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Earl Warren, The Warren Court And Civil Liberties

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Earl Warren, The Warren Court And Civil Liberties

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The two decades of the 1950's and 1960's witnessed a rush to place before the Supreme Court many perplexing and unanswered questions about the impact of a broadly worded Constitution upon a rapidly changing and increasingly complex society. History had cast the Supreme Court in an exceedingly difficult but profoundly important role. Whether one agrees or disagrees with the constitutional interpretations pronounced by the Warren Court, which sat for 16 of these 20 years, no impartial observer can deny that they have had, and will continue to have, a profound effect upon American institutions. Nor can anyone fail to recognize the imprint made by Chief Justice Warren.[1] The accomplishments of the Warren Court are inextricably linked with the views and abilities of its Chief Justice.

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1. Earl Warren was appointed Chief Justice by President Eisenhower in 1953, following the death of Chief Justice Vinson; Warren retired in 1969 and died on July 9, 1974.

With his passing comes a time for reflections on Earl Warren, the man, as a possible key to understanding Earl Warren, the Chief Justice, and ultimately the Warren Court. Like the hero in a Horatio Alger story, Earl Warren's origins were in humble surroundings as the son of an immigrant laborer. As a youth he worked on an ice wagon, a mule-drawn grocery wagon, as a newspaper delivery boy, and a brakeman on a railroad. After receiving his undergraduate and law degrees from the University of California at Berkeley, he became a member of the California Bar. His interests were in the area of law enforcement and politics. In sequence, over a period of 28 years, he served as District Attorney of Alameda County,[2] Attorney General of California,[3] and finally as Governor of the state.[4] He was known as a first-rate District Attorney who never had a conviction reversed on appeal; as Attorney General, he modernized an antiquated office. While Governor, he fought for better treatment of older citizens, better health care and hospitals, improved school and highway systems, and higher statutory public service standards. These largely people-oriented programs reflect the types of concerns that later became the hallmark of his judicial philosophy. Warren's political popularity as Governor gave him a position of national prominence. In 1948, Warren was the Republican candidate for vice-president, and in 1952, he was a serious contender for the Republican presidential nomination.

Warren supported the wartime internment of West Coast Japanese-Americans both as Attorney General and as Governor, but he is known to have considered this one of the major mistakes of his career. It has been suggested that his concern for the protection of civil liberties of minorities of all types, as evinced in a number of Warren Court decisions, was influenced by his reconsideration of his actions during this sorry event.

An illustration of the personal humanity accredited to Warren occurred during his first term on the Court. A California visitor was being escorted to Warren's chambers by a black attendant. When the visitor asked the attendant his opinion of the new Chief Justice, the reply was, "In all the years I've been here, it's the first time I've been treated like a man."

Protection of civil liberties is the common thread running through major decisions of the Warren Court. Blacks received

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2. 1925-1939.
3. 1939-1943.
4. 1943-1953.

particular attention in the Court's decisions declaring unconstitutional segregation imposed by law in public school systems.[5] The Court also ruled racial segregation in violation of the Constitution for public beaches and bathhouses,[6] municipal golf courses[7] and auditoriums,[8] as statutorily imposed for buses[9] and athletic events,[10] and in courtroom seating.[11] Although pre-Warren decisions had whittled down the precedent of *Plessy v. Ferguson*,[12] it took the Warren Court to finally reverse the 1896 case in the context of current-day fact situations. And the Court, anxious to sustain legislative initiative in the civil rights area, developed new constitutional doctrine in support of federal civil rights legislation.[13]

Criminal justice practices were changed to balance the procedural power of the criminal suspect with that of government prosecutors and police. By incorporating major portions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, several guarantees of the Bill of Rights were made binding on the states, among them the right to counsel for indigents in serious crimes,[14] the right to trial by jury,[15] the privilege against self-incrimination,[16] the warnings of one's rights prior to interrogation,[17] the exclusion of illegally seized evidence,[18] and the limitation on the scope of permissible wiretapping.[19]

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5. Brown v. Board of Education, 349 U.S. 294 (1955).
6. Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955).
7. Holmes v. Atlanta, 350 U.S. 879 (1955).
8. Schiro v. Bynum, 375 U.S. 395 (1964).
9. Gayle v. Browder, 352 U.S. 903 (1956).
10. State Athletic Commission v. Dorsey, 359 U.S. 533 (1959).
11. Johnson v. Virginia, 373 U.S. 61 (1963).
12. 163 U.S. 537 (1896).
13. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. Morgan, 384 U.S. 641 (1966); and United States v. Guest, 383 U.S. 745 (1966) (especially Clark concurring opinion at 762). For examples of such civil rights legislation, *see, e.g.*, Civil Rights Act of 1957, 71 Stat. 634; Civil Rights Act of 1960, 74 Stat. 90; Civil Rights Act of 1964, 78 Stat. 241 (42 U.S.C. 1981-2000h-e); Voting Rights Act of 1965, 79 Stat. 437 (42 U.S.C. 1971-1974e); Fair Housing Act of 1968 (42 U.S.C. 3601-3631).
14. Gideon v. Wainwright, 372 U.S. 335 (1966).
15. Duncan v. Louisiana, 391 U.S. 145 (1968).
16. Malloy v. Hogan, 378 U.S. 1 (1964).
17. Miranda v. Arizona, 384 U.S. 436 (1966).
18. Mapp v. Ohio, 367 U.S. 643 (1961).
19. Katz v. United States, 389 U.S. 347 (1967); Alderman v. United States, 394 U.S. 165 (1969).

The Court's civil liberties decisions also included the voter. Those individuals whose votes had been diluted by urbanization gained back the full weight of their vote as the Warren Court's reapportionment decisions were implemented. State legislative and federal House voting districts were equalized.[20] Warren himself considered these reapportionment decisions the most significant ones made by the Court. He stated that if citizens could elect representatives who were truly representative, then many of the difficult social problems which reach the Court for ajudication would be solved via the political process.[21]

Publishers' rights were also expanded when the Court rejected a restrictive obscenity test, (even if the decisions did create confusing guidelines)[22] and when the Court revised libel laws as applied to public officials.[23] Church-state relationships were examined, and new lines were drawn in the school prayer decisions.[24]

In defense of civil liberties, the Warren Court went so far as to develop what has been called the "new equal protection."[25] If state action affected a fundamental right or was based on suspect criteria, the state would have to come forth with a compelling state interest to justify its action. Racial classification was, of course, based on suspect criteria. But the Court went beyond race. A classification based on party political allegiance,[26] or which restricted the right to vote was suspect.[27] The right to travel interstate was deemed fundamental.[28]

Never before had a Supreme Court been so active. It reversed precedent after precedent and ruled on constitutional issues that had been steadfastly avoided by previous Courts. It demonstrated a willingness to decide against the government and set down new doctrine. It altered the structure of federalism, drawing power away from the states and depositing it at the federal level.

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20. Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964) (state legislatures); Wesberry v. Sanders, 376 U.S. 1 (1964) (House of Representatives).

21. New York Times, July 11, 1974, at 35, col. 2.

22. Roth v. United States, 354 U.S. 476 (1957); Jacobelis v. Ohio, 378 U.S. 184 (1964); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

23. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

24. Engel v. Vitale, 370 U.S. 421 (1962); Abington School District v. Schempp, 374 U.S. 203 (1963).

25. *See*, Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) for a discussion of the Warren Court's "new equal protection" and treatment of the doctrine by the Burger Court.

26. Williams v. Rhodes, 393 U.S. 23 (1968).

27. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

28. Shapiro v. Thompson, 394 U.S. 618 (1969).

A Supreme Court, of course, is composed of nine men. Seventeen men served on the Warren Court between 1953 and 1969.[29] But it is the Chief Justice who guides the critical conference discussions, who presides at open Court sessions, and who, if he is in the majority, decides who shall write the Court opinion. It is the Chief Justice who in many ways represents the Court to the nation.

Earl Warren performed these functions exceedingly well. His good natured humanism permeated the Court. He played a critical role in charting the Court's landmark decisions, often in the face of stormy seas of public resistance. He penned many of these decisions himself, such as *Brown v. Board of Education*,[30] *Reynolds v. Sims*,[31] and *Miranda v. Arizona*.[32] He held the Court together on several monumental but potentially divisive decisions.

Many people who find comfort in reviewing the civil liberties decisions of the Warren Court see them as reflecting a spirit of egalitarianism, as affording rich and poor, black and white, innocent and guilty an equal measure of protection under the Constitution. They see in those defended by decisions of the Court—the black, the indigent, the criminal suspect, the publisher of pornographic works, the disenfranchised, the religious minority—a single common denominator: all lacked political power. The political branches of the government, both legislative and executive, had passed these groups by. If the Supreme Court had not supported their claims, there would have been no relief. The Supreme Court is viewed as the last constitutional bulwark against the excesses of the political branches of government, both federal and state.

Others, while lauding the objectives of the Court, point to the many errors it made along the way. Some of these errors should be noted. The Court's decisions were sometimes poorly drafted. The rationale for expanding upon or reversing precedent was sometimes unclear and confusing. The significance of precedent as well

29. In addition to Earl Warren, the following persons served on the Court: Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Robert H. Jackson, Harold H. Burton, Tom C. Clark, Sherman Minton, John M. Harlan, William J. Brennan, Jr., Charles E. Whittaker, Potter Stewart, Bryon R. White, Arthur J. Goldberg, Abe Fortas, and Thurgood Marshall.

30. 349 U.S. 294 (1955).

31. 377 U.S. 533 (1964).

32. 384 U.S. 436 (1966).

as American history was sometimes distorted. Opinions were occasionally internally inconsistent. Such Court action needlessly hurts the Court and the rule of law. The Supreme Court, "possessed of neither the purse nor the sword"[33] must depend upon respect for the law and its own reasoning power to enforce its mandates and secure its place in the constitutional order. Lack of judicial craftsmanship and rationality reduces this respect.

Beyond this, the wisdom of some of its actions such as requiring reapportionment of both houses of state legislatures instead of one house, and extending the scope of the exclusionary rule, must seriously be questioned. The Court also opened the gate to a patch of thorny, unresolved issues, such as de facto segregation, and how to define fundamental rights and suspect criteria.

There are people who take their criticism of the Warren Court beyond noting errors such as these. They see the Court as reading the Constitution to reflect political views which were unsupported by either history or precedent. They view the Warren Court as a super-legislature, unresponsive to the public, substituting its views of policy for those of the policy-making branches. Some call it judicial tyranny. Some are less concerned with the results of specific cases than with the precedent of re-defining constitutional principles in terms of modern economic and social views without submitting them to the public for ratification.[34]

To these people, the Warren Court is seen as little short of disaster. Many decisions were locally unpopular, and some led to violence. These critics often disagree with the social ends sought to be achieved by the Court as well as with the Court's means of achieving them. They consider the decisions as having greatly eroded the confidence of the public in the rule of law.

The differences between those who laud and those who deplore the Warren Court will not be soon resolved. But both its advocates and its opponents look to Earl Warren as the symbol, if not the source, of their acclaim or grievance. Whenever freedom is debated or civil liberties defined, the name and views of Earl Warren, the fourteenth Chief Justice of the United States will be aired.

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33. Baker v. Carr, 369 U.S. 186 (1962) (Frankfurter dissent, at 267).

34. *See, e.g.*, Bickel, *Is the Warren Court Too "Political"?*, in THE SUPREME COURT UNDER EARL WARREN 216 (L. Levy ed. 1972); Kurland, *The Court Should Decide Less and Explain More*, in THE SUPREME COURT UNDER EARL WARREN 228 (L. Levy ed. 1972); P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970); J. CARTER, THE WARREN COURT AND THE CONSTITUTION, A CRITICAL VIEW OF JUDICIAL ACTIVISM (1973); and A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970), for essays and books critical of the Warren Court.

There has been much debate over the methodology utilized by the Warren Court in furthering civil liberties, and indeed with the results of the Court's efforts. A non-elected court calling for major socio-political change based upon constitutional text open to varying interpretation is most susceptible to criticism. When the total record is scrutinized, however, in this author's opinion the Court's critical role in seeing that majoritarian democracy does not obliterate the rights of the minority far outweighs the errors it may have made along the way.