Washington and Lee Law Review

Volume 59 | Issue 4 Article 2

Fall 9-1-2002

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The logic of passion, even when it serves the right cause, is never irrefutable to someone who is not moved by passion.[1]

I. Introduction

As the Articles that follow demonstrate, the Warren Court's legacy in the field of civil rights and civil liberties is both tremendously important and deeply flawed. The legacy is unquestionably important because the Warren Court oversaw a judicial revolution that helped to speed the end of American

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1. MARCEL PROUST, 1 LE TEMPS RETROUVÉ [THE PAST RECAPTURED] 111 (Gallimard 1927) ("La logique de la passion, fût-elle au service du meilleur droit, n'est jamais irréfutable pour celui qui n'est pas passionné."), *translated in* THE MAXIMS OF MARCEL PROUST 35 (Justin O'Brien ed. & trans., 1948); *see also* MARCEL PROUST, THE PAST RECAPTURED 61 (Andreas Mayor trans., 1970) ("The logic of passion, even if it happens to be in the service of the best possible cause, is never irrefutable for the man who is not himself passionate.").

apartheid in the Deep South. One cannot overestimate the significance of this legacy: Chief Justice Earl Warren and his colleagues did more to advance the project of equal citizenship than any court, state or federal, before or after.

As in the field of criminal procedure and with respect to the role and function of the federal courts, the Warren Court's efforts in the area of civil rights and civil liberties were nothing short of revolutionary.[2] Whether in the area of freedom of speech, equal protection, or substantive due process, Chief Justice Earl Warren and his colleagues redefined – in a radical way – the relationship of the citizen to the state.

Consider, for example, *New York Times Co. v. Sullivan*,[3] a case that distinguished free speech scholar Alexander Meiklejohn characterized as "an occasion for dancing in the streets."[4] In *New York Times*, Justice Brennan effectively abolished the concept of seditious libel against the state – a concept incorporated in the Alien and Sedition Act of 1798 and never formally repudiated until 1964.[5] Essentially, the Warren Court created a right of fair – even if factually inaccurate – comment by the citizen against the government. Arguably, the intellectual framework of *New York Times* provided inspiration for later cases like *Brandenburg v. Ohio*,[6] *Hustler Magazine, Inc. v. Falwell*,[7] and even *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[8]

Similarly, how can one talk meaningfully about equal protection doctrine without mentioning *Brown v. Board of Education*,[9] *Bolling v. Sharpe*,[10] *Baker v. Carr*,[11] and *Reynolds v. Sims*?[12] In the context of state

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2. *See* Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1118 (1991) (canvassing scope of legal – and moral – wrongs that Warren Court confronted and redressed, describing Warren Court's labors as "a program of constitutional reform almost revolutionary in its aspiration and, now and then, in its achievements," and concluding that Warren Court "spurred the great changes to follow, and inspired and protected those who sought to implement them").

3. 376 U.S. 254 (1964).

4. Harry Kalven, Jr., *The* New York Times *Case: A Note on the "Central Meaning of the First Amendment,"* 1964 S. CT. REV. 191, 221 n.125 (quoting Alexander Meiklejohn). Professor Kalven shared Meiklejohn's enthusiasm for the decision. *See id.* ("As always, I am inclined to think [Meiklejohn] is right.").

5. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273-77 (1964) (discussing history of Alien and Sedition Act of 1798 and concluding that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history").

6. 395 U.S. 444 (1969).

7. 485 U.S. 46 (1988).

8. 447 U.S. 557 (1980).

9. 347 U.S. 483 (1954).

10. 347 U.S. 497 (1954).

11. 369 U.S. 186 (1962).

12. 377 U.S. 533 (1964).

action, the most aggressive tests find their genesis in Warren Court opinions, particularly in *Burton v. Wilmington Parking Authority*[13] and *Reitman v. Mulkey*.[14] Finally, the resurrection of meaningful substantive due process review was the handiwork of the Warren Court. Without *Griswold v. Connecticut*,[15] it is less certain that we would have *Roe v. Wade*.[16] The Supreme Court's return to substantive review of state and federal legislation for consistency with unenumerated, yet fundamental, rights runs back to *Griswold* (as does the rehabilitation of *Lochner*[17] era cases such as *Meyer v. Nebraska*[18] and *Pierce v. Society of Sisters*[19]).

II. A Brief Review of the Warren Court's Approach to Enforcing Constitutional Rights: The Unfortunate Disjunction of Means and Ends

The most notable characteristic of the Warren Court in the field of enforcing constitutional rights was its creativity in reaching results favorable to those asserting rights against the government and the consistency with which it exhibited this creativity. Most of the time, I find myself very sympathetic to the outcomes in the Warren Court's major civil rights and civil liberties decisions.[20] However, that said, I harbor some serious reservations about the long-term effects of the methodology often employed by the Warren Court in reaching these desirable results.[21] A careful scholar of the Constitution and constitutional jurisprudence should have serious misgivings about the Warren Court's willingness to accept and embrace its role as a political institution by reaching results that created new law without much of an effort to ground the result in the text or history of the Constitution or to relate the result back to prior judicial precedents.[22] More often than not, if the end was sufficiently

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13. 365 U.S. 715 (1961).

14. 387 U.S. 369 (1967).

15. 381 U.S. 479 (1965).

16. 410 U.S. 113 (1973).

17. Lochner v. New York, 198 U.S. 45 (1905).

18. 262 U.S. 390 (1923).

19. 268 U.S. 510 (1925).

20. *Cf.* Laura Kalman, Comment, *The Wonder of the Warren Court*, 70 N.Y.U. L. REV. 780, 781 (1995) ("Pick up any *Harvard Law Review* Foreword from the Warren Court's glory days, and you will find famous law professors applauding the results the Warren Court reached while worrying about its activism.").

21. *Griswold v. Connecticut*, 381 U.S. 479 (1965), presents a paradigmatic example. Reread Justice William O. Douglas's opinion and ask yourself whether penumbras of judicial reasoning emanate from it.

22. *See* Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 761 (1992) ("The Warren Court Justices saw their service on the Supreme Court

important, the means used to get there did not terribly concern the Warren Court. Arguably, this ends-justify-the-means approach overshadowed – and ultimately betrayed – the Warren Court's institutional obligations to act as a legal and judicial institution.[23]

Yet, serious methodological misgivings notwithstanding, one should neither overlook nor underestimate the Warren Court's unwavering commitment to transforming merely theoretical (and largely empty) constitutional promises into meaningful (and judicially enforceable) rights. The outcomes in cases such as *Brown v. Board of Education*[24] and *Gideon v. Wainwright*[25] were far from preordained. A Court composed of members with less vision, less compassion, or less courage easily could have decided these cases quite differently. Moreover, Chief Justice Warren's personal stewardship of the project of expanding the scope and meaning of civil rights and liberties was simply remarkable. Earl Warren was indeed the "Super Chief."[26]

Nevertheless, one cannot look back without experiencing a certain sense of disappointment at the means sometimes used to accomplish laudable ends. Chief Justice Warren and his Court often placed results above process – a decision that might have seemed necessary (if not prudent) at the time, but in the hindsight of history, a decision that has proven quite detrimental to the long-term impact of the Warren Court's precedents. It would be something of an understatement to suggest that scholars have not particularly celebrated the Warren Court for its judicial craftsmanship.[27]

When reading some of the Warren Court opinions, one wonders precisely why a particular result flows, inexorably, from the Constitution.

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as just another job on the national political scene.").

23. *See id.* at 759 ("To conservatives, the Warren Court converted constitutional law into ordinary politics.").

24. 347 U.S. 483 (1954). *But see* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7-8, 18-23 (1996) (arguing that Warren Court's school desegregation decisions were less counter-majoritarian in historical context than commentators generally assert).

25. 372 U.S. 335 (1963).

26. *See* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY 771 (1983) (describing Justice William J. Brennan's use of "Super Chief" as nickname for Chief Justice Warren and observing that this title "was soon adopted by those in the Court who were growing increasingly nostalgic about the Warren years").

27. *See* Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 930 (1983) ("Although Warren was an important and courageous figure and although he inspired passionate devotion among his followers . . . he was a dull man and a dull judge."); Bernard Schwartz, *Chief Justice Earl Warren: Super Chief in Action*, 33 TULSA L. J. 477, 479 (1997) ("Certainly, Warren was anything but a learned legal scholar."). *See generally* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 4, 186-87, 217-21, 229-30, 358-67 (1982).

Consider *Bolling v. Sharpe*,[28] the decision holding the operation of segregated public schools in the District of Columbia unconstitutional on Fifth Amendment due process grounds.[29] Declaring it to be "unthinkable"[30] that the Constitution permits actions at the federal level that the Equal Protection Clause would prohibit if undertaken by a state government, Chief Justice Warren declared that the Fifth Amendment Due Process Clause "reverse incorporates" the Equal Protection Clause against the federal government (including the District of Columbia).[31] It is rather doubtful that the Reconstruction-era Congress would have considered it unthinkable that it possessed an ability to use racial classifications, even if the states did not possess such an ability.[32] After all, Congress considered itself the principal protector of the newly emancipated freedmen's civil and political rights. Moreover, its members expressly reserved to themselves the power to enforce the substantive provisions of the Fourteenth Amendment.[33]

From the perspective of the framers of the Fourteenth Amendment, the federal government was the answer to the pervasive problem of racial discrimination by the state governments, not part of the problem. Accordingly, Congress might have written the Fourteenth Amendment to preclude states from using racial classifications while reserving for itself an ability to write laws that expressly use race as a basis for granting or withholding

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28. 347 U.S. 497 (1954).

29. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (applying *Brown v. Board of Education*'s interpretation of Due Process Clause to schools in District of Columbia).

30. *Id.* at 500 (arguing that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government").

31. *Id.*; *see also* WHITE, *supra* note 27, at 363 (arguing that "Warren turned *Bolling v. Sharpe* into an unconventional equal protection case," noting that "[t]he important thing [for Warren] was to reach a result outlawing segregation in the District of Columbia," and suggesting that, for Warren, "[h]ow that result was accomplished was much less significant").

32. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521-22 (1989) (Scalia, J., concurring) (noting that Congress's "legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment" and suggesting that purpose of Fourteenth Amendment was to limit state control over matters of race while enlarging congressional oversight of such matters); Fullilove v. Klutznick, 448 U.S. 448, 472-73, 483-84 (1980) (holding that Congress has broad discretion to enforce Fourteenth Amendment, including authority to adopt race-based remedial plans, because it has been "expressly charged by the Constitution with competence and authority to enforce the equal protection guarantees"). *See generally* JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 36-39, 56-61, 152-69 (2d ed. 1994) (describing creation and role of Bureau of Refugees, Freedmen, and Abandoned Lands, commonly known as Freedmen's Bureau, and political and social conditions in states of former Confederacy that necessitated continued congressional activity to protect civil rights of African Americans).

33. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article.").

government benefits. The Freedmen's Bureau, with its promise of "Forty Acres and a Mule," represents a direct use of race to grant a benefit to one racial group (the newly freed African Americans) and yet to deny the same benefit to other citizens who lacked membership in the preferred racial group.

Thus, the question takes on subtleties that completely transcend the particular problem of school desegregation. One might well believe that the federal government should be able to establish race-based remedial programs that the state governments could not themselves establish. That is to say, the Equal Protection Clause might be thought to leave states without the power to use race-based classifications and yet to allow the federal government some latitude to do so.

Yet, the Warren Court's sloppy theory of reverse incorporation, convenient if not persuasive, left open the door to the identical application of the Equal Protection Clause to both the state and federal governments. With the advent of precedents disabling states and local governments from establishing "benign" race-based classifications,[34] the *Bolling* holding made it very easy to extend this prohibition to the federal government itself. And, in *Adarand Constructors, Inc. v. Pena*,[35] the Rehnquist Court made this exact jurisprudential move.[36]

Writing for the majority, Justice O'Connor explained that the Supreme Court's equal protection jurisprudence reflects principles of "skepticism," "consistency," and "congruence."[37] By this, she meant that equal protection demands strict scrutiny of all race-based government classifications ("skepticism"), applies to minorities and non-minorities alike ("consistency"), and binds both the state and federal governments ("congruence").[38] Justice O'Connor even cited *Bolling v. Sharpe* in support of these propositions.[39] Justice O'Connor's use of *Bolling* was more than fair: Chief Justice Earl Warren, and those Associate Justices who shared his vision (like Justice William J. Brennan, Jr.), gave insufficient attention to the full implications of their reasoning. If the end result seemed right, the reasons offered to support the result were a matter of some indifference.[40]

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34. *See J.A. Croson*, 488 U.S. at 490-94 (holding that strict scrutiny review applies to all state and municipal affirmative action plans).

35. 515 U.S. 200 (1995).

36. *See* Adarand Contractors, Inc. v. Pena, 515 U.S. 200 (1995) (requiring courts to analyze all racial classifications, including those imposed by federal government, with strict scrutiny).

37. *Id.* at 223-24.

38. *Id.*

39. *Id.* at 215-16, 224.

40. *See* Ronald J. Krotoszynski, Jr., *An* Epitaphios *for Neutral Principles in Constitutional Law:* Bush v. Gore *and the Emerging Jurisprudence of* Oprah!," 90 GEO. L.J. 2087,

In short, the Warren Court blundered by failing to do the jurisprudential heavy lifting needed to author a persuasive opinion as to why the federal government could not operate segregated schools. Deeming such arrangements "unthinkable" and moving on was, at best, an incomplete effort. By failing to engage in nuanced legal reasoning regarding the use of racial classifications by the federal government, the Warren Court planted the seeds of *Adarand*.

If subsequent political tides had favored the Warren Court's vision, this failure of means might not have mattered. But the electorate ultimately rejected the Warren Court's vision and elected Presidents (like Richard Nixon) who overtly committed themselves to repealing the Warren Court's judicial legacy (particularly in the field of criminal procedure). Had the Warren Court put an equal emphasis on means and ends, its legacy might have proven more robust over time. Thus, the Warren Court's disregard of legal process values made it much easier for subsequent Supreme Court majorities to limit or overrule the Warren Court's precedents.

Even though the Warren Court's methodology often left much to be desired, one should not assume that all of the Warren Court's legacy has been swept aside or diverted to jurisprudential projects at odds with Chief Justice Warren's vision. Modern First Amendment law finds its roots in decisions like *New York Times Co. v. Sullivan*,[41] *Brandenburg v. Ohio*,[42] and *Engel v. Vitale*.[43] Voting rights jurisprudence relates back in a rather straight jurisprudential line to *Baker v. Carr*,[44] *Reynolds v. Sims*,[45] and *Harper v. Virginia*

2089-93, 2102-04, 2117-24 (2002) (arguing that voting patterns and reasoning offered by most Justices in *Bush v. Gore* reflected strategic, and perhaps even political, considerations rather than principled adjudication of constitutional claims and warning that such behavior undermines public's confidence in Supreme Court's work); Schwartz, *supra* note 27, at 502 ("To [Warren], the outcome of a case mattered more than the reasoning behind the decision. He took full responsibility for the former and delegated the latter, in large part, to his law clerks."); *cf.* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11-20 (1959) (arguing that Supreme Court's legitimacy rests on persuasiveness of its claim of being engaged in project of principled adjudication based on constitutional text, history, and precedent and positing that unprincipled decisionmaking, over time, will undermine Court's claim of being engaged in something other than politics).

41. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (immunizing press from liability for factual errors in reporting about public officials or public figures absent showing by plaintiff that defendant possessed actual knowledge of falsity or published with reckless disregard of possible falsity).

42. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (protecting advocacy of any sort in absence of clear and present danger of imminent lawlessness).

43. *See* Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting official religious exercises in public schools).

44. *See* Baker v. Carr, 369 U.S. 186 (1962) (holding that equal protection principle disallows malapportioned state legislative districts and requiring each vote to count equally so

State Board of Elections.[46] Equal protection principles found new relevance beginning with *Brown v. Board of Education*[47] and, over the course of time, the equal protection guarantee has grown to encompass protection against invidious discrimination based on gender,[48] nationality,[49] disability,[50] and apparently sexual orientation.[51] Perhaps most importantly, the modern doctrine of substantive due process, which safeguards "fundamental liberties" from abridgment absent a compelling state interest, relates directly back to *Griswold v. Connecticut*[52] and *Loving v. Virginia*.[53]

Modern constitutional law, at least in the area of civil rights and civil liberties, constitutes a running commentary on the ideas and theories of the Warren Court. Although not all Warren Court precedents have survived the test of time, the Warren Court fundamentally reoriented the agenda of the federal judiciary. Indeed, it is difficult to imagine a contemporary debate about civil rights and civil liberties that does not draw upon the jurisprudential legacy of the Warren Court.

Consider, for example, the state action doctrine. As most lawyers, scholars, and judges know, the Bill of Rights and the Fourteenth Amendment only safeguard individual rights against government encroachment.[54] Purely

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that one person has effectively only one vote).

45. *See* Reynolds v. Sims, 377 U.S. 533 (1964) (explicating further one-person-one-vote rule of equal protection set forth in *Baker*).

46. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (holding that Equal Protection Clause prohibits states from conditioning voting rights in state elections on payment of poll tax). For a discussion of the Warren Court's work in the field of equal protection and voting rights, see Schwartz, *supra* note 27, at 490-92.

47. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (rejecting "separate but equal" doctrine and ordering racial integration of public schools).

48. *See* United States v. Virginia, 518 U.S. 515, 534 (1996) (invalidating, on equal protection grounds, bar on admission of women to state military college because state failed to proffer "exceedingly persuasive justification" in defense of gender-biased policy).

49. *See In re* Griffiths, 413 U.S. 717, 729 (1973) (rejecting, on equal protection grounds, state statute that prohibited aliens from admission to practice law).

50. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (invalidating, on equal protection grounds, adverse zoning decision that barred operation of home for retarded adults).

51. *See* Romer v. Evans, 517 U.S. 620, 631-36 (1996) (invalidating, on equal protection grounds, Colorado constitutional amendment that restricted ability of local and state government to enact laws prohibiting discrimination on basis of sexual orientation).

52. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating, on substantive due process grounds, Connecticut law that prohibited distribution or use of contraceptives).

53. *See* Loving v. Virginia, 388 U.S. 1 (1967) (invalidating Virginia anti-miscegenation law on both equal protection and substantive due process grounds).

54. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (observing that Bill of Rights and Fourteenth Amendment "erected no shield against merely private conduct, however discrimina-

private conduct need not comply with constitutional requirements. Absent a civil rights statute extending constitutional protections to persons suffering harms from nonstate actors,[55] a private entity may lawfully engage in behavior in which the government itself may not. Thus, prior to the enactment of major new civil rights legislation in the 1960s, the presence or absence of state action typically prefigured whether a defendant had an obligation to refrain from racial discrimination.[56]

Because of the importance of state action to the enforcement of the Fourteenth Amendment, the Warren Court began expanding the scope of the doctrine to reach more ostensibly "private" conduct. *Burton v. Wilmington Parking Authority*[57] arguably represents the zenith of this jurisprudential effort. In *Burton*, the Justices articulated the "symbiotic relationship" test, under which a federal court should hold an ostensibly private entity accountable under the Fourteenth Amendment if it seems reasonable to do so in light of the overall facts and circumstances. The Court characterized this test in terms of a mutually beneficial relationship between a private entity and the state.[58] However, the test really represented an open-ended inquiry into the relationship between the state and the private entity in order to ascertain whether it would be fundamentally fair to hold the private entity accountable for constitutional violations.[59]

Similarly, in *Reitman v. Mulkey*,[60] the Warren Court developed the "nexus" test, which holds private entities accountable for constitutional violations when the government encourages or invites the constitutional violation.[61]

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tory or wrongful"); *see also* The Civil Rights Cases, 109 U.S. 3, 11, 17 (1883) (describing Fourteenth Amendment as protecting individuals from "exertion of arbitrary and tyrannical power" by state governments, but not protecting "rights of one citizen against another"); United States v. Harris, 106 U.S. 629, 638-39 (1882) (stating that Fourteenth Amendment encompasses state action, not private action); Virginia v. Rives, 100 U.S. 313, 318 (1879) (same).

55. *E.g.*, 42 U.S.C. § 1981(c) (2000); 42 U.S.C. § 2000e-2 (2000).

56. *See, e.g.*, Peterson v. City of Greenville, 373 U.S. 244, 247-48 (1963) (holding that Greenville, South Carolina ordinance mandating segregation in public places, including restaurants, removed decision to refuse service to minorities from private store's sphere of choice and thereby made private store state actor when acting consistently with ordinance).

57. 365 U.S. 715 (1961).

58. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

59. *See id.* at 722-25 (examining various symbolic and financial connections between State of Delaware and Eagle Coffee Shoppe and concluding that Eagle Coffee Shoppe was state actor because of interdependent relationship).

60. 387 U.S. 369 (1967).

61. *See* Reitman v. Mulkey, 387 U.S. 369, 379-81 (1967) ("Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations.

In conjunction with the symbiotic relationship test, the nexus test casts a very broad net indeed. State action doctrine is a complex field, and reasonable people hold differing views as to what level of connection between the state and a private entity justifies imposing constitutional obligations on an ostensibly private entity. That said, the Warren Court's efforts made it very difficult for government to avoid responsibility for racial discrimination by delegating responsibility for the discriminatory actions to a private-sector entity. In this way, the expanded scope of state action doctrine greatly facilitated the Warren Court's equality project.

During the Burger Court and continuing into the Rehnquist Court, the Justices have limited the scope of the Warren Court's state action precedents. In a series of cases beginning in the mid-1970s and continuing into the 1980s, the Supreme Court restricted the scope of the state action doctrine considerably.[62] In case after case, the Justices declined to find state action present.[63] Although never flatly overruled, the Warren Court precedents appeared to hold significantly diminished binding power.

But sometimes the Warren Court's vision has an inescapable appeal. The Warren Court's commitment to holding government responsible for constitutional wrongs arguably represents one of those moments of moral clarity that also yields a compelling legal principle. Although the Warren Court's broad vision of state action fell into a state of desuetude under the Burger and Rehnquist Courts, it has proven to be more robust than some critics might have anticipated.

In 2001, the Rehnquist Court returned to the Warren Court's broad vision of state action in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.[64] In that case, Justice Souter established a new state action test – a test premised on "entwinement" between the state and the ostensibly private entity. He explained: "If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and

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Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State.").

62. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1011-12 (1982) (concluding that federal funding and regulation of home for elderly did not transform home into state actor); Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982) (concluding that state-funded special needs school that provided only special needs services in community, that used state funds, and that was subject to state and local oversight was not state actor); Jackson v. Metro. Edison Co., 419 U.S. 345, 351-53, 357-59 (1974) (applying various state action tests and finding that heavily regulated monopoly provider of electricity was not state actor).

63. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 199 (1988) (concluding that NCAA's imposition of sanctions against university was not state action); S.F. Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542-47 (1987) (concluding that United States Olympic Committee was not state actor).

64. 531 U.S. 288 (2001).

people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed."[65] Eschewing any simple (or single) talismanic test, Justice Souter argued, "what is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity."[66]

Prior to *Brentwood Academy*, three basic state action tests had emerged: the exclusive-government-function test,[67] the symbiotic-relationship test,[68] and the nexus test.[69] The Supreme Court also had held that the government did not cease to be the government through the use of a corporate shell to advance a public policy.[70] The federal courts consistently applied these tests independently and in isolation; factors relevant to one test were not germane to the application of a different test.[71] *Brentwood Academy* represents a marked departure from this methodology and reorients modern state action analysis toward its Warren Court roots.

Justice Souter did not apply the state action tests in isolation to find that the Association was a state actor. Instead, he examined the Association's function, its membership, and its relationship to the State of Tennessee (particularly to the Tennessee State Board of Education).[72] Justice Souter noted: "The entwinement down from the State Board is . . . unmistakable, just as the entwinement up from the member public schools is overwhelming."[73]

The *Brentwood Academy* Court expressly recognized its departure from prior state action precedents:

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65. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

66. *Id.*

67. Flagg Bros. v. Brooks, 436 U.S. 149, 157-62 (1978); Nixon v. Condon, 286 U.S. 73, 88-89 (1932).

68. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722-26 (1961).

69. Jackson v. Metro. Edison Co., 419 U.S. 345, 351-53 (1974).

70. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394 (1995) (holding that government's advancement of public policy by creating corporation and remaining majority shareholder results in corporation constituting part of government for purposes of state action determination).

71. *See* Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 304-05, 335-46 (1995) (arguing for "meta-analysis" in state action determinations, which means that federal courts should apply state action tests both individually and conjunctively in "totality of the circumstances" analysis using elements of all three state action tests).

72. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. at 233, 298-302 (2001) (observing that athletic association had public institutions and officials involved in its workings, financing, membership, and leadership positions).

73. *Id.* at 302.

> Entwinement is . . . the answer to the Association's several arguments offered to persuade us that the facts would not support a finding of state action under various criteria applied in other cases. These arguments are beside the point, simply because the facts justify a conclusion of state action under the criterion of entwinement, a conclusion in no sense unsettled merely because other criteria of state action may not be satisfied by the same facts.[74]

This exposition represents a new and different state action test, an amalgam of bits and pieces of evidence relevant to pre-existing state action tests but perhaps insufficient to satisfy any one of those tests standing alone. That the Association was not a state actor under these other state action tests was irrelevant to the Court because "[e]ntwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it."[75]

The majority's novel approach brought howls of protest from three dissenting Justices, led by Justice Thomas. He opened his dissent with the trenchant observation that "[w]e have never found state action based upon mere 'entwinement.'"[76] Justice Thomas's statement was entirely accurate: the entwinement test represented something new under the sun. Previously, state action analysis required a plaintiff either to establish that the entity was the government itself or to satisfy the exclusive-government-function test, symbiotic-relationship test, or nexus test.[77] Moreover, it is highly doubtful that the Association fully satisfied *any* of the pre-existing state action tests.[78]

The majority acknowledged that the pre-existing state action tests might not have justified its conclusion, but argued that this lack of justification simply did not matter. "Facts that address any of these criteria [the other state action tests] are significant, but no one criterion must necessarily be applied."[79] Thus, entwinement constitutes an independent test for the presence of state action. "When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test."[80]

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74. *Id.*

75. *Id.*

76. *Id.* at 305 (Thomas, J., dissenting).

77. *See id.* (Thomas, J., dissenting) (listing all three traditional state action tests).

78. *See id.* at 308-12 (Thomas, J., dissenting) (describing and applying Court's traditional state action tests and concluding that athletic association was not state actor under any of them).

79. *Id.* at 303.

80. *Id.*

Brentwood Academy provides an important caveat to those who argue that the Warren Court's legacy has proved fleeting. Even in areas in which subsequent Courts appeared to have supplanted the Warren Court's methodology, one may wonder whether everything old will be, in time, new again. This possibility certainly appears less likely in the area of criminal law and criminal procedure. The basic drift of the Supreme Court since the Warren Court has been away from expansive constructions of the rights of criminal defendants. But even in the area of criminal law, one should not underestimate the lingering effects of the Warren Court's legacy.[81] *Gideon*'s trumpet has a way of sounding when one least expects it.[82]

III. Three Views of the Warren Court's Legacy: The Past Critiqued, Celebrated, and Recaptured

The panel Articles richly explore the promise and the perils of the Warren Court's approach to civil rights and civil liberties. Professor BeVier acknowledges the importance of the Warren Court's contribution to First Amendment jurisprudence and its nexus with the federal government's efforts to disestablish state-sponsored racial discrimination in the South: "Let us begin with Justice Brennan's masterful and doctrinally innovative opinion in *New York Times Co. v. Sullivan*, a paradigmatic example of Warren Court First Amendment jurisprudence in service of the civil rights cause."[83]

Professor BeVier, endorsing the view of Professor Harry Kalven, characterizes the decision as "almost as much a civil rights case as it was a First Amendment case."[84] And Professor BeVier seems to believe that *New York Times Co.* advanced, in a reasonably convincing way, the civil rights agenda of the Warren Court.[85] But the long-term effects of the decision have fallen wide of Justice Brennan's mark: "Put bluntly, *New York Times Co.*'s direct progeny and their close cousins, namely the First Amendment cases

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81. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (holding that execution of mentally retarded defendants violates Eighth Amendment's proscription against cruel and unusual punishment).

82. *See* Gideon v. Wainwright, 372 U.S. 335, 342-45 (1962) (expanding right to counsel in criminal cases). *Gideon* served as one of the most visible icons of the Warren Court's efforts in the field of criminal procedure.

83. Lillian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment*, 59 WASH. & LEE L. REV. 1075, 1080 (2002).

84. *Id.* at 1081.

85. *See id.* at 1083 (describing *New York Times Co.* as reflecting "deliberately strategic approach to [the] First Amendment" intended to advance cause of civil rights for racial minorities).

dealing with libel and privacy, are for the most part an undistinguished lot of surprisingly trivial cases clothed in ill-fitting but by now wholly conventional-seeming First Amendment garb."[86]

In Professor BeVier's view, the Warren Court's efforts to protect civil rights through an expansive reading of the Free Speech Clause have devolved into a "hodge-podge of supposedly constitutionally mandated adjustments to the common law of libel."[87] Professor BeVier convincingly offers a cautionary note about the perils of unintended consequences.[88] Moreover, the Warren Court appeared especially prone to overlook this sort of problem in its decisions.[89]

With free speech now being used by citizens affirmatively opposed to pluralism and multiculturalism, doctrines fashioned to facilitate the end of *de jure* segregation are now deployed to protect the Ku Klux Klan and the American Nazi party and to attack efforts to create more inclusive communities through speech regulations such as campus speech codes. As Professor BeVier notes, "It's a fair bet that the Warren Court never imagined that civil liberties and civil rights could ever be on a collision course."[90] Undoubtedly the Warren Court could better have advanced its vision of the law had it thought more comprehensively about the potential implications of both its holdings and the reasons offered in support of them.

Professor Calmore presents a more sympathetic review of the Warren Court's handiwork, at least insofar as its decisions helped to reframe and recast the nation's thinking about issues of race. Rather than focusing on discrete results and rationale in particular cases, Professor Calmore sees the Warren Court's significance primarily in *cultural* terms. "I think that the real value of the Warren Court's race jurisprudence lies in its force as a culture-shifting tool and, more importantly, in its inspiration to advocates of social justice."[91]

Indeed, for Calmore the language of law is itself inadequate to the task of reforming contemporary culture. He posits cultural studies as an

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86. *Id.* at 1084.

87. *Id.* at 1085.

88. *See id.* at 1092 ("[O]ne of the most unhappy facts about the present day is that so many scholars regard free speech as the enemy – or at least the potential enemy – of civil rights, not its handmaiden.").

89. *See* text accompanying *supra* notes 34-40 (arguing that *Bolling v. Sharpe*'s loose reasoning facilitated end of federal affirmative action programs).

90. BeVier, *supra* note 83, at 1092.

91. John O. Calmore, *The Law and Culture Shift: Race and the Warren Court Legacy*, 59 WASH. & LEE L. REV. 1095, 1099 (2002).

essential addition to the nation's ongoing equality project. Professor Calmore explains that:

> I see the turn to cultural studies as both necessary and proper because social injustice seems to have overwhelmed the ability of law to redress it. Further, legal scholarship, in the narrow sense, seems quite inadequate to address what we need to know to open our society, to promote a multiracial democracy, and to establish a more just order. These values were the primary culture-shifting ambitions of the Warren Court's race jurisprudence.[92]

The equality project, in Calmore's view, has surpassed the capabilities of mere legal discourse. "The large shifts in society and culture over the nearly fifty years since *Brown v. Board of Education* have outpaced the rights and remedies that are part of the Warren Court's legacy."[93] A turn to cultural studies is therefore necessary because "[c]ultural studies is a tool to bridge this gap."[94]

Although Calmore asks rhetorically, "Did the Warren Court promise too much or not enough?,"[95] his arguments for the co-equal status of cultural norms to legal norms in the equality project plainly moot the question. Because the Warren Court limited its discourse to the formal language of law, it could never have achieved the revolution in race relations that Calmore believes to be an essential precondition to true equality. Of course, the Warren Court's precedents were themselves constitutive of the community's *zeitgeist* and affected the framing of race in contemporary American society. From this point of view, it is reasonable to ask whether the Warren Court did everything that it could to advance the equality project. But, plainly, if culture has an inexorable pull on law and legal norms – as Calmore posits – the Warren Court, by itself, could never do enough to remake society in a truly egalitarian image.

Professor Calmore cogently argues that whatever shortcomings might have inhered in the Warren Court's decisions on race, the subsequent decisions of the Burger and Rehnquist Courts are far worse. In particular, he accuses the Burger Court of a kind of willful blindness to the pervasive relevance of race as a social phenomenon. Using *City of Memphis* v. *Greene*[96] as a prism for

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92. *Id.* at 1109.

93. *Id.*

94. *Id.*

95. *Id.* at 1111.

96. 451 U.S. 100 (1981) (holding that City of Memphis could erect traffic barriers that separated predominantly white neighborhood near public park from predominantly black neighborhood on other side of street on theory that aesthetics and concern for unwanted traffic provided race-neutral reasons for city's action).

viewing the Supreme Court's framing of race issues, Professor Calmore argues that the Court in that decision "legitimized the adverse representation of blacks as 'undesirable traffic.'"[97] He goes on to discuss several incidents in which race and racism manifest in both private and public contexts, without much shame or remorse on the part of nonminorities.[98]

Notwithstanding the backsliding that Calmore sees both in legal doctrine and in everyday social relations, he believes that the equality project is not doomed to failure. For it to succeed, "[w]e must recommit to the humanizing aspects of the civil rights movement as it was organically connected to a larger movement for freedom, justice, and human dignity."[99] Continuing efforts at effecting change through law are important, but so too are grassroots efforts to change the culture in which law operates.

In particular, the framing devices used to present minorities must be amended. According to Calmore, "We must reconstruct and re-present unwanted traffic as the human beings that they really are, as members of society who deserve a fair shot at living their lives as part of the larger humanity within this nation."[100] Famed civil rights judge Frank M. Johnson, Jr., once noted: "[I]f the life of the law has been experience, then the law should be realistic enough to treat certain issues as special, as racism is special in American history. A judiciary that cannot declare that is of little value."[101] The Warren Court's legacy is an important, but only partial, contribution toward this goal.

Finally, Professor Peller believes that the Warren Court failed to grasp the full implications of the equality project: the creation and enforcement of *positive* constitutional rights.[102] The Warren Court attempted to remake

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97. Calmore, *supra* note 91, at 1113.

98. *See id.* at 1122-28 (providing several anecdotes illustrating examples of contemporary racism).

99. *Id.* at 1134.

100. *Id.* at 1138; *cf.* Adeno Addis, *"Hell Man, They Did Invent Us:" The Mass Media, Law, and African Americans*, 41 BUFF. L. REV. 523, 553-66 (1993) (arguing that media portrayals of racial minorities constitute powerful framing device that, quite literally, creates image of minorities held by nonminorities); Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1442-58 (1996) (arguing that federal courts accept role-model theories as relevant when such theories disadvantage minorities, but reject such theories when minorities would benefit from consideration of role-model function and suggesting that presence of positive minority role models benefits both minority and non-minority communities).

101. Honorable Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 908 (1979).

102. *See generally* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 872-87 (1986) (describing distinction between positive and negative constitutional rights and noting strong tradition of Supreme Court recognizing and enforcing only negative constitutional rights).

American society through the aggressive enforcement of negative constitutional rights; yet, the kind of broad-based societal reform necessary to create true conditions of equality might require the recognition and enforcement of both negative and *affirmative* rights.[103]

In Peller's view, the Warren Court was too timid in requiring affirmative state action to redress inequality: "Many of the celebrated Warren Court rulings in the areas of individual and civil rights applied a *de jure* analysis, and accordingly incorporated a conservative social theory, even as the rulings seemed to favor progressive political and cultural positions."[104] These decisions undermined the Warren Court's ability to promote progressive social change because they limited government responsibility for structural impediments, such as poverty, to the exercise of constitutional rights and to meaningful participation in the project of democratic self-governance. These rulings, which "depended on the same libertarian image of a private realm free from public power that it had so thoroughly discredited in the social and economic area,"[105] permitted the state to escape any responsibility for conditions of vast inequality throughout American society.

Looking to Warren Court decisions like *Green v. County School Board of New Kent County*[106] and *Sherbert v. Verner*,[107] Professor Peller argues that the Warren Court perceived the importance of providing affirma-

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103. *See, e.g.*, Honorable Frank M. Johnson, Jr., *The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 469-71 (1977) (arguing that federal courts must effectively remediate constitutional wrongs, even if this remediation requires granting affirmative relief). In the context of institutional reform lawsuits involving state-run prisons and mental hospitals, Judge Johnson stated:

> Because of the complexity and nature of the constitutional rights and issues involved, the traditional forms of relief have proven totally inadequate and the courts have been left with two alternatives. They could throw up their hands in frustration and claim that, although the litigants have established a violation of constitutional or statutory rights, the courts have no satisfactory relief to grant them. This would, in addition to constituting judicial abdication, make a mockery of the Bill of Rights.

Id. at 471.

104. Gary Peller, *A Subversive Strand of Warren Court Jurisprudence*, 59 WASH. & LEE L. REV. 1141, 1164 (2002).

105. *Id.* at 1151.

106. *See* Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968) (ordering affirmative steps to integrate formerly segregated public schools and prohibiting use of voluntary "freedom-of-choice" plan as device that would lead to resegregation of New Kent County, Virginia public schools).

107. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (holding that Free Exercise Clause mandates that state unemployment benefits be paid to Sabbatarian fired from job for refusing to work on Saturday).

tive relief, as opposed to merely prohibitory relief, for constitutional wrongs; the Court often required remedial steps in addition to the cessation of the unlawful discriminatory actions.[108] As Judge Frank Johnson observed, "[I]f we, as judges, have learned anything from *Brown v. Board of Education* and its progeny, it is that prohibitory relief alone affords but a hollow protection to the basic and fundamental rights of citizens to equal protection of the law."[109] Peller embraces this sort of reasoning and suggests that a focus on the *de facto* effects of both government action and government inaction would significantly improve the fundamental fairness of rights adjudication in constitutional law.[110] "The virtue of the *de facto* standard is that it permits a wider appraisal of the social order to determine if the social conditions for constitutional legitimacy actually exist . . . . [T]he *de facto* standard is linked to views of collective responsibility and to the norm of social solidarity."[111]

The implications of Professor Peller's proposal are quite broad. As he himself notes, "[T]he logical consequence of the victory of a general *de facto* standard of constitutional review would be to subject virtually all legislative action to judicial scrutiny – and the result is even more extreme than that."[112] A fully actualized *de facto* regime would empower the federal courts to act proactively to create the conditions necessary for democratic self-governance without "wait[ing] for legislative action at all – because governmental inaction itself might be the reason for the inability to exercise rights of free speech, or voting, or travel."[113] Ultimately, "were the Court to apply widely the *de facto* standard, the judiciary would evaluate the entire social field to ensure its consistency with constitutional norms."[114] Thus, Peller's critique of the Warren Court is that it was not progressive enough – that it recognized the limits of negative constitutional rights, worked around those limits in a handful of cases, but otherwise failed to reorient rights discourse in a way that would meaningfully empower economically disadvantaged persons.

Peller's critique provides an interesting contrast with the commonly held view that the Warren Court was, in fact, too activist. In essence, his claim seems to be that the Warren Court was not activist enough. This claim may well be true, and certainly vast disparities in wealth continue to exist in

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108. Peller, *supra* note 104, at 1154-60.
109. Johnson, *supra* note 103, at 471.
110. Peller, *supra* note 104, at 1164-65.
111. *Id.* at 1163.
112. *Id.*
113. *Id.*
114. *Id.* at 1164.

the contemporary United States. It also appears reasonably clear that economic need correlates with less active citizenship – particularly with respect to voting.[115] However, as a matter of practical politics one has to wonder if the Warren Court could have successfully transformed the concept of rights in the fashion that Peller suggests. A similar attempt by the *Lochner*-era Court ultimately failed, and in the process the Supreme Court managed to discredit itself to the point of generating bizarre court-packing schemes.[116] Political realities might well have impeded the sort of jurisprudence that Peller advocates or, presumably worse yet from his perspective, succeeded in creating a discourse of positive rights, only to have that discourse reoriented from the poor and powerless to the propertied.[117]

Ultimately, one can only speculate about what the Warren Court legacy might have become had the Court embraced the full implications of its recognition of positive rights in cases like *Green* and *Sherbert*. Professor Peller's Article posits the possibility of a constitutional jurisprudence more congenial to the progressive agenda. Perhaps this could have been so; perhaps not. In either case, it bears noting that at least some critics on the Left see the Warren Court's legacy as reflecting undue timidity, as opposed to unseemly haste, in the creation and enforcement of rights.

IV. Conclusion

The Warren Court presided over arguably the most important period for the development of human rights in the United States. Indeed, the Warren Court's overall importance is second only to that of the Marshall Court, which established the strong system of judicial review that prevails today (to say nothing of its efforts to sustain a strong and effective national government).[118]

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115. *See* James W. Fox, Jr., *Liberalism, Democratic Citizenship, and Welfare Reform: The Troubling Case of Workfare*, 74 WASH. U. L.Q. 103, 124-31, 136-49 (1996) (discussing relationship of basic material needs to meaningful participation in civic life).

116. *See* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940, at 143-46, 231-39 (1963) (describing Supreme Court's protracted efforts to block New Deal programs and President Roosevelt's response to Court's intransigence – a plan to "pack" Court with Justices thought to be supportive of Roosevelt's programs).

117. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 538 (1998) (concluding that retroactive funding mechanism for retired coal miners' health benefit coverage violated Takings Clause); Dolan v. City of Tigard, 512 U.S. 374, 383-96 (1994) (interpreting Takings Clause to disallow city's conditional approval of zoning variance).

118. *See* Philip B. Kurland, *Earl Warren: Master of the Revels*, 96 HARV. L. REV. 331, 332 (1982) (book review) (noting common view among legal academics that Chief Justice Warren "is the greatest or second greatest judge in American history, depending on where they rank John Marshall").

The Articles that follow bear testament to the importance of this period in American constitutional law. That the authors have such divergent attitudes about the work product of the Warren Court and its continuing legacy reflects the gravity of the Warren Court's decisions and the innovative means that it used to reach them.

The echoes of the Warren Court continue to reverberate in contemporary constitutional law discourse. It has been thus for the past fifty years and will likely be so for the next fifty. Questions of equality and fundamental fairness – the central projects of the Warren Court – will remain salient so long as some citizens perceive a lack of equality or fairness in the status quo. And although we have come a long way since *Brown v. Board of Education*, we still have a great distance to travel before the words "Equal Justice for All" describe a universally lived reality rather than merely a grand and hopeful aspiration.