

A History of the Supreme Court

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infringed upon personal rights guaranteed by the Bill of Rights, the Chief Justice refused to defer to the legislative judgment that had considered the law necessary.

Warren rejected the Frankfurter philosophy of judicial restraint because he believed that it thwarted effective performance of the Court's constitutional role. Judicial restraint, in the Chief Justice's view, all too often meant judicial abdication of the duty to enforce constitutional guarantees. "I believe," Warren declared in an interview on his retirement, "that this Court or any court should exercise the functions of the office to the limit of its responsibilities." Judicial restraint meant that "for a long, long time we have been sweeping under the rug a great many problems basic to American life. We have failed to face up to them, and they have piled up on us, and now they are causing a great deal of dissension and controversy of all kinds." To Warren, it was the Court's job "to remedy those things eventually," regardless of the controversy involved.⁴⁷

The Warren approach in this respect left little room for deference to the legislature, the core of the restraint canon. Warren never considered constitutional issues in the light of any desired deference to the legislature. Instead, he decided those issues based on his own independent judgment, normally giving little weight to the fact that a reasonable legislator might have voted for the challenged law.

For Chief Justice Warren, the issue on judicial review was not *reasonableness* but *rightness*. If the law was contrary to his own conception of what the Constitution demanded, it did not matter that a reasonable legislator might reach the opposite conclusion. When Warren decided that the Constitution required an equal population apportionment standard for all legislative chambers except the United States Senate, the fact that no American legislature had followed the new requirement did not deter him from uniformly applying the standard.⁴⁸ Justice Harlan's dissent may have demonstrated that the consistent state practice was, at the least, reasonable. For the Chief Justice, however, legislative reasonableness was irrelevant when the practice conflicted with his own interpretation of the Constitution.

The Court and Civil Rights

Not too long ago, legal observers expected the post-1937 "constitutional revolution" to signal a permanent decline in the Supreme Court's position. The subdued role played by the Court in the later New Deal period, during World War II, and in the postwar years led many to expect the Court to wither away, much as the state was supposed to do in Marxist theory. Yet one thing is clear: the Marxist state may have disappeared, but America's high tribunal has anything but withered away in the second half of the century.

Still, the work of the Supreme Court under Chief Justice Warren differed from earlier periods. In the Warren Court, the emphasis in the

Court completed the shift from the safeguarding of property rights to the protection of personal rights. In enforcing the liberties guaranteed by the Bill of Rights, the Supreme Court forged a new and vital place for itself in the constitutional structure. More and more the Court came to display its solicitude for individual rights. Freedom of speech, press, and religion, the rights of minorities and those accused of crime, those of individuals subjected to legislative and administrative inquisitions—all came under the Warren Court's fostering guardianship.

Foremost in the Warren Court's catalogue of individual rights was that to racial equality. The landmark decision here was, of course, that in the *Brown* school segregation case, to which the next chapter is devoted. As we shall see there, *Brown* not only outlawed school segregation but also served as the foundation for a series of decisions outlawing racial segregation in all public institutions. By 1963, the Court could declare categorically, "It is no longer open to question that a State may not constitutionally require segregation of public facilities."⁴⁹

In its *Brown* decision, the Court had held that school segregation was unconstitutional, and a year later, in its second *Brown* decision, the Court ordered the district courts to take such action as was necessary and proper to ensure the nondiscriminatory admission of plaintiffs to schools "with all deliberate speed."⁵⁰ The enforcement of *Brown* was left to the lower courts, which met massive resistance in many Southern school districts. The Warren Court intervened in several cases to force desegregation, particularly in *Griffin v. County Board of Prince Edward County* (1964),⁵¹ in which a Virginia county had closed down its school system rather than have blacks attend schools with whites. Then, in *Green v. County School Board* (1968),⁵² the Court invalidated "freedom of choice" plans, under which most Southern school districts then operated. The Court held that a school board had a duty to come forward with a desegregation plan that "promises realistically to work now." If the board did not do so, the federal court had authority to issue any order deemed necessary to achieve immediate desegregation.

The Warren Court decisions furthering racial equality were an important catalyst for the civil rights protests of the 1960s and congressional action to protect civil rights. Both developments received support from the Warren Court decisions. Convictions of civil rights demonstrators in public places and at sit-in demonstrations at restaurants, lunch counters, and libraries were reversed in a number of cases.⁵³ Other cases established the right to use the streets and other public places as "public forums" for the dissemination of even unpopular views.⁵⁴

Soon after the Court decided the last of the important sit-in cases, the Civil Rights Act of 1964 became law—the first time since Reconstruction that Congress had passed an important statute to protect civil rights. The 1964 law prohibited racial discrimination in hotels, restaurants, and other public accommodations. The decision in the *Civil Rights Cases*⁵⁵ of 1883 had invalidated a similar law (the Civil Rights Act of 1875) on the ground

that the Fourteenth Amendment's guaranty of equal protection was limited to "state action" and did not reach the discrimination of private hotel and restaurant owners, but the Warren Court upheld the 1964 Act.

The Court ruled in *Heart of Atlanta Motel v. United States* (1964)⁵⁶ that Congress could pass the law under its commerce power and a law under that power was not subject to the "state action" limitation. The Court also upheld the Voting Rights Act of 1965, which contained far-reaching provisions protecting the right of blacks to vote. Though the Act provides for the supplanting of state election machinery by federal law and federal officials, the opinion of Chief Justice Warren found it a valid congressional measure to enforce the Fifteenth Amendment.⁵⁷

Reapportionment

The *Brown* decision signaled the expansive attitude of the Warren Court toward the constitutional guaranty of equality. From the field of racial equality involved in *Brown*, the Court spread the equal protection mantle over an increasingly broad area, notably in the field of political rights. The key decision here was *Baker v. Carr* (1962),⁵⁸ in which the federal courts were ruled competent to entertain an action challenging legislative apportionments as contrary to equal protection. The problem arose from the fact that though American legislative districts had originally been apportioned on an equal population basis, over the years population shifts had made for extreme malapportionment. Thus the seats in the Tennessee legislature, where *Baker* arose, had last been apportioned in 1901. By the time the case was brought, a vote from the most populous country had only a fraction of the weight of one from the least populous: the population ratio of the most and least populous districts was then greater than nineteen to one.

Before *Baker*, the Supreme Court had held that the federal courts had no jurisdiction in such cases. The question of legislative apportionment was ruled a "political question" and therefore beyond judicial competence. The leading pre-*Baker* apportionment decision had declared, "Courts ought not to enter this political thicket."⁵⁹ In *Baker*, Chief Justice Warren and his colleagues overruled the earlier cases and held that attacks on legislative apportionments on equal protection grounds could be heard and decided by the federal courts.

Then, in *Reynolds v. Sims* (1964),⁶⁰ the Chief Justice's own opinion ruled that the Constitution lays down an "equal population" principle for legislative apportionment. Under this principle, substantially equal representation is demanded for all citizens. According to the most noted passage in the Warren opinion, "Legislators are elected by voters, not farms or cities or economic interests." It follows, Warren said, that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."⁶¹ Legislative districts must represent substantially equal populations, which means that the "one person, one vote" principle is now enshrined in the United States

Constitution: equal numbers of people are entitled to equal representation in their government.

Chief Justice Warren himself characterized the reapportionment cases as the most important cases decided by the Court during his tenure. In those cases, the Warren Court worked an electoral reform comparable to that achieved by the nineteenth-century Parliament in translating the program of the English Reform Movement into the statute book. The result has been a virtual transformation of the political landscape, with voting power shifted from rural areas to the urban and suburban areas in which most Americans have come to live.

The Chief Justice never had doubts about the correctness of the reapportionment decisions. He maintained that if the "one person, one vote" principle had been laid down years earlier, many of the nation's legal sores would never have festered. According to Warren, "Many of our problems would have been solved a long time ago if everyone had the right to vote, and his vote counted the same as everybody else's. Most of these problems could have been solved through the political process rather than through the courts. But as it was, the Court had to decide."⁶²

Equality and Criminal Justice

If one great theme recurred in the jurisprudence of the Warren Court, it was that of equality before the law—equality of races, of citizens, of rich and poor, of prosecutor and defendant. The result was what Justice Fortas termed "the most profound and pervasive revolution ever achieved by substantially peaceful means."⁶³ More than that, it was the rarest of all political animals: a judicially inspired and led revolution. Without the Warren Court decisions giving ever-wider effect to the right to equality before the law, most of the movements for equality that have permeated American society would have encountered even greater difficulties.

In addition to racial and political equality, the Warren Court moved to ensure equality in criminal justice. The landmark case was *Griffin v. Illinois* (1956).⁶⁴ Griffin had been convicted of armed robbery in a state court. He filed a motion for a free transcript of the trial record, alleging that he was indigent and could not get adequate appellate review without the transcript. The motion was denied. In the Supreme Court's conference on the case, Chief Justice Warren pointed out that the state had provided for full appellate review in such a case. A defendant who could pay for a transcript should not be given an advantage over one who could not. "We cannot," declared the Chief Justice, "have one rule for the rich and one for the poor." Hence he would require the state to furnish the transcript.

The Court followed the Warren lead and held that it violates the Constitution for a state to deny to defendants alleging poverty free transcripts of trial proceedings, which would enable them adequately to prosecute appeals from criminal convictions. According to Justice Black's opinion, "There can be no equal justice where the kind of trial a man gets

depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.⁶⁵

As it turned out, *Griffin* was a watershed in the Warren Court's jurisprudence. In it the Court made its first broad pronouncement of economic equality in the criminal process. After *Griffin* the Warren Court appeared to agree with Bernard Shaw that "the worst of crimes is poverty," as it tried to equalize criminal law between those possessed of means and the less affluent. It was the *Griffin* approach that was the foundation of the landmark decision in *Gideon v. Wainwright* (1963),⁶⁶ which required counsel to be appointed for indigent defendants.

The *Gideon* case was one of the most famous decided by the Warren Court. Indeed, Clarence Gideon and his case have become part of American folklore. In *Gideon* the Court overruled an earlier case that had refused to hold that the right to counsel was so fundamental as to be included in the due process guaranty. Again following the Chief Justice's lead, the Court reversed Gideon's conviction, because his request to the trial judge to have a court-appointed lawyer to assist him was denied. "[R]eason and reflection," declares the *Gideon* opinion, "require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."⁶⁷

Criminal Procedure

Gideon made plain that the Constitution requires public provision of counsel for criminal defendants who cannot afford to hire their own attorneys. The need for the assistance of counsel is not, however, limited to the courtroom. *Gideon* was based on the express constitutional guaranty of the right to counsel in "all criminal prosecutions." But the case only raised another critical question: When does the right to counsel begin?

The Warren Court answered this question in *Miranda v. Arizona* (1966).⁶⁸ Miranda had been convicted in a state court of kidnapping and rape. He had been arrested and taken to an interrogation room, where he was questioned without being advised that he had a right to have an attorney present. After two hours, the police secured a confession, which was admitted into evidence over Miranda's objection.

The state's highest court affirmed the conviction, but the Warren Court reversed. The majority agreed with Chief Justice Warren that for the police to be able to use any confession, they must show that they gave full effect to the defendant's right to remain silent and to the presence of an attorney, either retained or appointed. Warren had no doubt that the right to counsel began as soon as there was what his opinion termed "custodial interrogation"—that is, interrogation while an individual is in police custody. To the Chief Justice, the constitutional right came into play when Miranda was arrested. "I didn't know," he commented during the argu-

ment before the Court, "that we could arrest people in this country for investigation. Wouldn't you say it was accusatory when a man was locked in jail?"

The *Miranda* decision worked a drastic change in American criminal law and its application by police officers, prosecutors, and judges. The Warren Court in effect laid down the rule that an accused who wants a counsel should have one at any time after being taken into custody. Under Warren's decision, the police must give so-called *Miranda* warnings: that the person arrested has a right to remain silent, that anything he says may be used against him, that he can have a lawyer present, and that he can have counsel appointed if he cannot afford one.

Protection of the rights of criminal defendants had become a primary concern of the Warren Court. The *Miranda* decision, as much as anything, exemplified Warren's own concern in such cases. Indeed, *Miranda* was the ultimate embodiment of the Warren approach in criminal cases.

That approach was also illustrated by *Mapp v. Ohio* (1961),⁶⁹ where the Warren Court adopted the exclusionary rule, which bars the admission of illegally seized evidence, in state criminal cases. The Supreme Court had refused to follow that rule before *Mapp*, holding that the exclusionary rule was not required by the Constitution in state criminal cases. Now, under Chief Justice Warren, the *Mapp* state conviction was reversed because illegally seized evidence had been admitted at the trial. Such a holding, the Warren Court affirmed, closes "the only courtroom door remaining open to evidence secured by official lawlessness" in violation of the Constitution's guaranty against unreasonable searches and seizures.

From Property to Personal Rights

The dominant trend in the Court during the Warren tenure was a shift in emphasis from property rights to personal rights. "When the generation of 1980 receives from us the Bill of Rights," Chief Justice Warren declared in a 1955 article, "the document will not have exactly the same meaning it had when we received it from our fathers."⁷⁰ The Bill of Rights as interpreted by the Warren Court had a meaning much different from that handed down by its predecessors.

There were three principal developments in the Warren Court regarding the protection of personal rights: (1) acceptance of the preferred-position doctrine, (2) extension of the trend toward holding Bill of Rights guaranties binding on the states, and (3) broadening of the substantive content of the rights themselves.

The preferred-position theory, we saw in Chapter 11, was first stated in *United States v. Carolene Products Co.*,⁷¹ though only tentatively in a footnote. Under Chief Justice Warren it became accepted doctrine. The theory is based on the view that the Constitution gives a preferred status to personal, as opposed to property rights. The result is a double standard in the exercise by the Supreme Court of its review function. The tenet of

judicial restraint does not rigidly bind the judge in cases involving civil liberties and other personal rights.⁷² The presumption of validity for laws gives way far more readily in cases where life and liberty are restrained. In those cases, the legislative judgment must be scrutinized with much greater care.

Critics say that the preferred-position approach, with its elevation of personal rights, creates a hierarchy of rights not provided for in the Constitution. It should, however, be recognized that each generation must necessarily have its own scale of values. In nineteenth-century America, concerned as it was with the economic conquest of a continent, property rights occupied the dominant place. A century later, in a world in which individuality was dwarfed by concentrations of power, concern with the maintenance of personal rights had become more important. With the focus of concern on the need to preserve an area for the development of individuality, judges were naturally more ready to find legislative invasion when personal rights were involved than in the sphere of economics.⁷³

One of the last decisions of the Marshall Court had ruled the Federal Bill of Rights binding only on the Federal Government, not on the states.⁷⁴ It has been urged that the Fourteenth Amendment changed that result, incorporating the entire Bill of Rights in the Fourteenth Amendment's due process clause.⁷⁵ The Court has never accepted this view, adopting instead a selective approach, under which only those rights deemed "fundamental" are included in due process. Yet if advocates of full incorporation seemingly lost the incorporation battle, after midcentury they came close to winning the due process war; for the Warren Court, without formally abandoning its selective incorporation approach, held almost all the Bill of Rights guarantees to be fundamental and hence absorbed by due process.

The key decisions were *Mapp* and *Gideon*, which reversed earlier refusals to hold the right against the use of illegally secured evidence and the right to counsel to be so fundamental as to be included in due process. Both *Mapp* and *Gideon* spoke in broad terms of the need to protect individual rights; they signaled a trend to include ever more of the Bill of Rights guarantees in the Fourteenth Amendment. In the following decade the Warren Court held these rights fundamental and hence binding upon the states: rights against double jeopardy⁷⁶ and self-incrimination⁷⁷ and rights to jury trial in criminal cases,⁷⁸ to a speedy trial,⁷⁹ and to confrontation.⁸⁰ Add to these rights those that had been held binding on the states before midcentury,⁸¹ and they include all the rights guaranteed by the Federal Bill of Rights except the rights to a grand jury indictment and to a jury in civil cases involving more than twenty dollars. The two exclusions hardly alter the overriding tendency to make the Due Process Clause ever more inclusive.

The Warren Court did more than merely apply the Bill of Rights to the states: it also broadened the substantive content of the rights guaranteed, giving virtually all personal rights a wider meaning than they had there-

tofore had in American law. This was particularly true in two crucial areas: criminal justice and freedom of expression. The former has already been discussed, but it remains to say a word about the latter.

Two members of the Warren Court, Justices Black and Douglas, consistently urged an absolutist view of the freedom of speech guaranty.⁸² Their view was based upon the unqualified language of the First Amendment, which says that "Congress shall make no law . . . abridging the freedom of speech." In the Black-Douglas view, when the amendment says that no laws abridging speech shall be made, it means flatly that *no* laws of that type shall, under any circumstances, be made. Under the Black-Douglas approach, no speech may ever be restricted by government action, even speech which is libelous, obscene, or subversive.

The Warren Court did not adopt the Black-Douglas absolutist view, but it did place increasing emphasis on freedom of expression as a preferred right. The primacy of the First Amendment was firmly established. The right to use the streets and other public forums was extended to those using them for civil rights protests and demonstrations.⁸³ Most criticisms of conduct by public officials and public figures were exempted from the law of libel.⁸⁴ Freedom of the press was broadened; censorship laws were struck down,⁸⁵ and the power to restrain publication on grounds of obscenity was drastically limited.⁸⁶

In addition, the Warren Court began to recognize new personal rights not specifically guaranteed in the Federal Bill of Rights. Foremost among these was a constitutional right of privacy. Justice Douglas urged the existence of such a right in a 1961 dissent: "This notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live."⁸⁷ The Douglas notion of a right to privacy as part of the area of personal rights protected by the Constitution was accepted by the Warren Court only four years later.

In *Griswold v. Connecticut* (1965),⁸⁸ defendants had been convicted of violating a state law prohibiting the use of contraceptive devices and the giving of medical advice in their use. In reversing the conviction the Supreme Court held that the law violated the right of privacy. The opinion expressly recognized the existence of a constitutionally protected right of privacy—a right said to be within the protected scope of specific Bill of Rights guaranties.

During Chief Justice Warren's tenure, protection of personal rights and liberties became the very focus of the Court's enforcement of the contemporary Constitution. With property rights constitutionally curtailed, compensatory scope had to be given to personal rights if the ultimate social interest—the individual life—was not to be lost sight of.

The need to broaden the constitutional protection of personal rights received added emphasis from the growth and misuse of governmental power in the twentieth century. Totalitarian systems showed dramatically what it meant for the individual to live in a society in which Leviathan had become a reality. The "Blessings of Liberty," which the Constitution's

Framers had taken such pains to safeguard, were placed in even sharper relief in a world that had seen so clearly the consequences of their denial.

Warren in the Pantheon

In 1966, Vice President Hubert Humphrey declared that if President Eisenhower "had done nothing else other than appoint Warren Chief Justice, he would have earned a very important place in the history of the United States."⁸⁹ By then, it was widely recognized that Earl Warren had earned a place in the front rank of the American judicial pantheon. That is true even though Chief Justice Warren will never rank with the consummate legal craftsmen who have fashioned the structure of Anglo-American law over the generations—each professing to be a pupil, yet each a builder who added his few bricks.⁹⁰ But Warren was never content to deem himself a mere vicar of the common-law tradition. Instead he was the paradigm of the "result-oriented" judge, who used his power to secure the result he deemed right in the cases that came before his Court.

In reaching what he considered the just result, the Chief Justice was not deterred by the demands of stare decisis. For Warren, principle was more compelling than precedent. The key decisions of the Warren Court overruled decisions of earlier Courts. Those precedents had left the enforcement of constitutional rights to the political branches. Yet the latter had failed to act. In Warren's view, this situation left the Court with the choice either to follow the precedent or to vindicate the right. For the Chief Justice, there was never any question as to which was the correct alternative.

Warren cannot be deemed a great juristic technician, noted for his mastery of the common law. But he never pretended to be a legal scholar or to profess interest in legal philosophy or reasoning. To him, the outcome of a case mattered more than the reasoning behind the decision.

The result may have been a deficiency in judicial craftsmanship that subjected Warren to constant academic criticism, both during and after his tenure on the bench. Without a doubt, Warren does not rank with Holmes or Cardozo as a master of the opinion, but his opinions have a simple power of their own; if they do not resound with the cathedral tones of a Marshall, they speak with the moral decency of a modern Micah. Perhaps the *Brown* opinion did not articulate the juristic bases of its decision in as erudite a manner as it could have. But the decision in *Brown* emerged from a typical Warren judgment, with which few today would disagree. The Warren opinion was so *right* in that judgment that one wonders whether additional learned labor in spelling out the obvious was really necessary.

When all is said and done, Warren's place in the judicial pantheon rests, not upon his opinions, but upon his decisions. If impact on the law is the hallmark of the outstanding judge, few occupants of the bench have been more outstanding than Chief Justice Warren.

Employing the authority of the emine to the utmost, he never hesi-

tated to do whatever he thought necessary to translate his own conceptions of fairness and justice into the law of the land. His Court's principal decisions have taken their place in the forefront of historic judicial decisions. Their impact on a whole society's way of life can be compared only with that caused by political revolution or military conflict.

"It is a delicious irony," reads a famous passage by Anthony Lewis, "that a President who raised inactivity to a principle of government . . . should have appointed a Chief Justice for whom action was all."⁹¹ President Eisenhower said that one of the reasons he chose Warren was because he felt that Warren did not "hold extreme legal or philosophical views." Yet this criterion of moderation in legal and philosophical views is not necessarily valid as a measure by which to judge greatness on the bench. When people object to extremism in legal and philosophical views, they are really objecting to judicial activism. The judge who holds strong views is bound to take a more expansive view of the judicial function.

Perhaps the period of judicial activism that took place under the Warren Court was unprecedented in legal history. But almost all the outstanding judges in American law have been characterized by a more affirmative approach to the judicial role than that taken by their lesser colleagues. The great American judges have been jurists who used the power of the bench to the full. This was particularly true of Chief Justice Warren. The Marshall Court and the Warren Court have now become major parts of American legal history. The two men who sat at the center of those Courts were strong leaders who acquired their influence by the force of their character and their integrity.

We need not, in Justice Frankfurter's phrase, subscribe to the "hero theory of history" to recognize that great judges make a profound difference in the law. It did make a vast difference that Earl Warren and his colleagues rather than some other judges sat when they did. If Warren could not have made his judicial reputation without the opportunity that his position afforded him, it is also true that he forced the opportunity to make the creative contributions that escaped lesser Chief Justices. This, after all, has been the common characteristic of the greatest judges. Not all of them were masters of the common law or consummate craftsmen of judicial techniques. But all seized the occasion to make the creative contributions that eluded their lesser brethren.