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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I. INTRODUCTION

Polarization—not repose—characterizes empirical¹ and normative² re-


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responses enticed by one question. What did the Warren Court do? Differences, even radical divergence, can, of course, be constructive and beneficial, rather than debilitative. United States Supreme Court histories merely consti-


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 arts 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.


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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


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. 663, 671 (1935).


Lewis—contributing to this Retrospective are already enmeshed in Warren


Court controversies. Others—Urofsky,19 Tushnet,20 and White21—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


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[get]ing 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 a more balanced 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, exposing these conundrums is usually achieved by doctrinal analysis, biographical narratives, assessment of the impact already exerted, and predicting future influence. The Warren Court: A Retrospective adheres to this methodology. Previous appraisals of the Warren Court utilize additional approaches: jurimetrics, economic interpretations, empirical research and hermeneutic principles. As a result,

...
II. A WARREN COURT?

Even to a deceptively “simple question”\textsuperscript{35}—did the Warren Court exist?\textsuperscript{36}—“[a] good number of revisionist scholars apparently have doubts” about proclaiming or endorsing an affirmative response.\textsuperscript{39} Assume, albeit momentarily, that there was a Warren Court: who were its members? Ought all of the “seventeen” men\textsuperscript{40} 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”\textsuperscript{42}—to a more complex question: when did the Warren Court exist? However, other responses have also been postulated. For example, “conventional wisdom”\textsuperscript{43} erects a dichotomy: “The First Warren Court”\textsuperscript{44} from

\textsuperscript{35}Frankfurter, 59 Colum. L. Rev. 959 (1959) (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”).

\textsuperscript{36}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.


\textsuperscript{39}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).

\textsuperscript{40}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.

\textsuperscript{41}Kurland, supra note 24, at 225. The seventeen are: Warren (1953-69); Black (1937-71); Reed (1937-57); Frankfurter (1939-62); Douglas (1939-75); Jackson (1941-54); Burton (1945-58); Clark (1949-57); 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.

\textsuperscript{42}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).

\textsuperscript{43}“[T]he Warren Court] means the United States Supreme Court over which Earl Warren presided from 1953 to 1969.” Kurland, supra note 24, at 225.

\textsuperscript{44}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 Court: Yesterday, Today, and Tomorrow, 28 Ind. L. Rev. 309 (1995).
October 5, 1953\textsuperscript{45} to August 28, 1962\textsuperscript{46} and "The Real Warren Court"\textsuperscript{47} from October 1, 1962\textsuperscript{48} to June 23, 1969.\textsuperscript{49} Further variants emerge in suggestions which ante-date either the commencement\textsuperscript{50} or end\textsuperscript{51} of the latter characterization. Swirling within and influencing this chronological debate are substantive


44. \textit{Currie, supra note 36, at 377. See also Hall, supra note 37, at 298 (describing "the first" Warren Court).


47. \textit{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")}.


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"? \textit{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-à-vis a Chief Justice's tenure, there can be prior and/or post Supreme Court service.\(^{57}\) Secondly, Chief Justices may not be

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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 Whitaker, left before Warren’s retirement.

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


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).


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, controversies 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 ("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 Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2465, 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).
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); TINSLY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS (1988); Hall, supra note 37, at 294-95 ("[C]onservative 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\textsuperscript{73} segments—"The Constitutional Corpus,"\textsuperscript{74} "The Justices,"\textsuperscript{75} and "A Broader Perspective"\textsuperscript{76}—The Warren Court: A Retrospective raises, without necessarily answering,\textsuperscript{77} these perennial questions which pervade virtually the whole domain of constitutional law.

III. JUDICIAL REVIEW: 1953-1969

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

\textsuperscript{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).

\textsuperscript{74.} THE WARREN COURT: A RETROSPECTIVE, supra note 11, at 21-191.

\textsuperscript{75.} Id. at 195-282.

\textsuperscript{76.} Id. at 285-406.

\textsuperscript{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.


\textsuperscript{79.} Contemporary supporters included Archibald Cox, Anthony Lewis, Black, and Karst. See supra notes 18, 26 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. MORAN, 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]he 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 constitutional 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).
On the "neutral principles" debate, see generally, Peller, ESSAYS 3-48 (1961); Herbert Wechsler, REv. 1 (1959)

For Hand's view of Earl Warren and the Warren Court's judicial activism, ity for reviving the principle of equal citizenship, and thus formally redefining [America's] national community.

The Courts and the Constitution, 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.")

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), free speech and press, religious freedom and establishment, criminal justice, and Takings Clause jurisprudence. Within this milieu, juxtaposition—previous and subsequent cases against Warren Court opinions and decisions—inevitably produces a further consequence: comparative assessments (including revolution and counter-revolution terminology) of “achievements” in federal constitutional law during Chief Justices’ tenures. Again, more deft, nuanced, and intellectually intriguing examples of this enterprise exist.

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

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, “[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. That is where Chambers—"Race and Equality: The Still Unfinished Business of the Warren Court"—commences. Immediately, however, problems arise. First, is a bold assertion: Brown's "central holding" was "that separate-but-equal is constitutionally intolerable." A deeper and more complex panorama, generating greater ambivalence, could have been exposed by plunging into the jurisprudential and precedential relationships of Plessy and Brown and between Brown and affirmative action. 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. Of course, emphasis has also been given, sometimes simultaneously, to the "separate" side of this equation. 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 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).


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, 343, 460, 466, 469, 525, 549, 591, 592, 597, 603.

119. "As 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 check-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 (1967)) (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 delayed 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 deleterious126—impact, has it not been undone or, at least, partially dismantled? At this stage, only debate, not a final conclusion, exists.127

Admission of failure128 slides more easily and openly from Nadine Strossen's129 "Freedom of Speech in The Warren Court."130 Two examples

References:

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., Seldman, 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:
   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).
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 activists 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).
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 “substantially erode” First Amendment “free speech protection” and, therefore, “escape[] the full measure of comment and criticism it would otherwise provoke.” Others—especially, for example, from commercial speech, pornography, See also 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.


and hate speech perspectives—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. STROESSNER, 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, 259-299 (“PARTIAL SANCTIONS: THE ANTI-COMMUNIST INHERITANCE”); id. at 457-574 (“Official Inquiry”). See also infra note 273 (Cold War).

138. STROESSNER, 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 STROESSNER, 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."

But, how—especially if "specific doctrinal analyses" were eschewed—was that achieved? Strossen and Ronald Rotunda—"The Warren Court and Freedom of the Press"—suggest that a broader, more all-encompassing jurisprudence emerged. Driven by a "general spirit or attitude" to and a "broad vision of the First Amendment," two developments intertwined: "All speech [was treated] as presumptively protected" and "artificial categories and classifications among speech" was abandoned. One result, when confronted by two First Amendment clauses—"freedom of speech, or of the press"—is to join, not divide: "the Warren Court did not distinguish between 'speech' and 'the press.'" Therefore, to conform with the Retrospective theme—"not ... to bury the Warren Court in criticism, but to praise it"—a pivotal First Amendment decision, New York Times v. Sullivan, is, from speech and press perspectives, eulogized. Denigration, despite being omitted from A Retrospective, is, however, possible even with Sullivan.
“[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. However, exposing this “fundamental [Warren Court] weakness”\[^{165}\] 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.”\[^{166}\]

\(^{157}\) Sexton, \textit{supra} note 103, at 105.

\(^{158}\) See \textit{supra} note 150 (First amendment).


\(^{160}\) Sexton, \textit{supra} note 103, at 104.

\(^{161}\) Sexton, \textit{supra} note 103, at 105.

\(^{162}\) “John Sexton, Dean, New York University Law School.” \textit{THE WARREN COURT: A RETROSPECTIVE, supra} note 11, at x.

\(^{163}\) Sexton, \textit{supra} note 103.

\(^{164}\) Id. at 105.

\(^{165}\) Contrast the text accompanying \textit{supra} notes 150-51 (amalgamation of free speech and press clauses).

\(^{166}\) Sexton, \textit{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 (1969) (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 unconstitutiona); 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). \textit{See also} \textit{supra} note 159 (literature on these cases). Compare the number of free speech cases. \textit{See, e.g.}, Strossen, \textit{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 \textit{infra} note 211 (statistics on takings and other cases).
Much more—quantitatively and qualitatively—parades under Yale Kamisar’s\textsuperscript{168} “The Warren Court and Criminal Justice.”\textsuperscript{1169} For example, assume a revolution in constitutional law\textsuperscript{170} occurred during 1953-1964.\textsuperscript{171} Most probably,\textsuperscript{172} it was “the Warren Court’s ‘revolution’ in American criminal procedure . . . that lasted from 1961 . . . to 1966 or 1967.\textsuperscript{173} Familiar cases abound: \textit{Griffin v. Illinois},\textsuperscript{174} \textit{Mapp v. Ohio},\textsuperscript{175} \textit{Gideon v. Wainwright},\textsuperscript{176} \textit{Escobedo v. Illinois},\textsuperscript{177} \textit{Malloy v. Hogan},\textsuperscript{178} \textit{Massiah v. United States},\textsuperscript{179} \textit{Miranda v. Arizona},\textsuperscript{180} and the lineup-pretrial identification cases.\textsuperscript{181} Battles or, perhaps, wars—over doctrines, practical impact, and the

\begin{itemize}
\item \textsuperscript{168} “Yale Kamisar, Clarence Darrow Distinguished University Professor, University of Michigan Law School . . .” \textit{The Warren Court: A Retrospective}, supra note 11, at ix. See also supra note 13 (Kamisar’s publications on the Warren Court).
\item \textsuperscript{171} But see supra note 52 (suggesting that Warren Court merely “built upon and expanded” prior precedents).
\item \textsuperscript{172} But see supra note 110 (noting that the electoral reapportionment and voting cases constituted the revolution).
\item \textsuperscript{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).
\item \textsuperscript{174} 351 U.S. 12 (1956) (under certain conditions, indigent criminal defendants’ right, on appeal, to a free transcript). See, e.g., \textit{The Supreme Court 1955 Term, Cost of Criminal Appeals}, 70 \textit{Harv. L. Rev.} 126-29 (1956).
\item \textsuperscript{175} 367 U.S. 643 (1961). See supra note 83.
\item \textsuperscript{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, \textit{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 \textit{Sup. Ct. L. Rev.} 211; \textit{The Supreme Court, 1962 Term, Rights of Indigents at Trial}, 77 \textit{Harv. L. Rev.} 103-05 (1963).
\item \textsuperscript{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; \textit{The Supreme Court 1963 Term, Self Incrimination}, 78 \textit{Harv. L. Rev.} 223-30 (1964).
\item \textsuperscript{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 \textit{The Supreme Court 1963 Term, supra note 177}, at 217-23.
\item \textsuperscript{180} 384 U.S. 436 (1966). See supra note 84.
\item \textsuperscript{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.” \textit{Id.} at 131.
\end{itemize}
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 whirl-wind 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 aspects 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 notes 181, 183 (Burger and Rehnquist Courts).
187. See supra notes 183 (supporters), 184 (critics).
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 guerilla 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 (“conclus[i]o[i] 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. 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 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.

In complete contrast, "quiescence," not "tumult" characterizes judicial review of property rights and economic liberties during 1953-1969. For several reasons, as Richard Epstein indicates, "The Takings Jurisprudence of the Warren Court: A Constitutional Siesta"—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

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).

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

See supra note 182 (references).

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.

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.

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

Epstein, supra note 63, at 160.

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).

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 beleaguered property owners").

"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.

Epstein, supra note 63.

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.

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 takings216 cases.217 Epstein vigorously conveys this perspective:

[FL]or takings law there was no innovation [in Heart of Atlanta Motel v. United States218] . . . . [FL]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 "ignored" 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").


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 ("Civit 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. Mulkey219] 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 activism223—does not dominate The Warren Court: A Retrospective.224 Whether or not intended, this perpetuates a particular view:

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


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


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 scholars227 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, notably232 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.").
228. See, e.g., supra note 185 (Judge Henry Friendly); Feldman, supra note 72, at 360 n.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).
ture. 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-1959 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 222, at 62-74 (discussing conservatives who support Rehnquist Court activism); Earl Malz, 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).

IV. THE JUSTICES

Only six242 of the seventeen243 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, Clark,248 White,249 and Goldberg,250 for example,251 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).


251. See, e.g., STEBENNE, supra note 48; Hermann, supra note 48.

opinions, letters, or intra-court memoranda, 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, Brennan, Douglas, and Warren. Even Harlan is re-shaped into and praised as a liberal activist judge. Of the six, only one remains: Felix
Frankfurter.\textsuperscript{259} Again, \textit{A Retrospective} does not surprise. At least on two occasions Frankfurter is pilloried:

\ldots Frankfurter’s star has dimmed considerably . . . . There were flaws in Frankfurter’s makeup and judgment that eventually undermined his remarkable gifts and learning.\textsuperscript{260}

\ldots 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.\textsuperscript{261}

Only Kurland\textsuperscript{262} “a stalwart partisan of Frankfurter’s”\textsuperscript{263} offers praise:\textsuperscript{264}

[Frankfurter], along with [Learned] Hand [was] one of the two greatest judicial minds to have served on the bench in [Kurland’s] lifetime.

\ldots

[O]ne factor . . . disqualified [Frankfurter] from great influence within the Court and great popularity outside the Court. His notion of the constitu-


\textsuperscript{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, \textit{The Failure of Felix Frankfurter}, 26 U. RICH. L. REV. 175 (1991). But see text accompanying infra note 266 (Frankfurter revival or revisionism).

\textsuperscript{261} Schwartz, supra note 22, at 258. See also Mark B. Rotenberg, \textit{Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Restraint}, 83 COLUM. L. REV. 1865 (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.”).

\textsuperscript{262} See supra note 15.

\textsuperscript{263} Kurland, supra note 24, at 225.

\textsuperscript{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 accomplished 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 beneficiaries, 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, 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 any 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-


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).


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. . . .

. . . . . 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 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 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:

[An 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] brutally suppressed . . . 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).


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

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, 52 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.

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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]").