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Capturing the Future: Earl Warren and Supreme Court History

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REVIEW ESSAY

CAPTURING THE FUTURE: EARL WARREN AND SUPREME COURT HISTORY

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THE WARREN COURT: A RETROSPECTIVE. Edited by Bernard Schwartz.†† New York: Oxford University Press. 1996. Pp. i-x, 406. $45.00.

I. INTRODUCTION

Polarization—not repose—characterizes empirical[1] and normative[2] re-

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1. Consider, for example, debates on the empirical significance of *Miranda v. Arizona*, 384 U.S. 436 (1966) (inadmissibility of confessional statements without prior warning to accused of their constitutional rights), *Reynolds v. Sims*, 377 U.S. 533 (1964) (one vote, one value state legislatures' electoral reapportionment requirement), and *Brown v. Board of Education*, 347 U.S. 483 (1954) (state imposed racial segregation unconstitutional). *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (inconsequential empirical effects of *Miranda*, *Reynolds*, and *Brown*); Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673 (1992) (*Brown* and *Miranda* retreated from, rather than caused, change). Specifically on *Miranda*, see Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) (empirical evidence of *Miranda's* effect on confessions indicates significant harm to law enforcement); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 NW. U. L. REV. 1084 (1996) (same); Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996) (*Miranda*'s negligible conviction rate impact); Donald R. Songer, *Alternative Approaches to the Study of Judicial Impact:* Miranda *in Five State Courts*, 16 AM. POL. Q. 425 (1988); Symposium, *Dialogue on* Miranda, 43 UCLA L. REV. 821 (1996).

Participants in these debates also include Rodney J. Blackman, *Returning to* Plessy, 75 MARQ. L. REV. 767 (1992) (failure of Supreme Court's desegregation efforts); Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627 (continuing demise of *Brown*); Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 GEO. L.J. 433 (1994) (reviewing MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994)); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994) (different views of *Brown*'s indirect effects); Symposium, *The Supreme Court and Social Change*, 17 L. & SOC. INQUIRY 715 (1992); Symposium, *Where's the Politics?*, 34 WM. & MARY L. REV. 1 (1992); Steve Bachman, Book Review, 19 N.Y.U. REV. L. & SOC. CHANGE 391 (1991) (reviewing ROSENBERG, *supra*); Stephen L. Carter, *Do Courts Matter?*, 90 MICH. L. REV. 1216 (1992) (same); Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992) (same); Jonathan Simon, *"The Long Walk Home" to Politics*, 26 L. &

sponses[3] enticed by one question:[4] What did the Warren Court[5] do?[6] Differences, even radical divergence, can, of course, be constructive and beneficial, rather than debilitative.[7] United States Supreme Court histories[8] merely consti-

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SOC'Y REV. 923 (1992) (same); Cass R. Sunstein, *How Independent is the Court?*, N.Y. REV. BOOKS, Oct. 22, 1992, at 47; James A. Thomson, *Mirages of Certitude: Justices Black and Douglas and Constitutional Law*, 19 OHIO N.U. L. REV. 67, 81-82 (1992) (reviewing HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS AND AMERICA'S CONSTITUTIONAL REVOLUTION (1992)) (judicial review's empirical failure); Mark Tushnet, *The Bricoleur at the Center*, 60 U. CHI. L. REV. 1071, 1087-98 (1993) (reviewing CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993)) (ineffective judicial reform, because of courts' institutional defects, hindering "development of sensible compromises" in racial discrimination, anti-pornography legislation, and poverty-welfare reform). *See also infra* notes 121-23, 278.

2. Examples include debates over the legitimacy of judicial review and judicial activism. Perhaps the preeminent Warren Court antagonist was Professor Bickel. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT (1965); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 143-50 (1975) (bibliography of Bickel's publications). On Bickel, see David Adamy, *Bickel, Alexander*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 68-69 (Kermit L. Hall ed., 1992); Robert A. Burt, *Alex Bickel's Law School and Ours*, 104 YALE L.J. 1853 (1995); James A. Gardiner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805, 821-25 (1993) ("Bickel's Rejection of Constitutionalism"); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985); John Moeller, *Alexander M. Bickel: Toward a Theory of Politics*, 47 J. POL. 113 (1985); Clyde Spillenger, *Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis*, 97 J. AM. HIST. 125 (1992). *See also infra* notes 15 (Kurland), 96 (Hand), 98 (McCloskey), 99 (Wechsler); text accompanying *infra* notes 221-41 (theory and process). *See generally* Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991).

3. *See infra* notes 10, 12-18, 19-21 (sample of previous discussions of the Warren Court).

4. Other questions also protrude. For example, was there a Warren Court? For different responses *see infra* notes 22-24 (postulating Warren, Brennan and Frankfurter Courts). *See also* text accompanying *infra* notes 57-65 (discussing whether the Warren Court existed).

5. For the tradition of Chief Justices' names attaching to Supreme Court eras, see text accompanying *infra* notes 56-62.

6. Of course, this question is not exclusive to the 1953-1969 Warren era. It can be asked (and answered) with respect to other eras. *See, e.g.*, James A. Thomson, *Not A Trivial Pursuit: Salmon P. Chase and American Constitutional Law*, 23 N. KY. L. REV. 285 (1996) (reviewing JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY (1995)) (Chase era, 1864-1873); James A. Thomson, *Swimming in the Air: Melville W. Fuller and the Supreme Court 1888-1910*, 27 CUMB. L. REV. 139 (1997) (reviewing JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910 (1995)) (Fuller era, 1888-1910).

7. *See* Paul A. Freund, *New Vistas in Constitutional Law*, 112 U. PA. L. REV. 631, 646 (1964), *reprinted in* PAUL A. FREUND, ON LAW AND JUSTICE 3, 22 (1968).

> [A]ll law resembles art, for the mission of each is to impose a measure of order on the disorder of experience without stifling the underlying diversity, spontaneity, and disarray. New vistas open in the art as in law. In neither discipline will the craftsman succeed unless he sees that proportion and balance are essential, that order and disorder are both virtues when held in a proper tension. The new vistas give a false light unless there are cross-lights. There are . . . no absolutes in law or art except intelligence.

Id. For an elaboration, via Freund's constitutional law scholarship, see Peter Schotten, *Paul Freund's Constitution*, 14 POL. SCI. REV. 165 (1984) (reviewing FREUND, ON LAW AND JUSTICE, *supra*, and PAUL A. FREUND, THE SUPREME COURT OF THE UNITED STATES, ITS BUSINESS, PURPOSES AND PERFORMANCE (1969)); *In Memoriam: Paul A. Freund*, 106 HARV. L. REV. 1 (1992). *But see* Vince Blasi, Book Review, 35 U. CHI. L. REV. 388 (1968) (reviewing FREUND, ON LAW AND JUSTICE, *supra*) (criticizing Freund's moderate mediating approach).

8. For an eclectic sample, see ERNEST SUTHERLAND BATES, THE STORY OF THE SUPREME COURT (1963 ed.) (1936); 1-2 HAMPTON L. CARSON, THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES WITH BIOGRAPHIES OF ALL THE CHIEF AND ASSOCIATE JUSTICES (Philadelphia, P.W. Ziegler Co., 1891) (1991 reprint); CHARLES G. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835 (1944); CHARLES GROVE HAINES & FOSTER H. SHERWOOD, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1835-1864 (1957); GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1912); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT (1993); 1-2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1926); WILLIAM WIECEK, LIBERTY AND LAW: THE SUPREME COURT AND AMERICAN LIFE (1988); 1-9 THE OLIVER WENDELL

tute a prominent example.[9] Leaping into this quagmire is another collection of essays:[10] *The Warren Court: A Retrospective.*[11] Not unexpectedly, many essayists—Schwartz,[12] Kamisar,[13] Simon,[14] Kurland,[15] Dorsen,[16] Hall,[17] and

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HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1971-). On the establishment, progress, and objectives of the Holmes Devise History project, see Sanford Levinson, Book Review, 75 VA. L. REV. 1429 (1989) (reviewing G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835 (1988)); Eben Moglen, *Holmes's Legacy and the New Constitutional History*, 108 HARV. L. REV. 2027 (1995) (reviewing OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (1993)). *See generally* Charles G. Haines, *Histories of the Supreme Court of the United States Written from the Federalist Point of View*, 4 SW. POL. SCI. Q. 1 (1923); Mark Tushnet, *Writing Supreme Court Histories*, 1993 J. SUP. CT. HIST. 11; Mark Tushnet, *Toward a Revisionist History of the Supreme Court*, 36 CLEV. ST. L. REV. 319 (1988).

For other countries *see, e.g.*, JAMES F. SNELL & FREDERICK VAUGHAN, THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION (1985); James A. Thomson, *History, Justices and the [Australian] High Court: An Institutional Perspective*, 1 AUST. J. LEG. HIST. 281 (1995) (reviewing GARFIELD BARWICK, A RADICAL TORY (1995)).

9. Another prominent example is federalism's oscillations between constitutional extremities—preservation and destruction—to encapsulate differing visions of the relationships between state and national powers. Justice Brandeis envisaged a "federal system [where] a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). However, Justice Cardozo suggested that the U.S. Constitution "was framed under the dominion of a political philosophy less parochial in range . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935). For elaboration, see James A. Thomson, *State Constitutional Law: American Lessons for Australian Adventures*, 63 TEX. L. REV. 1225, 1247-48 (1985).

10. Previous collections include BICKEL, POLITICS AND THE WARREN COURT, *supra* note 2; THE WARREN COURT: A CRITICAL ANALYSIS (Richard H. Sayler et al. eds., 1969), *partially reprinting* Symposium, *The Warren Court*, 67 MICH. L. REV. 219 (1968); THE SUPREME COURT UNDER EARL WARREN (Leonard W. Levy ed., 1972); THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE (Mark Tushnet ed., 1993).

11. THE WARREN COURT: A RETROSPECTIVE (Bernard Schwartz ed., 1996).

12. Professor Bernard Schwartz's publications on the Warren Court include SCHWARTZ, *supra* note 8, at 263-310; BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY (1983); BERNARD SCHWARTZ & STEPHAN LESHER, INSIDE THE WARREN COURT, 1953-1969 (1983); BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT (1985); REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997); Bernard Schwartz, *More Unpublished Warren Court Opinions*, 1986 SUP. CT. REV. 317; Bernard Schwartz, *The Judicial Lives of Earl Warren*, 15 SUFFOLK U. L. REV. 1 (1981); Bernard Schwartz, *"Warren Court"—An Opinion*, in THE SUPREME COURT UNDER EARL WARREN, *supra* note 10, at 48-54; Bernard Schwartz, *Hugo Black*, in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 195-210.

13. Yale Kamisar (Clarence Darrow Distinguished University Professor, University of Michigan Law School) is "a Warren Court supporter." Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, *in* THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986, at 143, 144 (Herman Schwartz ed., 1987). His Warren Court publications include Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966), *reprinted in* POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 41 (1980); Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62-91, 273-89 (Vincent Blasi ed., 1983); Yale Kamisar, *Response: On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995).

14. James F. Simon (Martin Professor, New York Law School). *See, e.g.*, JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS (1980); James F. Simon, *Foreword: The New York Law School Centennial Conference in Honor of Justice John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 1 (1991); James F. Simon, *John Marshall Harlan*, *in* 11 COLLIER'S ENCYCLOPEDIA 654 (1988).

15. Philip B. Kurland (Late William R. Kenan Distinguished Service Professor Emeritus, University of Chicago Law School), who clerked for Frankfurter, *see* James B. O'Hara, *Introduction*, in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 5, was "a stalwart partisan of Frankfurter's," Philip B. Kurland, *Felix Frankfurter*, *in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 225. His Warren Court publications include PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970);

Lewis[18]—contributing to this *Retrospective* are already enmeshed in Warren

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Philip B. Kurland, *Earl Warren, "The Warren Court," and The Warren Myths*, in THE WARREN COURT: A CRITICAL ANALYSIS, *supra* note 10, at 162-67, *reprinted from* 67 MICH. L. REV. 353 (1968); Philip B. Kurland, *The Court Should Decide Less and Explain More*, *in* THE SUPREME COURT UNDER EARL WARREN, *supra* note 10, at 228-38; Philip B. Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19 (1969); Philip B. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968); Philip B. Kurland, *Felix Frankfurter*, 51 VA. L. REV. 562 (1965); Philip B. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143 (1964); Philip B. Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . . ,"* 1962 SUP. CT. REV. 1; Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961), *reprinted as* PHILIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT (rev. ed. 1962); Philip B. Kurland, *The* Mersky *Case and the Criminal Appeals Act: A Suggestion for Amendment of the Statute*, 28 U. CHI. L. REV. 419 (1961); Philip B. Kurland, *The Supreme Court and the Attrition of State Power*, 10 STAN. L. REV. 274 (1958); Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569 (1958); Philip B. Kurland, *"Neuro": A Biography of Felix Frankfurter*, 1981 AM. B. FOUND. RES. J. 1167 (reviewing H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981)); Philip B. Kurland, *Self Portrait of a Jurist-Without Warts*, 87 YALE L.J. 225 (1977) (reviewing EARL WARREN, THE MEMOIRS OF EARL WARREN (1977)); Philip B. Kurland, *The Chief Justice and the School Segregation Cases*, 27 U. CHI. L. REV. 170 (1959) (reviewing THE PUBLIC PAPERS OF CHIEF JUSTICE EARL WARREN (Henry M. Christman ed., 1959)); Philip B. Kurland, *The Supreme Court and Its Literate Critics*, 64 YALE REV. 596 (1958) (reviewing WALTER F. BERNS, FREEDOM, VIRTUE, AND THE FIRST AMENDMENT (1957)).

16. Norman Dorsen (Stokes Professor, New York University Law School), who clerked for Justice Harlan, *see* Tinsley E. Yarbrough, *Mr. Justice Harlan: Reflections of a Biographer*, 36 N.Y.L. SCH. L. REV. 223, 224 (1991); O'Hara, *supra* note 15, at 5, has published on the Warren Court, for example, Norman Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U. L. REV. 249 (1969); Norman Dorsen, *John Marshall Harlan and the Warren Court*, 1991 J. SUP. CT. HIST. 50, *reprinted in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE, *supra* note 10, at 109-22, 186-91; Norman Dorsen, *John Marshall Harlan, Civil Liberties, and the Warren Court*, 36 N.Y.L. SCH. L. REV. 81 (1991); Norman Dorsen, *Introduction: Douglas and Civil Liberties*, *in* "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 65-67 (Stephen L. Wasby ed., 1990); Norman Dorsen, *John Marshall Harlan II*, *in* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 215-23 (Melvin I. Urofsky ed., 1994); Norman Dorsen, Book Review, 34 J. LEGAL EDUC. 543 (1984) (reviewing G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE (1982)); Norman Dorsen, Book Review, 95 HARV. L. REV. 367 (1981) (reviewing HIRSCH, *supra* note 15).

17. Kermit L. Hall (Professor of History and Law, Ohio State University). His Warren Court publications include KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 309-29 (1989); Kermit L. Hall, *Justice Brennan and Cultural History:* New York Times v. Sullivan *and Its Times*, 27 CAL. W. L. REV. 339 (1991).

18. Anthony Lewis (columnist, the *New York Times*), who "reported [from 1957 to 1964] on the Warren Court for the *New York Times*," Anthony Lewis, *The Legacy of the Warren Court*, in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 398, has published ANTHONY LEWIS, CLARENCE EARL GIDEON AND THE SUPREME COURT (1972); ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT (1991) (history, including intra-mural Court papers, and discussions of *New York Times v. Sullivan*, 376 U.S. 254 (1964)); Anthony Lewis, *Earl Warren*, *in* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1373-1400 (Leon Friedman & Fred L. Israel eds., rev. ed. 1997); Anthony Lewis, *Earl Warren*, *in* 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2019-23 (Leonard Levy et al. eds., 1986); Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603 (1983), *reprinted in* LAW AND LIBERALISM IN THE 1980S: THE RUBIN LECTURES AT COLUMBIA UNIVERSITY 44-68 (Vincent Blasi ed., 1991); Anthony Lewis, *The Press: Free But Not Exceptional*, *in* REASON AND PASSION, *supra* note 12, at 53-63; Anthony Lewis, *Keynote Address, in Conference on the 30th Anniversary of the United States Supreme Court's Decision in* Gideon v. Wainwright: Gideon *and the Public Service Role of Lawyers in Advancing Equal Justice*, 43 AM. U. L. REV. 1, 15 (1993); Anthony Lewis, *Earl Warren*, in THE WARREN COURT: A CRITICAL ANALYSIS, *supra* note 10, at 1-31; Anthony Lewis, *Historic Change in the Supreme Court*, *in* THE SUPREME COURT UNDER EARL WARREN, *supra* note 10, at 73-81; *id.* at 114-19 (*"What Qualities for the Court"*); *id.* at 120-27 (*"An Appreciation of Justice Frankfurter"*); *id.* at 128-36 (*"Justice Black at 75: Still the Dissenter"*); *id.* at 151-63 (*"A Man Born to Act, Not to Muse"*); *id.* at 164-83; Anthony Lewis, *Adventures in Opinion*, N.Y. TIMES BOOK REV., Sept. 24, 1967, at 3 (reviewing LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY (1967)); Anthony Lewis, *Revolutionary Justice*, N.Y. TIMES BOOK REV., July 4, 1982, at 1 (reviewing WHITE, *supra* note 16); Anthony Lewis, *The Arguments Mattered Most*, N.Y. TIMES BOOK REV., Dec. 29, 1985, at 20

Court controversies. Others—Urofsky,[19] Tushnet,[20] and White[21]—might also have been included. Consequently, far from resolving disputes or engendering compromise, this potpourri invigorates those imbroglios. Even from the initial premise—*The Warren Court*—an illustration protrudes: Was the Supreme Court during the 1953-1969 era the Warren Court,[22] the Brennan Court,[23] or, perhaps, the Frankfurter Court?[24]

(reviewing SCHWARTZ, UNPUBLISHED OPINIONS, *supra* note 12).

19. Professor Melvin I. Urofsky (Professor of History, Virginia Commonwealth University). Urofsky's Warren Court publications include Melvin I. Urofsky, *Warren, Earl, in* THE OXFORD COMPANION TO THE SUPREME COURT, *supra* note 2, at 912-16; MELVIN I. UROFSKY, THE CONTINUITY OF CHANGE: THE SUPREME COURT AND INDIVIDUAL LIBERTIES 1953-1986 (1991); MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES (1991); THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS (Melvin I. Urofsky ed., 1987); MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 766-853 (1988); Melvin I. Urofsky, *Getting the Job Done: William O. Douglas and Collegiality in the Supreme Court, in* "HE SHALL NOT PASS THIS WAY AGAIN", *supra* note 16, at 33-49; Melvin I. Urofsky, *William O. Douglas as Common Law Judge, in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE, *supra* note 10, at 64-85, 177-83; Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L.J. 133 (1991); Melvin I. Urofsky, *William O. Douglas and His Clerks*, 3 WEST. LEGAL HIST. 133 (1990); Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71; Melvin I. Urofsky, *William O. Douglas, Common Law Judge*, CONST., Fall 1992, at 48; Melvin I. Urofsky, *"Dear Teacher": The Correspondence of William O. Douglas and Thomas Reed Powell*, 7 L. & HIST. REV. 331 (1989).

20. Mark V. Tushnet (Professor of Law, Georgetown University Law Center). Tushnet's Warren Court publications include TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 1; Mark Tushnet, *The Warren Court as History: An Interpretation, in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE, *supra* note 10, at 1-34, 171-73; Mark V. Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867 (1991); Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748 (1995).

21. G. Edward White (John B. Minor Professor of Law and Sullivan & Cromwell Professor of Law and History, University of Virginia). White's Warren Court publications include WHITE, *supra* note 16; G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 317-420 (expand. ed., 1988) (essays on Frankfurter, Black, Warren, Harlan, and Douglas); G. Edward White, *Warren Court, in* 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 18, at 2023-31; G. Edward White, *Earl Warren's Influence on the Warren Court, in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE, *supra* note 10, at 37-50, 173-74; G. Edward White, *Researching Oral History Materials: The Case of Earl Warren*, 75 L. LIBR. J. 355 (1982); G. Edward White, *Earl Warren as Jurist*, 67 VA. L. REV. 461 (1981).

22. For an affirmative response, see text accompanying *infra* notes 63-65. *See also* Tushnet, *The Warren Court as History*, *supra* note 20, at 2, 33 (analysis and conclusion that "there was a Warren Court, and not a Brennan Court"); William J. Brennan, Jr., *Chief Justice Warren*, 88 HARV. L. REV. 1 (1974) ("refer[ing] to the Supreme Court during [Earl Warren's] years as the 'Warren Court' . . . does not . . . signify that [Warren] dominated the shaping of the Court's decisions. . . . [H]owever, the 'Warren Court' is highly appropriate as recognition of [Warren's] effective leadership."); William J. Brennan, Jr., *A Personal Remembrance, in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 8, 10 (same); Bernard Schwartz, *Earl Warren, in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 256, 260-61 ("It Was the Warren Court"). *But see id.* at 260 (Justice Black changed the Justices' farewell letter to Warren from "the Warren Court" to "the Court over which [Warren had] presided.") (footnote omitted).

23. For an affirmative response, see, for example, Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 923, 928-30 (1983) (reviewing WHITE, *supra* note 16, and SCHWARTZ, SUPER CHIEF, *supra* note 12) (concluding that "it was 'the Brennan Court'" because Brennan "was Warren's intellectual chief-of-staff" and "clearly . . . the single most important justice of the period"); Robert C. Post, *Justice William J. Brennan and the Warren Court*, 8 CONST. COMMENTARY 11 (1991), *reprinted in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE, *supra* note 10, at 123 (arguing that the Warren era, in reality, was the Brennan era); James G. Exum, Jr., & Louis D. Bilionis, *The Warren Court and State Constitutional Law*, in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 313, 316 ("Justice William J. Brennan—for many, the personification of the jurisprudential revolution perfected by the Warren Court") (footnote omitted). *See also infra* note 255 (references).

24. For the suggestion of "a revisionist rehabilitation of [Justice Felix] Frankfurter," see text accompanying *infra* note 266. *See also* Philip B. Kurland, *Felix Frankfurter*, *supra* note 15, at 225 (partially quoted in

Within constitutional law's domain,[25] exposing these conundrums is usually achieved by doctrinal analysis,[26] biographical narratives,[27] assessment of the impact already exerted,[28] and predicting future influence.[29] *The Warren Court: A Retrospective* adheres to this methodology.[30] Previous appraisals of the Warren Court utilize additional approaches: jurimetrics,[31] economic interpretations,[32] empirical research[33] and hermeneutic principles.[34] As a result,

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text accompanying *infra* note 265) (suggesting that Frankfurter was "one of the great" Supreme Court Justices). *But see* Norman Dorsen, *John Marshall Harlan*, in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 248 (arguing that "Frankfurter's star has dimmed considerably"); Schwartz, *supra* note 22, at 258 (concluding that "Frankfurter's judicial career remained essentially a lost opportunity"). *See generally infra* notes 233, 259 (literature on Frankfurter).

25. What of the 1953-1969 Supreme Court's non-constitutional work? *See, e.g.*, WHITE, *supra* note 16, at 279-302 ("Warren [as] the Economic Theorist: Labor and Antitrust"); Alex Kozinski, *Spook of Earl: The Spirit and Spector of the Warren Court*, *in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 383 ("The [Warren] Court did take a variety of cases involving labor law and antitrust, but the results were overwhelmingly against business and property interests.") (footnote omitted). *See also* Richard Neely, *The Warren Court and the Welcome Stranger Rule*, *in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 188-89 (suggesting that the Warren Court should have federalized state product liability law); Thomson, *Mirages of Certitude*, *supra* note 1, at 72 n.29 (Black and Douglas' non-constitutional law opinions).

26. *See, e.g.*, *supra* notes 2, 10-21 and *infra* notes 92-94, 96, 98-99 (references).

27. *See, e.g.*, *infra* notes 12, 14-21, 246-59 (biographical literature). *See also* Tushnet, *Themes in Warren Court Biographies*, *supra* note 20.

28. For general assessments, see, for example, THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES (Theodore L. Becker & Malcolm M. Feeley eds., 2d ed. 1973); PHILLIP COOPER & HOWARD BALL, THE UNITED STATES SUPREME COURT: FROM THE INSIDE OUT 334-53 (1996); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 333-55 (1993) ("The impact of judicial decisions"); STEPHEN L. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970); STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY 26-45, 347-51 (1997) ("The Supreme Court's Impact on Litigation"). *See also supra* note 1 (empirical impact studies on Warren Court decisions).

29. *See, e.g.*, Neil K. Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U. L. REV. 191 (1987) (Constitution's framers intended to delegate most decisions to future decisionmakers); Richard Davies Parker, *The Past of Constitutional Theory — And Its Future*, 42 OHIO ST. L.J. 223 (1981); Tushnet, *The Warren Court as History*, *supra* note 20, at 33 ("Perhaps more interesting for the future, did the Warren Court ever end?"). Indeed, Professor Strossen is "especially eager to draw lessons that not only shed light on where we have been, but that also point the way toward where we can and should go. . . . [T]hat's the most promising aspect of [THE WARREN COURT: A RETROSPECTIVE, *supra* note 11]: It should serve not only as a retrospective celebration of a great Court, but also as a source of guidance and inspiration for future work. . . ." Nadine Strossen, *Freedom of Speech in the Warren Court*, *in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 68, 74. *See also* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1366 (1983) (expressing the "hope . . . that by analyzing the development of the [exclusionary] rule, we can best approach the question of what the law should be in the future").

30. *See generally* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11.

31. *See, e.g.*, GLENDON SCHUBERT, THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT ANALYSIS (1974); GLENDON SCHUBERT, HUMAN JURISPRUDENCE: PUBLIC LAW AS POLITICAL SCIENCE (1975); Russell W. Galloway, Jr., *The Early Years of the Warren Court: Emergence of Judicial Liberalism (1953-1957)*, 18 SANTA CLARA L. REV. 609 (1978); Russell W. Galloway, Jr., *The Second Period of the Warren Court: The Liberal Trend Abates (1957-1961)*, 19 SANTA CLARA L. REV. 947 (1979); Russell W. Galloway, Jr., *The Third Period of the Warren Court: Liberal Dominance (1962-1969)*, 20 SANTA CLARA L. REV. 773 (1980).

32. *See, e.g.*, Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986); (Sullivan's doctrinal decisions, for example liability rules, rest on unexplored empirical issues such as costs). *See generally* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991) (economics of First Amendment); Frank I. Michelman, *A Comment on* Some Uses and Abuses of Economics in Law, 46 U. CHI. L. REV. 307 (1979) (difficulty of tracing empirical impact of legal rules to assist economic analysis). *See generally* Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980) (outlining history of law-and-economics).

33. *See supra* note 1. *See also infra* note 283 (empirical pragmatism).

34. *Cf.* Eben Moglen, *Jewishness and the American Constitutional Tradition: The Cases of Brandeis and*

encrusted onto the U.S. Supreme Court Reports,[35] is a plethora of scholarship.[36]

II. A WARREN COURT?

Even to a deceptively "simple question"[37]—did the Warren Court exist?[38]—"[a] good number of revisionist scholars apparently have doubts" about proclaiming or endorsing an affirmative response.[39] Assume, albeit momentarily, that there was a Warren Court: who were its members? Ought all of the "seventeen"[40] men[41] who sat on the Supreme Court, during Chief Justice Warren's tenure, be included? If so, that would provide one answer—"from 1953 to 1969"[42]—to a more complex question: when did the Warren Court exist? However, other responses have also been postulated. For example, "conventional wisdom"[43] erects a dichotomy: "The First Warren Court"[44] from

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Frankfurter, 89 COLUM. L. REV. 959 (1989) (reviewing ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988)) (suggesting that in the "genre of literary criticism . . . historical data are treated metaphorically and [that] the test for establishing the quality of works in this genre is whether the questions raised are interesting").

35. For Earl Warren's 1963-1969 tenure, see volumes 346 to 399 of United States Reports. *See also* SCHWARTZ, THE UNPUBLISHED OPINIONS, *supra* note 12; SCHWARTZ, SUPER CHIEF, *supra* note 12 (draft opinions and internal Court papers); Schwartz, *More Unpublished Warren Court Opinions*, *supra* note 12.

36. *See, e.g.*, *supra* notes 2, 10, 11 and *infra* notes 92-99. *See also* HOWARD BALL, THE WARREN COURT'S CONCEPTIONS OF DEMOCRACY: AN EVALUATION OF THE SUPREME COURT'S APPORTIONMENT OPINIONS (1971); ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM (1968); ARCHIBALD COX, THE COURT AND THE CONSTITUTION 177-321 (1987); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986, at 375-459 (1990); JOHN P. FRANK, THE WARREN COURT (1964); RONALD KAHN, THE SUPREME COURT AND CONSTITUTIONAL THEORY, 1953-1993, at 30-104 (1994); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 1-131 (1996); ALPHEUS T. MASON, THE SUPREME COURT FROM TAFT TO BURGER 234-82 (3d ed. rev. & enlarged, 1979); ROBERT G. MCCLOSKY, THE MODERN SUPREME COURT 127-259 (1972) ("The Early Warren Court"); *id.* at 261-366 ("The Latter Warren Court"); HAROLD J. SPAETH, THE WARREN COURT: CASES AND COMMENTARY (1966); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 258-91 (rev. ed. 1994); *Supreme Court History Project: The Warren Court 1953-1957*, 18 SANTA CLARA L. REV. 609 (1978); *Supreme Court History Project: The Warren Court 1957-1961*, 19 SANTA CLARA L. REV. 947 (1979); *Supreme Court History Project: The Warren Court 1962-1969*, 20 SANTA CLARA L. REV. 773 (1980).

37. Kermit L. Hall, *The Warren Court in Historical Perspective*, in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 295, *reprinting* Kermit L. Hall, *The Warren Court: Yesterday, Today, and Tomorrow*, 28 IND. L. REV. 309 (1995).

38. *Compare id.* ("whether the Warren Court existed"). *See also* Moglen, *supra* note 34, at 976 (asserting that "'[t]he Warren Court,' [was] a psychological entity without existence").

39. Hall, *supra* note 37, at 295. Although "[s]ome scholars have . . . questioned the proposition that there was" a Warren Court, Professor Hall concludes that "there was without doubt a Warren Court, an identifiable judicial entity . . . which was distinctive in the overall history of the Supreme Court." *Id.* at 295, 299.

40. Kurland, *supra* note 24, at 225. The seventeen are: Warren (1953-69); Black (1937-71); Reed (1938-57); Frankfurter (1939-62); Douglas (1939-75); Jackson (1941-54); Burton (1945-58); Clark (1949-56); Minton (1949-56); Harlan (1955-71); Brennan (1956-90); Whittaker (1957-62); Stewart (1958-81); White (1962-92); Goldberg (1962-69); Marshall (1967-91). CURRIE, *supra* note 36, at 376; Julius L. Chambers, *Race and Equality: The Still Unfinished Business of the Warren Court*, *in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 48 n.7.

41. The first female justice—Sandra Day O'Connor—was appointed on Sept. 26, 1981. THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993, at 534 (Clare Cushman ed., 1993).

42. "[The Warren Court] means the United States Supreme Court over which Earl Warren presided from 1953 to 1969." Kurland, *supra* note 24, at 225.

43. Hall, *supra* note 37, at 298. *See also* CURRIE, *supra* note 36, at 375, 415 (two phases, pre and post 1962); Tushnet, *The Warren Court as History*, *supra* note 20, at 7 (same). *But see* Yale Kamisar, *The Warren*

October 5, 1953[45] to August 28, 1962[46] and "The Real Warren Court"[47] from October 1, 1962[48] to June 23, 1969.[49] Further variants emerge in suggestions which ante-date either the commencement[50] or end[51] of the latter characterization. Swirling within and influencing this chronological debate are substantive

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Court and Criminal Justice, in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 116-17, *reprinting* Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 2-4 (1995) (three phases, 1953-1962, 1962-1966 or 1967, and then until 1969 because "in the main, the [criminal procedure] revolution ended a couple of years *before* Earl Warren stepped down as Chief Justice") (emphasis in original) (footnote omitted).

44. CURRIE, *supra* note 36, at 377. *See also* Hall, *supra* note 37, at 298 (describing "the first" Warren Court).

45. Earl Warren took the judicial oath of office on Oct. 5, 1953, and, as this was a recess appointment, Senate confirmation occurred on March 11, 1954. *See* THE SUPREME COURT JUSTICES, *supra* note 41, at 531; THE OXFORD COMPANION, *supra* note 19, at 970; WHITE, *supra* note 16, at 129-55 ("Governing: National Politics and the Supreme Court Nomination"); John P. Frank & Julie Zatz, *The Appointment of Earl Warren as Chief Justice of the United States*, 23 ARIZ. ST. L.J. 725 (1991). But note WARREN, *supra* note 15, at 276 ("the fourth day of October, 1953"); *id.* at 278-79 (Warren's description of taking the "Constitutional Oath" and "Judicial Oath").

46. Justice Felix Frankfurter retired on Aug. 28, 1962. *See* THE SUPREME COURT JUSTICES, *supra* note 41, at 534; THE OXFORD COMPANION, *supra* note 19, at 969; UROFSKY, FELIX FRANKFURTER, *supra* note 19, at 184.

47. CURRIE, *supra* note 44, at 415. *See also* Hall, *supra* note 37, at 298 (describing the post "1962 term . . . Warren Court . . . as [a] powerful institution of liberal change").

48. Arthur J. Goldberg took the judicial oath of office on Oct. 1, 1962. *See* THE SUPREME COURT JUSTICES, *supra* note 41, at 534; THE OXFORD COMPANION, *supra* note 19, at 970; Susan H. Hemman, *Arthur Joseph Goldberg, in* THE SUPREME COURT JUSTICES, *supra* note 16, at 193. *See also* CURRIE, *supra* note 44, at 375 ("decisive event"), 415 ("dramatic shift"); Tushnet, *The Warren Court as History*, *supra* note 20, at 7 (precise date for dramatic change). *See generally* DAVID STEBENNE, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL (1996).

49. Chief Justice Warren retired on June 23, 1969. *See* THE SUPREME COURT JUSTICES, *supra* note 41, at 531; THE OXFORD COMPANION, *supra* note 19, at 970; WHITE, *supra* note 16, at 305-13.

50. For example, extending the "real" Warren Court back to Brown v. Board of Education, 347 U.S. 483 (1954). *See* Kurland, *supra* note 24, at 225-26. For suggestions that the start of this "real" court was somewhat later—1956 or 1961—but still prior to 1962, see Kamisar, *supra* note 43, at 146 n.3 (referring to Griffin v. Illinois, 351 U.S. 12 (1956) and Mapp v. Ohio, 367 U.S. 643 (1961)).

51. "In its final years [1966 or 1967], the Warren Court was *not* the same court [as it had been since 1962]. The Chief Justice's majority opinion in *Terry v. Ohio* [392 U.S. 1 (1968)] . . . is a dramatic demonstration of the Warren Court's change in tone and attitude." Kamisar, *supra* note 43, at 116-17. Does this suggest that the Warren Court instituted a "counterrevolution in criminal procedure"? *Id.* at 117 (footnote omitted).

constitutional concerns—the Warren Court's revolution[52]—for example, in racial discrimination,[53] electoral reapportionment,[54] and criminal procedure.[55]

Of course, "naming Supreme Court epochs after Chief Justices is problematic at best and misleading at worst."[56] Reasons are obvious. First, justices' tenures overlap. Consequently, vis-a-vis a Chief Justice's tenure, there can be prior and/or post Supreme Court service.[57] Secondly, Chief Justices may not be

52. For "revolution" terminology, see, for example, Kamisar, *supra* note 43, at 116 ("Warren Court's 'revolution' in American criminal procedure"); Bernard Schwartz, *Preface*, *in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at v ("the most profound and pervasive revolution") (quoting Justice Fortas); O'Hara, *supra* note 15, at 3 ("almost revolutionary significance"); Chambers, *supra* note 40, at 21 ("revolutionized"); Schwartz, *supra* note 22, at 273 ("transformation"); Hall, *supra* note 37, at 302 ("Warren Court's revolution in public law"); *id.* at 304 ("Warren Court revolution was . . . substantive [and] procedural"); Anthony Lewis, *The Legacy of the Warren Court*, *in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 398 ("Court . . . acted like a second [American] constitutional convention"). *See also* Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 66-67, 77-80 (recounting and analyzing 1960s revolution and complete transformation into federal constitutional law of state criminal law and procedure); Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5 (1993) (discussing Warren Court's "constitutional revolution"). For the view that the Warren Court (in race, criminal law, free speech, religion, and re-apportionment cases) merely "built upon and expanded" precedents, see Hall, *supra* note 37, at 299, 301; Chambers, *supra* note 40, at 28 ("not . . . create law from whole cloth"); Lewis, *supra*, at 400 (Brown "was not a sudden break with precedent"). For pre-Warren Court race cases, see, for example, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 3-357 (1975); TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 20, at 1-149. For pre-Warren Court free speech and press cases, see, for example, FRED W. FRIENDLY, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS (1981) (discussing Near v. Minnesota, 283 U.S. 697 (1931) (Minnesota state imposing unconstitutional prior restraint on newspaper's publication)); HARRY KALVEN JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (1988); RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH (1987) (discussing Abrams v. United States, 250 U.S. 616 (1919) (sustaining convictions under the Espionage Act)); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951 (1996); David M. Rabban, *The IWW Free Speech Rights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055 (1994); David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 37 STAN. L. REV. 47 (1992); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983); David M. Rabbin, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514 (1981). For pre-Warren Court criminal law cases, see, for example, RICHARD C. CORTNER, A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS RIOT CASES (1988) (analysis and narrative of Moore v. Dempsey, 261 U.S. 86 (1923); McNabb v. United States, 318 U.S. 322 (1943) (admissibility of confessions in federal courts); Upshaw v. United States, 335 U.S. 410 (1948) (same); Mallory v. United States, 354 U.S. 449 (1957)). *See also infra* notes 68 (counter-revolution thesis), 170 (revolution).

53. *See infra* note 86 (literature on Brown).

54. *See, e.g.*, GORDON E. BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT (1966); BALL, *supra* note 36; RICHARD C. CORTNER, THE APPORTIONMENT CASES (1970) (analysis and narrative of Baker v. Carr, 369 U.S. 186 (1962), and Reynolds v. Sims, 377 U.S. 533 (1964)); ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968); GENE GRAHAM, ONE MAN, ONE VOTE: BAKER V. CARR AND THE AMERICAN LEVELLERS (1972); ROYCE HANSON, THE POLITICAL THICKET: REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY (1966); ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION (Simon & Schuster, 1970) (1965); Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1; Benjamin R. Jacewicz, *The Relationship of Judicial Politics and Constitutional History in the Warren Court's Apportionment Revolution*, 9 J.L. & POL. 435 (1993); Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962). For subsequent developments, see, for example, Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245 (discussing Growe v. Emison, 507 U.S. 25 (1993); Voinovich v. Quilter, 507 U.S. 146 (1993); Shaw v. Reno, 509 U.S. 630 (1993)).

55. *See, e.g.*, CRAIG BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION (1993); FRED P. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW (rep. 1978) (1970 title The Self Inflicted Wound); Kamisar, *supra* note 43.

56. Hall, *supra* note 37, at 295. *See generally* Thomson, *Swimming in the Air*, *supra* note 6, at 142-43 n.17 (literature on office of Chief Justice of the U.S. Supreme Court).

57. *See* Hall, *supra* note 37, at 295.

the Court's dominant or major figure intellectually,[58] institutionally or administratively,[59] or socially.[60] Apart from personal abilities or characteristics, that may be a consequence of the Chief Justice's length—too long or too short—of tenure.[61] Thirdly, an individual justice or group of justices may provide the most effective influence on results and doctrines during a Chief Justice's tenure.[62] Assessing Earl Warren's attributes—positive and negative—as Chief Justice and comparing them with justices who served before, after, and with him, *The Warren Court* seemingly[63] advances a pre-ordained[64] conclusion: Warren "was the most important presence on the [Supreme] Court from 1953 to 1969; that is why it is fair to call the [Supreme] Court of this period after him."[65]

> There has often been considerable overlap in the Associate Justices on the Court . . . . More than seventy percent of all Associate Justices . . . 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 . . . Charles Whittaker, left before Warren's retirement.

Id. See also supra note 40 (dates of judicial tenure).

58. Compare, for example, the intellectual dominance of Chief Justices Marshall and Hughes with the subordinate intellectual position of Vinson and Warren. For details, see, for example, LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW (1974); CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996); HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835 (1997); JEAN EDWARD SMITH, JOHN MARSHALL: DEFENDER OF A NATION (1996); SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT (1950); 1-2 MERLO J. PUSEY, CHARLES EVANS HUGHES (1951); Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4 (1967); Paul A. Freund, *Chief Justice Charles Evans Hughes*, 69 N.Y. HIST. 144 (1988), *reprinted in* 1988 SUP. CT. HIST SOC'Y Y.B. 70; MELVIN I. UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953 (1997); James A. Thomson, *Frederick Moore Vinson*, *in* THE SUPREME COURT JUSTICES, *supra* note 16, at 489-92; *supra* note 23 (Brennan was the Warren Court intellectual chief-of-staff). For more ambivalence, see Thomson, *Not a Trivial Pursuit*, *supra* note 30, at 318, 323 (Chief Justice Chase).

59. Compare, for example, Hughes and Taft with Stone. *See, e.g.*, ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT 265-66 (1986) (Stone "had the good fortune to be able to observe two models of court management first-hand, Taft for five years and Hughes for ten, but . . . he was incapable of emulating either"); Peter Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 SUP. CT. REV. 123; Felix Frankfurter, *"The Administrative Side" of Chief Justice Hughes*, 63 HARV. L. REV. 1 (1949); Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5 (1949).

60. *See, e.g.*, ELY, *supra* note 6, at 30 ("Fuller was a masterful social leader of the Court."); WHITE, *supra* note 16, at 161 ("The most important feature of Earl Warren's chief justiceship . . . was his [formidable] presence. . . . [U]nlike [Marshall, Taney, and Hughes], Warren was not regarded as a judge possessing considerable intellectual talents or . . . abilities. He was regarded as one of the great Chief Justices . . . because of the intangible but undeniable impact of his presence on the Court.").

61. "Some Chief Justices have not stayed long enough to have much of an impact on the Court. [Examples are: Jay, Rutledge, and Ellsworth.] . . . Chief Justices can also stay too long. . . . [Examples are: Marshall and Taney]." Hall, *supra* note 37, at 295-96.

62. *See, e.g.*, Brennan, *A Personal Remembrance*, *supra* note 22, at 8-9 ("giants"). *See also supra* note 23 (Brennan's influence).

63. A caveat is necessary because THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, does contain essays by Warren Court critics. *See, e.g.*, Richard Epstein, *The Takings Jurisprudence of the Warren Court: A Constitutional Siesta*, *in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 159, *reprinting* Richard A. Epstein, *The Takings Jurisprudence of the Warren Court: A Constitutional Siesta*, 31 TULSA L.J. 643 (1996); Kurland, *supra* note 24; Kozinski, *supra* note 25. *See also supra* notes 23 (Brennan's influence), 24 (Frankfurter revival). *But see* text accompanying *infra* note 276 (critic's praise).

64. "[THE WARREN COURT: A RETROSPECTIVE, *supra* note 11] commemorates the tenure of Earl Warren as Chief Justice of the United States." O'Hara, *supra* note 15, at 3. "[THE WARREN COURT: A RETROSPECTIVE, *supra* note 11] is not the place to bury the Warren Court in criticism, but to praise it." Ronald D. Rotunda, *The Warren Court and the Freedom of the Press*, *in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 85, 97.

65. HALL, *supra* note 37, at 298. *See also id.* at 297 ("When placed in historical perspective, Warren emerges as perhaps the most persuasive and persistent Chief Justice the [Supreme] Court has ever had."); KLUGER, *supra* note 52, at 830 ("Arrival of the Super Chief"); Brennan, *A Personal Remembrance*, *supra* note 22, at 10 ("Super Chief").

Even if all of this is conceded,[66] controversies remain. What were the Warren Court's substantive doctrinal or jurisprudential achievements?[67] That is, did the 1953-1969 epoch produce a significant and durable[68] "Constitutional Corpus"?[69] How did the Court's decision making—the process of judicial review—fit within the Constitution's institutional and theoretical parameters? For example, did the Warren Court resolve or exacerbate the anti-majoritarian dilemma?[70] Can any interpretative methodologies—theories, principles, and strategies of constitutional adjudication[71]—be ascertained from Warren Court opinions, concurrences, or dissents?[72] Is there any correlation between these facets

66. *But see supra* notes 22, 24, 63 (Warren critics).

67. For overviews, see, for example, THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 21-191; *supra* notes 10, 12-21, 31-36 (literature and judicial opinions).

68. On whether and, if so, the extent to which Warren Court opinions and doctrines remain extant—the counter-revolution thesis—see, for example, Chambers, *supra* note 40, at 32 ("retreat from Warren Court [state action] decisions"); Strossen, *supra* note 29, at 68 ("sad reversal of the Warren Court approach" to free speech); *id.* at 72 ("substantial erosion in free speech protection since the Warren era"); Kamisar, *supra* note 43, at 145-46 ("although battered and bruised, most of the Warren Court's famous precedents remain in place"). *See also* THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? (Bernard Schwartz ed., forthcoming 1997); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2467 n.5 (1996) (bibliography on debate over "fate of the Warren Court's criminal procedure 'revolution' in the Burger and Rehnquist Courts"); Thomson, *Mirages of Certitude*, *supra* note 1, at 76 n.66 (literature on "differing assessments as to whether a change has occurred and, if so, when and at what rate").

69. THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at vii ("The Constitutional Corpus").

70. For this dilemma and attempts to dissolve it, see, for example, BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 16-23; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1090-96 (1988); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995).

71. *See generally* PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (3d ed. 1992); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991); HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION (1990); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); *Symposium on Phillip Bobbitt's Constitutional Interpretation*, 72 TEX. L. REV. 1703 (1994).

72. Negative responses have been proclaimed. For example, "Warren and at least . . . Douglas, Brennan, Fortas, and Thurgood Marshall, had little sustained interest in general matters of constitutional theory. . . . The Warren Court Justices were remarkable for their lack of concern about the era's main currents of constitutional thought." Hall, *supra* note 37, at 298. For other criticism *see supra* note 2 (Bickel's scholarship); KURLAND, POLITICS, *supra* note 15. But for more positive responses, see, for example, JEFFREY D. HOCKETT, NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON (1996); TINSLEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS (1988); Hall, *supra* note 37, at 294-95 ("'[C]onstitutive' interpretation of Warren Court" suggests that Warren Court justices "realized that their most important task was . . . to take doctrinal debates seriously. . . . [T]he Constitution, precedents, and fundamental rights and legal principles . . . influenced judicial decisionmaking."). *See also infra* notes 233-35 (references). For an overview of constitutional theory debate generated by the Warren Court, see, for example, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 205-99 (1995), *reprinting* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601 (1993); CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY (1991); THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM V. JUDICIAL RESTRAINT (David F. Forte ed., 1972); Stephen M. Feldman, *From Modernism to Postmodernism in American Legal Thought: The Significance of the Warren Court*, *in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 324, 339-48 (discussing Bickel, Wellington, Pollak, Black, Wechsler, Cox); Gary Minda, *Jurisprudence at Century's End*, 43 J. LEGAL EDUC. 27, 32-36 (1993); Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REFORM 561 (1988). *See also supra* note 2 (Bickel scholarship). For discussion of the central, unresolved dilemma of modern American constitutional law—how to reconcile praise for *Brown* with condemnation of *Lochner v. New York*, 198 U.S. 45 (1905) (state legislative prohibition on bakery employees working more than 60 hours per week unconstitutional 14th Amendment due process deprivation)—see Thomson, *Swimming in the Air*, *supra* note 6, at 176 n.228.

of the Supreme Court's work and Warren Court justices' biographical profiles? Divided into three main[73] segments—"The Constitutional Corpus,"[74] "The Justices,"[75] and "A Broader Perspective"[76]—*The Warren Court: A Retrospective* raises, without necessarily answering,[77] these perennial questions which pervade virtually the whole domain of constitutional law.

III. JUDICIAL REVIEW: 1953-1969

Almost from the start,[78] commendations and condemnations were simultaneously hurled at the Warren Court.[79] Certainly, the deluge began at 1:20 pm

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73. *See also* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 3-17 (essays by O'Hara, *supra* note 15, Brennan, *supra* note 22, and David Halberstam, *Earl Warren and His America*, THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 12).

74. THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 21-191.

75. *Id.* at 195-282.

76. *Id.* at 285-406.

77. For example, "[o]ne of the more interesting yet unexplored issues involving the Warren Court was the extent to which the Justices themselves appreciated the consequences of their actions." Hall, *supra* note 37, at 302.

78. For pre-Warren Court criticism of the Supreme Court, see generally ROBERT J. STEAMER, THE SUPREME COURT IN CRISIS: A HISTORY OF CONFLICT (1971); Paul A. Freund, *The Supreme Court Under Attack*, 25 U. PITT. L. REV. 1 (1963); Paul A. Freund, *Storm Over the American Supreme Court*, 21 MOD. L. REV. 345 (1958).

79. Contemporary supporters included Archibald Cox, Anthony Lewis, Black, and Karst. *See supra* notes 18, 36 and *infra* notes 92-94. Contemporary critics included Bickel, Kurland, Hand, McCloskey, and Wechsler. *See supra* notes 2, 15 and *infra* notes 95-99. A small sample of epithets is reproduced in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 79 ("The Communists cannot win; the NAACP cannot lose" and "There are red cases and . . . black cases"); *id.* at 302 (Supreme Court Justices "put the Negroes in the schools and now [in Engel] they have driven God out"). For other condemnation and anti-Court attacks, see, for example, LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 200-30 (1988) (curbing the U.S. Supreme Court via constitutional amendments, statutory reversals, court packing, withdrawing jurisdiction, and noncompliance); EDWARD KEYNES & RANDALL K. MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION (1989); WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 82-162, 274-99 (1995) (discussing Franklin Roosevelt's court-packing plan); DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 269-91 (1966) (discussing Senate debate on the Jenner-Butler Bill to withdraw Supreme Court's jurisdiction over individual rights cases); WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS (1962); JOHN R. SCHMIDHAUSER & LARRY L. BERG, THE SUPREME COURT AND CONGRESS: CONFLICT AND INTERACTION, 1945-1968 (1972); WARREN, *supra* note 15, at 300-35 ("The Court was under attack by powerful interests nearly all the time I was there"); Michael Comiskey, *Can a President Pack-or-Draft the Supreme Court? FDR and the Court in the Great Depression and World War II*, 57 ALB. L. REV. 1043 (1994) (President Roosevelt's court-packing); William S. Dodge, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role,"* 100 YALE L.J. 1013 (1991) (supporting the view that Congress' exceptions clause power does not authorize the destruction of the Supreme Court's essential role); Christopher T. Handman, *The Doctrine of Political Accountability and Supreme Court Jurisdiction: Applying a New External Constraint to Congress's Exception Clause Power*, 106 YALE L.J. 197, 197 (1996) (discussing Congress's attempts and constitutional power to strip the Supreme Court's appellate jurisdiction and noting that "[t]hroughout the twentieth century, fundamental changes in political power often have ushered in novel and hostile attacks on the federal judiciary's jurisdiction"); Mark E. Herrmann, *Looking Down from the Hill: Factors Determining the Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution*, 33 WM. & MARY L. REV. 543 (1992); Richard A. Paschal, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. 143 (1991); *The Supreme Court-1995 Term: Federal Jurisdiction and Procedure: Exceptions Clause*, 110 HARV. L. REV. 277-87 (1996) (discussing Congress' power over the Supreme Court's appellate jurisdiction and concluding that a literal interpretation, recognizing an expansive congressional power, rather than structural interpretations to limit Congress' power, should prevail).

on May 17, 1954 when Chief Justice Warren finished reading[80] the unanimous *Brown v. Board of Education*[81] opinion.[82] It continued, perhaps most prominently via cases such as *Mapp v. Ohio*,[83] *Miranda v. Arizona*,[84] *Engel v. Vitale*,[85] *Abington v. Schempp*,[86] *Reynolds v. Sims*,[87] and the obscenity deci-

80. KLUGER, *supra* note 52, at 887, 894 ("It was 12:52 p.m. . . . [Brown] was Warren's first major opinion as Chief Justice. He read it . . . in a firm, clear, unemotional voice . . . . It was 1:20 p.m. [when he finished]"). *See also* WARREN, *supra* note 15, at 3 ("I read").

81. 347 U.S. 483 (1954) (state imposed racial discrimination unconstitutional).

82. On the Brown litigation process, see, for example, KLUGER, *supra* note 52; TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 20, at 150-231; James A. Thomson, *Inside the Supreme Court: A Sanctum Sanctorum?*, 66 MISS. L.J. 178, 183 n.12 (1997) (reviewing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE REHNQUIST COURT (1996)) (literature on *Brown* litigation process); Tushnet & Lezin, *supra* note 20. Subsequent analyses include ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992); DONALD E. LIVELY, THE CONSTITUTION AND RACE (1992); LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 91-116 (1996) ("Racial Equality and the Rhetoric of Nondiscrimination"); RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION (Austin Sarat ed., 1997); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENTARY 223 (1996); Michael W. McConnell, *Segregation and the Original Understanding: A Reply to Professor Maltz*, 13 CONST. COMMENTARY 233 (1996); Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J. L. & PUB. POL'Y 457 (1996); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Michael W. McConnell, *The Originalist Justification for* Brown: *A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989); *Symposium*: Brown v. Board of Education, 20 S. ILL. U. L.J. 1 (1995); Symposium, Brown v. Board of Education *After Forty Years: Confronting the Promise*, 36 WM. & MARY L. REV. 337 (1995); Commentaries, 80 VA. L. REV. 151-99 (1994).

83. 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule applied, via Fourteenth Amendment to the states). *See generally* Francis A. Allen, *Federalism and the Fourth Amendment: A Requiem for* Wolf, 1961 SUP. CT. REV. 1; Stewart, *supra* note 29; The Supreme Court 1960 Term, *Exclusion of Unconstitutionally Seized Evidence*, 75 HARV. L. REV. 152-58 (1961).

84. 384 U.S. 436 (1966) (inadmissibility of confessions unless Fifth amendment warnings given to suspects prior to custodial interrogation). *See generally* LIVA BAKER, MIRANDA: CRIME, LAW, AND POLITICS (1983); JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993) (discussing *Miranda*'s policy and doctrinal roots); Sheldon H. Elsen & Arthur Rosett, *Protections for the Suspect Under* Miranda v. Arizona, 67 COLUM. L. REV. 645 (1967); Kamisar, *supra* note 43, at 119-30 (opposing *Miranda* critics and *Miranda*'s post-Warren Court fate); Symposium, *Interrogation of Criminal Defendants—Some Views on* Miranda v. Arizona, 35 FORDHAM L. REV. 169 (1966); The Supreme Court 1965 Term, *[Self Incrimination] Privilege Applies to Custodial Interrogation*, 80 HARV. L. REV. 201 (1966). *See also supra* note 1 (empirical debate on *Miranda*).

85. 370 U.S. 421 (1962) (prayer in public schools violated First Amendment's establishment clause). *See generally* Ernest J. Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1; Kurland, *The Regents' Prayer Case*, *supra* note 15; Arthur E. Sutherland, Jr., *Establishment According to* Engel, 76 HARV. L. REV. 25 (1962).

86. 374 U.S. 203 (1963) (Bible reading in public schools violated First Amendment's establishment clause). *See generally* WILLIAM K. MUIR, JR., PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE (1967) (empirical impact of *Schempp*). Louis H. Pollak, *Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62 (1963).

87. 377 U.S. 533 (1964) (one vote, one value state legislatures' electoral reapportionment requirement). *See supra* note 54 (references).

sions,[88] almost unabated until 1963[89] and beyond.[90] Inevitably, a scholarly[91] debate ensued. Distinctive and powerful positions—pro and contra the Warren Court—quickly emerged. Early supporters included: Black,[92] Cox,[93] and Karst.[94] Their antagonists were exemplified by Bickel,[95] Hand,[96] Kurland,[97] McCloskey,[98] and Wechsler.[99] One tangible result has been the accumulation of thought-provoking commentary. Quantitatively, *The Warren Court: A Retrospective* does not, however, enrich that repository.

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88. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (obscenity, gauged by a "prurient interest" test, outside free speech protection); Kingsley International Pictures v. Regents, 360 U.S. 684 (1959) (overturning New York State ban on the movie version of Lady Chatterley's Lover). *See generally* CURRIE, *supra* note 36, at 396-99; EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS (1992); KALVEN, *supra* note 52, at 35-47 (1957-69 obscenity cases); FREDERICK F. SCHAUER, THE LAW OF OBSCENITY (1976); MARTIN SHAPIRO, FREEDOM OF SPEECH 157-59 (1966); Rotunda, *supra* note 64, at 97 ("In the area of obscenity, the Warren Court meandered about in a series of rulings that gave little guidance to the lower courts as to what was or was not 'obscene' in a constitutional sense.") (footnote omitted); Lewis, *supra* note 52, at 402 ("tortuous trail of decisions" which "liberated American society"). *Compare infra* note 134 (pornography).

89. *See supra* note 79 (criticism and condemnation of Supreme Court).

90. *See supra* note 63 (1996 criticism in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11).

91. Compare the political debate. *See supra* note 79 ("condemnation and anti-Court attacks").

92. Professor Charles Black, Jr. (Sterling Professor Emeritus of Law, Yale University). *See, e.g.*, CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); Charles Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970); Charles Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960), *reprinted in* CHARLES L. BLACK, JR., THE OCCASIONS OF JUSTICE 129-43 (1963); Charles Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967). For Black's assistance to the NAACP during Brown litigation, see KLUGER, *supra* note 52, at 812, 814-15, 912.

93. Professor Archibald Cox (Carl M. Loeb University Professor, Emeritus, Harvard Law School). *See, e.g.*, COX, THE WARREN COURT: CONSTITUTIONAL DECISION, *supra* note 36; COX, THE COURT AND THE CONSTITUTION, *supra* note 36; Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966) (Warren Court's "magnificent accomplishments"); Archibald Cox, *Chief Justice Earl Warren*, 83 HARV. L. REV. 1 (1969).

94. Professor Kenneth L. Karst (David G. Price and Dallas P. Price, Professor of Law, University of California, Los Angeles). *See, e.g.*, Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal* Protection, 1967 SUP. CT. REV. 39; Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75. *See also* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 80 (1989) ("[I]t is proper to credit the Warren Court's decisions on racial equality for reviving the principle of equal citizenship, and thus formally redefining [America's] national community.").

95. *See supra* note 2 (Bickel's publications).

96. Federal Court Judge Learned Hand. *See* LEARNED HAND, THE BILL OF RIGHTS (1958) (criticisms of Warren Court and judicial review). For Hand's view of Earl Warren and the Warren Court's judicial activism (especially via correspondence with Justice Frankfurter), see GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 652-72 (1994); WHITE, *supra* note 16, at 179-80; James A. Thomson, *Learned Hand: Evaluating a Federal Judge*, 22 N. KY. L. REV. 763, 805-09 (1995) (reviewing GUNTHER, *supra*).

97. *See supra* note 15 (Kurland's scholarship).

98. Robert G. McCloskey (Late Harlan Fiske Stone Professor Emeritus of Constitutional Law, Columbia University, Law School). *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 215-19, 221, 227-31 (1960) (Brown "not . . . very well thought out"); MCCLOSKEY, *supra* note 36; Robert G. McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229 (1965); McCloskey, *supra* note 54.

99. Herbert Wechsler (Late Harlan Fiske Stone Professor Emeritus of Constitutional Law, Columbia University, Law School). Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) *reprinted in* HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS 3-48 (1961); Herbert Wechsler, *The Courts and* the *Constitution*, 65 COLUM. L. REV. 1001 (1965). On the "neutral principles" debate, see generally, Peller, *supra* note 72; Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 855 n.6 (1993) (bibliography indicating continuing influence of Wechsler's *Neutral Principles* article).

A. *Substantive Doctrines*

Revealing, illustrating, and explaining constitutional law, as promulgated during 1953-1969 by the Supreme Court, is attempted in this *Retrospective* through a focus on equal protection issues (especially race and state action),[100] free speech[101] and press,[102] religious freedom and establishment,[103] criminal justice,[104] and Takings Clause jurisprudence.[105] Within this milieu, juxtaposition—previous and subsequent cases against Warren Court opinions and decisions[106]—inevitably produces a further consequence: comparative assessments (including revolution and counter-revolution terminology[107]) of "achievements" in federal[108] constitutional law during Chief Justices' tenures. Again, more deft, nuanced, and intellectually intriguing examples of this enterprise exist.[109]

Well worn starting points for explorations of Warren Court expositions of the Constitution are obvious:[110] race, the equal protection clause, and

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100. *See, e.g.*, Chambers, *supra* note 40.

101. *See, e.g.*, Strossen, *supra* note 29.

102. *See, e.g.*, Rotunda, *supra* note 64.

103. *See, e.g.*, John Sexton, *The Warren Court and the Religion Clauses of the First Amendment*, in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 104.

104. *See, e.g.*, Kamisar, *supra* note 43.

105. *See* Epstein, *supra* note 63.

106. *See, e.g.*, THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 24-44 (Warren, Burger, and Rehnquist Courts' race and state action decisions); *id.* at 69-70 (Warren, Burger and Rehnquist Courts' free speech decisions); *id.* at 86-97 (Warren, Burger and Rehnquist Courts' free press decisions); *id.* at 104-08, 112-13 (Warren, Burger, and Rehnquist Courts' religious freedom cases); *id.* at 116-46 (Warren, Burger, and Rehnquist Courts' criminal law decisions). *See also supra* note 68 (counter-revolution debate).

107. *See supra* note 68 (debate and references).

108. *But see* James G. Exum, Jr., & Louis D. Bilions, *The Warren Court and State Constitutional Law*, in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 313. *See also* Neely, *supra* note 25 (suggesting the federalization of state product liability law).

109. *See supra* notes 36 (Warren Court scholarship), 68 (counter-revolution debate literature), 93 (Professor Cox). *See also* Paul A. Freund, *The Judicial Process in Civil Liberties Cases*, 1975 U. ILL. L.F. 493, *reprinted in* DAVID C. BAUM MEMORIAL LECTURES: CIVIL LIBERTIES AND CIVIL RIGHTS 3 (Victor J. Stone ed., 1997) ("synoptic view of Warren Court's treatment of civil liberties and civil rights").

110. However, for Warren, *Baker v Carr*, 369 U.S. 186 (1962), "was the most important case of [his] tenure on the Court." WARREN, *supra* note 15, at 306 (quoted by Schwartz, *supra* note 22, at 265). Warren also "never thought" that "[t]he *Brown* case . . . was the most important case of [his] tenure on the [Supreme] Court." WARREN, *supra* note 15, at 306. *See also* John Hart Ely, *The Chief*, 88 HARV. L. REV. 11, 12 (1974) (Warren's view that if reapportionment cases had been decided before 1954, *Brown* would not have been necessary); Lewis, *supra* note 52, at 400 ("[A]sked at the end of his life to name the most important decisions of his years on the Supreme Court, [Warren] put the reapportionment cases at the head of the list."). Similarly, "[Thurgood] Marshall . . . call[ed] [*Smith v. Allwright*, 321 U.S. 649 (1944) (Texas white primary unconstitutional state racial discrimination),] his most significant victory—not excepting the *Brown v. Board of Education* decision." JOHN EGERTON, SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT 380 (1994). The reason was obvious.

> No single issue, no reform, was more important to all sides than the ballot. To blacks and white liberals, the right to vote was the prerequisite to every other reform . . . . To white conservatives . . . the specter of a full and free franchise for five million African-American adults in the Southern States was terrifying to contemplate.

Id. at 398. *But see* Freund, *supra* note 109, at 495 ("given the effect of reapportionment in increasing the representation of the suburbs, and . . . the recalcitrance even of urban areas in carrying out their legal obligations to substitute a unitary school system for an officially segregated one" to suggest that Brown "would not have [been] needed . . . seems a bit exaggerated . . . [despite] the centrality of fair representation in the process of political responsiveness").

Brown.[111] That is where Chambers[112]—"Race and Equality: The Still Unfinished Business of the Warren Court"[113]—commences. Immediately, however, problems arise. First, is a bold assertion: *Brown's* "central holding" was "that separate-but-equal is constitutionally intolerable."[114] A deeper and more complex panorama, generating greater ambivalence, could have been exposed by plunging into the jurisprudential and precedential relationships of *Plessy*[115] and *Brown*[116] and between *Brown* and affirmative action.[117] Indeed, even after 1954, it has been argued that separate-but-equal is, should be, and can be constitutionally tolerable if "equal" means (in judicial decrees and practical operation) equal.[118] Of course, emphasis has also been given, sometimes simultaneously, to the "separate" side of this equation.[119] Secondly, Chambers is inconsistent on the empirical impact or significance of *Brown*, even during the 1953-1964 era. For example:

> [T]he defining decisions of the Warren era . . . extended constitutional relief to blacks through the Equal Protection Clause and aided in inspiring presidential and congressional action . . . . [L]ittle [was] . . . done actually to advance enforcement of blacks' equal protection rights. Indeed, the travesty of *Brown* came one year later in the 1955 *Brown II* "all deliber-

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111. 347 U.S. 483 (1954) (state imposed racial discrimination unconstitutional). *See supra* note 82 (references). *See also* Lewis, *supra* note 52, at 400 ("for most Americans the landmark of those [1953-1969] judicial years was *Brown v. Board of Education*") (footnote omitted).

112. "*Julius L. Chambers*, Chancellor, North Carolina Central University; Former Director-Counsel, NAACP Legal Defense Fund." THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at ix. On that Defense Fund and Chambers' involvement, see JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 7, 11, 40, 199, 292, 341, 372, 375, 376, 388, 395, 400-01, 418, 420, 421, 422, 484, 486, 502, 504, 507, 521, 590 n.416 (1994).

113. Chambers, *supra* note 40.

114. *Id.* at 21-22. For the phrase "equal, but separate" in the 1890 Louisiana statute held constitutional in *Plessy v. Ferguson*, 163 U.S. 537 (1896), see Thomson, *Swimming in the Air*, *supra* note 6, at 190 n.287. *See also id.* at 178-79 n.234 (meaning and importance of terminological difference).

115. Plessy v. Ferguson, 163 U.S. 537 (1896) (1890 Louisiana statute requiring "equal, but separate" accommodation for black and white railway passengers not contravene 14th Amendment equal protection clause). *See generally* Seidman, *supra* note 1, at 686-95 ("Plessy *and the Dilemmas of Liberal Individualism*"); Thomson, *Swimming in the Air*, *supra* note 6, at 173-75 n.212, 177-78 n.229, 190 n.287 (references and differing views and interpretations of *Plessy*).

116. Brown v. Board of Education, 347 U.S. 483 (1954) (state imposed racial discrimination unconstitutional). *See supra* note 82 (references).

117. Unfortunately, Chambers, *supra* note 40, when discussing affirmative action does not explore the relationship between *Brown* and affirmative action. For some attempts, see David A. Strauss, *Affirmative Action and The Public Interest*, 1995 SUP. CT. REV. 1 (discussing relationship between affirmative action and discrimination against minorities); Thomson, *Swimming in the Air*, *supra* note 6, at 169-70 n.193, 181-82 n.248 (explanations and references).

118. *See, e.g.*, Seidman, *supra* note 1, at 713-14 (postulating the consequences if Brown had "used segregationist ideology as a lever to pry loose from white society massive resources that could have made the promise of equal treatment a reality" and of "[m]aking separate facilities truly equal"). For pre-1954 arguments to make separate black facilities truly and completely equal, see EGERTON, *supra* note 110, at 255, 272, 434, 460, 466, 469, 525, 549, 591, 592, 597, 603.

119. "[A]s many commentators from the black community have emphasized over the course of this past generation, the *Brown* Court—and the *Brown* opinion—. . . failed to appreciate or manifest any awareness of how Black America could experience—and generate—top-quality education *apart from* and *independent of* any cheek-by-jowl classroom exposure to white folks." David J. Garrow, *What the Warren Court Has Meant to America*, in THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 390, 392 (citing HAROLD CRUSE, PLURAL BUT EQUAL: A CRITICAL STUDY OF BLACKS AND MINORITIES AND AMERICA'S PLURAL SOCIETY (1987)) (emphasis added). *See also* ROY L. BROOKS, INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY (1996) (postulating a middle course between racial integration and separation).

> ate speed" formula. [T]he Court's resolve soon weakened. [B]etween [1958 and 1968], the Court . . . countenanced delay and failed to impose clear criteria with respect to the remedial obligations of the States to eradicate discrimination. . . . The Warren Court's courageous and, to a significant degree, successful efforts to effect positive social change defy arguments to the contrary.[120]

Reference to and discussion of the emerging impact debate,[121] including suggestions that *Brown* retarded, rather than expedited, congressional civil rights legislation,[122] would have added alternative perspectives and, perhaps, produced different conclusions.[123] Thirdly, given Chambers' laments about the Burger and Rehnquist Courts' retreat from Warren Court decisions,[124] one question emerges: Contrary to Chambers' suggestion, isn't *Brown's* "central holding . . . in jeopardy"?[125] That is, even if *Brown* had some—whether beneficial or deleterious[126]—impact, has not it been undone or, at least, partially dismantled? At this stage, only debate, not a final conclusion, exists.[127]

Admission of failure[128] slides more easily and openly from Nadine Strossen's[129] "Freedom of Speech in The Warren Court."[130] Two examples

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120. Chambers, *supra* note 40, at 22, 26, 45 (footnote omitted).

121. *See supra* note 1 (empirical impact studies and debate on Warren Court decisions).

122. *See, e.g.*, Seidman, *supra* note 1, at 715-17 ("Rather than sparking continued struggle for change, [*Brown*] has served to deaden political debate and to legitimate the status quo."). *Cf.* ROSENBERG, *supra* note 1, at 107-10, 117-25, 155-56 (Brown's negligible or no effect or influence on congressional civil rights legislation).

123. *See supra* note 1 (literature). Note, for example, the suggestions:

> In terms of judicial effects . . . *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform.
>
> . . . .
>
> The evidence suggests that *Brown's* major positive impact was limited to reinforcing the belief in a legal strategy for change of those already committed to it.
>
> . . . .
>
> The combination of . . . factors-growing civil rights pressure from the 1930s, economic changes, the Cold War, population shifts, electoral concerns, the increase in mass communications-created the pressure that led to civil rights . . . . [T]he courts contributed little to [civil rights] . . . .

ROSENBERG, *supra* note 1, at 71, 156, 169. "[T]he Warren Court was simply in the position of ratifying decidedly more dramatic and far-reaching legislative actions [; namely, the Civil Rights Act of 1964 and Voting Rights Act of 1965,] that had been initiated by successive Presidents and approved by successive Congresses." Garrow, *supra* note 119, at 392. *See also infra* note 278 (backlash thesis).

124. Chambers, *supra* note 40, at 29-44. *See also supra* note 68 (counter-revolution debate literature containing similar sentiments).

125. Chambers, *supra* note 40, at 21-22. Of course, most commentators and judicial nominees endorse *Brown*. *See, e.g.*, SUNSTEIN, *supra* note 1, at 116 ("the commitment to *Brown* seems nearly inevitable for all participants in the American constitutional tradition"). *See also* STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENT PROCESS 65-68 (1994) (*Brown*'s role in Senate confirmation hearings).

126. *See supra* note 120 and accompanying text. *See also supra* notes 122-23.

127. For recent *Brown* scholarship, see *supra* note 82.

128. Strossen, *supra* note 29, at 72 ("downside" in Warren Court's free speech doctrines and "guidance"); *id.* at 78 ("Warren Court failed to protect . . . civil rights activisits from harassment by the House Un-American Activities Committee"); *id.* at 79 ("not . . . a perfect record" in protecting communists' "free speech"). *See also infra* note 137 (communists' free speech).

129. "*Nadine Strossen*, Professor, New York Law School; President, American Civil Liberties Union." THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at x. Her Warren Court publications include Nadine Strossen, *The Religion Clause Writings of Justice William O. Douglas*, *in* "HE SHALL NOT PASS THIS WAY AGAIN," *supra* note 16, at 91-107; Nadine Strossen, *Justice Harlan and the Bill of Rights: A Model for How A Classic Conservative Court Would Enforce the Bill of Rights*, 36 N.Y.L. SCH. L. REV. 133 (1991).

130. Strossen, *supra* note 29.

protrude. First, is the assertion that "the [Warren] Court's speech-protective . . . rulings often did not articulate specific doctrinal analyses, and therefore did not provide firm guidance for future Courts."[131] At least for Strossen, the consequence is catastrophic: subsequent Supreme Court "results" have, "without . . . expressly overrul[ing] Warren Court precedents," been able to "substantial[ly] ero[de]" First Amendment "free speech protection" and, therefore, "escape[] the full measure of comment and criticism it would otherwise provoke."[132] Others—especially, for example, from commercial speech,[133] pornography,[134]

131. *Id.* at 72. *See also id.* ("the Warren Court's speech-affirming decisions often did not lay out precise doctrinal or analytical guidelines"). *But cf.* GERALD GUNTHER, CONSTITUTIONAL LAW 1222 (12th ed. 1991) (Warren Court "prolific in its [free speech] doctrinal innovations"), *quoted in* Strossen, *supra* note 29, at 68.

132. Strossen, *supra* note 29, at 72 (citing Nadine Strossen, *The Free Speech Jurisprudence of the Rehnquist Court*, 29 FREE SPEECH Y.B.: THE MEANING OF THE FIRST AMENDMENT 83 (1991)).

133. *See, e.g.*, STEPHEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 31, 35, 52-53, 55, 82, 105-06, 152, 209-10 (1990) (varying perspectives on how much First amendment protection from regulation commercial speech should obtain); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xviii, 3-4, 7-9, 15, 123, 126-28, 131-32, 140, 142-43, 153-55, 158, 220-21 (1993) (opposing First amendment protection for commercial speech); Symposium, *Commercial Speech and the First Amendment*, 56 U. CIN. L. REV. 1165 (1988).

134. Different perspectives on the First Amendment-pornography relationship include DONALD ALEXANDER DOWNS, THE NEW POLITICS OF PORNOGRAPHY (1989) (pornography protected by First amendment); CATHERINE A. MACKINNON, ONLY WORDS (1993) (pornography not First amendment speech); NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995) (First amendment encompasses pornography); Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887 (1992) (suggesting arguments favoring constitutionality of restrictions on pornographic speech); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988), *reprinted in* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 89-116, 356-71 (1995); Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Conduct*, 60 U. CHI. L. REV. 845 (1993) (discussing anti-pornography ordinances); C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181 (1994) (reviewing MACKINNON, *supra*) (critiquing suggested conflict between free speech and liberty and reconstructing free speech doctrines to exclude practices silencing oppressed victims); Ronald Dworkin, *Women and Pornography*, N.Y. REV. BOOKS, Mar. 3, 1994, at 36 (reviewing MACKINNON, *supra*), *reprinted in* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 227-43 (1996); Lynn S. Chancer, *Feminist Offensives: Defending Pornography and the Splitting of Sex From Sexism*, 48 STAN. L. REV. 739 (1996) (reviewing STROSSEN, *supra*); Christine A. Littleton, *Old Wine in Nude Skins*, 69 TEX. L. REV. 497 (1990) (reviewing DOWNS, *supra*) (criticizing Downs and supporting feminist pornography critiques). *See* also Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 294 n.8 (1989) (suggesting "'pornography' is coming to be reserved for sexually explicit material indicted as harmful to women" while "'[o]bscenity' . . . legally denominates sexually explicit material disvalued because of its offensiveness to community sensibilities or generally deleterious impact on the tone of public life").

and hate speech[135] perspectives—might not agree.[136] Secondly, the Warren Court did not protect communists' or suspected communists' freedom of speech.[137] In this domain, the "double standard" between "Communists and . . . civil rights activists"[138] was blatant.[139] Epigrams[140] and statistics[141] provide contextual and factual evidence illuminating this failure.[142]

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135. *See generally* EDWARD J. CLEARY, BEYOND THE BURNING CROSS: THE FIRST AMENDMENT AND THE LANDMARK R.A.V. CASE (1994) (background and analysis of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)); KENT GREENWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES AND LIBERTIES OF SPEECH (1995); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY (1994); Akhil Reed Amar, *The Case of the Missing Amendments*: R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992) (suggesting that Thirteenth and Fourteenth amendments may assist in precluding First amendment invalidation of racial hatred speech regulations); Michael A. Cullers, Comment, *Limits on Speech and Mental Slavery: A Thirteenth Amendment Defense Against Speech Codes*, 45 CASE W. RES. L. REV. 641 (1995) (similar); Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (1994) (analysis and critique of neoconservative arguments against hate speech regulations); Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135 (1994) (advocating speech-conduct dichotomy); Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) (discussing *R.A.V.* case to suggest that the First amendment's primary object is uncovering improper or illicit government motives); Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content Underinclusion*, 1992 SUP. CT. REV. 29 (discussing *R.A.V.* case in context of First amendment's content neutrality doctrine); Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639 (1993) (dissenting from Amar's Thirteenth and Fourteenth amendments racial hate speech thesis); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103 (1992) (contrasting assimilationist, pluralist, individualist, and culturally authoritarian paradigms' approach to free speech and race hate regulations); Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339 (1992); Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425 (comparative analysis of hate speech debates); Steven H. Shriffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43 (1994) (concluding that First amendment does not prohibit racist speech regulation and assessing effectiveness of such regulations in a racist society); Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1.

136. On Burger and Rehnquist Courts' free speech, see, for example, STANLEY H. FRIEDELBAUM, THE REHNQUIST COURT: IN PURSUIT OF JUDICIAL CONSERVATISM 45-72, 82-85, 91 (1994); JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 257-81, 320-21 (1995); Norman Dorsen & Joel Gora, *The Burger Court and Freedom of* Speech, *in* THE BURGER COURT, *supra* note 13, at 28-45, 267-70. *See also supra* note 106 (same). *See generally* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 199, 368-83, 387-90 (1996) (discussing the emergence, especially in relation to hate and commercial speech, of a retrenchment theory of free speech jurisprudence).

137. Strossen, *supra* note 29, at 77-79. *See also* Lewis, *supra* note 52, at 402-04 ("record of the Warren Court was less happy, and less courageous"). *See generally*, CURRIE, *supra* note 36, at 385-96 ("Reds," "Skirmishing," and "Surrender"); *id.* at 434-38 ("Curbing the Witch Hunters"); KALVEN, *supra* note 52, at 259, 299-399 ("*Partial Sanctions: The Anti-Communist Inheritance*"); *id.* at 457-574 ("*Official Inquiry*"). *See also infra* note 273 (Cold War).

138. Strossen, *supra* note 29, at 79.

139. But for some mitigation, see *infra* note 142 (two excuses).

140. *See supra* note 79 ("The communists cannot win; the NAACP cannot lose" and "There are red cases and . . . black cases."). *But see* text accompanying *infra* note 220 (when conflicting civil rights won and property rights lost in Warren Court).

141. *See* Strossen, *supra* note 29, at 70-71 ("parties invoking free speech rights won almost three-fourths of their cases before the Warren Court" which was an "unusually high success rate").

142. Two mitigating factors or excuses emerge. First, the Warren Court "was sufficiently protective of [Communists' free speech] rights to earn the vicious attacks of anti-Communists and . . . to be accused of being subject to Communist influence." *Id.* at 79 (footnotes omitted). Secondly, this failure occurred at "the height of Cold War hysteria." *Id.* at 79. However, it is these occasions which particularly require an independent Supreme Court. *See infra* note 273 (Cold War references).

Despite such exceptions and pessimism about post-1963 developments, Strossen's conclusion is crisp and bold: "on the whole, the Warren Court was the most speech-protective Court that we have yet seen, leaving us a lasting legacy of protective precedents and principles."[143] But, how—especially if "specific doctrinal analyses" were eschewed[144]—was that achieved? Strossen and Ronald Rotunda[145]—"The Warren Court and Freedom of the Press"[146]—suggest that a broader, more all-encompassing jurisprudence emerged.[147] Driven by a "general spirit or attitude" to and a "broad vision of the First Amendment,"[148] two developments intertwined: "All speech [was treated] as presumptively protected" and "artificial categories and classifications among speech" was abandoned.[149] One result, when confronted by two First Amendment clauses— "freedom of speech, or of the press"[150]—is to join, not divide: "the Warren Court did not distinguish between 'speech' and 'the press.'"[151] Therefore, to conform with the *Retrospective* theme—"not . . . to bury the Warren Court in criticism, but to praise it"[152]—a pivotal First Amendment decision, *New York Times v. Sullivan*,[153] is, from speech and press perspectives, eulogized.[154] Denigration, despite being omitted from *A Retrospective*,[155] is, however, possible even with *Sullivan*.[156]

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143. Strossen, *supra* note 29, at 68. *But see* text accompanying *supra* note 132 (erosion of Warren Court precedents).

144. *See* text accompanying *supra* note 131 (no specific doctrinal analysis or future guidance). *But see supra* note 131 (Gunther's view of doctrinal innovations); Rotunda, *supra* note 64, at 86-97 (Warren Court's "intellectual legacy" of "not distinguish[ing] between 'speech' and 'the press'" so that the First Amendment would "cover all forms of communication").

145. "*Ronald D. Rotunda*, Albert E. Jenner, Jr., Professor of Law, University of Illinois." THE WARREN COURT, *supra* note 11, at x.

146. Rotunda, *supra* note 64.

147. Despite Strossen, *supra* note 29 and Rotunda, *supra* note 64, this may be an easily dissipatable facade. *See infra* note 149 ("pragmatic" approach).

148. Strossen, *supra* note 29, at 71.

149. *Id.* at 70. *But see id.* at 71 (noting that at bottom "[t]he Warren Court had a realistic, pragmatic" approach: "freedom of expression [was] a preferred constitutional value").

150. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

151. Rotunda, *supra* note 64, at 86. *See also id.* at 87, 88, 90, 98 (applying this amalgamation view to right of access to trials, libel litigation, and campaign financing). *But see id.* at 99 n.8 (articles criticizing the amalgamation view).

152. *Id.* at 97. Therefore, a pivotal First Amendment Warren Court decision—*New York Times v. Sullivan*, 376 U.S. 254 (1964), *see infra* note 153—can be eulogized, not denigrated. *But see infra* note 156 (denigration of *Sullivan*).

153. 376 U.S. 254 (1964) (First amendment—via Fourteenth amendment—constitutionalization of state libel law to protect persons and corporations who defame public figures). *See generally* LEWIS, MAKE NO LAW, *supra* note 18.

154. *See, e.g.*, Strossen, *supra* note 29, at 69, 72-73, 76; Rotunda, *supra* note 64, at 88-90 ("The protection that *Sullivan* and its progeny offer has benefited all of us"); Kozinski, *supra* note 63, at 383 ("I have no trouble at all with *Sullivan*"); Lewis, *supra* note 52, at 402 ("freedom of all Americans to criticize their rulers, government and government officials").

155. *But see* Rotunda, *supra* note 64, at 89 ("People have criticized *Sullivan* . . . as being insufficiently protective of libel defendants. Perhaps."). Note, however, the equivocation—"[p]erhaps"—and that no citations or references are provided. *Compare infra* note 156.

156. *See, e.g.*, LEWIS, MAKE NO LAW, *supra* note 18, at 200-18 ("The Dancing Has Stopped"); *id.* at 219-33 ("Back to the Drawing Board?"); Epstein, *supra* note 32 (from an institutional perspective Sullivan wrongly decided). For an Australian comparison, see James A. Thomson, *Slouching Towards Tenterfield: The*

"[D]octrinal problems"[157] also haunt the Warren Court's religion—free exercise and establishment[158]—jurisprudence.[159] Again, no necessary correlation exists between doctrine and practical effects. Therefore, a concession—that Warren Court decisions on these First Amendment clauses had "broad political and social impact"[160]—can co-exist with a conclusion: those decisions "lack[] substantive majesty."[161] For John Sexton[162]—"The Warren Court and the Religion Clauses of the First Amendment"[163]—that conclusion "partly" emanates from "doctrinal problems, which the Warren Court either perpetuated or generated itself."[164] Failure to contextualize—recognizing and acting upon—relationships among the religion clauses' terminology contributed to this doctrinal disarray. First Amendment phrases were being severed, not joined.[165] However, exposing this "fundamental [Warren Court] weakness"[166] is far removed from a fatal or antagonistic attack. Obviating any such obloquy are statistics: "The corpus of cases involving the Religion Clauses . . . decided by the Warren Court is small . . . . [T]here are only ten cases in all."[167]

Constitutionalization of Tort Law in Australia, 3 TORT L. REV. 81 (1995).

157. Sexton, *supra* note 103, at 105.

158. *See supra* note 150 (First amendment).

159. *See infra* note 167 (ten cases). *See generally* CURRIE, *supra* note 36, at 410-12, 444-46; Paul G. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347 (discussing Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969)); John Mansfield, *Conscientious Objection—1964 Term*, 1965 RELIGION & PUB. ORD. 10. *See also supra* notes 85, 86 (references).

160. Sexton, *supra* note 103, at 104.

161. Sexton, *supra* note 103, at 105.

162. *"John Sexton*, Dean, New York University Law School." THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at x.

163. Sexton, *supra* note 103.

164. *Id.* at 105.

165. Contrast the text accompanying *supra* notes 150-51 (amalgamation of free speech and press clauses).

166. Sexton, *supra* note 103, at 114.

167. *Id.* at 104. The ten cases are: Engel v. Vitale, 370 U.S. 421 (1962) (state composed prayers to be read aloud in public schools infringed establishment clause); Abington Township v. Schempp, 374 U.S. 203 (1963) (bible reading and recitation of Lord's Prayer in public schools infringed establishment clause); United States v. Seeger, 380 U.S. 163 (1965) (conscientious objectors' religious beliefs); the Sunday Closing Law cases, McGowan v. Maryland, 366 U.S. 420 (1961) (Maryland legislation prohibiting or limiting specified activities, including retail sales, not contravene First amendment's establishment clause as applied to states via Fourteenth Amendment), Two Guys from Harrison v. McGinley, 366 U.S. 582 (1961) (same), Braunfeld v. Brown, 366 U.S. 599 (1961) (same), and Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961) (same); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969) (Georgia law, permitting juries to decide church property disputes by examining whether church leaders disregarded their faith's tenets, unconstitutional); Flast v. Cohen, 392 U.S. 83 (1968) (general taxpayers have standing to litigate establishment clause cases); Torcaso v. Watkins, 367 U.S. 488 (1961) (Maryland Constitution's requirement of officeholders declaring a belief in God unconstitutional); Epperson v. Arkansas, 393 U.S. 97 (1968) (Arkansas statute prohibiting teaching of evolution unconstitutional); Board of Education v. Allen, 392 U.S. 236 (1968) (New York's practice of giving parochial school students textbooks unconstitutional); Sherbert v. Verner, 374 U.S. 398 (1963) (South Carolina unemployment compensation statute's eligibility provisions unconstitutionally applied by state to deny benefits where work refused on religious grounds). *See also supra* note 159 (literature on these cases). Compare the number of free speech cases. *See, e.g.*, Strossen, *supra* note 29, at 73-74 ("Numerical Indicia" indicating, for example, that "even by . . . Earl Warren's [1969] resignation, Justice Brennan [who joined the Supreme Court in 1956] had participated in over three-hundred such cases"). Also compare *infra* note 211 (statistics on takings and other cases).

Much more—quantitatively and qualitatively—parades under Yale Kamisar's[168] "The Warren Court and Criminal Justice."[169] For example, assume a revolution in constitutional law[170] occurred during 1953-1964.[171] Most probably,[172] it was "the Warren Court's 'revolution' in American criminal procedure . . . that lasted from 1961 . . . to 1966 or 1967."[173] Familiar cases abound: *Griffin v. Illinois*,[174] *Mapp v. Ohio*,[175] *Gideon v. Wainwright*,[176] *Escobedo v. Illinois*,[177] *Malloy v. Hogan*,[178] *Massiah v. United States*,[179] *Miranda v. Arizona*,[180] and the lineup-pretrial identification cases.[181] Battles or, perhaps, wars—over doctrines, practical impact, and the

168. "*Yale Kamisar*, Clarence Darrow Distinguished University Professor, University of Michigan Law School . . . ." THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at ix. *See also supra* note 13 (Kamisar's publications on the Warren Court).

169. Kamisar, *supra* note 43.

170. *See supra* notes 52, 68 (revolution and counter-revolution debate and references). *See also* BERNARD SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT (1957) (characterizing the post-1937 Supreme Court era as a constitutional revolution). More generally on constitutional law revolutions, see, for example, William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907 (1988); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13 (1995); Robert Justin Lipkin, *The Anatomy of Constitutional Revolutions*, 68 NEB. L. REV. 701 (1989); Robert Justin Lipkin, *Conventionalism, Pragmatism, and Constitutional Revolutions*, 21 U.C. DAVIS L. REV. 645 (1988); James A. Thomson, *The Australia Acts 1986: A State Constitutional Law Perspective*, 20 U. W. AUST. L. REV. 409, 410 n.3 (1990) (references). More historically and jurisprudentially, see Stanley N. Katz, *Constitutionalism and Revolution*, 14 CARDOZO L. REV. 635 (1993); Ali Khan, *A Legal Theory of Revolutions*, 5 B.U. INT'L L.J. 1 (1987); David A.J. Richards, *Revolution and Constitutionalism in America*, 14 CARDOZO L. REV. 577 (1993).

171. *But see supra* note 52 (suggesting that Warren Court merely "built upon and expanded" prior precedents).

172. *But see supra* note 110 (Warren and Marshall's views that the electoral reapportionment and voting cases constituted the revolution).

173. Kamisar, *supra* note 43, at 116 (footnotes omitted). *See also supra* note 50 (referring to Kamisar); *supra* note 52 (debate as to whether there was a revolution). For a general overview, see *supra* note 55 (references). For the Burger-Rehnquist Courts' counter-revolution thesis, see Streiker *supra* note 68. *See also infra* note 190 (same).

174. 351 U.S. 12 (1956) (under certain conditions, indigent criminal defendants' right, on appeal, to a free transcript). *See, e.g.*, The Supreme Court 1955 Term, *Cost of Criminal Appeals*, 70 HARV. L. REV. 126-29 (1956).

175. 367 U.S. 643 (1961). *See supra* note 83.

176. 372 U.S. 335 (1963) (incorporating Sixth amendment indigent criminal defendants' right, at least in serious cases, to free counsel into Fourteenth amendment against the states). *See generally* LEWIS, CLARENCE EARL GIDEON, *supra* note 18; Kamisar, *supra* note 43, at 139 (noting that initial "widespread applause" for Gideon quickly dissipated into criticism); Jerold H. Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. L. REV. 211; The Supreme Court, 1962 Term, *Rights of Indigents at Trial*, 77 HARV. L. REV. 103-05 (1963).

177. 378 U.S. 478 (1964) (right to counsel infringed by questioning indicted or incarcerated suspects without their lawyers' knowledge). *See generally* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 161-62 (1980) (summarizing disagreements over Escobedo's meaning); The Supreme Court 1963 Term, *Right to Counsel Before Trial*, 78 HARV. L. REV. 217-23 (1964).

178. 378 U.S. 1 (1964) (self-incrimination Fifth Amendment privilege incorporated into Fourteenth Amendment rights against the states). *See generally* CURRIE, *supra* note 36, at 447; The Supreme Court 1963 Term, *Self Incrimination*, 78 HARV. L. REV. 223-30 (1964).

179. 377 U.S. 201 (1964) (absent counsel, the Sixth Amendment precludes using incriminating statements purposefully obtained, after an indictment, by law enforcement officers). *See generally* The Supreme Court 1963 Term, *supra* note 177, at 217-23.

180. 384 U.S. 436 (1966). *See supra* note 84.

181. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967). These Warren Court cases "applied the right to counsel to [pre-trial] identification [lineups]." Kamisar, *supra* note 43, at 130. However, the Burger Court "virtually demolished" them in what "may well be the saddest chapter in modern American criminal procedure." *Id.* at 131.

legitimacy of these decisions—erupted.[182] Indeed, they have not ceased or dissipated.[183] Proponents[184] and antagonists[185]—from within the Supreme Court,[186] among scholars,[187] in Congress,[188] and between presidential candidates[189]—generated a whirl-wind of revolution and counter-revolution.[190]

A Retrospective conveys that complexity. Doctrinal analysis, for example, of the Warren Court's constitutionalization of federal and state criminal law[191] attracted criticism not only from opponents and supporters[192] but also, even when only critics were involved, "from opposite directions."[193] One result may be that only remnants remain of the substantive aspects[194] of this criminal law revolution.[195] Even so, other benefits[196] endure. For example, the experience gained by exposing and testing "innovative"[197] formulations of constitutional

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182. *See generally* BAKER, *supra* note 84; GRAHAM, *supra* note 55; Kamisar, *supra* note 43, at 119-21, 128-29, 143.

183. *See, e.g.*, Kamisar, *supra* note 43 (discussing Burger and Rehnquist Courts' and scholarly attacks).

184. *See, e.g.*, GRAHAM, *supra* note 55; Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970); Kamisar, *supra* note 43.

185. *See, e.g.*, BRADLEY, *supra* note 55; Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968). Judge Friendly has been characterized as "perhaps the most formidable [and 'powerful'] critic of the Warren Court's criminal procedure cases." Kamisar, *supra* note 43, at 118, 143. *See also supra* notes 181, 183 (Burger and Rehnquist Courts).

186. *See, e.g.*, Kamisar, *supra* note 43, at 128 ("Justice White's bitter dissent" in *Miranda*).

187. *See supra* notes 183 (supporters), 184 (critics).

188. *See, e.g.* Kamisar, *supra* note 43, at 116 ("strong criticism of the Court by many members of Congress . . . and the obviously retaliatory provisions of the Crime Control Act of 1968"); *id.* at 143 (1968 congressional legislation "'repealing' . . . *Escobedo* and *Miranda*" and "purporting to repeal the lineup decisions") (footnote omitted). *See generally* ADAM CARLYLE BRECKENRIDGE, CONGRESS AGAINST THE COURT (1970) (discussing congressional reaction to *Mallory* and *Miranda*). *See also supra* note 79 (Congress' anti-Court attacks).

189. *See, e.g.*, Kamisar, *supra* note 43, at 116 ("strong criticism of the Court by . . . presidential candidate Richard Nixon"); *id.* at 139 (Supreme Court "a major political issue in the 1968 presidential campaign"); Hall, *supra* note 37, at 293 (Nixon's 1968 campaign attacks and promises). "In mid-October [1968] . . . Nixon went after the law-and-order issue harder than ever. He stepped up his criticism of the Supreme Court and promised that he would name to the Court only strict constructionists." 2 STEPHEN E. AMBROSE, NIXON: THE TRIUMPH OF A POLITICIAN 201 (1989).

190. *See generally supra* note 68 (counter-revolution thesis). Kamisar considers that "[i]n the main, in place of the counterrevolution in criminal procedure that many expected, 'the Burger Court waged a prolonged and rather bloody campaign of guerrilla warfare.'" Kamisar, *supra* note 43, at 131 (quoting Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442 (1987)).

191. *Cf. supra* note 153 (constitutionalization of state libel law); Thomson, *supra* note 156 (same).

192. *See* Kamisar, *supra* note 43, at 119-21 ("Criticism of *Miranda*—From Opposite Directions"). That is, there were conservative and liberal Miranda critics.

193. *Id.* at 139 (emphasis omitted). *See also* Hall, *supra* note 37, at 293-95 (postulating differing approaches to Warren Court: the "traditional, consensus approach" and the "three schools of revisionist scholarship").

194. *But cf.* text accompanying *infra* notes 237-39 (institutional aspects—judicial activism and methods of constitutional interpretation—of the Warren Court still resonate).

195. *See supra* note 68 (debate on whether, and, if so, the extent to which Warren Court opinions and doctrines remain extant). *See also supra* note 181 (demolition of Warren Court lineup cases). *See also* Kozinski, *supra* note 25, at 382 ("very little is left of the Warren Court legacy"); Lewis, *supra* note 52, at 405 ("conclud[ing] that the Warren Court's bold efforts in the criminal law field were less successful, less lasting, than in reapportionment or race or freedom of expression").

196. Of course, especially for conservative critics and some liberal critics, *see supra* notes 192-93, there are also detriments.

197. Hall, *supra* note 37, at 298 ("The majority of [Warren Court] Justices invariably adopted innovative approaches to major constitutional controversies.").

rules, commands and doctrines.[198] Perhaps simultaneously, that is implicated in and was a reaction to the relationship between such doctrinal developments, their durability, and intense political and public pressures on the Supreme Court.[199] During 1953-1969 such extraneous pressures, though probably most vociferous and sustained against constitutional decisions limiting law enforcement power to investigate and prosecute crimes,[200] were not unusual.[201] Of course, when placed within a longer historical continuum, this is clearly not a unique Warren Court phenomenon.[202] Consequently, any sympathy *A Retrospective* invokes for the Warren Court can easily be diluted. As that occurs, reassessments of the 1961-1967 criminal law revolution's doctrinal edifice may produce new revisionist syntheses starkly at variance with *A Retrospective.*[203]

In complete contrast, "quiescence," not "tumult"[204] characterizes judicial review of property rights and economic liberties during 1953-1969.[205] For several reasons,[206] as Richard Epstein[207]—"The Takings Jurisprudence of the Warren Court: A Constitutional Siesta"[208]—indicates, "[t]he question of property rights, their status, and protection, was not an issue that much troubled or preoccupied the Warren Court."[209] Therefore, from a doctrinal perspective, the takings clause jurisprudence provides a "far more meager [harvest] than it is in other areas."[210] At most, "the Warren Court's takings decisions help[] set the

198. *See supra* note 71 (references). For example, Chief Justice Warren's *Miranda* opinion, "laying out what amounted to a code of police procedure after arrest, seemed to some more legislative than judicial in character." Lewis, *supra* note 52, at 405. Another benefit may be "'the dynamic of change [which] may well be more significant than many of the solutions proposed by the Warren Court.'" Kamisar, *supra* note 43, at 146 (quoting Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 539).

199. *See supra* notes 79, 188-89 (congressional, presidential and public attacks on the Warren Court).

200. *See supra* note 182 (references).

201. For example, attacks on Warren Court race, school prayer and bible reading, and reapportionment decisions. *See supra* notes 79 (references). "[A]s much as [at] any time in [America's] history . . . controversy . . . usually characterized reaction to the Warren Court. . . . [M]any . . . of its landmark rulings produced real hostility, disobedience, and . . . calls for [Justices'] impeachment . . . . Particularly controversial were . . . school prayer cases, pro-Communist speech and protest decisions [and] obscenity rulings . . . ." Hall, *supra* note 37, at 306.

202. *See supra* note 78 (pre-Warren Court). For pre- and post-Warren Court pressures, see, for example, KEYNES & MILLER, *supra* note 79; MORGAN, *supra* note 79; MURPHY, *supra* note 79; SCHMIDHAUSER & BERG, *supra* note 79.

203. *See, e.g.*, Streiker, *supra* note 68 (proposing a "decision" and "conduct" rules dichotomy).

204. Epstein, *supra* note 63, at 160.

205. For pre- and post-1953-1969 cases and doctrines, see *id.* at 159-62. *See generally* Thomson, *Swimming in the Air, supra* note 6 (examining property and civil rights in the Fuller Court and juxtaposing Warren Court's *Brown* decision); *supra* note 72 (central, unresolved constitutional law dilemma).

206. *See* Epstein, *supra* note 63, at 160-62 (historical explanation concerning *Lochner* and the 1937 New Deal "revolution on the status of property rights" and political explanation because of 1953-1969 "legislative agenda did not force the [Supreme] Court to mediate between aggressive state regulators and beleagured property owners").

207. *"Richard A. Epstein*, James Parker Hall Distinguished Service Professor of Law, University of Chicago Law School . . . ." THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at ix.

208. Epstein, *supra* note 63.

209. *Id.* at 159. "[I]nsofar as the focus . . . is the protection of property rights and economic liberties, there is little energy, excitement, or sense of intellectual adventure in the Warren Court." *Id.* at 160.

210. *Id.* at 162.

stage for contemporary understandings of the takings issue."[211] However, there are also connections with larger themes in *A Retrospective*. First is the contrast between retaining (in property rights litigation) and rejecting (in criminal law cases) the status quo.[212] Second is the suggestion that "the modern Civil Rights movement"[213] dominated and skewed 1953-1969 doctrinal developments, for example, in free speech,[214] criminal law,[215] and takings[216] cases.[217] Epstein vigorously conveys this perspective:

> [F]or takings law there was no innovation [in *Heart of Atlanta Motel v. United States*[218]] . . . .
>
> [F]or the Court to innovate on takings in the context of civil rights would have been too suicidal for its political survival. The powerful New Deal conception that property does not include the right to pick one's trading partners was a status quo position that the Warren Court was eager to embrace.
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> . . . .

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211. *Id.* at 162. *See also id.* at 160 (listing six Warren Court "takings cases"). "Between 1953 and 1969 the [Supreme] 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." Hall, *supra* note 37, at 300. For other constitutional law areas which the Warren Court "ignored" *see* Kozinski, *supra* note 25, at 382-83 ("four copyright cases . . . [o]nly three cases even mention the Contract Clause . . . [and] three trademark cases"). *Compare supra* note 167 (number of free speech and religion cases).

> By staking out certain constitutional areas in which it took an intense interest, and giving short shrift to others, the Warren Court contributed to the now widespread perception that there really *is* no such thing as constitutional law, that it's all a matter of the philosophy of the particular judges who are making the decision.

Kozinski, *supra* note 25, at 384 (emphasis in original).

212. *Compare* text accompanying *supra* notes 170-90 (criminal law "revolution") *with* text accompanying *supra* notes 209-10 (property cases "meager").

213. Epstein, *supra* note 63, at 175. On this "modern" movement *see, e.g.*, TAYLOR BRANCH, PARTING THE WATERS: MARTIN LUTHER KING AND THE CIVIL RIGHTS MOVEMENT 1954-63 (1988); SETH CAGIN & PHILIP DRAY, WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI (1988); DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN LEADERSHIP CONFERENCE (1986); STEVEN KASHER, THE CIVIL RIGHTS MOVEMENT: A PHOTOGRAPHIC HISTORY 1954-68 (1996); ROBERT J. NORRELL, REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE (1985); FRED POWLEDGE, FREE AT LAST? THE CIVIL RIGHTS MOVEMENT AND THE PEOPLE WHO MADE IT (1991); JAMES R. RALPH, JR., NORTHERN PROTEST: MARTIN LUTHER KING, JR., CHICAGO, AND THE CIVIL RIGHTS MOVEMENT (1993); THE CIVIL RIGHTS MOVEMENT IN AMERICA (Charles W. Eagles ed., 1986). For the earlier (1930s and 1940s) movement, see EGERTON, *supra* note 110.

214. *See, e.g.*, Strossen, *supra* note 29, at 74-77 ("First Amendment legal holdings arose in the factual context of the struggle for racial justice"). For elaborations *see* LEWIS, MAKE NO LAW, *supra* note 18; Fred D. Gray, *The Sullivan Case: A Direct Product of the Civil Rights Movement*, 42 CASE W. RES. L. REV. 1223 (1992).

215. *See, e.g.*, Kamisar, *supra* note 43, at 117-19 ("The Relevance of the Struggle for Civil Rights").

216. *See, e.g.*, Epstein, *supra* note 63, at 160, 173-75 ("Civil Rights Cases").

217. For the civil rights movement's general influence on the 1953-1969 Supreme Court and Earl Warren, see, for example, Hall, *supra* note 37, at 299-300 ("Like Courts of other eras, the Warren Court had a reciprocal and reinforcing relationship with its own times . . . . The Warren Court was very much *in* . . . the stream of history . . . . The Justices operated in a political culture . . . . The Warren Court . . . was a product of its time, just as were previous Courts.") (emphasis in original).

218. 379 U.S. 241 (1964) (Congress' interstate commerce power sustained the Civil Rights Act of 1964 prohibition of racial discrimination in public accommodation). *See generally* CURRIE, *supra* note 36, at 425; The Supreme Court 1964 Term, *Civil Rights Act of 1964*, 79 HARV. L. REV. 128-32 (1965).

> Yet so strong was the Warren Court's commitment on discrimination that it was prepared [in *Reitman v. Mulkey*[219]] to strike down the reinstatement of the common law position [that treats the right to dispose of property to whomsoever one sees fit as an ordinary property right] even though it would not dare to require some antidiscrimination law in private housing. Any conflict between property rights and the modern Civil Rights movement could come out only in one way.[220]

B. Theory and Process

Dialogue about methodology—fundamental questions concerning constitutional interpretation,[221] comparative institutional power, legitimacy, and competence,[222] and judicial deference or activism[223]—does not dominate *The Warren Court: A Retrospective*.[224] Whether or not intended, this perpetuates a particular view:

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219. 387 U.S. 369 (1967). *See generally* CURRIE, *supra* note 36, at 420; Black, *Foreword*, *supra* note 92; Karst & Horowitz, *supra* note 94.

220. Epstein, *supra* note 63, at 174-175 (footnote omitted). *Cf.* text accompanying *supra* note 138 (communist-civil rights double standard).

221. *See supra* notes 1, 71-72 (references).

222. First, for normative and empirical aspects of congressional and presidential constitutional decisionmaking and interpretation, see David P. Currie, *The Constitution in Congress: The Third Congress, 1793-1795*, 63 U. CHI. L. REV. 1 (1996); David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U. L. REV. 606 (1996); David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161 (1995); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775 (1994); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); James A. Thomson, *An Australian Bill of Rights: Glorious Promises, Concealed Dangers*, 19 MELB. U.L. REV. 1020, 1026 n.24 (1994) (references); Symposium, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993); Symposium, *Elected Branch Influences in Constitutional Decisionmaking*, 56 L. & CONTEMP. PROBS. 1 (1993). Secondly, for debates on who—Supreme Court, Congress, President, or the People—is the ultimate constitutional authority, see Thomson, *supra*, at 1026 n.24 (references on judicial supremacy); *id.* at 1034 nn.62-63 (Congress' power, for example, under U.S. CONST. amend. XIV, § 5); *infra* note 266 (political question doctrine). Thirdly, for suggestions that Congress is the pre-eminent protector of individual rights, see Thomas C. Berg, *What Hath Congress Wrought? An Interpretative Guide to the Religious Freedom Restoration* Act, 39 VILL. L. REV. 1, 2 (1994) ("[T]he most important step in protecting the constitutional right of free exercise of religion has come not from the federal courts, but from Congress.") (footnote omitted); Henry P. Monaghan, Book Review, 94 HARV. L. REV. 296, 310 (1980) (reviewing JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980)) (Congress and states have established most rights and these are above minimum constitutional requirements). *See also supra* note 70 (judicial review's antimajoritarian conundrum).

223. *See generally* WOLFE, *supra* note 72; THE SUPREME COURT, *supra* note 72; David P. Bryden, *A Conservative Case for Judicial Activism*, 111 PUB. INTEREST 73 (1993) (noting that New Deal "liberal restraintists" have replaced liberal "activists" but that conservatives remain restraintists and create "very few conservative rights"); David P. Bryden, *Is the Rehnquist Court Conservative?*, 109 PUB. INTEREST 73 (1992) (noting that the Rehnquist Court is not creating liberal or conservative rights); Lino A. Graglia, *Judicial Activism: Even on the Right It's Wrong*, 95 PUB. INTEREST 57 (1989); Alpheus T. Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385 (1969).

224. But for some glimpses, see THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 143-44 (congressional legislation versus Supreme Court decisions); *id.* at 205 ("Justice Brennan's use of history" in constitutional adjudication); *id.* at 285 (Warren Court's "common law approach to constitutional analysis" and Thayerian "dark side" to judicial activism which "has tempted [Americans] into shirking our responsibility . . . to resolve [social problems] in . . . nonjudicial arenas"); *id.* at 301-02 (judicial activism prior to and in Warren Court); *id.* at 338-48 (constitutional theory in Warren era); *id.* at 401 (Congress' Fourteenth Amendment responsibilities); *id.* at 405 (Harlan's view that Court's "constitutional function" was not social reformation).

> Warren and at least four other of his colleagues, Douglas, Brennan, Fortas, and Thurgood 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 . . . . The Warren Court Justices were remarkable for their lack of concern about the era's main currents of constitutional thought . . . . 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.[225]

Like takings clause jurisprudence,[226] *A Retrospective* conveys the impression that only scholars[227] and some others,[228] not Supreme Court Justices, participated in "the era's main currents of constitutional thought."[229] Even if five,[230] out of seventeen,[231] Justices "constitute" the Warren Court, other Justices, notably[232] Frankfurter,[233] Harlan,[234] and Black,[235] did lead and stimulate these debates over constitutional decision making processes. Such controversies, encompassing passive virtues, judicial activism, and anti-majoritarian features and consequences of judicial review, are encapsulated within an extensive repository of the *United States Reports* and academic litera-

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225. Hall, *supra* note 37, at 298-99.

226. This is an example where scholars, not the Supreme Court, led. *See* Epstein, *supra* note 63, at 162 ("The academic scholarship on the Takings Clause has turned out at least in part to be more influential than the decisions of the Court itself.").

227. *Compare* text accompanying *supra* note 225 (Justices' "little sustained interest") *with* Feldman, *supra* note 72 at 340-43 (discussing scholars' constitutional law theories: Sacks, Bickel, Wellington, Brown, Wechsler, Pollak, Black, Gunther).

228. *See, e.g., supra* note 185 (Judge Henry Friendly); Feldman, *supra* note 72, at 360 nn.110, 124 (citing scholarship by Judge Learned Hand, *see supra* note 96, and Judge Skelly Wright).

229. Hall, *supra* note 37, at 298.

230. *Id.* (Warren, Douglas, Brennan, Fortas, and Marshall). There may be more than five. *See id.* ("Warren and *at least* four of his colleagues") (emphasis added).

231. *See supra* note 40 (list of 17 Justices).

232. Other Justices could also be included. *See, e.g.*, HOCKETT, *supra* note 72, at 215-88 (Jackson); KLUGER, *supra* note 52, at 729-31, 771 (Jackson's attempt, via U.S. CONST. amend. XIV, § 5, to have Congress take constitutional responsibility for enforcing equal protection clause's mandate against racially segregationist states); Lewis, *supra* note 52, at 401 (same).

233. *See generally* HIRSCH, *supra* note 15; RICHARD G. STEVENS, FRANKFURTER AND DUE PROCESS (1987); UROFSKY, FELIX FRANKFURTER, *supra* note 19; Michael Ariens, *A Thrice-Told Tale, Or Felix the Cat*, 107 HARV. L. REV. 620 (1994); Paul Freund, *Mr Justice Frankfurter*, 26 U. CHI. L. REV. 205 (1959); Sanford V. Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973); Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism"*, 27 GA. L. REV. 697 (1993); Nathaniel L. Nathanson, *Mr Justice Frankfurter and the Holmes Chair: A Study in Liberalism and Self Restraint*, 71 NW. U. L. REV. 135 (1976); Alfred S. Neely, *Mr Justice Frankfurter's Iconography of Judging*, 82 KY. L.J. 535 (1993-94); Sanford Victor Levinson, Skepticism, Democracy, and Judicial Restraint: An Essay on the Thought of Oliver Wendell Holmes and Felix Frankfurter 171-324 (1969) (unpublished Ph.D. dissertation, Harvard University) (on file with author). *See also infra* note 259 (references), 266 (Frankfurter's role in *Brown*).

234. *See generally* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT (1992); THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN (David L. Shapiro ed., 1969); Symposium, *Centennial Conference in Honor of Justice John Marshall Harlan* 36 N.Y.L. SCH. L. REV. 1 (1991). *See also supra* note 16 (Dorsen's Harlan publications).

235. *See generally* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994); Thomson, *Mirages of Certitude*, *supra* note 1, at 69 n.10 (bibliography of pro-Black scholars); *id.* at 70 n.11 (bibliography of anti-Black scholars); *id.* at 77-80 (comparing and contrasting Black and Frankfurter's methods and theories of constitutional adjudication and interpretation). *See also infra* note 254 (references).

ture.[236] Importantly, even if substantive Warren Court doctrines have been repudiated,[237] these perennial process puzzles[238] continue to resonate.[239] For example, Supreme Court activism, whether to constitutionalize liberal or conservative values, is criticized and eulogized often with attackers and defenders switching roles and allegiances[240] depending on whether their values command four or five votes.[241] Attributing the vitality and richness of this aspect of judicial review to the Warren Court would, therefore, not be remiss.

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236. *See supra* notes 1, 10-21, 71-72, 92-99 (references).

237. *See supra* notes 78 (counter-revolution thesis), 181 (demolition of criminal law lineup cases), 195 ("very little is left"). But for remnants of hope, see Kamisar, *supra* note 43, at 145-46 ("although battered and bruised, most of the Warren Court's famous precedents remain in place—waiting for a future court to reclaim the torch") (footnote omitted).

238. Compare the similar conundrums confronting, for example, the Chase (1864-1873) and Fuller (1888-1910) Courts, over judicial review of property, economic, and civil rights adumbrated in HAROLD M. HYMAN, THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE (1996); Thomson, *Not a Trivial Pursuit, supra* note 6; Thomson, *Swimming in the Air, supra* note 6.

239. For example, whether, and, if so, how, judicial review should differentiate between speech, property, and economic rights. *Compare* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41 (1992) (advocating strengthening judicial review vis-a-vis property and economic rights so as to equate with free speech judicial review) *with* Frank I. Michelman, *Liberties, Fair Values, and Constituitonal Method*, 59 U. CHI. L. REV. 91 (arguing for retention of differential elevation of free speech's judicial protection over property). Another example is in Martin H. Redish, *The Passive Virtues, The Counter-Majoritarian Principle, and The "Judicial-Political" Model of Constitutional Adjudication*, 22 CONN. L. REV. 647 (1990) (testing Bickel's 1960s theories, *see supra* note 2, against "standards of modern constitutional and political theory concerning the judiciary's proper role within [the American] system").

240. Generally, pre-1937, conservatives applauded and liberals denigrated the Supreme Court; from 1937-1969 liberals applauded and conservatives denigrated; and post-1969 their positions are, again, reversed. For pre-Warren Court examples, see Thomson, *Mirages of Certitude, supra* note 1, at 81 (noting difference in liberals pre-1937 denigration of and post-1937 applause for "vigorous" judicial review); James A. Thomson, *Making Choices: Tribe's Constitutional Law*, 33 WAYNE L. REV. 229, 240 n.48 (1986) (reviewing LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES (1985)) (characterizing as "[t]ransient advocates of judicial activism" conservatives and liberals who after 1937 reversed their attitude towards judicial activism and review). Similarly, conservatives who opposed Warren Court activism now applaud Rehnquist Court activism. *See, e.g.*, Bryden, *A Conservative Case, supra* note 223 (arguments for Supreme Court creation of conservative rights); Graglia, *supra* note 223, at 62-74 (discussing conservatives who support Rehnquist Court activism); Earl Maltz, *The Prospects of a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629 (1990) (suggesting breakage in link between liberalism and judicial activism and postulating emergence of a more aggressive conservative judicial activism). For an analysis of judicial review theories sustaining conservative activism (and liberalism's critiques), see Epstein, *supra* note 239; Michelman, *supra* note 239; Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301 (1993); Mark Tushnet, *Conservative Constitutional Theory*, 59 TUL. L. REV. 910 (1995). *See also* text accompanying *infra* note 266 (postulating judicial review dilemma for liberals).

241. Compare the statement attributed to Justice Brennan when emerging from "a heated conference" of the Justices: "Five votes can do anything around here." BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 6, 8, 146 (1996). *See also* SIMON, *supra* note 136, at 43, 54 (same). Also compare Learned Hand's Feb. 6, 1934 Letter to Justice Stone: "Who in hell cares what anybody says about [constitutional questions] but the Final Five of the August Nine . . . ?" ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 384 (1956).

IV. THE JUSTICES

Only six[242] of the seventeen[243] Warren Court members are allocated separate essays in *The Warren Court: A Retrospective*. However, reasons for this choice, in addition to the suggestion that they are "the six greatest Justices of the Warren era,"[244] are less than obvious. In contrast, three factors indicate why others,[245] but not the "greatest" six, should have been chosen. First, each of the six is already the subject of probing biographies and a plethora of articles.[246] Secondly, with rare exceptions,[247] *A Retrospective* does not provide new information, material, or revisionist perspectives. Thirdly, much less has been published on other Warren Court justices. Essays on Jackson,[248] Clark,[249] White,[250] and Goldberg,[251] for example,[252] might have supplied previously unrevealed information from their personal papers, such as draft

242. Justices Black, Brennan, Douglas, Frankfurter, Harlan, and Chief Justice Warren. *See infra* notes 254-59 (references). Compare the separate essays in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE, *supra* note 10, at 37-50 (Warren); *id.* at 51-63 (Frankfurter); *id.* at 64-85 (Douglas); *id.* at 86-105 (Black); *id.* at 109-22 (Harlan); *id.* at 123-36 (Brennan); *id.* at 139-54 (White); *id.* at 155-68 (Fortas).

243. *See supra* note 40 (Justices' names and tenure dates).

244. O'Hara, *supra* note 15, at 5.

245. For example, Justices Jackson, Clark, Goldberg, Fortas and Stewart. *See infra* notes 248-52 (references).

246. *See infra* notes 254-59 (references).

247. *See, e.g.*, THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 5, 229-34 (unpublished letters to and from Felix Frankfurter). *See also infra* note 259 (published Frankfurter letters).

248. *See, e.g.*, EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON (1958); HOCKETT, *supra* note 72; GLENDON SCHUBERT, DISPASSIONATE JUSTICE: A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON (1969); MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR (1969); Daniel A. Farber, *Robert Houghwout Jackson, in* THE SUPREME COURT JUSTICES, *supra* note 16, at 257-62; Paul A. Freund, *Mr Justice Jackson and Individual Rights, in* MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR, *supra*, at 29, 34-56; Paul A. Freund, *Individual and Commonwealth in the Thought of Mr. Justice* Jackson, 8 STAN. L. REV. 9 (1955); Philip B. Kurland, *Justice Robert H. Jackson-Impact on Civil Rights and Civil Liberties, in* SIX JUSTICES ON CIVIL RIGHTS 57-82 (Ronald D. Rotunda ed., 1983); Philip B. Kurland, *Robert H. Jackson, in* 4 THE JUSTICES, *supra* note 18, at 1282-1311. *See also supra* note 232 (Jackson's deference). Professor Dennis J. Hutchinson is writing a Jackson biography. UROFSKY, FELIX FRANKFURTER, *supra* note 19, at 222.

249. *See, e.g.*, Michael R. Belknap, *Tom Campbell Clark, in* THE SUPREME COURT JUSTICES, *supra* note 16, at 113-19; Richard Kirkendall, *Tom C. Clark, in* 4 THE JUSTICES, *supra* note 18, at 1347-60; Thomas M. Mengler, *Public Relations in the Supreme Court: Justice Tom Clark's Opinion in the School Prayer Case*, 6 CONST. COMMENTARY 331 (1989); A SYMPOSIUM ON THE TOM C. CLARK PAPERS, MARCH 19, 1985 (1987) (Tarlton Law Library, School of Law, University of Texas at Austin); BIOBIBLIOGRAPHY OF JUSTICE TOM C. CLARK (Tarlton Legal Bibliography Series, No. 27, 1985).

250. *See, e.g.*, Leon Friedman, *Byron R. White, in* 4 THE JUSTICES, *supra* note 18, at 1574-1606; William E. Nelson, *Byron White, in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE, *supra* note 10, at 139-54; William E. Nelson, *Byron Raymond White, in* THE SUPREME COURT JUSTICES, *supra* note 16, at 517-24; Rex E. Lee, *On Greatness and Constitutional Vision: Justice Byron R. White*, 1993 J. SUP. CT. HIST. 5.

251. *See, e.g.*, STEBENNE, *supra* note 48; Hennman, *supra* note 48.

252. Justice Fortas might also be included. *See, e.g.*, LAURA KALMAN, ABE FORTAS: A BIOGRAPHY (1990); BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (1988); Jonathan Kahn, *Abe Fortas, in* THE SUPREME COURT JUSTICES, *supra* note 16, at 169-70; James A. Thomson, *Repudiation and Revenge: Abe Fortas's Southern Connection*, 1 GA. J.S. LEGAL HIST. 495 (1991) (reviewing KALMAN, *supra*). On a much less well known Warren Court justice, see, for example, WILLIAM F. RADCLIFF, SHERMAN MINTON: INDIANA'S SUPREME COURT JUSTICE (1996).

opinions, letters, or intra-court memoranda,[253] and produced fresh insights about the Warren Court. That is, rejuvenation, not regurgitation, is required.

Regrettably, the latter, not the former, predominates in *A Retrospective.* Therefore, not unexpectedly, encomiums flow profusely to Black,[254] Brennan,[255] Douglas,[256] and Warren.[257] Even Harlan is re-shaped into and praised as a liberal activist judge.[258] Of the six, only one remains: Felix

253. For the existence, publication, and usefulness of such materials, see Thomson, *supra* note 82. For the location of these papers, see ALEXANDRA K. WIGDOR, THE PERSONAL PAPERS OF SUPREME COURT JUSTICES: A DESCRIPTIVE GUIDE (1986); LOCATION GUIDE TO THE MANUSCRIPTS OF SUPREME COURT JUSTICES (Adrienne de Vergie & Mary K. Kell comp., Tarlton Law Library Legal Bibliography Series, No. 16, Sept., 1978). For an example, see Mengler, *supra* note 249 (draft opinion in Clark papers); A SYMPOSIUM ON THE TOM C. CLARK PAPERS, *supra* note 249.

254. *See* Bernard Schwartz, *Hugo Black, in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 195-210. *See generally* HOWARD BALL, HUGO BLACK: COLD STEEL WARRIOR (1996); GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION (1977); TONY FREYER, HUGO L. BLACK AND THE DILEMMA OF AMERICAN LIBERALISM (1990); NEWMAN, *supra* note 235. *See also supra* note 235 (pro- and anti-Black scholars).

255. *See, e.g.*, Richard S. Arnold, *William J. Brennan, Jr., in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 204-09; Exum & Bilionis, *supra* note 23, at 316. *See generally* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR. AND THE DECISIONS THAT TRANSFORMED AMERICA (1993); REASON AND PASSION, *supra* note 12; Stephen J. Wermiel, *William Joseph Brennan, Jr., in* THE SUPREME COURT JUSTICES, *supra* note 16, at 49-60. *See also supra* note 23 (the Brennan Court); Thomson, *Mirages of Certitude, supra* note 1, at 77 n.73 (references on scholarship on Brennan).

256. *See, e.g.*, BALL & COOPER, *supra* note 1; SIMON, *supra* note 14; "HE SHALL NOT PASS THIS WAY AGAIN," *supra* note 16; THE DOUGLAS LETTERS, *supra* note 19; John P. Frank & Vern Countryman, *William O. Douglas, in* 4 THE JUSTICES, *supra* note 18, at 1219-46; Dorothy J. Glancy, *William Orville Douglas, in* THE SUPREME COURT JUSTICES, *supra* note 16, at 141-51. *See also* Thomson, *Mirages of Certitude, supra* note 1, at 69-70 nn.10-11 (bibliography of pro- and anti-Douglas scholars).

257. *See, e.g.*, Schwartz, *supra* note 22; Brennan, *supra* note 22; Hall, *supra* note 37, at 296-98; Tyrone Brown, *Clerking for the Chief Justice, in* THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 276-82. *See also supra* note 22 (the Warren Court). *See generally* SCHWARTZ, SUPER CHIEF, *supra* note 12; WHITE, *supra* note 16; Daniel B. Rodriguez, *Earl Warren, in* THE SUPREME COURT JUSTICES, *supra* note 16, at 501-09.

258. *See supra* note 234 (references).

Frankfurter.[259] Again, *A Retrospective* does not surprise. At least on two occasions Frankfurter is pilloried:

> . . . Frankfurter's star has dimmed considerably . . . . There were flaws in Frankfurter's makeup and judgment that eventually undermined his remarkable gifts and learning.[260]

> . . . Frankfurter may have been a better letter writer than he was a judge. With all his intellect and scholarly talents, Frankfurter's judicial career remained essentially a lost opportunity. As far as public law was concerned, he may well have had more influence as a law professor than as a Supreme Court Justice.[261]

Only Kurland,[262] "a stalwart partisan of Frankfurter's"[263] offers praise:[264]

> [Frankfurter], along with [Learned] Hand [was] one of the two greatest judicial minds to have served on the bench in [Kurland's] lifetime.
>
> . . . .
>
> [O]ne factor . . . disqualified [Frankfurter] from great influence within the Court and great popularity outside the Court. His notion of the constitu-

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259. *See generally* LIVA BAKER, FELIX FRANKFURTER: A BIOGRAPHY (1969); BURT, *supra* note 34; HIRSCH, *supra* note 15; HOCKETT, *supra* note 72, at 141-214; CLYDE E. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES (1961); PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION (1971); WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (2d ed. 1966); BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982); MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS (1982); JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA (1989); HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH (1960); Michael E. Parrish, *Felix Frankfurter, The Progressive Tradition, and the Warren Court*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE, *supra* note 10, at 51-63, 174-77; Michael E. Parrish, *Felix Frankfurter*, *in* THE SUPREME COURT JUSTICES, *supra* note 16, at 171-81; Michael E. Parrish, *Justice Felix Frankfurter and the Supreme Court*, *in* THE JEWISH JUSTICES OF THE SUPREME COURT REVISITED: BRANDEIS TO FORTAS 61-80 (Jennifer M. Lowe ed., 1994) (special edition of J. SUP. CT. HIST.). *See also* THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER: SOME REPRESENTATIVE OPINIONS (Samuel J. Konefsky ed., 1949); FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION (Philip B. Kurland ed., 1970); ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945 (Max Freedman ed., 1967); HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934 (Robert M. Mennel & Christine L. Compston eds., 1996); Felix Frankfurter: An Intimate Portrait: An Exhibition at the Harvard Law School 7 September to 31 December 1982 Honoring Felix Frankfurter on the Centennial of His Birth (prepared by Erika Chadbourn, 1982); A Passionate Intensity: Felix Frankfurter: Public Servant, Teacher, Jurist, Colleague: A Retrospective Exhibit at the Harvard Law School, September 6, 1977-February 6, 1978 (prepared by Erika S. Chadbourn, 1977); Felix Frankfurter: An Inventory of His Papers in the Harvard Law School Library (compiled by Erika S. Chadbourn, 1982); Felix Frankfurter: A Register of His Papers in the Library of Congress (Manuscript Division, rev. ed., 1984). *See also supra* note 233 (references); *infra* note 266 (references on Frankfurter's role in Brown).

260. Dorsen, *supra* note 24, at 248. *See also* Moglen, *supra* note 34, at 966 (arguing that Frankfurter's "career on the Supreme Court . . . was in many respects a failure" especially "the failure to become the dominant presence on the Court *in his* time") (emphasis added); UROFSKY, FELIX FRANKFURTER, *supra* note 19 (same); Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 175 (1991). *But see* text accompanying *infra* note 266 (Frankfurter revival or revisionism).

261. Schwartz, *supra* note 22, at 258. *See also* Mark B. Rotenberg, *Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Restraint*, 83 COLUM. L. REV. 1863 (1983) (reviewing MURPHY, *supra* note 259 & HIRSCH, *supra* note 15) ("Felix Frankfurter stands [in 1983], perhaps more than any other judge past or present, as an easy target for criticism.").

262. *See supra* note 15.

263. Kurland, *supra* note 24, at 225.

264. *See also* Feldman, *supra* note 72 (some faint praise for Frankfurter, but ultimately Warren receives the praise for "a crucial role" in *Brown*).

> tional role of the judiciary in [American] democracy often condoned results distasteful to . . . The Liberal Creed . . . .
> [Frankfurter] was concerned with the proper means for resolving issues in a constitutional democracy, whereas [most Warren Court justices] were primarily concerned with getting the right answers to those issues, however secured. Frankfurter . . . thought that the doctrine that the ends justified the means was pernicious . . . . [H]e had doubts beyond the theoretical that [Justices] fulfilled the qualifications for Platonic guardians. Certainly . . . their method of selection did not assure that they were so qualified.[265]

Some, but not most *Retrospective* contributors, may have glimpsed, for Warren Court aficionados, the future.

> [Frankfurter] is widely regarded [in 1994] . . . as a "tragic" figure . . . .
> . . . .
> Still . . . Frankfurter (even if he was an impossible person) deserves a biographer who doesn't regard Black and Douglas as . . . unambiguous heroes . . . . Frankfurter had at least an arguable claim to impressive consistency over time, opposing individual rights claims with which he had political sympathy not only when political conservatives dominated the Court . . . but also when political liberals did. From the perspective of the 1990s, when judicial activism is as likely to mean judicial invalidation of affirmative action (*Croson*), campaign finance reform legislation (*Buckley v. Valeo*), hate speech regulations (*R.A.V.*), or restrictive environmental legislation (*Lucas*) as it is to mean invalidation of abortion restrictions or school prayer, one wonders if the time has not arrived to begin contemplating a revisionist rehabilitation of Frankfurter.[266]

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265. Kurland, *supra* note 24, at 225, 228, 229. *See also* McManamon, *supra* note 233, at 701 (suggesting that Frankfurter "was much more of a success that we currently realize" and providing three reasons why characterization of Frankfurter as a failure is wrong); Alfred S. Neely, *Mr. Justice Frankfurter's Iconography of Judging*, 82 KY. L.J. 535, 573 (1993) (concluding that Frankfurter has "bested the best of his critics" in achieving "judicial restraint accompanied by proper disinterest"); Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 758 (1992) (concluding that "Frankfurter was not an apostle of judicial restraint" and that "Frankfurter's true successors were people like Earl Warren and Thurgood Marshall").

266. Michael J. Klarman, Book Review, 12 L. & HIST. REV. 399, 400, 407 (1994) (reviewing BALL & COOPER, *supra* note 1; UROFSKY, FELIX FRANKFURTER, *supra* note 19; YARBROUGH, *supra* note 234). This raises a stark question: should supporters and advocates of Warren Court judicial activism now (even if they can obtain five Supreme Court votes) switch to embracing Frankfurterian deference? *Cf. supra* note 240 (examples of allegiance switches). That is, should implementation of values be through democratic—legislative and executive—processes? Should judicial activism be repudiated? *See supra* notes 70 (references on countermajoritarian conundrum), 223 (references on judicial activism and deference). Should the political question doctrine be expanded? *See generally* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 118-46, 208-12 (1996) ("Judicial Review of Impeachments"); Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v. United States, 1993 SUP. CT. REV. 125 (advocating abandonment of nonjusticiability doctrine); Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 DUKE L.J. 231 (1994); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (answer: No); Wayne McCormack, *The Political Question Doctrine—Jurisprudentially*, 70 U. DET. MERCY L. REV. 793 (1993); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988); Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989); Linda S. Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303 (1996) (discussing relationship between standing and political question doctrine and concluding that the latter should be abolished). Note that in *Brown*, Justice Jackson advocated judicial restraint, *see supra* note 234, not Justice Frankfurter. On Frankfurter's role in Brown, see *supra* note 82 (references); Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960*, 100 HARV.

V. BROAD PERSPECTIVES

No glimmer emerges from *The Warren Court: A Retrospective* of a pragmatically important controversy: vis-a-vis their assumed beneficiaries,[267] was the effect of 1953-1969 Supreme Court decisions and doctrines beneficial or detrimental?[268] Oblivious to other possibilities,[269] essays constituting "A Broader Perspective"[270] push in one-beneficial-direction.[271] Consequently, the conclusion appears to be unavoidable: constitutional law promulgated by the Warren Court was and has been, especially for African-Americans, the civil rights movement, and criminal defendants, an unalloyed good. Indeed, by subsuming this conclusion into their premise, that the Justices were making constitutional law for African-Americans, civil rights agitators, and criminals, conservative critics[272] reinforced this conclusion's credibility.

Additionally, contextualized within and against broader parameters—cold war,[273] civil rights movement, and Vietnam war[274]—of nearly two decades of American history,[275] the Supreme Court becomes a beacon of shimmering light. Even "conservative" critics concede that

> [a]ny criticism of the Warren Court—at least any honest and fair criticism—must start with the acknowledgment that this was a truly great Court, that many of its members were giants of [America's] modern ju-

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L. REV. 817 (1987); Philip Elman, *Response*, 100 HARV. L. REV. 1949 (1987); Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938 (1987).

267. Sometimes these assumptions are wrong. For an example, see Thomson, *Swimming in the Air*, *supra* note 6, at 192-93 n.299 (discussing different views of Muller v Oregon, 208 U.S. 412 (1908) (holding constitutional Oregon statute imposing maximum working day for women in factories and laundries)).

268. This is a complex (and evolving) debate involving empirical and normative aspects. *See supra* notes 1-2, 121-23.

269. Of course, THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, refers to conservative criticism of Warren Court decisions such as *Miranda*, *see, e.g., id.* at 119-21, as benefiting defendants, but hindering law enforcement. *See also supra* notes 95-99, 185-89 (references to critics).

270. THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at 283-406.

271. Even critics such as Kozinski concede the Warren Court was beneficial. *See, e.g.*, text accompanying *infra* note 276. Kozinski concludes: "[The Warren Court] has . . . forever changed the way we look at the sun [of Justice]." Kozinski, *supra* note 25, at 385.

272. *See supra* note 269 (references to Warren Court's conservative critics and criticism).

273. *See generally* DAVID CARTER, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1978); WALTER GOODMAN, THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES (1968); STANLEY I. KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR (1982). For some legal and constitutional perspectives, see, for example, MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES (1977); Michal R. Belknap, *Cold War in the Court Room: The Foley Square Communist Trial*, *in* AMERICAN POLITICAL TRIALS 210 (Michal R. Belknap ed., rev. ed., 1994); Michal R. Belknap, Dennis v. United States: *Great Case or Cold War Relic?*, 1993 J. SUP. CT. HIST. 41.

274. *See generally* PHILLIP B. DAVIDSON, VIETNAM AT WAR: THE HISTORY 1946-1975 (1988); JAMES HERRING, AMERICA'S LONGEST WAR (1979). For some legal and constitutional aspects, see, for example, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); Symposium, *War and Responsibility: A Symposium on Congress, the President, and the Authority to Initiate Hostilities*, 50 U. MIAMI L. REV. 1 (1995).

275. *See generally* 2 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 553-677 (7th ed. 1991); JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974 (1996); UROFSKY, A MARCH OF LIBERTY, *supra* note 19, at 746-853.

> risprudence. It was a Court imbued with vision and courage at a time in [America's] history when vision and courage were scarce commodities.[276]

Supporters also promulgate this theme.

> 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 social and political outsiders. . . .
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> . . . .
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> . . . The quest to enhance social and political rights was a uniquely judicial and legal task, since the existing centers of political power were unlikely, without some pressure, to change their behavior.[277]

But, was the resulting "change . . . [in] behavior," greater resistance by "centers of political power" which, for example, stalled or impeded congressional civil rights legislation?[278] As a matter of empirical and statistical evidence, did even prominent cases, such as *Brown*[279] and *Miranda*,[280] advance or retard (either contemporaneously or subsequently) actual factual situations—as opposed to the

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276. Kozinski, *supra* note 25, at 377. Immediately, preceding this concession, Kozinski states: "for a conservative like myself." *Id. See also id.* at 383 ("I have no trouble at all with *Sullivan*. . . . I think it's an excellent example of the vigor with which judges and Justices should approach constitutional provisions that protect individuals from government oppression.").

277. Hall, *supra* note 37, at 299-300.

278. *See supra* note 122 (*Brown* "served to deaden political debate"). For attacks, on *Brown* and the Supreme Court, which stalled or impeded civil rights legislation, see *supra* notes 79, 81. *See also* JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S BROWN DECISION INTO A REVOLUTION FOR EQUALITY (1981); JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS (1993); E. CULPEPPER CLARK, THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA (1993); TONY FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION (1984). More generally, see *supra* note 213 (civil rights movement). Eventually, *Brown* contributed (albeit indirectly) to congressional civil rights legislation. This is the "backlash" thesis:

> [A]n alternative account of *Brown's* indirect contribution to racial change . . . focuses on the backlash against *Brown*. In this view, *Brown* was indirectly responsible for the transformative civil rights legislation of the mid-1960s by setting in motion . . . [a] pattern of events. *Brown* crystallized southern resistance to racial change . . . . [This] unification of southern racial intransigence . . . temporarily destroyed southern racial moderation . . . [and] catapulted into public office . . . massive resistance politicians . . . [who] brutal[ly] suppress[ed] . . . civil rights demonstrations. There followed nationally televised scenes of . . . [this brutality] which converted millions of previously indifferent northern whites into enthusiastic proponents of civil rights legislation.
>
> . . . . Many . . . [scholars] have copiously documented the racial fanaticism that *Brown* induced in southern politics. Other scholars . . . have convincingly demonstrated the connection between suppression of civil rights demonstrations at Birmingham and Selma, Alabama, and the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 . . . . [N]obody has assembled these links into a causal chain that connects *Brown*, in an indirect and indeed almost perverse manner, with the landmark civil rights legislation of the mid-1960s.

Klarman, *How* Brown *Changed Race Relations*, *supra* note 1, at 81-82. *Cf. supra* notes 122-23 (postulating different *Brown* effects). *See also* Symposium, *Twentieth-Century Constitutional History*, 80 VA. L. REV. 1, 7-199 (1994) (Klarman article and commentaries by Garrow, Rosenberg, Tushnet, and Klarman on *Brown*'s impact and significance).

279. 347 U.S. 483 (1954). *See supra* note 82 (references).

280. 384 U.S. 436 (1966). *See supra* note 84 (references).

theoretical possession and expansion of constitutional rights—of individual African-Americans or criminal defendants?[281]

Already, support for a retardation conclusion has emerged.[282] Without rushing to pragmatic extremities,[283] this should encourage the abandonment of shibboleths.[284] Consequently, more realistic assessments, not devoid of important intangible—emotions, feelings, and psychology—characteristics,[285] can be eagerly anticipated. If initial indications[286] are confirmed, a radical shift in assessments of the Warren Court—from beneficial advancement to retrogressive retardation—may emerge.

VI. CONCLUSION

Of course, as *A Retrospective* perhaps unintentionally suggests, more time is required. Its contributors' biographical resumes supplies an obvious reason: objectivity[287] is not necessarily enhanced and may be diminished by scholarly reminiscences of those who lived through and closely participated in the Warren

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281. For negative responses, see, for example, ROSENBERG, *supra* note 1; Seidman, *supra* note 1. For negative short-term, but positive (even if indirect) long-term, responses on *Brown*'s effect, see Klarman, *supra* note 1. *See also supra* note 122-23 (quotations). Of course, if *Miranda* has been eroded, *see supra* note 195, only contemporaneous evaluations are relevant.

282. *See supra* notes 122, 278.

283. *See, e.g.*, WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 60-67 (1973) (discussing 1930s-1950s "empirical research" including Underhill Moore's "twenty years . . . of applying scientific method to the empirical study of law," for example, his "parking studies . . . considered by many to be the *reductio ad absurdum* of 'scientism'"); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979); Christopher Shannon, *The Dance of History*, 8 YALE J.L. & HUMAN. 495, 497-502 (1996) (reviewing JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995)) (describing empirical and statistical projects undertaken by legal realists such as Underhill Moore and Walter Wheeler Cook). For subsequent, less empirical, pragmatism, see, for example, PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver eds., 1991); Steven D. Smith, *In Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569-1853, 1911-28 (1990). *See also* David M. Trubeck, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984) (more sophisticated understanding, than early legal empiricists, of empirical research's nature and power). Compare the controversy generated by footnote 11 in *Brown*, 347 U.S. 483, 494 n.11 (1954). *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 653-54 (12th ed. 1991) (explanation and references); David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 565-72 (1991) (discussing footnote 11); Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 DUKE L.J. 624, 664 n.226 (references).

284. *See, e.g.*, THE WARREN COURT: A RETROSPECTIVE, *supra* note 11, at i ("the [Warren] Court that so transformed the law and the society"); *id.* at 406 ("judicial heroism").

285. *See, e.g., id.* at 277 (Warren "was my hero"); *id.* at 399 (when Warren "began reading portions of his opinion" in *Reynolds v. Sims*, "it felt [like] be[ing] present at the Second American Constitutional Convention [which] reflected the awe that all of us in [the Supreme Court] felt at what was happening"). *See also Brown*, 347 U.S. at 494 ("A sense of inferiority affects the motivation of a child to learn" and reference to "psychological knowledge").

286. *See supra* notes 278-81 (possibility that Warren Court decisions harmed Court's intended beneficiaries).

287. *See generally* RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983) (discussing dichotomy between objectivism and relativism and their replacement with historically situated contingency); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 430 (1987) (exploring "[t]raditional epistemology, with its belief in the existence of transcendent, objective truth" and the "new" more culturally contingent epistemology). *See also* KENT GREENAWALT, LAW AND OBJECTIVITY (1992) (examining whether the law is or should be objective).

Court revolution. Even without invoking general historical scholarship,[288] Supreme Court historiography exemplifies the continuous revisionism which inevitably occurs.[289] Indeed, Warren Court history has already encountered ripples, if not waves, of revisionism.[290] Given this milieu, as the title recognizes, *The Warren Court: A Retrospective* pushes backwards, not forward.

Is receding enthusiasm for the Warren Court, therefore, a pre-ordained result? If so, it is not displayed in *The Warren Court: A Retrospective*. Thus, there remain prospects of future Warren Court celebrations. Rather than regret, this can confer benefits. One is the enticement of different and opposing perspectives. Then, in the best traditions of American legal literature, the past will capture the future.

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288. "Revising interpretations of the past is intrinsic to the study of history." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at xix (1988). A prime example is Reconstruction historiography. *See, e.g., id.* at xix-xxvii (summarizing constant revisionism); Eric Foner, *Reconstruction Revisited*, 10 REV. AM. HIST. 82 (1982).

289. *See*, e.g., Moglen, *supra* note 8, at 2027-29 (placing Fiss' history of the 1888-1910 Supreme Court "in the new scholarly synthesis" and contrasting "the pre-World War II institutionalists" with "a new vision of the role of the [Holmes Devise *History of the Supreme Court* which] . . . depart[s] fundamentally from the pattern of exhaustive institutional description and adopt[s] a self-consciously revisionist interpretative posture"). *See also supra* note 8 (references).

290. *See, e.g.*, Hall, *supra* note 37, at 294 (adumbrating "[t]hree schools of revisionist scholarship [which] have sharply challenged [the traditional] liberal-instrumentalist view [of the Warren Court]").