyers Guild, the National Organization of Women, and various left wing, religious, labor, and ethnic organizations brought test cases designed purposefully to challenge what they believed were impediments to certain individual freedoms and civil rights.[69] Even the Department of Justice, which had pursued civil rights issues infrequently since Reconstruction, began during the Kennedy and especially during the Johnson administrations to press these matters before the federal courts. Moreover, these groups gathered additional incentives from the passage of major legislation, much of it prompted by the actions of the Court itself in the area of civil rights and voting rights in particular.

As judicial activism triumphed on the Court in the 1960s, more and more groups turned to the Justices for solutions. In the area of criminal justice the Warren Court's decisions extending the right to counsel and providing greater scrutiny of the major elements of criminal justice practice resulted in additional litigation before the Court, litigation that forced the Justices to further explain and expand the rationale for controversial landmark decisions.[70]

The Court's activism was both grist for the growing media and a pressure on the Court itself. The Warren Court, we should recall, was the first modern Court in the sense of having its work broadly evaluated for the public and, at the same time, in bringing a sense of humanity and approachability to the institution. Press coverage of the Court soared in the wake of *Brown*,[71] and it never came down. The Court became headline

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least a decent burial, especially from members of the Court who were not present when it had been established. *Id.* at 349.

67. Flast v. Cohen, 392 U.S. 83 (1968).

68. 369 U.S. 186 (1962).

69. RICHARD C. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS 282 (1981).

70. Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966); *In re* Gault, 387 U.S. 1 (1967).

71. Brown v. Board of Education, 349 U.S. 294 (1955).

news; it was a subject for nightly reporting on recently created television evening news. Even Justices Black and Douglas agreed to be interviewed at length about their views on the Constitution. Through books, magazines, newspapers, radio, and television, the Warren Court was presented to the world for evaluation and, depending on where one sat on the issue, either praise or condemnation in a way that no previous Court had experienced. The new light of publicity only amplified the already controversial nature of the Court's work.

Measuring public reaction to the Court during these years is difficult. Yet certain themes do emerge. Over time the American public has held the institution of the Court in generally high regard, embracing the need for the Justices at a level of unvarnished understanding that accepts their role without necessarily being able to explain it. The Warren Court inherited a public attitude toward the Court that was framed, at least in part, by the notion that the Justices in the 1920s and 1930s had been biased toward special privilege and vested interests and unwilling to cooperate with Congress during the New Deal to restore economic prosperity. The Court's so-called "switch in time that saved nine" in 1937 began a long term process of changing such attitudes among the citizenry and showing that the Court could be helpful in providing relief from the pressing problems of modern society. Significant aspects of the Court's behavior received strong, but not necessarily uniform, support. The decisions involving equal justice for African-Americans in *Brown* and the sit-in decisions received popular responses. There was also support for the extension of counsel to indigents, for the curtailment of excessive search and seizure and invasion of privacy, and for the end of rural domination of state legislatures.[72]

However, perhaps as much as any time in the nation's history, controversy and not consensus usually characterized reaction to the Warren Court. In 1968, as the stewardship of Warren drew to a close, the Gallup Poll asked Americans to rate the Supreme Court. The response indicated considerable skepticism: eight percent responded excellent; twenty-eight percent, good; thirty-two percent, fair; and twenty-one percent, poor.[73] The Court was most strongly supported among the young and the well-educated; it was most opposed in the South where its decisions, from race relations to free press to reapportionment, had the greatest impact.[74]

These numbers testify to the continuing suspicion on the part of many Americans about the proper functioning of the Court. Rather than being a force of stability, the Court had become such a powerful instrument of change that it threatened the social fabric.[75] While some of the Warren Court's holdings did receive support, many more of its landmark rulings produced real hostility, disobedience, and even calls for the impeachment of some of the Justices, including Warren. Particularly controversial were the Court's holdings in school prayer cases, pro-Communist speech and protest decisions, its obscenity rulings, and many of its criminal procedure rulings, particularly those that granted new protections to the accused and were, as a result, portrayed as coddling the

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72. *See* G. THEODORE MITAU, DECADE OF DECISION: THE SUPREME COURT AND THE CONSTITUTIONAL REVOLUTION, 1954-1964 (1967).

73. *High Court Found In Disfavor, 3 to 2*, N. Y. TIMES, July 10, 1968 at A19.

74. *Id.*

75. *See* sources quoted in *supra* note 4.

criminal element. To many Americans, the nation seemed to be unraveling, and the Court seemingly contributed to that process.[76] While the Justices crafted constitutional decisions that opened the political and social systems, protest over civil rights, major urban rioting, and, by the end of Warren's tenure, dissent against the Vietnam War contributed to the unsettling of American society. The marketplace of ideas, some thought, had become a free-for-all in which obscene and libelous statements had crowded out civility, decency, and respect for authority.[77]

Moreover, liberal goals came to be mixed with notions of moral corruption, even depravity. Hence, war protestors and pornographers were lumped together as part of the problem of modern American culture, a problem seemingly sponsored by a latitudinarian Supreme Court.

Mobilization against the Warren Court was quite impressive, especially since Americans have repeatedly accorded the Court great respect even as they have taken often bitter exception to decisions that affect their lives. The Warren Court was no exception.[78]

Criticism of the Justices reached its crescendo in the nomination hearings of Associate Justice Abe Fortas to replace Warren. Senator Strom Thurmond of South Carolina asked Fortas in the course of the hearings to justify more than fifty cases decided by the Court involving the rights of the accused and obscenity that covered the entire course of the Warren Court era.[79] Fortas ultimately withdrew from consideration amid disclosures of conflict of interest. Fortas's life seemed to the Court's critics an affirmation of the inherent corruption associated with liberal judicial activism.

Similar resistance came from many state and local officials. Especially in the area of criminal justice procedure, the Warren Court's seemingly radical pronouncements often elevated into the realm of national constitutional protections practices that were already

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76. ALLEN J. MATUSOW, THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S at 428 (1984).

77. New York Times v. Sullivan, 376 U.S. 254 (1964); Kermit L. Hall, *Justice Brennan and Cultural History:* New York Times v. Sullivan *and Its Times,* 27 CAL. W. L. REV. 339 (1990-91).

78. For example, following the Court's decision in *Brown*, most of the southern members of Congress issued a "manifesto" denouncing the decision and the Court. The remedy, according to southerners, was to limit the jurisdiction of the Court, an old chestnut regularly wheeled out against the justices. In 1957 Senator William Jenner of Indiana introduced during the later stages of the debate over the 1957 Civil Rights Act an omnibus anti-Court bill "to limit the appellate jurisdiction of the Supreme Court in certain cases." MURPHY, *supra* note 40, at 332. Jenner claimed that "by a process of attrition and accession, the extreme liberal wing of the Court has become a majority; and we today witness the spectacle of a Court constantly changing the law, and even changing the meaning of the Constitution, in an apparent determination to make the law of the land what the Court thinks it should be." 103 CONG. REC. 12, 806 (1957). So serious was the threat to the Court, that Senator Jacob Javits of New York, a liberal, proposed a law to prevent Congress from interfering with the Court's appellate jurisdiction. 104 CONG. REC. 7807, 7843-50, 9143-45 (1958). Neither measure passed; nor did other efforts by Congressman Howard Smith of Virginia and Senator John M. Butler of South Carolina to limit other parts of the Court's jurisdiction with regard to criminal justice procedures and the ability of the Court to review state legislation, including segregation measures. MURPHY, *supra* note 40, at 332-33.

79. *Attempt to Stop Fortas Debate Fails by 14-vote Margin,* XXIV CONG. Q. ALMANAC 531, 534 (1968).

well-established in the states.[80] In other instances, however, the innovation by the Justices stirred protest from below. Many state political leaders, and not all of them in the South, believed that the Court had become too involved in monitoring their historic functions in areas including voting practices, apportionment, racial segregation, education, censorship, loyalty, and welfare programs. State judicial leaders also expressed their dismay at the Court's criminal justice rulings. The Conference of State Chief Justices in 1958 passed a resolution blasting the Warren Court's "policy-making" and proclaiming that "strong state and local governments are essential to the effective function of the American system of federal government. . . ."[81] Four years later the annual meeting of the Council of State Governments adopted a proposal for "returning the Constitution to the states and the people."[82] That proposal included a plan for the creation, through a constitutional amendment, of a "Court of the Union," comprised of the fifty state Chief Justices, to review the work of the Supreme Court.

Even the American Bar Association, itself an aggregation of local and state bars, contributed to the attack on the High Court. The ABA's House of Delegates refused to endorse the active support given by the Warren Court to sustaining the Bill of Rights, an action which prompted Warren's quiet resignation from that organization.[83]

The political right wing took aim at the Chief Justice and his brethren. The John Birch Society in the late 1950s launched a nationwide campaign to stir popular support for the impeachment of the Chief Justice, a campaign that included billboards sprinkled across the American countryside that simply proclaimed: "Impeach Earl Warren." The Birch Society even sponsored an essay contest with an award to the best paper on the subject: "Grounds for the Impeachment of Earl Warren."[84] The Texas millionaire H. L. Hunt used his fortune to sponsor radio and televisions programs that attacked the Chief Justice and Associate Justice William O. Douglas. The most extreme demands were registered by Fulton Lewis, Jr. and retired Marine Colonel Mitchell Paige, both of whom proposed before public audiences that Warren should be hanged.[85]

IV. In Historical Perspective

Current fashion among many Warren Court scholars holds that its Justices did less than we would have supposed, that in the end it was little different from either its successors or predecessors, and that what achievements it did earn turn out not to have been as significant as once believed. Hence, it is now stylish to think of the Burger Court

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80. Mapp v. Ohio, 367 U.S. 643, 654 (1961) (holding that evidence obtained by unconstitutional searches and seizures is inadmissible in state courts); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that prosecution may not use statements stemming from custodial interrogation of defendant unless it demonstrates use of procedural safeguards); Gideon v. Wainwright, 372 U.S. 335 (1972) (holding that right of a criminal defendant to counsel is fundamental).

81. Murphy, *supra* note 40, at 477 (quoting C. Herman Pritchett, Congress Versus the Supreme Court, 1957-1960 at 141-59 (1961)).

82. Murphy, *supra* note 40, at 478 (quoting State Government, XXXVI 10-15 (Winter 1963)).

83. Warren, *supra* note 35, at 321-31.

84. Murphy, *supra* note 40, at 482.

85. Katcher, *supra* note 65, at 3.

as an extension of the Warren Court and in so doing to denigrate the achievements of the latter. Other commentators have suggested that, in the end, the Court was hypocritical; it did not go as far as it could have in such crucial areas as race relations and gender discrimination. In the former it accepted only "all deliberate speed" and in the latter it simply ignored obvious discrimination against women. Indeed, there is now an effort to demonstrate that Warren and his colleagues really were not politically motivated, that they did not take big risks, and that they were confused in their agenda. There are no *good* insights, we are once again reminded, only *new* insights.

Sometimes simple lessons are the most difficult to grasp. The current wave of revisionism surrounding the Warren Court has missed the essential historical point that its liberal majority was important because it had the courage to be in tension with the dominant political culture. The Warren Court was historically significant not just for what it did, which was substantial, but for reaffirming that the Justices could help to shape public policy and that their role in doing so was appropriate and constitutionally defensible, even if it was not popular. At the same time, the approach to judging adopted by the majority of the Justices did break historically from the pretense that judges merely judge and the associated idea that law is an autonomous profession. The Warren Court disrupted the prevailing consensus that the goals of law were to train professionals in analytical reasoning to be applied in narrow ways to appellate opinions. The Court, according to the older view, was important not because it made policy but because it imposed certain institutional and doctrinal restraints on the political branches through precedent and a close reading of the Constitution. The Warren Court Justices had another goal. They were willing to turn to extra-legal materials, as was the case in footnote eleven of *Brown*, and willing to usher in, according to G. Edward White, the first stirring of the "law and" movement.[86] The High Court became a place where practical politics, social scientific learning, and morality were viewed as more comfortably fused in Supreme Court decisions than ever before.

What the Warren Court did was to reintroduce political culture into mainstream constitutional discourse, something that had not been present so significantly since the debate over slavery in the Taney Court of the mid-nineteenth century. Since the Warren Court, it has been impossible to separate social domination from political domination in matters of constitutional debate.[87] Warren and his colleagues brought a pragmatic focus to American constitutional law, one that has surely altered it for years to come.

With the retirement of Warren an era certainly did come to an end, in large measure because the Chief Justice, in his unassuming but persistent ways, had managed to become the symbol of it. Much like the period following the death of John Marshall, an era of unprecedented general judicial assertion of power came to an end. That is not to say, of course, that the jurisprudence of the Warren era ended, which is an entirely different matter. Chief Justice Warren Burger was, in this regard, something of a disappointment to those conservatives who expected a sharp turn to the jurisprudential right. The Warren Court holdovers, most notably Douglas, Brennan, and Marshall, were usually able to get

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86. White, *supra* note 21, at 49.

87. Morton J. Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 455 (1988).

the fourth, fifth, and often sixth vote to maintain and, in some instances, actually expand liberal decisions of the Warren era.

We should in all matters of historical interpretation respect the obvious at the same time we doubt it. To borrow a phrase from the current student vernacular, all of the "heavy lifting" was done in the Warren era. One of the Warren Court's most important achievements was the acknowledgement of concrete human realities and the qualities of empathy, compassion, and justice as central to constitutional decision making. That was new in the American constitutional tradition. The legacy of the Warren Court, therefore, was not simply in the case law that it propounded, some of which has been narrowed although none of it abandoned, but in the general approach that it took toward judging, the judicial process, and the role of the Court in opening to many new groups the promise of American life.

Like sharks, scholars have no choice but to move forward. Hegel was right; there is a scholarly dialectic. But in pursuing that dialectic, we should at least honor the past on its own terms. If we do so, then we will appreciate that the Warren Court, when placed in historical perspective, is and will continue to be, the ghost present at the constitutional banquet served each year beginning on the first Monday in October.