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REVIEW ESSAY

CAPTURING THE FUTURE: EARL WARREN AND SUPREME COURT HISTORY

James A. Thomson†

THE WARREN COURT: A RETROSPECTIVE. Edited by Bernard Schwartz.††

I. INTRODUCTION

Polarization—not repose—characterizes empirical¹ and normative² re-
sponses\(^4\) enticed by one question: \(^5\) What did the Warren Court\(^6\) 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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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.


8. All 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 law 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.


tute a prominent example. Leaping into this quagmire is another collection of essays: The Warren Court: A Retrospective. Not unexpectedly, many essayists—Schwartz, Kamisar, Simon, Kurland, Dorsen, Hall, and


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. Liebhmann, 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).


Lewis—contributing to this Retrospective are already enmeshed in Warren


Court controversies. Others—Urofsky, Tushnet, and White—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 prostrates: Was the Supreme Court during the 1953-1969 era the Warren Court, or, perhaps, the Frankfurter Court?


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) (“[f]or[e]mally 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—1953 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. Billions, 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
encrusted onto the U.S. Supreme Court Reports, is a plethora of scholarship.36

II. A WARREN COURT?

Even to a deceptively "simple question"—did the Warren Court exist?—"[a] good number of revisionist scholars apparently have doubts" about proclaiming or endorsing an affirmative response. Assume, albeit momentarily, that there was a Warren Court: who were its members? Ought all of the "seventeen" men 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"—to a more complex question: when did the Warren Court exist? However, other responses have also been postulated. For example, "conventional wisdom" erects a dichotomy: "The First Warren Court" from

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 1953-1969 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.


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.


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 to August 28, 1962 and "The Real Warren Court" from October 1, 1962 to June 23, 1969. Further variants emerge in suggestions which ante-date either the commencement or end of the latter characterization. Swirling within and influencing this chronological debate are substantive...
constitutional concerns—the Warren Court’s revolution for example, in racial discrimination, electoral reapportionment, and criminal procedure.

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


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


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, institutionally or administratively, or socially. Apart from personal abilities or characteristics, that may be a consequence of the Chief Justice's length—too long or too short—of tenure. Thirdly, an individual justice or group of justices may provide the most effective influence on results and doctrines during a Chief Justice's tenure.

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 advances a pre-ordained 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."

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).


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).


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, controversyless remain. What were the Warren Court’s substantive doctrinal or jurisprudential achievements? That is, did the 1953-1969 epoch produce a significant and durable “Constitutional Corpus”? 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? Can any interpretative methodologies—theories, principles, and strategies of constitutional adjudication—be ascertained from Warren Court opinions, concurrences, or dissents? 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 (“recession 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”); Kaminar, 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 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”).
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).
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]onsitutional 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, Pollock, 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 main73 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

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.
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 CRITICISM, 2nd ed. (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 the unanimous Brown v. Board of Education opinion. It continued, perhaps most prominently via cases such as Mapp v. Ohio, Miranda v. Arizona, Engel v. Vitale, Abington v. Schempp, Reynolds v. Sims, 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").


87. 377 U.S. 533 (1964) (one vote, one value state legislatures' electoral reapportionment requirement). See supra note 54 (references).
tions, almost unabated until 1963 and beyond. Inevitably, a scholarly debate ensued. Distinctive and powerful positions—pro and contra the Warren Court—quickly emerged. Early supporters included: Black, Cox, and Karst. Their antagonists were exemplified by Bickel, Hand, Kurland, McCloskey, and Wechsler. One tangible result has been the accumulation of thought-provoking commentary. Quantitatively, The Warren Court: A Retrospective does not, however, enrich that repository.

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. 658 (1959) (overturning New York State ban on the movie version of Lady Chatterley’s Lover). See generally CURRIB, 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).


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


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 Telephase of Substantive Equal Protection, 1967 SUP. CT. REV. 39; Kenneth L. Karst, Legislative Facets 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).


97. See supra note 15 (Kurland’s scholarship).


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 speech101 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 decisions106—inevitably produces a further consequence: comparative assessments (including revolution and counter-revolution terminology107) of "achievements" in federal108 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.
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. Billions, 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).
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, "[T]hough 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 EDERTON, SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT 380 (1994). The reason was obvious.
111. 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.
112. 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 Chambers¹¹²—"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 Plessy¹¹⁵ and Brown¹¹⁶ 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-

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).


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 held unconstitutional 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).

¹¹⁶ 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).

¹¹⁷ Chambers, supra note 40.

¹¹⁸ 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).

¹¹⁹ Plessy v. Ferguson, 163 U.S. 537 (1896) (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).
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.\textsuperscript{120}

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

Admission of failure\textsuperscript{128} slides more easily and openly from Nadine Strossen’s\textsuperscript{129} “Freedom of Speech in The Warren Court.”\textsuperscript{130} Two examples

\begin{itemize}
  \item \textsuperscript{120} Chambers, supra note 40, at 22, 26, 45 (footnote omitted).
  \item \textsuperscript{121} See supra note 1 (empirical impact studies and debate on Warren Court decisions).
  \item \textsuperscript{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).
  \item \textsuperscript{123} See supra note 1 (literature). Note, for example, the suggestions:
    \begin{itemize}
      \item In terms of judicial effects . . . Brown and its progeny stand for the proposition that courts are impotent to produce significant social reform.
    \end{itemize}
    \begin{itemize}
      \item 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.
    \end{itemize}
    \begin{itemize}
      \item 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 . . . [The courts contributed little to [civil rights].]
      \end{itemize}
  \item \textsuperscript{124} Chambers, supra note 40, at 29-44. See also supra note 68 (counter-revolution debate literature containing similar sentiments).
  \item \textsuperscript{126} See supra note 120 and accompanying text. See also supra notes 122-23.
  \item \textsuperscript{127} For recent Brown scholarship, see supra note 82.
  \item \textsuperscript{128} Strossen, supra note 29, at 72 (“downside” in Warren Court’s free speech doctrines and “guidance”); \textit{id.} at 78 (“Warren Court failed to protect . . . civil rights activists from harassment by the House Un-American Activities Committee”); \textit{id.} at 79 (“not . . . a perfect record” in protecting communists “free speech”). See also infra note 137 (communists’ free speech).
  \item \textsuperscript{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." At least for Strossen, the consequence is catastrophic: subsequent Supreme Court "results" have, "without ... expressly overruling Warren Court precedents," been able to "substantial[ly] erode" First Amendment "free speech protection" and, therefore, "escape[ ] the full measure of comment and criticism it would otherwise provoke."

131. Vot. 32:843 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.


and hate speech cases—might not agree. Secondly, the Warren Court did not protect communists’ or suspected communists’ freedom of speech. In this domain, the “double standard” between “Communists and civil rights activists” was blatant. Epigrams and statistics provide contextual and factual evidence illuminating this failure.


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."\(^\text{143}\) But, how—especially if "specific doctrinal analyses" were eschewed\(^\text{144}\)—was that achieved? Strossen and Ronald Rotunda\(^\text{145}\)—"The Warren Court and Freedom of the Press"\(^\text{146}\)—suggest that a broader, more all-encompassing jurisprudence emerged.\(^\text{147}\) Driven by a "general spirit or attitude" to and a "broad vision of the First Amendment,"\(^\text{148}\) two developments intertwined: "All speech [was treated] as presumptively protected" and "artificial categories and classifications among speech" was abandoned.\(^\text{149}\) One result, when confronted by two First Amendment clauses—"freedom of speech, or of the press"\(^\text{150}\)—is to join, not divide: "the Warren Court did not distinguish between 'speech' and 'the press.'"\(^\text{151}\) Therefore, to conform with the Retrospective theme—"not ... to bury the Warren Court in criticism, but to praise it"\(^\text{152}\)—a pivotal First Amendment decision, New York Times v. Sullivan,\(^\text{153}\) is, from speech and press perspectives, eulogized.\(^\text{154}\) Denigration, despite being omitted from A Retrospective,\(^\text{155}\) is, however, possible even with Sullivan.\(^\text{156}\)

\(^\text{143.} \) Strossen, supra note 29, at 68. But see text accompanying supra note 132 (erosion of Warren Court precedents).
\(^\text{144.} \) 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").
\(^\text{145.} \) "Ronald D. Rotunda, Albert E. Jenner, Jr., Professor of Law, University of Illinois." The Warren Court, supra note 11, at x.
\(^\text{146.} \) Rotunda, supra note 64.
\(^\text{147.} \) Despite Strossen, supra note 29 and Rotunda, supra note 64, this may be an easily dissipable facade. See infra note 149 ("pragmatic" approach).
\(^\text{148.} \) Strossen, supra note 29, at 71.
\(^\text{149.} \) 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").
\(^\text{150.} \) "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.
\(^\text{151.} \) 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).
\(^\text{152.} \) 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).
\(^\text{153.} \) 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.
\(^\text{154.} \) 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"); Koziinski, 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").
\(^\text{155.} \) 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.
\(^\text{156.} \) 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”\textsuperscript{157} also haunt the Warren Court’s religion—free exercise and establishment\textsuperscript{158}—jurisprudence.\textsuperscript{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”\textsuperscript{156}—can co-exist with a conclusion: those decisions “lack[] substantive majesty.”\textsuperscript{161} For John Sexton\textsuperscript{162}—“The Warren Court and the Religion Clauses of the First Amendment”\textsuperscript{163}—that conclusion “partly” emanates from “doctrinal problems, which the Warren Court either perpetuated or generated itself.”\textsuperscript{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.\textsuperscript{165} However, exposing this “fundamental [Warren Court] weakness”\textsuperscript{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.”\textsuperscript{167}


157. Sexton, supra note 103, at 105.

158. See supra note 150 (First amendment).


160. Sexton, supra note 103, at 104.

161. Sexton, supra note 103, at 105.


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); Flatl 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. Vemer, 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).

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.


171. 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).


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. REV. 211; The Supreme Court, 1962 Term, Rights of Indigents at Trial, 77 HARV. L. REV. 103-05 (1963).


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.


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. Indeed, they have not ceased or dissipated. Proponents and antagonists—from within the Supreme Court, among scholars, in Congress, and between presidential candidates—generated a whirlwind of revolution and counter-revolution.

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

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).
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 note 181, 183 (Burger and Rehnquist Courts).
187. See supra note 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 (Court’s 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 wagged 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”).
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 (“conclu[d]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 detractors.
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. 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. During 1953-1969 such extraneous pressures, though probably most vociferous and sustained against constitutional decisions limiting law enforcement power to investigate and prosecute crimes, were not unusual. Of course, when placed within a longer historical continuum, this is clearly not a unique Warren Court phenomenon. Consequently, any sympathy \textit{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 \textit{A Retrospective}.

In complete contrast, "quiescence," not "tumult" characterizes judicial review of property rights and economic liberties during 1953-1969. For several reasons, as Richard Epstein\footnote{See supra note 78 (pre-Warren Court). For pre- and post-Warren Court cases and doctrines, see \textit{id.} at 159-62. See generally Thomson, \textit{Swimming in the Air}, supra note 6 (examining property and civil rights in the Fuller Court and juxtaposing Warren Court's Brown decision); \textit{supra note 72 (central, unresolved constitutional law dilemma). \textit{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 beleaguered property owners").} "The Takings Jurisprudence of the Warren Court: A Constitutional Siesta"\footnote{See supra note 78 (pre-Warren Court). For pre- and post-Warren Court races, see, for example, KEYNES \& MILLER, supra note 79; MORGAN, supra note 79; MURPHY, supra note 79; SCHMIDHAUSER \& BERG, supra note 79. \textit{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 beleaguered property owners").} indicates, "[t]he question of property rights, their status, and protection, was not an issue that much troubled or preoccupied the Warren Court." Therefore, from a doctrinal perspective, the takings clause jurisprudence provides a "far more meager [harvest] than it is in other areas." At most, "the Warren Court’s takings decisions help[] set the
stage for contemporary understandings of the takings issue. 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. Second is the suggestion that “the modern Civil Rights movement” dominated and skewed 1953-1969 doctrinal developments, for example, in free speech, criminal law, and takings cases. Epstein vigorously conveys this perspective:

[F]or takings law there was no innovation [in Heart of Atlanta Motel v. United States].

[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.

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 “ignore[d]” see Kozinski, supra note 25, at 382-83 (“four copyright cases . . . [only 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 Kasner, 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.


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).

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


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 responsibilities . . . 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).
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-

\(^{225}\) 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).


\(^{235}\) 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).
tured. Importantly, even if substantive Warren Court doctrines have been repudiated, these perennial process puzzles continue to resonate. 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 depending on whether their values command four or five votes. Attributing the vitality and richness of this aspect of judicial review to the Warren Court would, therefore, not be remiss.

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.
240. Generally, pre-1937, conservatives applauded and liberals denigrated the Supreme Court; from 1937-1959 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]ranstient 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);
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
opinions, letters, or intra-court memoranda,\textsuperscript{253} and produced fresh insights about the Warren Court. That is, rejuvenation, not regurgitation, is required.

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

\textsuperscript{253} For the existence, publication, and usefulness of such materials, see Thomson, \textit{supra} note 82. For the location of these papers, see \textit{Alexandra K. Wigdor, The Personal Papers of Supreme Court Justices: A Descriptive Guide} (1986); \textit{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, \textit{supra} note 249 (draft opinion in Clark papers); \textit{A Symposium on the Tom C. Clark Papers}, \textit{supra} note 249.


\textsuperscript{255} \textit{See, e.g., Richard S. Arnold, William J. Brennan, Jr., in The Warren Court: A Retrospective, \textit{supra} note 11, at 204-09; Exum & Bilionis, \textit{supra} note 23, at 316. See generally Kim Isaac Eisele, A Justice for All: William J. Brennan, Jr. and the Decisions that Transformed America} (1993); \textit{Reason and Passion, \textit{supra} note 12; Stephen J. Wermiel, William Joseph Brennan, Jr., in The Supreme Court Justices, \textit{supra} note 16, at 49-60. See also \textit{supra} note 23} (the Brennan Court); Thomson, \textit{Mirages of Certitude, \textit{supra} note 1, at 77 n.73 (references on scholarship on Brennan)}.

\textsuperscript{256} \textit{See, e.g., Ball & Cooper, \textit{supra} note 1; Simon, \textit{supra} note 14; “He Shall Not Pass This Way Again,” \textit{supra} note 16; The Douglas Letters, \textit{supra} note 19; John P. Frank & Vern Countryman, William O. Douglas, in 4 The Justices, \textit{supra} note 18, at 1219-46; Dorothy J. Glancy, William Orville Douglas, in The Supreme Court Justices, \textit{supra} note 16, at 141-51. See also Thomson, \textit{Mirages of Certitude, \textit{supra} note 1, at 69-70 nn.10-11 (bibliography of pro- and anti-Douglas scholars).}

\textsuperscript{257} \textit{See, e.g., Schwartz, \textit{supra} note 22; Brennan, \textit{supra} note 22; Hall, \textit{supra} note 37, at 296-98; Tyrone Brown, Clerking for the Chief Justice, in The Warren Court: A Retrospective, \textit{supra} note 11, at 276-82. See also \textit{supra} note 22 (the Warren Court). See generally Schwartz, Super Chief, \textit{supra} note 12; White, \textit{supra} note 16; Daniel B. Rodriguez, Earl Warren, in The Supreme Court Justices, \textit{supra} note 16, at 501-09.}

\textsuperscript{258} \textit{See \textit{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 Kurland262 "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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260. Dorsten, 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

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 (1995) (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”).

V. BROAD PERSPECTIVES

No glimmer emerges from *The Warren Court: A Retrospective* of a pragmatically important controversy: vis-a-vis their assumed benefactors, was the effect of 1953-1969 Supreme Court decisions and doctrines beneficial or detrimental? Oblivious to other possibilities, essays constituting “A Broader Perspective” push in one-beneficial-direction. 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 reinforced this conclusion’s credibility.

Additionally, contextualized within and against broader parameters—cold war, civil rights movement, and Vietnam war—of nearly two decades of American history, 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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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).


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).


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risprudence. It was a Court imbued with vision and courage at a time in
[America's] history when vision and courage were scarce commodi-
ties.16

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 distinc-
tive in the history of the Court and for the first and only time the Justices
empathized with the social and political outsiders....

The quest to enhance social and political rights was a uniquely judi-
cial and legal task, since the existing centers of political power were un-
likely, 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 Brown279 and Miranda,280 advance or retard (either
contemporaneously or subsequently) actual factual situations—as opposed to the

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 Su-
preme 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 TRAN-
SLATED THE SUPREME COURT’S BROWN DECISION INTO A REVOLUTION FOR EQUALITY (1981); JACK BASS,
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 con-
tributed (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 legis-
lation 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 brutally suppressed ... civil rights demonstrations. There followed national-
ly 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 sup-
pression 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).

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 indications²⁸⁶ 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: objectivity²⁸⁷ is not necessarily enhanced and may be diminished by scholarly reminiscences of those who lived through and closely participated in the Warren

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.


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] being 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, Supreme Court historiography exemplifies the continuous revisionism which inevitably occurs. Indeed, Warren Court history has already encountered ripples, if not waves, of revisionism. 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.

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]”).