A Remembrance of Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights

Ronald J. Krotoszynski, Jr.

59 Washington and Lee Law Review, forthcoming 2002

A Remembrance of Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights

by

Prof. Ronald J. Krotoszynski, Jr.[1]

> The logic of passion, even when it serves the right cause, is never irrefutable to someone who is not moved by passion.[2]

As the papers 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 speed the end of American apartheid in the Deep South. The significance of this legacy cannot be overestimated: Chief Justice Earl Warren and his colleagues did more to advance to 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

---

[1] Ethan Allen Faculty Fellow and Professor of Law, Washington and Lee University School of Law.

[2] MARCEL PROUST, A LA RECHERCHE DU TEMPS PERDU TOME 8 [A REMEMBRANCE OF THINGS PAST VOLUME 8], 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."), *reprinted in* THE MAXIMS OF MARCEL PROUST (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.").

nothing short of revolutionary.[3] 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.

Take, for example, *New York Times Company v. Sullivan*,[4] a case that distinguished free speech scholar Alexander Meiklejohn characterized as "an occasion for dancing in the streets."[5] In *New York Times Company*, 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.[6] Essentially, the Warren Court created a right of fair -- even if factually inaccurate -- comment on the part of the citizen against the government. At least arguably, the intellectual framework *New York Times Company*

---

[3] *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 the 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 the Warren Court "spurred the great changes to follow, and inspired and protected those who sought to implement them").

[4] 376 U.S. 254 (1964).

[5] *See* 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 Meiklejohn). Professor Kalven shared Meiklejohn's enthusiasm for the decision. *See id.* ("As always, I am inclined to think he [Meiklejohn] is right.").

[6] *New York Times Co.*, 376 U.S. at 273-77 (discussing history of the 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").

established laid the ground work for later cases like *Brandenburg v. Ohio*,[7] *Hustler Magazine v. Falwell*,[8] and even *Central Hudson*.[9]

Similarly, how can one talk meaningfully about equal protection doctrine without mentioning *Brown v. Board of Education*,[10] *Bolling v. Sharpe*,[11] *Baker v. Carr*,[12] and *Reynolds v. Sims*?[13] In the context of state action, the most aggressive tests find their genesis in Warren Court opinions -- particularly in *Burton v. Wilmington Parking Authority*[14] and *Reitman v. Mulkey*.[15] Finally, the resurrection of meaningful substantive due process review was the handiwork of the Warren Court. Without *Griswold v. Connecticut*,[16] it is less certain that we would have *Roe v. Wade*.[17] The Supreme Court's return to substantive review of state and federal legislation for consistency with unenumerated, yet nevertheless fundamental, rights runs back to *Griswold* (as does the rehabilitation of

---

[7] 395 U.S. 444 (1969).

[8] 485 U.S. 46 (1988).

[9] Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980).

[10] 347 U.S. 483 (1954).

[11] 347 U.S. 497 (1954).

[12] 369 U.S. 186 (1962).

[13] 377 U.S. 533 (1964).

[14] 365 U.S. 715 (1961).

[15] 387 U.S. 369 (1967).

[16] 381 U.S. 479 (1965).

[17] 410 U.S. 113 (1973).

Lochner[18] era cases such as *Meyer v. Nebraska*[19] and *Pierce v. Society of Sisters*[20]).

I. 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.[21] That said, however, I harbor some serious reservations about the long term effects of the methodology often employed by the Warren Court in reaching these desirable results.[22] 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 creating new law without much of an effort to ground the result in the text or

---

[18] Lochner v. New York, 198 U.S. 45 (1908).

[19] 262 U.S. 390 (1923).

[20] 268 U.S. 510 (1925).

[21] *See* Laura Kalman, *The Wonder of the Warren Court*, 70 NYU 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.").

[22] *Griswold*, 381 U.S. at 484-86, presenting a paradigmatic example -- reread Justice William O. Douglas's opinion and ask yourself whether penumbras of judicial reasoning emanate from it.

history of the Constitution, or to relate the result back to prior judicial precedents.[23] More often than not, if the end was sufficiently important, the Warren Court was not terribly concerned about the means used to get there. At least 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.[24]

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*[25] and *Gideon v. Wainwright*[26] were far from preordained. A court composed of members with less vision, less compassion, or less courage could easily have decided these cases quite differently. Moreover, Chief Justice Warren's personal stewardship of the project of expanding the scope and

---

[23] *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 as just another job on the national political scene.").

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

[25] 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 is commonly believed).

[26] 372 U.S. 335 (1963).

meaning of civil rights and liberties was simply remarkable. Earl Warren was indeed the "Superchief."[27]

At the same time, however, one cannot look back without experiencing a certain sense of disappointment at the means sometimes used to accomplish undeniably 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 which, in the hindsight of history, 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 the Warren Court has not been particularly celebrated for its judicial craftsmanship.[28]

When reading some of the Warren Court's opinions, one is often left to wonder precisely why a particular result flows, inexorably, from the Constitution. Consider *Bolling v. Sharpe*,[29] the decision holding unconstitutional on Fifth Amendment Due Process Clause grounds the operation of segregated public schools

---

[27] *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 a nick name 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").

[28] *See* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 4, 184-87, 217-21, 229-30, 358-67 (1982); *see also* 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. REV. 477, 479 (1997) ("Certainly, Warren was anything but a learned legal scholar.").

[29] 347 U.S. 497 (1954).

in the District of Columbia. Declaring it to be "unthinkable"[30] that the federal 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's Due Process Clause "reverse incorporates" the Equal Protection Clause against the federal government (including the District of Columbia). It is rather doubtful that the Reconstruction-era Congress would have considered it unthinkable that it possessed an ability to use racial classifications not enjoyed by the states.[31] After all, Congress considered itself the principal protector of the newly emancipated freedmen's civil and political rights. Moreover, its

---

[30] *Id.* at 500 (arguing that "it would be unthinkable that the same Constitution would impose a lesser duty on the federal government"); *see* White, *supra* note 28, 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").

[31] *See generally* JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 36-40, 56-60, 152-73 (1961) (describing creation and role of the Bureau of Refugees, Freedmen, and Abandoned Lands, commonly known as the Freedmen's Bureau, and the political and social conditions in the states of the former Confederacy that necessitated continued congressional activity to protect the civil rights of African American citizens); *see* Fullilove v. Klutznick, 448 U.S. 448, 472-73, 483-84 (1980) (holding that Congress has broad discretion to enforce the Fourteenth Amendment, including the adoption of race-based remedial plans, because it has been "expressly charged by the Constitution with competence and authority to enforce the equal protection guarantee"); 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 purpose of Fourteenth Amendment was to limit state control over matters of race while enlarging congressional oversight of such matters).

members expressly reserved to themselves the power to enforce the substantive provisions of the Fourteenth Amendment.[32]

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 a part of the problem. Accordingly, Congress might have written the Fourteenth Amendment to preclude states from using racial classifications while, at the same time, reserving for itself an ability to write laws that expressly use race as a basis for granting or withholding 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), while denying 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 more completely leave states without the power to use race based classifications.

Yet, the Warren Court's sloppy theory of reverse incorporation, convenient if not persuasive, left open the door

---

[32] *See* U.S. CONST. AMEND. 14, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article.").

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,[33] the *Bolling* holding made it very easy to extend this prohibition to the federal government itself. And, in *Adarand Constructors, Inc.* v. *Pena*,[34] the Rehnquist Court made exactly this jurisprudential move.

Writing for the majority, Justice O'Connor explained that the Supreme Court's equal protection jurisprudence reflects principles of "skepticism," "consistency," and "congruence." By this, she meant that the equal protection principle demands strict scrutiny of all race based government classifications ("skepticism"), applies to both minorities and non-minorities alike ("consistency"), and that it binds both the state and the federal governments ("congruence").[35] Justice O'Connor even cites *Bolling v. Sharpe* in support of these propositions.[36] Justice O'Connor's use of *Bolling* is 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

---

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

[34] 515 U.S. 200 (1995).

[35] *See id.* at 223-25.

[36] *See id.* at 215-16, 224.

end result seemed right, the reasons offered to support the result were a matter of some indifference.[37]

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, as things have turned out, the electorate ultimately rejected the Warren Court's vision and elected Presidents (like Richard Nixon) who were overtly committed to repealing the Warren Court's judicial legacy (particularly in the field of criminal

---

[37] *See* Schwartz, *supra* note 28, at 502 ("To him [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 the Supreme Court's legitimacy rests on the persuasiveness of its claim to being engaged in a project of principled adjudication based on constitutional text, history, and precedent and positing that unprincipled decision making, over time, will undermine the Supreme Court's claim to be engaged in something other than politics); 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, 2089-93, 2102-04, 2117-24 (2002) (arguing that voting patterns and reasoning offered by most of the 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 confidence of the public in the Supreme Court's work).

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 repeal 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*,[38] *Brandenburg v. Ohio*,[39] and *Engel v. Vitale*.[40] Voting rights jurisprudence relates back, in a rather straight jurisprudential line, to *Baker v. Carr*,[41] *Reynolds v. Sims*,[42] and *Harper v. Virginia State Board of*

---

[38] 376 U.S. 254 (1964) (immunizing the press from liability for factual errors in reporting about public officials or public figures absent a showing of "actual malice" by the plaintiff, meaning that the defendant possessed actual knowledge of falsity or published with reckless disregard of possible falsity).

[39] 395 U.S. 444 (1969) (protecting advocacy of any sort in absence of a clear and present danger of imminent lawlessness).

[40] 370 U.S. 421 (1962) (prohibiting official religious exercises in the public schools).

[41] 369 U.S. 186 (1962) (holding that equal protection principles disallow malapportioned state legislative districts and requiring each vote to count equally so that one person has effectively only one vote).

[42] 377 U.S. 533 (1964) (explicating further one-person-one-vote rule of equal protection set forth in *Baker*).

Elections.[43] Equal protection principles found new relevance starting with *Brown v. Board of Education*[44] and, over the course of time, the equal protection guarantee has grown to encompass protection against invidious discrimination based on gender,[45] nationality,[46] disability,[47] and, it appears, sexual orientation.[48] 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*[49] and *Loving v. Virginia*.[50]

---

[43] 383 U.S. 663 (1966) (holding that the Equal Protection Clause prohibits states from conditioning voting rights in state elections on payment of a poll tax). For a discussion of the Warren Court's work in the field of equal protection and voting rights, *see* Schwartz, *supra* note 28, at 490-92.

[44] 347 U.S. 483 (1954).

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

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

[47] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (invalidating, on equal protection grounds, adverse zoning decision that barred operation of home for retarded adults).

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

[49] 381 U.S. 479 (1965) (invalidating Connecticut law prohibiting distribution or use of contraceptives on substantive due process grounds).

[50] 388 U.S. 1 (1967) (invalidating Virginia anti-miscegenation law on both equal protection and substantive due

Modern constitutional law, at least in the area of civil rights and civil liberties, is and for some time to come will remain, a running commentary on the ideas and theories of the Warren Court. Although the Warren Court's precedents have not all survived the test of time, the Warren Court, to a tremendous degree, reoriented the agenda of the federal judiciary. Indeed, it is difficult to imagine a contemporary debate about civil rights and 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 Fourteenth Amendment only safeguard rights against the government.[51] Purely private conduct does not have to comply with constitutional requirements (although properly enacted civil rights statutes can extend constitutional protections to persons suffering harms from non-state actors[52]); a private entity may lawfully engage in behavior that government itself may not. Prior to the enactment of major new civil rights legislation in the 1960s, the presence or absence of state action often

---

process grounds).

[51] *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (holding that Bill of Rights and Fourteenth Amendment "erect[ ] no shield against merely private conduct, however discriminatory or wrongful"); *see also* The Civil Rights Cases, 109 U.S. 2, 11 (1883); United States v. Harris, 106 U.S. 629, 638-40 (1882); Virginia v. Rives, 100 U.S. 313, 318 (1879).

[52] *See, e.g.*, 42 U.S.C. § 1981(c); 42 U.S.C. § 2000e.

prefigured whether a defendant had an obligation to refrain from racial discrimination.[53]

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 and more ostensibly "private" conduct. *Burton v. Wilmington Parking Authority*[54] 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 to respect constitutional rights if, in the overall facts and circumstances, it seems reasonable to do so. Although characterized in terms of a mutually beneficial relationship between a private entity and the state,[55] the test really represented an open-ended inquiry into the relationship of the state to the private entity in order to ascertain whether it would be fundamentally fair to hold the private entity accountable for constitutional violations.[56]

---

[53] *See, e.g.*, Peterson v. City of Greenville, 373 U.S. 244 (1963) (holding that a Greenville, South Carolina city ordinance mandating segregation in public places, including restaurants, motivated a private store's decision to refuse service at its lunch counter to minorities on basis of race, thereby making the private store a state actor when it acted consistently with local law).

[54] 365 U.S. 715 (1961).

[55] *See id.* at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

[56] *See id.* at 722-25 (examining various symbolic and financial connections between the state of Delaware and the Eagle Coffee Shoppe and concluding that, in light of a "symbiotic relationship," the Eagle Coffee Shoppe was a state actor).

Similarly, in *Reitman v. Mulkey*,[57] the Warren Court developed the "nexus" test, which holds private entities accountable for constitutional violations where the government encourages or invites the constitutional violation.[58] In conjunction with the symbiotic relationship test, the nexus test casts a very broad net indeed.

State action doctrine is a complex field and people, in good faith, hold inconsistent views about 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 the 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[59] and continuing into the 1980s,[60] the Supreme Court

---

[57] 387 U.S. 369 (1967).

[58] *See id.* at 379-81 ("Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. 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.").

[59] *See*, *e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-53, 357-59 (1974) (applying various state action tests and finding that heavily regulated, monopoly provider of

restricted the scope of the state action doctrine considerably. In case after case, the Justices declined to find state action present.[61] Although the Warren Court precedents were never flatly overruled, their precedential value seemed significantly diminished.

But sometimes the Warren Court's vision has an inescapable appeal. At least arguably, the Warren Court's commitment to holding government responsible for constitutional wrongs represents one of those moments of moral clarity that also reflects a compelling legal principle. Although the Warren Court's broad vision of state action fell into a state a desuetude during 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 Association*.[62] In this case, Justice Souter establishes a new state action test -- a test premised on

---

electricity was not a state actor).

[60] *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 831, 839-43 (1982) (holding that state funded special needs school providing only such services in community, using state funds, and subject to state and local oversight, was not a state actor); Blum v. Yaretsky, 457 U.S. 991, 1007-1010 (1982) (holding that federal funding and regulation of home for the elderly did not transform home into a state actor).

[61] *See, e.g.*, Nation Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (holding that NCAA is not a state actor); San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987) (holding that USOC is not a state actor).

[62] 531 U.S. 288 (2001).

"entwinement" between the state and the ostensibly private entity. He explains that "[i]f the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and 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."[63] Eschewing any simple (or single) talismanic test, Justice Souter argued that "[w]hat is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity."[64]

Prior to *Brentwood Academy*, three basic state action tests had emerged: the exclusive government function test,[65] the symbiotic relationship test,[66] and the nexus test.[67] 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.[68] The federal courts consistently applied these tests independently and in isolation; factors relevant to one

---

[63] *Id.* at 295.

[64] *Id.*

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

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

[67] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-53 (1974).

[68] Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995).

test were not germane to application of a different test.[69] *Brentwood* 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 is a state actor. Instead, he examined the Association's function, its membership, its relationship to the state of Tennessee (and particularly to the Tennessee State Board of Education).[70] "The entwinement down from the State Board is therefore unmistakable, just as the entwinement up from the member public schools is overwhelming."[71]

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

> 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.[72]

---

[69] *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, meaning that federal courts should apply state action tests both individually and conjunctively in a "totality of the circumstances" analysis using elements of all three tests).

[70] *Brentwood Academy*, 531 U.S. at 298-302.

[71] *Id.* at 302.

[72] *Id.*

This represents a new and different test; a test that consists of bits and pieces of evidence relevant to the application of other state action tests, but perhaps insufficient to satisfy another free standing state action test. That the Association is not a state actor under another state action test is irrelevant, 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."[73]

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.'"[74] Justice Thomas's statement is entirely accurate: the entwinement test represents something new under the sun. Previously (as Justice Thomas duly noted), state action analysis required a plaintiff to establish that the entity was the government itself, or to satisfy the exclusive government function, symbiotic relationship, or nexus test for state action.[75] Moreover, it is highly doubtful that the Association fully satisfied any of the pre-existing state action tests.[76]

---

[73] *Id.*

[74] *Id.* at 305 (Thomas, J., dissenting).

[75] *See id.* at 305 (listing the three traditional state action tests).

[76] *See id.* at 308-12 (describing and applying the Supreme Court's traditional state action tests and concluding that the Association is not a state actor under any of them).

The majority acknowledged that its conclusion might not be justified under any of the pre-existing state action tests, but argued that this 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."[77] Entwinement is 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."[78]

Brentwood Academy provides an important caveat to those who argue that the Warren Court's legacy has proven fleeting. Even in areas where the Supreme Court seemed to have supplanted the Warren Court's methodology (such as the state action doctrine), there might be cause for wondering whether everything old will be, in time, new again. This certainly seems less likely to be the case 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

---

[77] *Id.* at 303.

[78] *Id.*

legacy.[79] *Gideon*'s trumpet has a way of sounding when one least expects it.[80]

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

The panel papers richly explore the promise and the perils of the Warren Court's approach to civil rights and civil liberties claims. Professor BeVier acknowledges the importance of the Warren Court's contribution to First Amendment jurisprudence and its nexus with the efforts to disestablish apartheid in the South: "Let us begin with Justice Brennan's masterful, doctrinally innovative opinion in *New York Times v. Sullivan*, a paradigmatic example of Warren Court First Amendment jurisprudence in service of the civil rights cause."[81]

Professor BeVier, endorsing the view of Professor Harry Kalven, characterizes the decision "almost as much a civil rights case as it was a First Amendment case."[82] And, on its own terms, Professor BeVier seems to believe that *New York Times Company v. Sullivan* advanced, in a reasonably convincing way, the civil

---

[79] *See, e.g.*, Atkins v. Virginia, 122 S. Ct. 2242 (2002) (holding that execution of mentally retarded defendants violates the Eighth Amendment's proscription against cruel and unusual punishments).

[80] *See* Gideon v. Wainwright, 372 U.S. 335 (1962) (expanding the right to counsel in criminal cases and serving as one of the most visible icons of the Warren Court's efforts in the field of criminal procedure).

[81] Lillian R. BeVier, *Intersection and Divergence: Some Reflections on The Warren Court, Civil Rights, and the First Amendment*, ___ WASH. & LEE L. REV. ___ (2002).

[82] *Id.* at ____.

rights agenda of the Warren Court.[83] But the long term effects of the decision have fallen wide of Justice Brennan's mark: "Put bluntly, *New York Times*' direct progeny and their close cousins, namely First Amendment cases 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."[84]

In Professor BeVier's view, the Warren Court's efforts to protect civil rights through an expansive reading of the Free Speech Clause has devolved into a "hodge-podge of supposedly constitutionally-mandated adjustments to the common law of libel."[85] Professor BeVier convincingly offers a cautionary note about the perils of unintended consequences. Moreover, the Warren Court seemed especially susceptible to overlooking this sort of problem in its decisions.[86]

With free speech now being used by citizens affirmatively opposed to pluralism and multi-culturalism, 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

---

[83] *See id.* at _____ (describing the decision as reflecting a "deliberately strategic approach to the First Amendment" intended to advance the cause of civil rights for racial minorities).

[84] *Id.* at ___.

[85] *Id.* at ___.

[86] *See supra* notes ___ to ___ and accompanying text (arguing that *Bolling* v. *Sharpe*'s loose reasoning facilitated the end of federal affirmative action programs).

speech regulations such as campus speech codes. As Professor BeVier notes, "[i]t's a fair bet that the Warren Court never imagined that civil liberties and civil rights could ever be on a collision course."[87] 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 reform the nation's thinking about issues of race. Rather than focusing on discrete results in particular cases and the reasons offered in support of those results, Professor Calmore sees the Warren Court's significance primarily in cultural terms. "I think the real value of the Warren Court's race jurisprudence lies in its force as a culture-shifting tool and, more importantly, its inspiration to social justice advocates."[88]

Indeed, for Calmore the language of law is itself inadequate to the task of reforming contemporary culture. He posits cultural studies as an 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 and legal scholarship, in the narrow sense, seems quite inadequate to address what we

---

[87] *Id.* at ___.

[88] John O. Calmore, *The Law and Culture Shift: Race and the Warren Court Legacy*, ___ WASH. & LEE L. REV. ___ (2002) [draft at 5].

> need to know in order to open our society, promote a multiracial democracy, and to establish a more just order, which were the primary culture-shifting ambitions of the Warren Court's race jurisprudence.[89]

The equality project, in Calmore's view, has transcended the ability of legal discourse to keep up. "The large shifts in society and culture over the almost fifty years since *Brown v. Board of Education* have outpaced the rights and remedies that are part of the Warren Court's legacy."[90] A turn to cultural studies is therefore necessary because "[c]ultural studies is a tool to bridge the gap."[91]

Although Calmore asks rhetorically "Did the Warren Court promise too much or not enough?,"[92] 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 evolution 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. So, viewed in this light, it is reasonable to ask whether the Warren Court did everything it could to advance the equality project. But, plainly, if culture has an inexorable pull on law and legal norms

---

[89] *Id.* at ___. [draft at p. 18]

[90] *Id.* at ___. [draft at p. 19]

[91] *Id.*

[92] *Id.* at ____. [draft at p. 21]

-- 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*[93] as a prism for the Supreme Court's framing of race issues, Professor Calmore notes that in this decision "the United States Supreme Court legitimize the adverse representation of blacks as 'unwanted traffic.'"[94] 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 non-minorities.[95]

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."[96]

---

[93] 451 U.S. 100 (1981) (holding that Memphis could erect traffic barriers that separated predominantly white neighborhood near public park from a predominantly black neighborhood on the other side of the street barriers on theory that aesthetics and concern for unwanted traffic provided race-neutral reasons for city's action).

[94] Calmore, *supra* note ___, at ___. [draft at p. 23]

[95] *See id.* at _____. [draft pp. 23-42]

[96] *Id.* at ___ [draft at 49].

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. "We must re-construct and re-present unwanted traffic as the human beings 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."[97] As Judge Frank M. Johnson, Jr., a famed civil rights judge, once noted:

> if 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.[98]

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.[99]

---

[97] *Id.* at ___ [draft at 55]; *see* Adeno Addis, *"Hell Man, They Did Invent Us": The Mass Media, Law, and African Americans*, 41 BUFF. L. REV. 523 (1993) (arguing that media portrayals of racial minorities constitute a powerful framing device that, quite literally, creates the image of minorities held by non-minorities); *see also* Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377 (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).

[98] Judge Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 908 (1979).

[99] *See generally* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 872-87 (1986) (describing the distinction between positive and negative

The Warren Court attempted to remake 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 requires both negative and affirmative rights.[100] In Peller's view, the Warren Court was too timid in requiring affirmative state action to redress inequality: "[W]hen I read Warren and teach Warren Court decisions, I try to avoid the kind of celebratory tones that liberals and progressives today tend to take toward these the Warren Court because. . .I am frustrated by the inability of the Warren Court to push to the next step further."[101]

---

constitutional rights and noting the strong tradition of the United States Supreme Court to recognize and enforce only negative constitutional rights).

[100] *See, e.g.*, Judge 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 requires granting affirmative relief). Judge Johnson explains that, in the context of institutional reform lawsuits involving state-run prisons and mental hospitals:

> 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.

[101] Peller, manuscript at 2.

Looking to *Green v. County School Board of New Kent County, Virginia*[102] and *Sherbert v. Verner*,[103] Professor Peller argues that the Warren Court perceived the importance of providing affirmative relief for constitutional wrongs, as opposed to merely prohibitive relief, i.e., the Warren Court required affirmative remedial steps in addition to the cessation of the unlawful discriminatory actions.[104] 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 the equal protection of the law."[105] 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.[106] "For a while in the late 1960s and early 1970s, it appeared that the Warren Court was moving toward either recognizing indigency or economic status as a suspect classification precisely because by

---

[102] 391 U.S. 430 (1968) (ordering affirmative steps to integrate formerly segregated public schools and prohibiting use of voluntary "school choice" plan as device that would lead to resegregation of Kent County public schools).

[103] 374 U.S. 398 (1963) (holding that the Free Exercise Clause mandates that state unemployment benefits be paid to Saturday sabbatarian fired from job for refusing to work on Saturday).

[104] *See* Peller, manuscript at 10-12.

[105] Johnson, *supra* note 100, at 471.

[106] *See* Peller, draft at 8-9.

taking this de facto approach they were requiring the Constitution to be sensitive to and to accommodate people's economic situations."[107]

The implications of Professor Peller's proposal are quite broad. As he himself notes, "if we apply an impact or de facto analysis to the application of equal protection norms, it would call into question the run of economic, social, licensing, regulatory, and taxation legislation."[108] 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. His basic claim seems, at base, to be that the Warren Court was not activist enough. This may well be so, and certainly vast disparities in wealth continue to exist in the contemporary United States. It also seems reasonably clear that economic need correlates with less active citizenship -- particularly with respect to voting.[109] As a matter of practical

---

[107] *Id.* at 12-13.

[108] *Id.* at 14.

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

politics, however, one has to wonder if the Warren Court could have successfully transformed the concept of rights in the fashion Peller suggests. The *Lochner*-era Court certainly did so, but this project ultimately failed and in the process the Supreme Court managed to discredit itself to the point of generating bizarre court-packing schemes.[110] Political realities might well have impeded the sort of jurisprudence 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.[111]

One cannot predict the future with confidence or know how things might have been, had the Warren 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 of the Left see the Warren Court's legacy as reflecting undue

---

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

[111] *See, e.g.*, Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (holding that retroactive funding mechanism for retired coal miners' health benefit coverage violates the Takings Clause); Dolan v. City of Tigard, 512 U.S. 374 (1994) (interpreting the Takings Clause to disallow City of Tigard's conditional approval of a zoning variance).

timidity, as opposed to unseemly haste, in the creation and enforcement of rights.

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).[112] The articles that follow bear testament to the importance of this period in U.S. constitutional law. That the authors have such divergent attitudes about the work product of the Warren Court, and its continuing legacy, simply reflects the gravity of the Warren Court's decisions and the innovative means it used to reach them.

The echoes of the Warren Court continue to be heard in contemporary constitutional law discourse. It has been thus for the past fifty years and, at the risk of an improvident prediction, it will likely be so during the next fifty years. Questions of equality and fundamental fairness -- the central project 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.

---

[112] *See* Philip B. Kurland, *Earl Warren: Master of the Revels*, 96 HARV. L. REV. 331, 332 (1982) (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").

Board of Education, we still have a great distance to travel before the words "Equal Justice for All" describe a universal lived reality rather than a grand and hopeful aspiration.