Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and The Warren Court

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I am glad to be going to the Supreme Court because now I can help the less fortunate, the people in our society who suffer, the disadvantaged.2
- Governor Earl Warren, 1953

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Introduction

The decade-and-a-half period when Earl Warren was Chief Justice of the United States Supreme Court (1953-1969) was marked by numerous landmark rulings in the areas of racial justice,
criminal procedure, reproductive autonomy, First Amendment freedom of speech, association and religion, voting rights, and more. These decisions led to positive fundamental changes in the lives of millions of less-advantaged Americans, who had historically been disfavored because of their race, nationality, gender, socioeconomic class or political views. The legacy of the Court as led by Warren is one of an institution committed to “a dedication in the law to the timeless ideals of ‘human dignity, individual rights, and fair play, and recognition that the best of us have no more rights or freedoms than the worst of us.’” For its efforts, the “Warren Court” is considered by some to be the greatest high court in the nation’s history.

At the same time, many Warren Court decisions were hugely controversial, upsetting as they did the settled expectations of those who benefited from long-entrenched governmental biases and practices. “The intensity and bitterness of the political attacks provoked by the Court’s expanding vision of equality, liberty, and fairness exceeded any other comparable political assaults on the federal judiciary experienced since the aftermath of the pro-slavery Dred Scott Case on the eve of the Civil War,” suggests law Professor Harry Scheiber. Indeed, “Impeach Earl Warren” billboards were ubiquitous throughout the countryside during the late 1950s and 60s. Underlying the entire Warren Court era was “a sustained effort by conservative politicians to turn back important elements of the New Deal legacy of 1933-53 in law and policy”; and conservative jurists, academics and others to this day bemoan the Warren Court’s “lack of principle.”

3 Id.
4 See infra note 298 and accompanying text.
6 Scheiber, supra note 5 at 19.
7 Conversation with Hon. David McKeague, Sixth Circuit Court of Appeals, May 2014.
Ultimately, such criticisms prove wanting. By demonstrating a consistent concern for the plight of less-advantaged, less-favored members of American society, the Warren Court was, to the contrary, highly-principled in exercising its full powers to achieve fairness and equal protection for all, regardless of one’s status in society. We should demand nothing less from government, which exists, after all, to serve the people - all the people.

Interestingly, the Warren Court’s practice of using its power of equity to achieve fair outcomes closely resembles, at its core, the “justice-as-fairness” approach promoted in John Rawls’s monumental 1971 work, A Theory of Justice. At its simplest, Rawls’s argument suggests that in order to achieve a just (or “fair”) society, decision-makers should operate from the original position of equality behind a so-called “veil of ignorance,” whereby they have no idea of their own personal circumstances, in order to promote a just society. If the individual decision-maker herself might in fact be among the persons most negatively affected by a certain decision, she is much more likely, in her own self-interest, to make decisions that minimize the potential harm to herself. In this way, the interests of less-advantaged, more vulnerable members of society are adequately considered, promoting the justice-as-fairness principle of equal opportunity for all.

Of course, Earl Warren and the Warren Court did not adopt justice-as-fairness reasoning per se, since Rawls had not yet published A Theory of Justice by the time Warren left the Court in 1969. Nonetheless, the point is that principles of fairness and equal opportunity underlie both the Warren Court’s jurisprudence and Rawls’s theory of justice.⁸ Not incidentally, the same

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⁸ The timing of Rawls’s book, written as it was at essentially the same time as Earl Warren wrapped up his Chief Justiceship, suggests that Rawls may well have been influenced by the Warren Court’s jurisprudence.
core principles guide notions of public virtue, a concept vital to the founding generation, and of the Golden Rule, the ancient mandate long-recognized by all of the world’s major religious and moral authorities to “do unto others as you would have them do unto you.”

This article is divided into three Sections. Section I explains John Rawls’s justice-as-fairness theory, and relates how the theory has resonated in legal and constitutional theory. Section II discusses the Warren Court’s equity-based jurisprudence and its profound impact in creating a more just America. This Section also discusses the constitutional bases for the Warren Court’s decisions, principally the Fourteenth Amendment equal protection and due process clauses. Section III then discusses the Warren Court’s legacy and how its jurisprudence embraced broader concepts of human rights and public virtue. Section III finally suggests that the essentially-Rawlsian fairness-jurisprudence approach could serve as a useful normative ideal for judicial decision-making.

I. John Rawls’s A Theory of Justice

The year 1971 marked the publication of A Theory of Justice by political philosopher John Rawls. A Theory of Justice “is a modern classic…. [I]ts impact on contemporary legal thinking has been profound,” suggests law professor Lawrence Solum. “One indicator of the

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9 See infra notes 314-328 and accompanying text.
10 The Golden Rule dates to antiquity. Homer identified the idea: “Welcome the coming; speed the parting guest.” See, Robert Fagles 31 (stating, “And taking a leaf from Pope’s translation, [Homer] formulates the Golden Rule.”).
work’s influence is the staggering number of law review articles citing A Theory of Justice…. Legal scholars have used the original position in a wide variety of contexts in order to make arguments about what is the fair or just legal rule.”\textsuperscript{13} It has been frequently cited in court opinions, “a phenomenon that is unduplicated by any other twentieth-century work of political philosophy.”\textsuperscript{14} Law professor Stephen Griffin explains, “Surely one of the reasons for the enthusiastic reception of Rawls’s theory among legal scholars is that it was perceived as a theory that justified many aspects of the American constitutional tradition.”\textsuperscript{15}

Political philosophers are similarly laudatory. “Political philosophers now must either work within Rawls’s theory or explain why not,”\textsuperscript{16} says Robert Nozick. Michael Sandel adds, “For us in late twentieth century America,” [Rawls's approach] is our vision, the theory most thoroughly embodied in the practices and institutions most central to our public life.”\textsuperscript{17}

More broadly, Rawls’s work has permeated American society at large. “A large swath of the public, explicitly or otherwise,” says Professor Luke Milligan, “shares Rawls’s fundamental view that ‘justice is fairness.’”\textsuperscript{18} Rawls “set in motion a powerful and inspirational force …

\textsuperscript{13} Lawrence B. Solum, Situating Political Liberalism, 69 Chi.-Kent L.Rev. 549, 550, 558 (1994); See also Anita L. Allen, Social Contract Theory in American Case Law, 51 Fla.L.Rev. 1 n.4 (1999) (stating, “Rawls’s theory has been widely discussed criticized and applied in diverse scholarly legal and philosophical circles) (citing numerous law reviews).
\textsuperscript{14} Solum, [1994] supra note 13 at 550-551.
\textsuperscript{16} Milligan, supra note 12 at 1180 (quoting Robert Nozick).
\textsuperscript{18} Milligan, supra note 12 at 1180.
in the consciousness of his legions of admirers, interpreters, students, and critics,”

19 observes Professor Peter Lake.

Rawls himself said that his purpose in writing *A Theory of Justice* was to offer “an alternative systematic account of justice that is superior, or so I argue, to the dominant utilitarianism” approaches - to the detriment of more egalitarian systems of justice - for the past several centuries.20 “Perhaps the animating philosophical idea in *A Theory of Justice* is that utilitarianism does not take [individual] rights seriously, that not taking rights seriously is a grave defect, and so we need a theory of justice that better fits our core convictions about ways that people must not be treated.”21

Rawls sought “to generalize and carry to a higher order of abstraction of traditional theory of the social contract as represented by Locke, Rousseau, and Kant.”22 To Rawls, the social contract requires that certain principles of justice (premised on basic fairness) be applied to society’s institutions to determine whether the institutions are just. Society’s institutions constitute “the basic structure of society” - “the interconnected system of rules and practices that define the political constitution, legal procedures and the system of trials, the institution of

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20 Rawls, *supra* note 11 at xviii.


property, the laws and conventions which regulate markets and economic production and exchange, and the institution of the family.”

A. Justice-as-Fairness

“[W]hat primarily underlies [Rawls’s approach] is a view about the bases of social justice,” explains Rawls scholar Samuel Freeman. “It is an ideal of a society of free and equal citizens who take responsibility for their ends and cooperate with one another on a basis of reciprocity and mutual respect.” Responding to Rawls critics who claim the theory attempts to “level” all people, Freeman explains, “It is this idea [of cooperative reciprocity and mutual respect], not the ideal of redressing undeserved inequalities of welfare, resources, or luck, that is at the foundation of Rawls’s view.”

In A Theory of Justice, Rawls posits that “justice is fairness, a theory of justice that generalizes and carries to a higher level of abstraction the traditional conception of the social contract. The compact of society is replaced by an initial [theoretical position of equality] that … [is] designed to lead to an original agreement on principles of justice.” This “justice as fairness” formulation is composed of two core principles: “equal basic liberty,” and the combined “difference principle” / “fair equality of opportunity.” According to Rawls, these

23 Freeman, supra note 22 at 3.
25 Rawls, supra note 11 at 3.
26 Id. at 52-54.
27 Id. at 52-54, 86-92.
are “principles that free and rational persons concerned [with] further[ing] their own interests would accept in an initial position of equality [with others].”

Taken together, the principles advance “values of equal protection and civil liberty; fair equality and opportunity; social equality and reciprocity.”

Under the first principle, “equal basic liberty,” each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. In this context, basic liberties include “liberty of conscience and freedom of thought, freedom of association, and the rights and liberties that define the freedom and integrity of the person (including freedom of movement, occupation, and choice of careers, and a right to personal property), [as well as] equal political rights of participation and the rights and liberties that maintain the rule of law [and] protection of one’s physical integrity.” Rawls’s first principle “parallels J.S. Mill’s principle of liberty in that it is conceived as defining constitutional limits on democratic government.”

The second basic principle is divided into two parts, whereby “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage [(the “difference principle’)], and (b) attached to positions and offices open to all [(the “principle of fair equality of opportunity’)].” In other words, “[a]ll social primary goods – liberty and opportunity, income and wealth, and the bases of self-respect –
are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.”

The difference principle has been especially controversial, largely because of this last part – that inequalities are tolerated only insofar as they are “to the advantage of the least favored.” “In particular, the difference principle has struck many as a radically egalitarian principle of justice.”

Disputing this characterization, Professor Griffin suggests that the second principle provides for equal opportunities for all, but which do not actually result in radical redistributions.

Under Rawls’s hypothetical “original position of equality,” people should imagine themselves in this unknowing state when making decisions affecting other people – that is, they should image themselves as operating from behind a “veil of ignorance.” “No one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.”

Since all are similarly situated and no one is able to design principles to favor his

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33 Id. at 52, 54, 87. See also Lawrence Solum, To Our Children’s Children’s Children: The Problems of Intergenerational Ethics, 35 Loy.L.A.L.Rev. 163, 182 (2001). Rawls supplements the theory with two priority rules: “Priority of Liberty” (wherein the first principle of equal political liberty takes priority over the second principle of socioeconomic equality) and “Priority of Justice over Efficiency and Welfare.” Solum, supra note 13 at 180-181. See also Freeman, supra note 22 at 5.

34 Griffin, supra note 15 at 739.

35 Id. at 739, 740, 742 (stating, [t]he second principle of justice … reduce[s] inequalities from social circumstances and natural endowment … not by restricting the natural endowment of the more favored, but by improving the circumstances of those less favored by employing the talents of all in a system of mutual benefit.

36 Rawls, supra note 11 at 11. They are allowed to know, however, that they are “heads of families and as such are interested in their families’ share of primary social goods.” April L. Cherry, Social Contract Theory, Welfare Reform, Race, and the Male Sex-Right, 75 Or.L.Rev. 1037, 1057 (1996). See also Christopher J. Peters, Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis, 105 Yale LJ 2031, 2092 (1996).
particular condition, the principles of justice are the result of a fair agreement or bargain.”  

Under this approach, decision-makers who do not know how they themselves are situated with respect to a given matter will be more likely to make decisions that are fair to all.

**B. Rawls & the Constitution**

As noted above, since its unveiling in 1971, Rawls’s justice-as-fairness theory has received copious attention across the disciplines, including law. Since any legal discussion inevitably traces back to the Constitution, the basis of all laws, it is appropriate to consider justice-as-fairness in constitutional terms. 

Rawls states: “The historical experience of democratic institutions and reflection on the principles of constitutional design suggest that a practicable scheme of liberties can indeed be found.” 

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37 Rawls, *supra* note 11 at 11.

38 In later years, Rawls published several additional works, including Political Liberalism (New York: Columbia University Press 1993) and Justice as Fairness: A Restatement, E. Kelly (ed.) (Cambridge, MA: Harvard University Press 2001), largely responding to criticisms of various aspects of *A Theory of Justice*. Some of the more recent legal commentary assessing Rawls’s subsequent work describe a theory that is arguably considerably less robust than that originally envisioned in *A Theory of Justice*. *See, e.g.*, Frank A. Michelman, Rawls on Constitutionalism and Constitutional Law (in Cambridge Companion to Rawls) 398 (2003) (suggesting that under Rawls’s revised theory such matters as providing basic governmental structure or securing core basic liberties may be resolved through a process of judicial review within constitutional law, but that other matters, such as the operation of difference principle, would instead be resolved through the political process). *But see contra, e.g.*, George Klosko, Rawls’s Argument from Political Stability, 94 Colum.L.Rev. 1882-1883 (1994) (stating that even after Rawls’s subsequent works, “certain fundamental ideas [are still] seen as implicit in the political culture of a democratic society.”). 


40 Rawls suggests: “The constitution [sic] is not what the Court says it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the Court to say it is. A particular understanding of the constitution [sic] may be mandated to the Court by amendments, or by a wide and continuing political majority, as it was in the case of the New Deal.” *Bruce A. Antkowiak, Saving Probable Cause, 40 Suffolk U.L.Rev. 569, 605 (2007) (quoting Rawls).*

41 Griffin, *supra* note 15 at 764.
of Rights and Fourteenth Amendment in the United States); however, longstanding constitutional practice has developed a “practicable scheme” whereby those liberties are, while protected, not absolute. Rawls accepts that “drawing limits to regulate the basic constitutional rights into a coherent system of rights does not infringe on the priority of these rights,” explains Professor Griffin. “Rules of order and ‘time, place, and manner’ regulations are all appropriate. Rights may also be restricted, which is to say they may be limited for the purpose of securing an even more extensive system of rights.”

1. Rawls Applied

Scholars have applied Rawls’s justice as fairness approach to a variety of legal topics. Criminal law and procedure, for example, lend themselves well to Rawlsian analysis. This area of law - the process for trying defendants and punishing convicted offenders - is “the most intrusive, and the most severe [of] all the manifestations of power the state exercises against its own citizens…. If the exercise of state power in a liberal democracy is to be legitimate,” Professor Sharon Dolovich suggests, “it must be justifiable in terms that all members of society subject to that power would accept as just and fair. It may be hard at first to see how this standard could yield the terms of legitimate punishment. For wouldn’t any citizens, finding themselves convicted of crimes and facing punishment, simply withhold their agreement as to the just and fair nature of the contemplated penalty, whatever its character?”

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42 Id. (stating, “Rawls envisions two sorts of cases: restrictions on the rights of political participation to protect other rights …, and restrictions of an emergency nature necessary to protect the entire system of rights in time of war or other constitutional crisis. Both cases are familiar enough in our constitutional law.”). See also Freeman, supra note 22 at 5.
Rawlsian analysis helps resolve this difficulty. “Rawls’s theory allows us to evaluate … an existing rule against the two principles of justice to reveal the values it embodies,” Professor Elizabeth Pendo suggests. “Such an analysis may not establish what the [law] should say, but it may suggest a way to evaluate what the [law] does say: ‘The role of a political conception of justice … is not to say exactly how these questions are to be settled, but to set out a framework of thought within which they can be approached.’”

Rawlsian analysis has been applied in a number of other legal contexts as well. For example, Rawlsian approaches are helpful in discussing matters of intergenerational justice. Traditional social contract theory encounters difficulty when applied to justice between generations, since it is problematic to suggest that the yet unborn are able to “consent” in any meaningful way to the terms of any particular agreement or arrangement. By contrast, explains Professor Lawrence Solum, “[b]ecause the original position is more abstract and general, it avoids the many problems that social contract theory faces when applied to intergenerational justice.”

“Regulated by a principle of intergenerational savings,” In the copyright law, for example, “individual [authors] within each generation are obliged to forgo immediate gains that are available to them where necessary to protect the interests of future generations.”

Intergenerational justice also implicates matters of the environment and sustainability. “In seeking to develop a theory for the conservation of resources, [one may extend] the hypothetical

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44 Pendo, supra note 39 at 241.
45 Id.
46 Solum, supra note 33 at 207-08. See also Lawrence Zelenak, Does Intergenerational Justice Require Rising Standards of Living, 77 Geo Wash.L.Rev 1358, 1363 (2009) (stating, according to Rawls’s just savings principle, “‘[e]ach generation must … put aside in each period of time a suitable amount of real capital accumulation.’”).
veil of ignorance to the intergenerational context,” explains Alhaji Marong. “[W]here members of society are ignorant about which generation they would be born into, they would in the original position, agree upon rules that ensure a condition of ‘permanent liability’; one that assures that sufficient resources are available for the sustenance of each succeeding generation.”

Regarding foreign policy, including self-defense and the state, “[b]ehind the veil of ignorance, we might ask what rights we would wish to have against others when we act in self-defense,” Professor Kimberly Ferzan suggests. “So, for instance, [should] preemptive strikes … be justified in instances where it is unreasonable to wait for an attack to be imminent[?] … ‘Behind the veil of ignorance, would not we all agree to limited, humane preemptive strikes for the safety of all?’”

Professor Catherine Powell employs a Rawlsian analysis to assess the fairness to women, over time, of the federal judiciary’s jurisprudence. Assuming that “behind the veil of ignorance, men and women, each unaware of his or her gender, would be deeply concerned with ensuring

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49 Id.
51 Id.
52 A Theory of Justice has been criticized for its insensitivity to gender concerns. “In 1971, [Rawls] did not explicitly list gender as one of the unknowns behind the veil of ignorance.” Catherine Powell, Lifting our Veil of Ignorance: Culture, Constitutionalism, and Women’s Human Rights in Post Sept. 11 America, 57 Hastings L.J. 331, 338 (2005). See also Marion Smiley, Democratic Citizenship v. Patriarchy: A Feminist Perspective on Rawls, 72 Fordham L.Rev 1599, 1601-1602 (2004) (identifying feminist concerns: “first, that that the methodology underlying Rawls's Original Position - individuation and abstraction - privileges men over women by undermining the values of care and relationship; second, that individuals behind the Veil of Ignorance cannot produce principles of justice that are powerful enough to challenge the patriarchal family; and third, that Rawls's insistence on a Veil of Ignorance takes away from black women and other women of color in particular the racial and cultural identities necessary to both their moral agency and their personal integrity.”).
women greater equality than is available under the U.S. constitutional scheme (which of course, women were not able to participate in designing),” Powell concludes that “the principles selected behind a veil of ignorance would be more consistent with CEDAW [Convention on the Elimination of All Forms of Discrimination Against Women] than the sex equality paradigm that has developed through judicial interpretation of the U.S. Constitution.”

2. Judicial Review

How does the doctrine of judicial review fare under Rawlsian analysis? Since the early days of the Republic, judicial review - the judiciary’s review of the actions of the coequal, elected legislative and executive branches - has become an indispensable feature of American constitutionalism.54

Even so, judicial review, in principle, is controversial. Specifically, arguably it offends basic democratic principles that an unelected group of judges should be able to override the actions of duly-elected legislative and executive officials. Many have expressed this concern, including Judge Learned Hand, who vocally favored democratic institutions and principles over the

53 Powell, supra note 52 at 338. While Rawls himself was agnostic on the topic of abortion, “he nonetheless left behind a coherent theoretical model with which to analyze the justness of policy determinations.” Milligan, supra note 12 at 1181. Regarding other possible topical areas: “Some have argued that disability fares well under a Rawlsian analysis because, similar to the decision makers in the original position, no one knows if or when he or she might become disabled....” Pendo, supra note 39 at 244. See also Karen Halverson Cross, Converging Trends in Investment Treaty Practice, 38 NC J.Int’l L. & Com.Reg. 151, 155 (2012) (explaining Rawlsian analysis in context of international investment treaty practices).

54 The doctrine of judicial review is regarded by some as nothing short of America’s greatest contribution to constitutional theory. As Professor Bickel puts it, “Marbury v. Madison … exerts an enormous magnetic pull. It is, after all, a great historic event, a famous victory; and it constitutes, even more than victories won by arms, one of the foundation stones of the Republic. It is hallowed. It is revered. If it had a physical presence, like the Alamo or Gettysburg, it would be a tourist attraction; and the truth is that it very nearly does have and very nearly is.”
“counter-majoritarianism” inherent in America’s practice of broad judicial review: “It would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.”

On the other hand, there is ample reason for why the Constitution does subject majoritarian democracy to judicial review. Archibald Cox explains: “[C]ourts will be a great deal firmer and wiser than legislatures in interpreting constitutional guarantees which protect essential liberty. First, judicial interpretation gives better protection to unpopular individuals and minorities shut out of or inadequately represented in the political process. Similarly,” Cox adds, “judicial review provides better protection over time for enduring values which politicians too often neglect and of which the people too often lose sight in the emotional intensity and maneuvering of political conflict.”

Indeed, the founders and framers themselves were well aware of the perils of leaving the People’s liberties to the whims of direct and elected majorities. James Madison, for example, arguing in support of passage of the Bill of Rights before the First Congress, said, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or

55 Hand, Learned, The Bill of Rights 73-74 (Harvard Press 1958). See also Bickel: “[N]othing … can alter the essential reality that judicial review is a deviant institution in the American democracy.”
56 Archibald Cox, The Independence of the Judiciary: History and Purposes, 21 U.Dayton L.Rev. 565, 572-73 (1996). See also Eugene V. Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193, 205, 197 (1952)(stating, “The task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives, elected or appointed.”).
executive.” In a letter to a French correspondent, Thomas Jefferson averred, “the laws of the land, administered by upright judges, … would protect you from any exercise of power unauthorized by the Constitution of the United States.” And Alexander Hamilton commented, in Federalist 78, that “the judiciary was entrusted with the primary responsibility for guarding the value that underlay the entire constitutional structure: The courts were expected to commit to ‘inflexible and uniform adherence to the rights of the Constitution, and of individuals. . . .”

Under Rawlsian analysis, the doctrine of judicial review is inherently neither favored nor disfavored. Rawls “does not lay out a single set of institutions he thinks works best [in a just society] because such practical questions of constitutional design are not part of his theory,” Professor Griffin explains. Rawls does believe, however, that “it is plausible that the traditional mechanisms of constitutionalism can be justified,” despite the fact that “[a]s prima facie restrictions on the equal political liberties, all of the devices of constitutionalism (a written constitution, bicameral legislature, separation of powers, a bill of rights, and judicial review) are equally suspect. All must be justified,” Griffin adds, “on the ground that the restrictions they entail provide a greater degree of protection to the other liberties than would be available under a system of pure majority rule. Majority rule as such has no special place.”

One thing that is possible to say about a Rawlsian perspective of judicial review is that the judiciary is better-suited than is the legislature “to mirror the fair representation of persons

\[57\] 1 Annals of Cong. 457 (Joseph Gales ed., 1834).
\[58\] Scheiber, supra note 5 at 15 (quoting Thomas Jefferson).
\[60\] Griffin, supra note 15 at 773. Indeed, Rawls did not necessarily intend for the two principles of justice to be applied to legislation or to the Supreme Court cases interpreting it. Pendo, supra note 39 at 241-242.
\[61\] Griffin, supra note 15 at 774.
achieved by the original position,” Griffin suggests. “[T]his is the ideal we are trying to achieve in designing the constitutional system. Striving for this ideal in the legislative process requires a complex system of restraints and compensatory devices. By contrast, the nature of constitutional adjudication directly guarantees that persons will be treated equally in a certain sense.” Lawrence Sager adds, “It is irrelevant that a claimant is despised . . . , or even that his is a claim shared by many or held in solitude.” In any and every event, “[j]udges are commonly said to have a duty to act fairly, impartially, objectively, and to exercise their sense of justice wisely. This is precisely the perspective persons adopt in the original position,” Griffin concludes. “If this perspective is already at least partially built into the institution of the judiciary, then we have strong grounds for saying that judicial review is compatible with Rawls’s theory and stands on as firm a footing as the power of the legislature to enact legislation.”

In sum, “Rawls's theory … puts the traditional concern of constitutional theory to reconcile judicial review with democratic government in a somewhat different light. In terms of his theory,” Griffin explains, “judicial review is no more ‘deviant’ an institution than the other devices of constitutionalism - if judicial review stands in need of a justification, then so does the notion of a written constitution. . . . Rawls's conception of justice … offers a persuasive legitimacy to judicial review.”

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62 Id. at 774 (quoting Lawrence Sager).
63 Id. (stating, “Of course, the courts cannot play the same role as the legislature in guaranteeing the system of rights. The courts cannot enact legislation or act on their own to create cases. Further, Rawls makes it clear that no branch of government has a monopoly on constitutional interpretation.”).
64 Id. at 775.
II. The Warren Court

Several hundred feet from the Tomb of the Unknowns at the Arlington National Cemetery, about a quarter-mile from John F. Kennedy’s eternal flame, rests the grave of Earl Warren. The tombstone reads,

Where there is injustice, we should correct it; where there is poverty, we should eliminate it; where there is corruption, we should stamp it out; where there is violence we should punish it; where there is neglect, we should provide care; where there is war, we should restore peace; and wherever corrections are achieved we should add them permanently to our storehouse of treasures.65

This statement of Warren’s personal philosophy made in 1972 toward the end of his life gives insight into how Warren approached his work as Chief Justice of the United States Supreme Court from 1953-1969.

The Warren Court holds “an enduring place in modern American history for [its] boldly creative constitutional jurisprudence, acting on the Court’s constitutional visions of justice and of equality under the law,” suggests Professor Scheiber. “Only the Marshall Court, in the Republic’s early decades, has had a comparable impact in shaping the nation’s law and its public life.”66

66 Scheiber, supra note 5 at 1.
Over the course of sixteen years, the Warren Court would “remake the nation’s voting rights, empower criminal defendants, break down racial segregation, halt the demagogic pursuit of Communists, expand the rights of protest and dissent, embolden newspapers to challenge public leaders, and reimagine the relationship between liberty and security in a free society,” suggests Los Angeles Times journalist Jim Newton. It faced up to “the inherited institutions and policies that demeaned individuals and groups, denying due process of law or truly equal protection to all Americans. Earl Warren thus presided as chief justice over what is fairly termed the Warren Court’s “revolution” in American constitutional law….”

Undeterred by the controversies surrounding its course of action,” Scheiber adds, “the Court moved further toward an expansion of individual rights in a series of cases… [in which the] imperatives of the egalitarian ideal broadened into a capacious concept of ‘human dignity.’ The very language of the decisions in these areas reflected the expansion of the Court’s equal protection and due process concerns into the universal domain of human rights.”

The Court also substantially “examined and redefined” individual rights in the First Amendment areas of freedom of speech (including “deeply divisive issues arising from the protest tactics of both the civil rights groups and the anti-Vietnam War movement”) and church-state relations. Regarding speech, “[t]he justices did not consistently expand the permissible range of behavior, but on the whole, their decisions established [a] strong basis in national constitutional law for broadening review of state legislative and enforcement practices, with much greater freedom allowed for nonverbal expression and symbolic protests.” On church-state matters, “[t]he Court’s jurisprudence … was equally dramatic in

67 Newton, supra note 65 at 11.
68 Scheiber, supra note 5 at 2.
69 Id. at 20.
its departure from the long-established status quo, as the justices established new constitutional standards that embodied a much more formidable ‘wall of separation’ than earlier Courts … had ever been willing to enforce previously.”70

A. Chief Justice Earl Warren

Because the Warren Court’s jurisprudence is so closely identified with the man for whom it is named, it is useful to discuss Earl Warren.  Warren joined the Court at age sixty-two, appointed as Chief Justice by President Eisenhower upon the death of Chief Justice Fred Vinson in 1953.  He came from California, where he had most recently served for ten years as governor, four years before that as California attorney general, and fourteen years as Alameda County district attorney.

As Warren joined the Court in 1953, America “remained an immature country in many respects.  Institutionally sanctioned racism eroded America’s moral authority,”71 suggests journalist Newton.  “The Cold War and internal debate over Communism ran rivulets of fear and divisiveness through the body politic.  Spotty respect for the human rights promised to its citizens in the Declaration of Independence but withheld from them by its courts undermined America’s desire to lead the world by example.”72  “Warren[, who] had an early sense that the true intention of the Fourteenth Amendment, which he understood was to help African

70 Id. at 20-21.
71 Newton, supra note 65 at 3.
72 Id.
Americans after the elimination of slavery, had been betrayed by the nineteenth-century Supreme Court,”\textsuperscript{73} knew the twentieth-century Supreme Court should be doing more.

The Court Warren would be leading was highly polarized. Composed in the mid-1940s of “the most brilliant and able collection of Justices who ever graced the high bench together,” according to Yale law professor Fred Rodell, each of whom “possessed … a peculiarly forceful personality [and were as a group] … perhaps the most unbrotherly in the Court’s annals.”\textsuperscript{74} The most prominent Justices of that Court were, on one side of the doctrinal divide, Hugo Black and William Douglas; and on the other, Felix Frankfurter and Robert Jackson, “represented polar views on the proper role of the Court in enforcing the Constitution. . . . [T]he judicial rancor did not turn into sweetness and light because Warren was elevated to the central chair,”\textsuperscript{75} Professor Bernard Schwartz recounts. “The antipathy … continued as strong as ever. But the Chief Justice plays a crucial role in the temper of the Court.” Like a “great conductor leading an orchestra[, h]e, too, strikes the pitch, as it were, and sets the tone for the entire performance.”\textsuperscript{76} Warren excelled in this role.

Indeed, by all accounts, Earl Warren was an extraordinary leader. “All the Justices who served with him stress[ed] … Warren’s ability to lead the conference,” a big improvement from “[his] predecessor [who] had been notably inept in their conduct of conferences,” explains Schwartz. His colleague on the Court, Justice Byron White, reported that in conference Warren “would

\textsuperscript{73} Scheiber, \textit{supra} note 5 at 16.
\textsuperscript{74} Bernard Schwartz, \textit{Super Chief: Earl Warren and His Supreme Court – A Judicial Biography} 32 (NYU Press 1983).
\textsuperscript{75} Id. “To Frankfurter,” professor and biographer Bernard Schwartz explains, “the law was almost an object of religious worship - and the Supreme Court its holy of holies. If Frankfurter saw himself as the priestly keeper of the shrine, he looked on [Hugo] Black and his supporters, notably [William] Douglas, as false prophets defiling hallowed ground.” Id. at 40.
\textsuperscript{76} Id. at 73.
state his position and he usually had his mind made up. He usually had a pretty firm view of the
case.” 77 Justice William J. Brennan added, “it is incredible how efficiently the Chief would
conduct the Friday conference, leading the discussion of every case on the agenda, with a
knowledge of each case at his fingertips.” 78

Warren was unapologetically activist in addressing certain matters that came before Court. He
was, for example, “convinced that his Court had no choice but to assert and enforce
constitutional mandates for equal protection,” Professor Scheiber explains. Warren also,
however, “regarded it as vitally important that Congress too should step forward ‘to share the
constitutional responsibility.’ If Congress did so move positively to assert egalitarian
imperatives of the Constitution, justice would be pursued through ‘democratic process’ rather
than judicial fiat.” Warren believed that a legislative approach was “far superior to leaving the
Court to carry that burden on its own.” 79

The Warren Court did not always have the luxury, however, of sharing the burden. “There were
times when Warren and his colleagues concluded that the judiciary had no choice but to lead,”
Scheiber continues, “even if it meant challenging head-on the prerogatives of Congress itself, as
in cases regarding rights of witnesses before congressional committees, attempts by federal
bureaucracies to contract the range of citizens’ First Amendment rights or rights to travel, or
fundamentals of the law in church-state relations.” 80 Professor and former Kennedy
Administration Solicitor General Archibald Cox explains, “the Warren Court’s ‘activism’ was

77 Id. at 144.
78 Id.
79 Scheiber, supra note 5 at 15 (emphasis added).
80 Scheiber, supra note 5 at 15.
deployed mainly in these areas of law and policy, where, in [Warren’s] opinion as in the Court’s view, “politicians [in Congress or the states] were blind to fundamental injustice.”

Gordon Silverstein adds: “From the moment in 1954 … when the Supreme Court’s Brown decision struck down legally mandated racial segregation in public schools, … social activists [thereafter] looked to the Court rather than Congress or state legislatures to advance their public policy goals.”

Warren believed that each case the Court considered must be “‘evaluated in terms of practical application. Everything we do must include the human equation, for what we do with our legal system will determine what American life will be – not only now but in the years ahead…. [L]aw must not be placed in a straitjacket of historical precedent.’”

One of Warren’s law clerks, Curtis Reitz, explained, “He wasn’t tied down by doctrine. He wasn’t into the piddling kinds of distinctions that so box the lawyer…. His understanding of human beings, and his understanding of social conditions, and the way society and government worked, was absolutely extraordinary.”

Law, as Warren explained in a Fortune magazine article, “is simply a mature and sophisticated attempt, never perfected, to institutionalize this sense of justice and to free men from the terror and unpredictability of arbitrary force.”

Warren admitted that he was not a legal scholar in the classic sense; he was, instead, a pragmatist. “I wish that I could speak to you in the words of a scholar, but it has not fallen to my lot to be a scholar in life,” he stated in a 1957 speech. “I have been in public life for forty

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81 Id.
82 Id. at 197 (quoting Silverstein).
83 Cray, supra note 2 at 317 (quoting Warren).
84 Id.
85 Id. (quoting Warren, Fortune magazine).
years. Since that time, I have been doing the urgent rather than the important.”86 Lacking any judicial experience prior to coming to the Supreme Court, “Warren was not prone to highly technical legal thinking,” which, perhaps paradoxically, allowed his common-sense “concern with basic principles of equality and fairness” to flourish.87

He did not disregard “the received law,” one of his law clerks commented. Warren knew “you didn’t just decide a case because that was how you felt about it…. There had to be “respectable authority for getting where you want to be. At the same time, the chief justice understood they could make a legitimate legal argument for whatever position he took.”88

Warren looked first to the facts of a given case. Another law clerk explained, “He went for a decision that would be right… And right for him was what was morally based, what was good for the individual, and in the larger sense good for the country to have a fair society…. He seized on facts to decide his cases, and on facts his judgment is good.” Warren biographer Ed Cray adds, “What he cared about – almost exclusively, not completely – was the bottom line: who won and who lost.” Indeed, one time in 1957 an exasperated Felix Frankfurter exclaimed to Warren, “God damn it, you’re a judge! You don’t decide cases by your sense of justice or your personal predilections.” To which Warren replied with matching passion, “Thank heaven, I haven’t lost my sense of justice.”89

86 Schwartz, supra note 74 at 287. See also Cray, supra note 2 at 531.  
87 Melissa Cully Anderson and Bruce E Cain, Venturing onto the Path of Equal Representation: The Warren Court and Redistricting 40 (in Scheiber, supra note 5).  
88 Cray, supra note 2 at 357.  
89 Id. at 356.
Over time, “Frankfurter’s elastic interpretations ‘turned the Chief into a great skeptic, if not a
cynic, about the alleged binding nature of jurisdictional rules.’”\textsuperscript{90} Warren complained that the
rules were “only binding because Felix says so”; accordingly, “[t]he Chief struck out on his
own, … no longer intimidated by Frankfurter’s erudition and his own inexperience.” Professor
Gunther explains, “I think he learned from the reaction to \textit{Brown} and the subtle maneuverings
of Felix Frankfurter that a judge could do whatever he damn pleased… At least it didn’t turn
much on whether he had a legal basis for it…. And so he didn’t give so much of a damn about
the legal grounds.”\textsuperscript{91}

Justice Frankfurter, by contrast, advocated judicial \textit{restraint}; and he typically went to
considerable lengths to find legislative or other official bases for the Court not to hear or to
decide a particular dispute. “Above all Frankfurter felt, it was not for the judge to read his own
‘notion’ into the Constitution.” He believed, explains Professor Schwartz, that “[h]is colleagues
who were doing so were performing more a legislative than a judicial function.”\textsuperscript{92}

Frankfurter vehemently opposed Warren’s activist, equity-based approach.\textsuperscript{93} He and his
frequent correspondent, the esteemed Judge Learned Hand of the United States Court of
Appeals for the Second Circuit (who himself harbored unrealized hopes of being elevated one
day to the U.S. Supreme Court), were withering in their criticisms of Warren and his activist
allies on the Court. “I do not conceive,” Frankfurter revealed in a 1957 note to Justice William
Brennan, “that it is my function to decide cases on my notion of justice and, if it were, I

\begin{thebibliography}{99}
\bibitem{90} Id. at 310 (quoting Warren; quoting Gunther).
\bibitem{91} Id. (quoting Gunther).
\bibitem{92} Schwartz, \textit{supra} note 74 at 265.
\bibitem{93} Cray, \textit{supra} note 2 at 307.
\end{thebibliography}
wouldn’t be as confident as some others that I know exactly what justice requires in a particular case…. I envy those for whom the dictates of justice are spontaneously revealed." 94

For his part, a bitter Judge Hand wrote to Frankfurter, “It must be damnable to be one of a bunch that can never agree, and of whom four at any rate regard themselves as Teachers of the Four Fold Way and the Eight Fold Path.” Elsewhere, Hand denigrated “those Harbingers of a Better World – Black, Douglas, Brennan and the CHIEF’ and called the four ‘the Jesus Quartet,’ ‘the Jesus Choir,’ and ‘the Holy Ones.’ ‘Oh,’ he declared in still another letter, ‘to have the inner certainties of those Great Four of your Colleagues!’” 95

Warren believed that “this Court or any court should exercise the function of the office to the limit of its responsibility.” 96 And that responsibility includes the obligation to enforce constitutional guarantees. Anything less amounts to “judicial abnegation.” 97 “[F]or a long, long time,” Warren explained, by adhering excessively to a doctrine of judicial restraint, “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.” 98 Warren had “come to understand that the law had to

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94 Schwartz, supra note 74 at 267. According to Justice Potter Stewart, Frankfurter “was as fickle as a high school girl. I understand … that, when Earl Warren first came to the Court as Chief Justice [in 1953], Felix was going around Washington saying, ‘This is the greatest Chief Justice since John Marshall and maybe greater.’ And by the time I got here [in 1958, he] had very much been disenchanted by the Chief Justice.” Id. at 147.

95 Id. at 277-78. Justice Frankfurter’s doctrinal approach often prevailed Warren’s first ten years on the Court. After Frankfurter’s 1962 retirement, however, “it seems Warren’s natural leadership skills and fundamental commit to equality ‘won over’ the rest of the Court.”

96 Schwartz, supra note 74 at 265) (quoting Warren).

97 Id.

98 Id.
meet the changing needs of society.”99 In Warren’s view, reports Schwartz, “it was the Court’s job ‘to remedy those things eventually,’ regardless of the controversy involved.”100 As Warren himself explained: “When we come to the Court, we no longer can compromise…. We have to decide the matter according to the principle as we see it.”101

To critics who accused the Court of “throwing society in a turmoil… [by] look[ing] about for sore spots in the society and proceed[ing] to operate upon them,” Warren responded: “That is not how we work…. We reflect the burning issues of our society; we do not manufacture them…. [T]he times we are living in determine the kind of cases we hear.”102 And to friends who complained that the Court was going too fast, Warren emphasized, “There should be no delay in correcting a mistake.”103

Indeed, Warren “conce[ived] of the Supreme Court as a virtual modern Court of Chancery – a residual ‘fountain of justice’ to rectify individual instances of injustice, particularly where the victims suffered from racial, economic, or similar disabilities” – with himself as a sort of “present-day Chancellor, whose job was to secure fairness and equity in individual cases, particularly where they involved his ‘constituency’ of the poor or underprivileged.”104 During oral arguments in a case, it was not unusual for Warren to sit silently, “only to lean forward at the end of an argument to ask, ‘Yes, but is it fair?’ No single question,” suggests Cray, “could more quickly deflate a government prosecutor or corporation lawyer swollen with legal

99 Cray, supra note 2 at 317.
100 Schwartz, supra note 74 at 265.
101 Cray, supra note 2 at 339.
102 Id. at 462.
103 Id. at 339.
104 Schwartz, supra note 74 at 267, 252.
precedent. Fairness, simple justice was fundamental and was learned as early as the child’s protest, ‘That isn’t fair.’”

As an illustration of its equitable approach, the Warren Court not infrequently “review[ed] the merits in employment cases involving issues of fact.” Acknowledging that “an argument among Supreme Court justices in a case concerning grease on a railroad tie may not appear to be a very weighty matter,” Warren himself “felt as strongly as Frankfurter about these cases…. He had personal experience,” explains Schwartz, “when both his father and he had worked for the Southern Pacific Railroad in his youth, of how devastating accidents could be. . . . [Warren] supposed that was the first time he thought of the human cost of … the railroads.”

Upon ascending to become Chief Justice, “Warren looked upon the Supreme Court as the last resort of the widows and orphans who had lost on the FELA [Federal Employers Liability Act] cases,” Schwartz suggests. “The Chief used to stress to his clerks how important it was that the Court should take some FELA cases each year to make sure that everyone knew that the statute meant what it said.”

The same sensibilities were revealed in *Voris v. Eikel*, “a simple workmen’s compensation case, where the lower courts had denied compensation to an injured longshoreman because he had not notified the employer of his injury as required by statute. The short and simple Warren opinion,” Schwartz explains, “reversed on the ground that it was enough for the worker to

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105 Cray, *supra* note 2 at 317.
106 Id. at 270-71.
107 Id. at 271. “Once installed in the Chief’s office, [his law clerks] discovered their training and honed intelligence were less important to Warren than their humanity,” Cray reports. “That overriding sense of justice led the Chief to instruct his clerks when they were reviewing petitions for certiorari not to keep off petitioners ‘where personal rights are concerned. With property cases, we may be more severe and deny certiorari.’” Cray, *supra* note 2 at 356.
notify the foreman who was his immediate supervisor. The basic principle, said Warren, was that ‘this Act must be liberally construed … and in a way which avoids harsh and incongruous results.’”

Additional anecdotes epitomize Warren’s passion for justice and fairness. Warren’s longtime colleague Justice William Douglas opined at the time of Warren’s death in 1974 that “in many ways the lesser cases mirrored the philosophy of the man.”

Schwartz suggests, “Warren the man was perhaps best shown in Brooks v. Florida”:

The Brooks case arose out of a food riot by blacks in a Florida prison. Brooks and the others were stripped naked and placed in bare punishment cells which the Supreme Court described as “the windowless sweatbox … a barren cage with a hole in one corner into which he and his cell mates could defecate.” For two weeks, they were kept in these cells on a daily diet of twelve ounces of thin soup and eight ounces of water. Within minutes after Brooks was brought from the cell, he signed a confession. The confession was used to convict him of participating in the riot. The highest state court affirmed. Brooks filed an in forma pauperis petition for certiorari.

At the certiorari conference, the Justices voted 8-1, with Warren dissenting, not to take the case, feeling that it involved a matter of internal

109 Schwartz, supra note 74 at 134. The Warren Court’s approach in these cases is in sharp contrast to the modern Supreme Court, where the Court frequently denies standing or access to court. Combined with the related issue of the Court’s overly-expansive interpretation of states’ sovereign immunity under the eleventh amendment, these cases show a Roberts Court demonstrably unfriendly to less powerful and more vulnerable members of society.

110 Id. at 155-156 (citing Douglas in ABA Journal).
prison discipline in which the Court should not become involved. Warren was indignant at the decision to deny certiorari. He told [his law clerk] to work up a draft dissent[, who] prepared a number of drafts, but the Chief kept saying of each, “that’s not strong enough. Doggone it! If those guys don’t want to take this case, I want to be sure that every gruesome detail is recorded in those books up there [pointing to the Supreme Court Reports] for posterity.” Finally Warren circulated an extremely sharp draft dissent on November 9, 1967, and, … “just kind of sat in his office and waited.”

In the next month, the Justices came in one by one and joined the dissent. By the next conference on the case, the Chief had the votes of all, not only for the granting of certiorari, but for summary reversal. Warren had Brown draft a short per curiam to that effect, which was issued December 18, 1967.

In sum, while “Felix Frankfurter saw the Supreme Court as a seat of law[,] Earla Warren saw it as a seat of justice.”

B. Fairness - “Equity” - as Guiding Principle for the Warren Court

As we suggested above, underlying virtually every aspect of the Warren Court’s (and Earl Warren’s) jurisprudence was a concern for fairness. In judicial conference for one of the

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111 Id. at 719.
112 Id. at 719. See also Cray, supra note 2 at 446.
113 Cray, supra note 2 at 310.
reapportionment cases (discussed below), for example, Justice Douglas recalls Warren stating, “[The] ... starting point in this type of case is whether apportionment meets standards of republican form of government ... that means, is it representative? Is it fairly representative?” Warren insisted the “principle of equality is the starting point,” in language that John Rawls might have also used ten years later in constructing A Theory of Justice: “Equal representation is basic.”

The Warren Court’s fairness-jurisprudence is animated by the ancient doctrine of Equity. Equity as a concept seems to have been first enunciated around 340 BC by Aristotle, who commented, “For that which is equitable seems to be just, and equity is justice that goes beyond the written law.” Some two millennia later in 1835, U.S. Supreme Court Associate Justice Joseph Story explains: “In the most general sense, we are accustomed to call that Equity, which, in human transactions, is founded in natural justice, in honesty and right, and which properly arises ex aequo et bono. . . . Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance,” Story suggests. “It is impossible, that any code, however minute and particular, should embrace, or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them.”

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114 “Warren distinguished himself from his colleagues on the Court by his reliance on intuition, instinct,” and what Warren’s 1963 law clerk Frank Beytagh referred to as “‘overwhelming dedication to fairness.’” Anderson & Cain, supra note 87 at 44.


116 Gary L. McDowell, Equity and the Constitution 4 (Univ. of Chicago Press 1982) (quoting Aristotle). See also McClintock on Equity 1:1; Story vol.1 p.4.


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Equity has a long tradition in American law and its antecedent English law. In England the concept began taking shape as early as the Norman period (11th – 12th centuries) with the formation of the *Curia Regis* (“King’s Court). “It is to be understood that the King’s Court was a sure asylum for the oppressed,” authoritative histories instruct. Over the following centuries, the Court of Chancery gained dramatically in influence - and in case load (and, in so doing, sparked long-standing turf wars between itself and Courts of Law), until its dissolution and merger with law courts in 1875. “In the course of time the Chancellor … came to be called the keeper of the King’s conscience.” The Chancery was considered to be “the secret closett [sic] of his Majesty’s conscience where his oppressed and distressed subjects hope to find mercy and mitigation against the rigour [sic] and extremitye [sic] of his laws.” Or, as Lord Chancellor Ellesmere explained, Chancery “is the refuge of the poor and afflicted, it is the altar and sanctuary for such as against the might of rich men and the countenance of great men, [who] cannot maintain the goodness of their cause and the truth of their title.”

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119 Marsh, *supra* note 118 at 47-48. Among the objections to Chancery were those of subjectivity, as expressed famously by the 17th century jurist John Senden: “Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience.” Dennis R. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* 2 (Ashgate 2010).
122 Id. at 48. *See also generally*, Candace S. Kovacic-Fleischer, et al., Equitable Remedies, Restitution and Damages 2-8 (8th ed.).
In the United States (and the Colonies before them), after a slow start Equity began to be “studied [and] administered as a system of enlightened and exact principles” around the end of the eighteenth century, explains Justice Joseph Story in his highly influential 1835 work, *Commentaries on Equity Jurisprudence* (cited by, among many others, Abraham Lincoln). As for its nature, “Equity Jurisprudence … flows from the same sources here, that it does in England, and admits of an almost universal application in its principles. The Constitution of the United States has,” Story continues, “conferred on the National Judiciary cognizance of cases in Equity, as well as in Law; and the uniform interpretation of the clause has been, that … Equity Jurisprudence embraces the same matters of jurisdiction and modes of remedy, as exist in England.”

Story elaborates:

Courts of Equity are not so restrained [as Courts of Law]. Although they have prescribed forms of proceeding, they are flexible, and may be suited to the different postures of cases. They may adjust their decrees, so as to meet most, if not all, of these exigencies; and they may vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties. Nay, more, they can bring before them all parties interested in the subject matter, and adjust the rights of all, however

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124 Id. at 62-65 sec 56-58.
numerous; whereas Courts of Common Law are compelled to limit their inquiry
to the very parties in the litigation before them.”

Quoting Lord Redesdale, Justice Story adds, “The jurisdiction of a Court of Equity [may
extend to, among other things,] … where the principles of law, by which the ordinary courts are
guided, give no right, but, upon the principles of universal justice, the interference of the
judicial power is necessary to prevent a wrong, and the positive law is silent.”

More recently, McClintock on Equity explains, “Equity jurisdiction may attach [in the United
States] in almost any field of the law, where the circumstances may call for the exercise of its
peculiar powers.” “Equitable doctrines also have continuing vitality insofar as they inspire
judges to consider themselves as being bound by a higher obligation. Judges … continue to
express a greater willingness to experiment with innovative remedies when exercising
‘equitable jurisdiction,’” adds a recent Equitable Remedies casebook. “Modern judges who
are exercising ‘equitable jurisdiction,’ like the early chancellors, feel less constricted in their
application of precedents than do their counterparts who are exercising jurisdiction over claims
for legal relief.”

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125 Id. at sec.28 p.27-28.
126 Id. at sec.32 p.30. See also McClintock, supra note 135 at p.52-53, 3:24 (citing 1 Pomeroy, Eq.Jur
sec.363) (describing certain “maxims of equity … that guide courts of equity in the exercise of their
discretion.”).
127 McClintock, supra note 126 at 101, 4:42. See also generally, Kovacic et al., supra note 122 at 8-11.
128 Kovacic et al., supra note 141 at 11.
129 Id. at 12.
The principle that courts in the United States have wide latitude to offer equitable relief has long been recognized in the U.S. Supreme Court. In an 1869 contract case, for example, the Court announced that “relief … is a matter resting in the discretion of the court [of equity], to be exercised upon a consideration of all the circumstances of each particular case.”\textsuperscript{130} Nearly a hundred years later, the Warren Court embraced equitable principles in the landmark cases of \textit{Brown v. Board of Education} in announcing, “In fashioning and effectuating the decrees, the courts will be guided by \textit{equitable} principles…. These cases call for the exercise of these traditional attributes of \textit{equity} power,” and “[c]ourts of \textit{equity} may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner.”\textsuperscript{131}

\textbf{C. Constitutional Bases: Equal Protection}

Constitutionally speaking, the Warren Court accomplished much of its work by breathing life into the Fourteenth Amendment Equal Protection and Due Process Clauses - provisions the Court read, essentially, so as to provide for fair, equitable outcomes. Earl Warren’s position regarding equal protection and due process “rested on his profound belief that America’s highest court must interpret the Constitution in light of ‘the evolving standards of decency that mark the progress of a maturing society,’” explains Professor Scheiber. “[T]he 1787 document, its amendments and the body of judicial precedent in the Supreme Court, Warren

\textsuperscript{130} Willard v Tayloe, 75 U.S. 557 (1869).
believed, must not be taken as ‘hollow shibboleths’ but rather must be continuously evaluated and advanced as ‘principles.’”

1. School desegregation cases

Indeed, the Warren Court’s landmark equal protection cases, including *Brown v. Board of Education* in 1954,“ushered in a revolution in the way the Supreme Court approaches racially discriminatory practices in modern society, … render[ing] illegitimate widespread mechanisms and practices of racial subordination.” Prior to *Brown*, during the nearly one-hundred years after the ratification of the equal protection clause in 1868, the Court refused to consider that the equal protection clause - once derided by Justice Oliver Wendell Holmes as “the usual last resort of constitutional arguments” – might embrace anything beyond official racial discrimination. And, even then, the Court interpreted the clause very narrowly, holding in *Plessy v. Ferguson* in 1896 that laws requiring separation of the races did not technically violate the letter of the equal protection clause, so long as the alternate facilities were “equal.”

The *Plessy* Court’s “separate but equal” doctrine thus sanctioned the system of institutionalized apartheid in the United States that existed until the Warren Court’s repudiation of the doctrine in *Brown* in 1954.

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132 Scheiber, supra note 5 at 20.
134 Sheila Foster, Race, Agency, and Equal Protection: A Retrospective on the Warren Court (in Scheiber, supra note 5 at 77-78). See also Scheiber at 3 (stating, “[Brown] served to redefine dramatically the constitutional imperatives of equal protection.”). After *Brown*, the Court has expanded the equal protection clause’s reach beyond race to include also gender, national origin, alienage, and children of unmarried parents. See Erwin Chemerinsky, Constitutional Law 713 (Wolters Kluwer Law & Business 4th ed. 2013).
136 163 U.S. 537 (1896).
In announcing the Court’s decision in *Brown* regarding the question of “[whether] segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive[s] the children of the minority group of equal educational opportunities?,” Chief Justice Warren replied, “We unanimously believe that it does.” The Court reasoned: “In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.”

Appealing then to notions of basic fairness, the Court concluded, “these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” Warren’s opinion in *Brown* thus “articulates the concept of a living constitution that must adapt to new knowledge and to new conditions.”

Of course, putting an end to deeply-ingrained, centuries-old segregation practices would not simply be a matter of declaring such practices unconstitutional. A Court-ordered remedy would also be necessary; accordingly, the Supreme Court carried over to the next year, 1955, the question of what would be the proper approach for effectuating the desegregation of schools. In

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137 Cray, *supra* note 2 at 287.
138 Schwartz, *supra* note 74 at 8.
139 *Brown*, 347 U.S. at 492-493.
140 Scheiber, *supra* note 5 at 7.
the follow-up case, *Brown v. Board of Education* (“Brown II”), the Court remanded the cases to the federal district courts which had originally heard the cases, explaining that while “[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.” The Court looked squarely and expressly to the judiciary’s power of *equity*:

> In fashioning and effectuating the decrees, the courts will be guided by *equitable* principles. Traditionally, *equity* has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of *equity* power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles. . . . Courts of *equity* may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. . . .

Among the remarkable aspects of *Brown* was that it was an unanimous 9-0 decision. According to Justice William Douglas’s memoirs, when the case had first been argued before the Supreme Court only the previous year (then led by Chief Justice Fred Vinson, who died after the 1953 Term, thus opening the slot that President Eisenhower filled with Warren, it seemed likely that the Court would vote 5-4 to *uphold* the separate-but-equal doctrine. “The Court’s unanimity

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142 *Brown*, 349 U.S. at 299.
143 *Brown*, 349 U.S. at 300 (emphasis added).
[thus] came as a complete surprise both to Court watchers and the public,” explains Professor Schwartz. “There was a feeling of surprise, even shock, that Warren had pulled a unanimous decision from a court once so badly split,”\textsuperscript{144} adds biographer Ed Cray. For his part, Warren credited the three Southern Justices. “Don’t thank me,” he advised a friend. “I’m not the one. You should see what those … fellows from the southern states had to take from their constituencies. It was absolutely slaughter. They stood right up and did it anyway because they thought it was right.”\textsuperscript{145}

\textit{Brown} was met with massive resistance. “State legislatures adopted resolutions of ‘nullification’ and ‘interposition’ that declared the Supreme Court’s decisions were without effect,”\textsuperscript{146} explains Professor Erwin Chemerinsky. “State officials attempted to obstruct desegregation in every imaginable way.”\textsuperscript{147} Indeed, true progress in desegregation did not occur for another decade and more - but in the end, \textit{Brown’s} equal opportunity mandate prevailed.\textsuperscript{148}

2. Reapportionment cases

All too often throughout the Nation’s history, government has enacted regulations and restrictions on voting which have disproportionately affected and effectively disenfranchised

\textsuperscript{144} Cray, \textit{supra} note 2 at 287 (stating that, upon announcing the decision, “Warren sensed more than heard a collective gasp from the people in the courtroom, ‘a wave of emotion’ without sound or movement, ‘yet a distinct emotional manifestation that defies description.’”).

\textsuperscript{145} Schwartz, \textit{supra} note 74 at 106.

\textsuperscript{146} Chemerinsky, \textit{supra} note 134 at 795-796.

\textsuperscript{147} Id. at 796.

\textsuperscript{148} By 1964, only 1.2 percent of black children in the South were attending school with whites. By contrast, by 1968, (as aided greatly by the Civil Rights Act of 1964, which both authorized the U.S. Attorney General to intervene against laggard school districts and tied receipt of federal education funds to compliance with the desegregation mandate), 32 percent of districts were desegregated (by 1973, 91 percent were desegregated). Id. at 796-798.
poor or more vulnerable citizens, often from racial minority groups. These barriers on voting have only compounded the separate longstanding problem of rampant malapportionment and racial redistricting, which has resulted in underrepresentation of racial minorities in both state legislatures and Congress.149

In the early 1960s, the Warren Court looked to the newly-robust post-Brown equal protection clause as it tackled malapportionment. Until the Warren Court issued its landmark Baker v. Carr150 and Reynolds v. Sims151 decisions in 1962 and 1964, for many decades the Supreme Court stood mutely by on the sidelines. Baker and Reynolds established the now-axiomatic “one-person, one-vote” principle – that one person’s vote in any election should be counted with the same weight as any other person’s vote – as a core element of fair elections in a democracy.

Baker involved a claim by Tennessee voters that a state apportionment statute “arbitrarily and capriciously apportioned representatives in the [state] Senate and House without reference … to any logical or reasonable formula whatever,” thus violating plaintiffs’ Fourteenth Amendment equal protection and due process rights. Not surprisingly, the case below was found non-justiciable and dismissed, since matters involving apportionment had long been held by the Court to be non-justiciable “political questions” under the Constitution’s Guaranty Clause,

149 Indeed, both of these problems have recently reemerged with the current Roberts Court’s decisions in such cases as Crawford v. Marion County Election Board, 553 U.S. 81 (2008) (upholding a state law requiring all voters to show a photo identification), and Shelby County v. Holder, 133 S.Ct. 2612 (2013) (effectively striking down Section 5 of the Voting Rights Act of 1965 requiring certain jurisdictions to receive preclearance from the Justice Department before changing voting laws or district boundaries).
150 369 U.S. 186 (1962) (finding redistricting cases justiciable).
which expressly left such matters solely to Congress. In the 1946 case Colegrove v. Green, for example, Justice Felix Frankfurter explained (in denying review of an Illinois malapportionment where counties with populations of 1,000 and 100,000 would each be entitled to one representative), “the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed …, whereby standards of fairness are offended, the remedy ultimately lies with the people.”

Justice Brennan’s opinion for the Court some sixteen years later in Baker, by contrast, concluded that in determining whether a state apportionment system violates the Fourteenth Amendment equal protection clause (as opposed to the Art. IV Guaranty Clause), none of the traditionally-recognized “political question” factors apply. “Judicial standards under the Equal Protection Clause are well developed and familiar,” the Court explained, “and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.”

The Baker majority’s sea change away from a long history of judicial passivity on the apportionment issue “was quite notable … with Frankfurter still a powerful force on the

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152 See, e.g., Article I Section 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, …”); Article IV (Guaranty Clause) (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. Const. Art. I, sec.; U.S. Const. Art IV, sec. 4.
154 Baker, 369 U.S. at 226. See also supra at 217 for the Court’s full elucidation of justiciability factors.
Court.”\textsuperscript{155} Frankfurter castigated the majority’s new position in a note to Justice John Harlan II after the conference discussion: “What powerfully emerged for me this afternoon is that men who so readily impose their will on the nation and the fifty states by exultingly overruling their most distinguished predecessors behave like subservient children when lectured by a martinet with a papa-knows-best complacency.”\textsuperscript{156} Regarding the decision itself, “Frankfurter was sure that the bottle had been uncorked which would land the courts in what he called (in a sentence that he added to his dissent just before it was issued), ‘the mathematical quagmire … into which this Court today catapults the lower courts of the country, without so much as adumbrating the basis for a legal calculus as a means of extraction.’”\textsuperscript{157}

Two years later in \textit{Reynolds v. Sims}, with the justiciability barrier having been removed by \textit{Baker}, the Court then considered and struck down an Alabama apportionment system in which Alabama failed, over the course of many decades of shifting populations, to re-district as required by the state Constitution, resulting in a gross malapportionment disadvantaging black voters. Chief Justice Warren explained: “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And,” he added, “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”\textsuperscript{158} The Court further reasoned:

\textsuperscript{155} Anderson & Cain, \textit{supra} note 87 at 35.
\textsuperscript{156} Schwartz, \textit{supra} note 74 at 424.
\textsuperscript{157} Id. at 424, 425.
\textsuperscript{158} Reynolds, 377 U.S. at 555. \textit{See also} Gray v. Sanders, 372 U.S. 368, 379, 381 (1963) (stating, [t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing - one person, one vote’’); Wesberry v. Sanders, 376 U.S. 1 (1964) (holding unconstitutional a Georgia districting system).
Legislators represent people, not trees or acres. . . . It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.159

In short, the Court concluded, “the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. . . .”160

The Reynolds opinion, which Justice William Brennan later suggested was driven by Warren’s core sense of fairness,161 hit with breathtaking force. “One journalist at the time likened being in the Court on the day Reynolds was announced to ‘being present at the second American Constitutional Convention,’ . . . . Even liberals and academics, warm to the Warren Court, he continued, were ‘stunned.’”162

159 Reynolds, 377 U.S. at 562-563.
160 Id. at 567. Reynolds specified, moreover, that the one-person, one-vote principle applies to both the lower and upper chambers in a bicameral state legislature. Reynolds, 377 U.S. at 575-576.
161 Cray, supra note 2 at 435 (quoting Justice Brennan: “Possessed of an equal right to vote, the least of us, [Warren] thought, would be armed with an effective weapon needed to achieve a fair share of the benefits of our free society”).
162 Anderson & Cain, supra note 87 at 47.
For traditionalists, “[t]he outcry was immediate and pained,” recounts Ed Cray. The Court “finished its work of completely devastating one of the most basic and one of the most revered concepts of American constitutional government, [federalism],”163 claimed Missouri Democrat Richard Ichord. While “[c]ampaigning for the presidency, Arizona Republican Senator Barry Goldwater seized on the Supreme Court as a political issue. ‘I would be very very worried about who is president the next four or eight years, thinking of only one thing – the makeup of the Supreme Court,’ he reminded the conservative faithful.”164 New York Times columnist Arthur Krock lamented the decision as misguided, an “expression of the philosophy that the Constitution implicitly provides for the correction of any social or political condition that a majority of the Court deems undesirable and endows the Court with power to take the functions of another branch of Government when that branch fails to act.”165

Many others, however, believed the Court to be well-justified: “[I]t should be remembered,” wrote Professor Martin M. Shapiro in 1964, “that the Court did not act in the apportionment area until long after the states had shown themselves totally incapable of doing the job.”166 Professor Vicki Jackson adds: “With respect to apportionment, the Court appeared to be the only institution of government plausibly posed to correct a deep imbalance.”167

Warren himself never doubted the propriety of the “one-person, one-vote” mandate. “If Baker had been in existence fifty years ago, we would have saved ourselves acute racial troubles.

164 Cray, supra note 2 at 435 (quoting Sen. Barry Goldwater).
166 Martin M. Shapiro, Law and Politics in the Supreme Court 247 (1964).
167 Jackson, supra note 115 at 141 (citing Alpheus Thomas Mason, The Supreme Court from Taft to Warren 239-40 (1968) (stating the Court’s reapportionment cases were prompted by “necessity”)).
Many of our problems would have been solved a long time ago,” he asserted, “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.” Indeed, Warren later said that he considered the
reapportionment cases to be his Court’s “single most profound contribution to the law. This was
so … because only with equality in voting could the political system live up to the nation’s ideal
of democratic elections and lawmaking.”

In sum, Reynolds “had an enormous impact on the political face of the U.S. . . . By 1970,
William Douglas noted with satisfaction in his autobiography, 36 states had passed
reapportionment bills substantially in keeping with Reynolds’s mandate,” Cray reports.
“Reynolds, coupled with the Voting Rights Act of 1965, had redrawn the political landscape.”
For example, the reapportionment cases forced “reconsideration of ninety-percent of U.S.
House districts, nearly every single seat in the upper houses of the state legislature, and many
lower house seats as well.”

D. Constitutional Bases: Due Process

The Warren Court also embraced a more expansive reading of the Fourteenth Amendment’s due
process clause. The due process clause states, “nor shall any State deprive any person of life,
 liberty or property, without due process of law.”\(^{172}\)

Under the Warren Court’s jurisprudence, the due process clause would now proscribe a much broader range of state conduct vis-à-vis Bill of Rights protections, and would begin offering heightened recognition to other enumerated and unenumerated individual rights as well.

1. Incorporation and The Bill of Rights

Another way the Warren Court greatly bolstered fairness for all Americans was in recognizing that most of the separate provisions in the Bill of Rights apply not only to the federal government, but also to state (and local) governments. In so doing, the Court showed sensitivity to the exceedingly vulnerable position of criminal defendants in the face of a powerful prosecuting government.

Many people are surprised to learn that the Bill of Rights – roughly twenty-five provisions contained in the first ten amendments which protect many of Americans’ most dearly-held liberties and rights against governmental infringement - did not always apply to the state governments. Specifically, by their terms, the protections encompassed within the Bill of Rights apply only against the federal government.\(^{173}\)

The Fourteenth Amendment privileges or immunities clause (stating, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”) was intended to correct this shortcoming by applying those protections against state governments.

\(^{172}\) U.S. Const. Am. XIV.

\(^{173}\) See Barron v. Baltimore, 32 U.S. 243 (1833). The amendments constituting the Bill of Rights were proposed in 1789 and ratified in 1791, two years after the Constitution’s ratification.

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and local governments. The Supreme Court, however, effectively read the privileges or immunities clause out of the Constitution in 1873 in the *Slaughter-House Cases*,\(^{174}\) just five years after the Fourteenth Amendment’s ratification.\(^{175}\) For many decades longer, therefore, States were allowed to continue abridging certain individual rights that would be protected but for the fact that it was a state, not the federal, government abridging the rights.

Gradually, the Supreme Court began considering individual claims of whether states might be depriving persons of “life, liberty, or property” in violation of the Fourteenth Amendment due process clause.\(^{176}\) The first time the Court expressly applied a Bill of Rights provision to the States through the due process clause was in the 1925 case *Gitlow v. New York*.\(^{177}\) The Court explained, “we may and do assume that freedom of speech and of the press - which are protected by the First Amendment from abridgement by Congress - are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment from impairment by the States.”\(^{178}\)

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\(^{174}\) Butchers’ Benevolent Ass’n of New Orleans v. Crescent City Livestock Landing & Slaughter-House Co. (Slaughter-House Cases), 83 U.S. 36 (1872). \(^{175}\) For description of how the Supreme Court arguably improperly found that the privileges or immunities clause does not apply the Bill of Rights to the states, see e.g., Michael Anthony Lawrence, Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses, 72 Mo. L. Rev. 1, 27-35 (2007); Michael Anthony Lawrence, The Potent Expansive Reach of McDonald v. Chicago: Enabling the Privileges or Immunities Clause, 2010 Cardozo L. Rev. de novo 139, 141-149 (2010). See also Michael Anthony Lawrence, Rescuing the Fourteenth Amendment Privileges or Immunities Clause: How “Attrition of Parliamentary Processes” Begat Accidental Ambiguity; How Ambiguity Begat *Slaughter-House*, 18 Wm. & Mary Bill Rts. J. 445 (2009). \(^{176}\) See, e.g., Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226, 241 (1897) (regarding the due process clause’s protection against state infringement of property rights, also protected from federal infringement by Fifth Amendment takings clause); Twining v. New Jersey, 211 U.S. 78, 99 (1908) (regarding due process clause’s protection of speech rights, also protected from federal infringement by First Amendment). \(^{177}\) 268 U.S. 652 (1925). \(^{178}\) Id. at 666 (citation omitted).
The Supreme Court incorporated a few more provisions in the following decades, then the Warren Court began its move toward applying increasing numbers of the Bill of Rights provisions to the states through its “selective incorporation” doctrine, which itself took a relatively more objective, searching look at the history of Reconstruction and the Fourteenth Amendment than taken under its earlier approach. Selective incorporation posed as the proper question for analysis whether a particular right “is fundamental - whether, that is, [it] is necessary to an Anglo-American regime of ordered liberty.”

It seems only fair and proper that such Bill of Rights protections would apply to any form of government - it makes little difference, after all, to a person whose speech has been officially silenced, for example, whether the silencing was performed by the federal or a state government. Either way, the person is being prevented by government from speaking – a seeming clear violation of the First Amendment. Yet by the time Earl Warren joined the Court in 1953, only a handful of Bill of Rights provisions had yet been applied to the states. In the eighteen-year span from when Earl Warren became Chief Justice until two years after his 1969 retirement, by contrast, the Court incorporated an additional dozen provisions (mostly involving criminal procedure).

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179 Bill of Rights provisions incorporated before the 1953 beginning of the Warren Court era include the First Amendment’s religion, press and assembly clauses; the Fourth Amendment’s unreasonable searches and seizures clause; and the Sixth Amendment’s public trial and notice of accusation clauses.

180 Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968). On similar reasoning, in a companion case to Brown, the Warren Court “reverse-incorporated” the Fourteenth Amendment’s equal protection clause (which applies textually only to state government) through the Fifth Amendment’s due process clause to apply to the federal government. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

181 See supra note 179.

182 Most of the incorporation cases came following Felix Frankfurter’s 1962 retirement. Thereafter, Warren, Brennan, and the Court’s more liberal wing (Arthur Goldberg, Abe Fortas, and Thurgood Marshall) were able to consolidate their position. Scheiber, supra note 5 at 10-12.
The “‘Warren Court revolution’ gave new configuration to the entire constitutional landscape,”183 fundamentally changing the face of criminal justice in America. After these additional Bill of Rights provisions had been incorporated, no longer could states use evidence that had been seized by the police in the course of an unreasonable search,184 for example; and police would now be required to have a lawful warrant in order to search or seize persons, places or things (Fourth Amendment).185 In addition, no longer could a state use a defendant’s refusal to testify as evidence of guilt,186 nor try a person more than once for the same offense (Fifth Amendment).187 A state would now be required to provide a speedy trial188 (by jury189) to a criminal defendant, with the assistance of legal counsel,190 with the opportunity to compel the appearance of favorable witnesses191 and to confront adverse witnesses (Sixth Amendment).192 No longer could states impose excessive bail or cruel and unusual punishments (Eighth Amendment);193 and finally, the First Amendment right to petition for redress of grievances was applied to the states.194

183 Id. at 11-12.
184 Mapp v. Ohio, 367 U.S. 643 (1961). Warren viewed Mapp’s extension of the exclusionary rule to States as “‘the only way . . . [to] control governmental misadventure’ and to assure all persons, including the innocent, of effective protection of their rights in criminal justice process in the states.” Scheiber, supra note 5 at 12, 13.
186 Miranda v. Arizona, 384 U.S. 436 (1966). Miranda, which “was entirely [Warren’s]” according to Justice Fortas, was the “ultimate embodiment of the Warren fairness approach.” Schwartz, supra note 74 at 628 (quoting Fortas at 589).
190 Gideon v. Wainwright, 372 U.S. 335 (1963). “[F]ew people realize that the Gideon decision resulted directly from Warren’s [initiative],” Schwartz reports. “[T]he Chief’s new law clerks [in 1961] were instructed by one of the prior term’s clerks, ‘Keep your eyes peeled for a right to counsel case. The Chief feels strongly that the Constitution requires a lawyer.’” Schwartz, supra note 74 at 457-458.
Of course there were many critics of the Warren Court’s assertive posture in incorporating virtually all of the Bill of Rights’ criminal procedural requirements to apply to the states. Many believed the Court’s actions would ultimately contribute to a rise in crime, to which Warren later responded: “Thinking persons and especially lawyers know that this is not the fact. They know that crime is inseparably connected with factors such as poverty, degradation, sordid social conditions and weakening of home ties, low standards of law enforcement and the lack of education.”

More fundamentally, critics lamented the Warren Court’s “assault” on state sovereignty. “The Court was attacked for its alleged ‘judicial activism,’ much as the conservative courts of an earlier day had been charged by progressives and liberals for their brand of property-minded antiregulatory and anti-labor activism.”

Professor Vicki Jackson suggests, however, that a “re-reading of the principal opinions does not so much create a picture of a Court insensitive to the concerns of the states as of a Court increasingly frustrated with what it regards as major deviations from constitutional standards of fair play and respect for human dignity by local police.” Simply put, “[t]here is a less consistent sense that [the Warren Court believed] all rights and remedies should be

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195 Cray, supra note 2 at 462 (quoting Warren).
196 Scheiber, supra note 5 at 19.
197 Jackson, supra note 115 at 147 (further stating that the cases “suggest that the Court’s purposes were not to displace state authority as such but to establish a minimum judicially enforceable floor of federal standards.”).
nationalized than a sense that states were doing specific things quite wrongly, that need[ed] to be fixed.”

Paradoxically, the Warren Court decisions supposedly infringing state sovereignty may have actually worked to strengthen the states. “[B]y providing the impetus for a more democratically legitimate form of state government, [the reapportionment decisions] helped contribute to a revival of states as a locus of reform (and thence to the more aggressively enforced federalism in the late twentieth and early twenty-first centuries).” In short, “federalism emerged … in some respects healthier than it was before th[e Warren] Court’s work, with more opportunities, in more states, for more people, including those previously excluded from effective participation in the polity, to vote, stand for election, or otherwise work in and for state and local government.”

2. Privacy

Beyond reading the due process clause to apply most of the Bill of Rights to the states, the Warren Court also began interpreting the clause to encompass a broader range of substantive rights as well. In Loving v. Virginia in 1968, for example, the Court struck down a state statute punishing interracial marriage. “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one

198 Id. at 141, 148-150 (stating, “[i]t would be well to remember[, for example,] the record of infringement of the Fourth Amendment that confronted the Court in Mapp and its predecessors”).
199 Id. at 139.
200 Id.
of the ‘basic civil rights of man,’ fundamental to our very existence and survival,” wrote Chief Justice Warren for a unanimous Court. “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.”

More controversially, the Warren Court found an implicit “right of privacy” in the 1965 *Griswold v. Connecticut* case. *Griswold* struck down a Connecticut statute prohibiting the use and distribution of contraceptives. Writing for the Court, Justice Douglas explained that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy…. [and] penumbral rights of ‘privacy and repose.’” In finding a privacy right in this case, the Court wondered: “Would we allow the police to search the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”

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202 Id. The Court also struck down the law on equal protection grounds: “There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race…. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” Id.
204 Id. at 484-485. The Court identified a number of such protections, such as the zone of privacy right of association (found in penumbra of First Amendment), the zone of privacy not to have soldiers quartered in one’s home (Third Amendment), the zone of privacy to be protected against unreasonable searches and seizures (Fourth Amendment), and the zone of privacy not to be required to testify against oneself (Fifth Amendment). Id. at 484.
205 Id. at 485-486 (stating, “This is a ‘right of privacy older than the Bill of Rights – older than our political parties, older than our school system.’”). Separate concurring opinions by Justices Harlan and White took a narrower approach, suggesting that the privacy interest at issue was instead the sort of “liberty” protected by the due process clause because it violates basic values “implicit in the concept of ordered liberty.” Id. at 500 (Harlan, J., concurring) (stating, “The Due Process Clause of the Fourteenth Amendment stands … on its own bottom.”).
*Griswold* has been roundly criticized by (primarily) conservative commentators, who argue the Court should not recognize a right of privacy since the Constitution does not *expressly* recognize such a right. Justice Goldberg’s concurring opinion (joined by Chief Justice Warren and Justice Brennan) thoroughly negates such objections, however:

The Ninth Amendment reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” … The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected … because it is not mentioned in explicit terms by first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that “[t]he enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people.”

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206 id. at 486-491 (Goldberg, J., concurring) (emphasis in original) (citations omitted) (further explaining that the Ninth Amendment “is almost entirely the work of James Madison. It was introduced in Congress by him and passed [easily] by the House and Senate. . . . These statements of Madison and [Justice Joseph] Story [in Commentaries on the Constitution of the United States 651 (5th ed. 1891)] make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.” Id. at 488-490.
Regrettably, even half a century later, the Supreme Court today simply fails to assertively enforce the understanding that the Ninth Amendment intends to create an expansive understanding of liberty and equal justice.\textsuperscript{207} The Goldberg/Warren/Brennan \textit{Griswold} concurring opinion remains the U.S. Supreme Court’s most detailed acknowledgement ever concerning the Ninth Amendment’s robust mandate.

That said, the various opinions in \textit{Griswold} laid the groundwork for the Court’s subsequent broader recognition of the due process clause’s role in protecting fundamental - and other constitutionally-protected rights, such as a woman’s right to choose abortion,\textsuperscript{208} the right to be free of unwanted medical treatment,\textsuperscript{209} the right to engage in private sexual activity of one’s choice,\textsuperscript{210} and, most recently, the right of same-sex couples to marry.\textsuperscript{211} [Author’s note: the last assumes the expected outcome in June 2015 of the pending same-sex marriage cases.]

\textit{E. Constitutional Bases: First Amendment}

Some suggest the Warren Court was not as stalwart on matters involving the First Amendment’s protection of speech, association and religion. The Court “was extremely slow in coming to a strong position in defense of First Amendment rights and the legitimacy of the Court’s review

\textsuperscript{210} Lawrence v. Texas, 539 U.S. 558 (2003).
\textsuperscript{211} [Case Name], __ S.Ct. __ (2015).
powers vis-a-vis Congress’s authority to regulate in what it deemed the national interest,” suggests William Van Alstyne.212 “[I]n a series of important cases involving congressional restraints on the free speech and association of Communists and others deemed subversive,” adds Professor Scheiber, “the Court relied upon narrow procedural issues or on statutory interpretation to ‘duck’ the First Amendment issues.”213

In *Walker v. Birmingham*,214 for example, the Court affirmed criminal contempt convictions of the Reverend Martin Luther King, Jr. and other civil rights activists who defied an Alabama state court order not to march. Reasoning that “respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom,” the Court said the activists should have sought instead to have the injunction set aside by a higher court.215

Chief Justice Warren and Brennan dissented, however, with Warren asserting, “I do not believe that giving this Court’s seal to such a gross misuse of the judicial process is likely to lead to greater respect for the law.”216 Warren believed the law was unconstitutional on its face “since it gives [the government] unfettered discretion to control First Amendment rights without standards[, and] … thought that the symbol of Martin Luther King in jail for having engaged in activities clearly protected by the First Amendment was going to make people cynical about the courts and the law.”217

213 Id. at 13-14.
Despite its occasional reticence on some First Amendment issues, the Warren Court majority did seriously consider matters of fairness and equity in handing down a number of key cases. Against the backdrop of McCarthy-era witch-hunts, for example, the Court decided a series of “freedom of association” cases reversing the convictions of (real or imagined) communists and their sympathizers.218 The June day in 1957 (June 17) on which the Court released four such decisions became known as “Red Monday” to its critics, including FBI Director J. Edgar Hoover.219 In Yates v. United States,220 the Court reversed the convictions of individuals who had been charged for their mere membership in the Communist Party. Writing for a 6-1 majority, Justice Harlan said, the District Court “fail[ed] to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end. . . . The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something.”221 By drawing a hard line between advocacy (protected) and action (not protected), “the Supreme Court irreparably crippled the [McCarthy-era] witch hunt.”222

218 “The law clerks starting kidding each other about the fact that we had the Communists before us in at least a dozen or more cases and they were winning every one,” recalls a Warren law clerk about the end of the 1956 Term. Id. at 280.
220 354 U.S. 298 (1957). The other three cases handed down the same day were Watkins v. United States, 354 U.S. 178 (1957) (reversing conviction of a labor leader for declining to discuss his associations and beliefs; placing limits on House Un-American Activities Committee); Sweezy v. New Hampshire 354 U.S. 234 (1957) (holding state investigation into alleged subversive activities violates due process clause); Service v. Dulles, 354 U.S. 363 (1957) (finding invalid the discharge of diplomat who had been released for disloyalty in violation of the State Department’s own procedures).
221 Yates v. US, 354 U.S. at 320, 324-325.
The landmark *New York Times v. Sullivan*\(^{223}\) case in 1964, moreover, has been a key bulwark in protecting freedom of speech and freedom of the press. In this case the Warren Court struck down an Alabama state court award of $500,000 in damages to a plaintiff city commissioner claiming defamation for certain trivial factual inaccuracies in an advertisement placed in the *New York Times* by civil rights activists. Writing for a unanimous Court, Justice Brennan explained that the Constitution guarantees “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”\(^{224}\) “[E]rroneous statement is inevitable in free debate,” the Court reasoned, and … “must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’”\(^{225}\) The Warren Court thus created a framework protecting the ability of anybody - individuals, groups and the press alike – to criticize the government or other public figures virtually without fear of legal repercussions.

In the same vein, the Warren Court’s sympathetic position regarding the antiwar protests of the 1960s largely mirrored the views of the Chief Justice, who commented, “This is a country that was born in protest…. [I]t’s a way people have of bringing about progress… [and] it may prove effective in shaking the Establishment out of complacency and smugness.”\(^{226}\) In *Tinker v. Des Moines,*\(^{227}\) for example, the Court held that “the wearing of an armband for the

\(^{223}\) 376 U.S. 254 (1964).
\(^{225}\) *New York Times v. Sullivan*, 376 U.S. at 271-272 (further stating, “[c]riticism of …[government officials’] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations”). Id. at 273.
\(^{226}\) Cray, *supra* note 2 at 487 (quoting Warren). Warren “seemed to understand the protest movement,” recalled Warren’s law clerk Paul Meyer. “For a man of his age, my expectation would have been that Warren would be more narrow-minded than he was, more fixed in a lot of position than he was.” Id.
\(^{227}\) 393 U.S. 503 (1969).
purpose of expressing certain views is the type of symbolic act that is within the First Amendment…. It [is] closely akin to ‘pure speech’ which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.\(^{228}\)

Finally, the Warren Court established the highly-speech-protective “clear and present danger” standard for incitement of illegal activity that survives to this day. In *Brandenburg v. Ohio\(^ {229}\)* in 1969, the Court reversed the convictions of Ku Klux Klan members who had burned a cross and chanted racist threats and epithets at a meeting held on a farm outside the city, reasoning that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”\(^ {230}\) The Warren Court in *Brandenburg* thus “completed the Court’s long journey toward the embrace of radical speech, from *Dennis*, where Douglas sputtered his disapproval of the Smith Act but lost to a majority willing to punish the teachers of Communism,” suggests journalist Newton; “to *Whitney*, where Brandeis scolded men who had ‘feared witches and burnt women’ but where the Court had upheld Whitney’s criminal conviction, … and now, at last to *Brandenburg*, where the Court declared that speech triumphed over fear.”\(^ {231}\)

\(^{228}\) Tinker v. Des Moines, 393 U.S. at 505-506. *See also*, U.S. v. O’Brien, 391 U.S. 367, 377, 382 (1968) (determining that the act of burning a draft card in opposition to the Vietnam War was “expressive conduct” and was thus entitled to a measure of protection under the First Amendment. On the facts, the Court found that the government met its burden, and thus upheld O’Brien’s conviction for burning his draft card in violation of federal law.).


\(^{230}\) Brandenburg, 395 U.S. at 447-448 (explaining, “the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”).

\(^{231}\) Newton, *supra* note 65 at 504 (citing Dennis v. United States, 341 U.S. 494 (1953); Whitney v. California, 274 U.S. 357 (1927)).
On matters of First Amendment religious freedom, the Warren Court was bold - and highly controversial. In the “school prayer case,” *Engel v. Vitale*, 232 for example, the Court found short opening prayers in public schools to be unconstitutional abridgements of the establishment clause. Writing for the Court, Justice Black reasoned, “the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.” 233 Reaction to the holding across the country was intense, prompting the largest volume of critical mail to the Court in its history. Warren himself recalled, “I vividly remember one bold newspaper headline, ‘Court Outlaws God’”, 234 and “many religious leaders in this same spirit condemned the Court,” reports Professor Schwartz. “Church leaders, according to the *New York Times*, expressed ‘shock and regret.’” Indeed, “[t]he school prayer case soured Billy Graham on the Warren Court.” 235

Finally, in *Seeger v. U.S.*, 236 a Vietnam War-era case, the Warren Court broadly interpreted the First Amendment’s protection of free exercise of religion to allow a religiously agnostic person to claim statutory conscientious objector status and thus avoid the military draft. The Court explained, “any person opposed to war on the basis of a sincere belief, which in his life fills the same place as a belief in God fills in the life of an orthodox religionist, is entitled to exemption

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234 Schwartz, supra note 74 at 441 (quoting Warren).
235 Id. at 441.
under the statute.”\textsuperscript{237} Chief Justice Warren joined the majority, commenting at conference, “[Seeger believed] in a guiding spirit and that’s enough to give [him] the exemption. I don’t know how to define ‘Supreme Being’ and judges perhaps ought not do so.”\textsuperscript{238}

III. The Warren Court’s Legacy; Rawlsian Justice-as-Fairness as Judicial Guiding Principle

The Warren Court’s legacy is imposing. Although the Court was hugely controversial in its day, its “great moral teaching,” \textit{Brown v. Board of Education}, “remains the ideal; the U.S. shall not be two societies, separate and unequal,” reflects biographer Ed Cray. “The political revolution wrought by the redistricting cases … continues. The concept of one-man-one-vote is so simply understood, so fundamental to fairness that it cannot be reversed even if legislatures were so minded.” Moreover, “[t]he minimal standards the Warren Court created in the field of criminal law … hold. Police still advise suspects of their rights. Courts still throw out evidence as inadmissible because of police errors. Poor defendants in criminal cases are provided lawyers and free transcripts on appeal.”\textsuperscript{239}

These axioms, in addition to the decisions that imposed “curbs on prosecutions of Communists [and] the end to government-sponsored prayer in public schools … are such settled facts of American society that they barely stir dispute,” observes journalist Newton. “[G]iven the range and depth of the decisions of the Warren Court, one cannot help but be struck at the endurance

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\item \textsuperscript{237} Seeger v. U.S., 380 U.S. at 192-193.
\item \textsuperscript{238} Schwartz, \textit{supra} note 74 at 570.
\item \textsuperscript{239} Cray, \textit{supra} note 2 at 530.
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Indeed, with its embrace, both expressly and implicitly, of basic concepts of human rights and public virtue, the Court “gave new meaning and new force to the ideals of equality and of justice.” These Warren Court ideals, as further informed by John Rawls’s “justice-as-fairness” formulations, would provide useful tools for judicial decision-making in the twenty-first century.

A. Opposition and Support

The Warren Court was nothing if not polarizing. On one hand its supporters and adherents sang the Court’s praises for addressing long-neglected principles of fairness and equal justice. Meanwhile, its opponents were unrelenting in their criticism, thinking the Court “too doctrinaire, too eager to right what it takes to be wrong, too much concerned with grand abstractions of liberty at the expense of the orderly growth and continuity of the law.”

Opposition. Any account of the Warren Court would be incomplete without mentioning the wrath it engendered among its critics. The heavy criticism began in the Warren Court’s very first year with its desegregation decision in Brown v. Board of Education, and continued with varying

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240 Newton, supra note 65 at 517.
241 Scheiber, supra note 5 at 21.
242 Cray, supra note 2 at 436 (quoting Newsweek).
levels of intensity throughout the next sixteen years. Professor Gary McDowell says, for example, “Since Brown, the Court has continued to expand, and to confuse the public perception of, its power of equity. The result has been to substitute social-science speculation for precedent and principle as the standard of both constitutional meaning and equitable relief.”

As the Court in the mid-1950s began undoing the McCarthy-era’s damaging excesses by reversing trumped-up convictions of communists and their alleged sympathizers (culminating with “Red Monday” on June 17, 1957), opponents’ denunciations intensified. The widely-circulated book *Nine Men Against America: The Supreme Court and Its Assault on American Liberties,* for example, asserted that on Red Monday “[t]he Court really went to town – amid the cheers and hurrahs of the communist conspirators.”

Fueled by the *Nine Men* book, the first efforts to impeach Earl Warren began with the John Birch Society in September 1957 and continued for the next decade and more. “The Birch attack was based upon the claim that the Chief Justice had voted ’92 percent in favor

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243 Perhaps it was inevitable that the Warren Court triggered fierce opposition for its progressive approach. Institutions and individuals who have upset the well-settled, entrenched, too-often-unfair practices of the ruling classes throughout the millennia have often encountered intense resistance – witness, for example, the hardships encountered by the brave individuals who have led the way throughout four hundred years of American in calling out and agitating against the discriminatory and unfair practices of the particular day’s *status quo.* See Michael Anthony Lawrence, Radicals in Their Own Time: Four Hundred Years of Struggle for Liberty and Equal Justice in America (Cambridge 2011) (discussing the contributions of Roger Williams (religious liberty of conscience, died 1683); Thomas Paine (political and individual rights, died 1809); Elizabeth Cady Stanton (women’s rights, died 1902); W.E.B. Du Bois (black rights, died 1963); and Vine Deloria, Jr. (Native American rights, died 2005)).

244 McDowell, *supra* note 116 at 9.

245 See *supra* notes 218–222 and accompanying text. See also Cray, *supra* note 2 at 337.


247 Schwartz, *supra* note 74 at 250 (quoting Gordon, *supra* note 273). Regarding Red Monday, the book asserted, “Chief Justice Warren … took away from Congress investigating committees their freedom of inquiry [in *Watkins*.]” In *Sweezy* “he nailed down the clamp … on the rights of the states to protect their students against subversive teacher”; and the *Yates* decision “makes it practically impossible to prosecute conspirators against America.” Id.

Communists’ and ‘sanctioned treason,’” reports Warren biographer Ed Cray. “The American landscape soon blossomed with ‘Impeach Earl Warren’ billboards, and Congressmen were deluged with letters urging impeachment. … Pamphlets calling for the Chief Justice’s impeachment were even found widely distributed among the students of the Earl Warren High School in Downey, California.”249 During these years “Warren could scarcely attend any function without being met by ‘Impeach Earl Warren’ pickets, who would shout and sometimes hurl their placards at Warren and his party.”250 The Georgia state legislature got into the act, voting to impeach Warren and the other Justices for “high crimes and misdemeanors.”251

“Concern about an increasingly liberal Supreme Court spread well beyond segregationists and red-hunters. Conservative business organizations such as the National Association of Manufacturers and the National Chamber of Commerce, fearing severe antitrust and pro-labor decisions, lent weight to the anti-Court hue and cry.”252 Congress debated the Jenner-Butler bill (thwarted eventually by efforts led by Senate majority leader Lyndon B. Johnson), which “would have deprived the Supreme Court of jurisdiction in most security cases as well as bar admissions.”253 Even President Eisenhower, who had earlier opposed the school

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249 Schwartz, supra note 74 at 281-282. For his part, Warren himself maintained a sense of humor. “Just below his framed commission as Chief Justice … on his library wall, there hung the 1965 New Yorker cartoon showing an indignant caricature of Whistler’s Mother frantically embroidering a sampler, “Impeach Earl Warren,” reports Schwartz. “According to one of his sons, ‘It really breaks him up.’ Warren himself laughingly told a Southern law clerk that, if he was fired by the Chief, he could go back home and run for Governor unopposed on both parties’ tickets.” Id.

250 Id. at 627.

251 Id. at 250.

252 Cray, supra note 2 at 322.

253 Schwartz, supra note 74 at 280. See also Sabin, supra note 219 at 196.
desegregation decisions, 254 jumped in, reportedly proclaiming that his appointment of Earl Warren as chief justice “was the biggest damn-fool thing I ever did.” 255

In following years, “[c]riticism of the activist Court spread well beyond the halls of Congress. Thirty-two state legislatures, just two less than the required minimum, passed resolutions [in the early 1960s] calling for a constitutional convention. Apportionment was to be just one of the agenda items,” 256 Cray reports. “The dean of Harvard Law School, Erwin Griswold, similarly expressed doubts. ‘The Supreme Court is as good a way as man has ever invented to resolve judicial problems - but I very much doubt that it’s a good way to resolve political problems.’” 257

In 1964, “the Court itself became a major issue in a presidential campaign. In a series of speeches after he had received the Republican nomination, Senator Goldwater attacked the Warren Court as the governmental branch ‘least faithful to the constitutional tradition of limited government,’” 258 Schwartz recalls. “[Goldwater] accused the Justices of sacrificing law and order ‘just to give criminals a sporting chance to go free’ and charged that they were

254 Cray, supra note 2 at 337. “Eisenhower ‘regarded racial segregation as being so ingrained in social mores and long accepted in the law that the Court ought not to ‘meddle’ with it.” Scheiber, supra note 5 at 5. Warren and the rest of the justices resented Eisenhower’s lack of support. William Douglas, for example, placed blame for the South’s resistance to Brown squarely at the President’s feet, commenting in his Autobiography, “Eisenhower’s ominous silence on our 1954 decision gave courage to the racists who decided to resist the decision ward by ward, precinct by precinct, town by town, and county by county.” Schwartz, supra note 74 at 175 (quoting William Douglas).

255 Cray, supra note 2 at 337. Despite the President’s disdain, during the Red Monday furor he “called on the nation to respect the Supreme Court, which he characterized as ‘one of the great stabilizing influences of this country.’” Schwartz, supra note 74 at 250.

256 Cray, supra note 2 at 436.

257 Id. The newsweekly U.S. News & World Report observed critically after Earl Warren’s ten-year Supreme Court anniversary that “the trend of the Warren Court in using its judicial authority to promote change in more and more fields shows no sign of abating.” Id. at 335 (quoting U.S. News & World Report). Congress expressed its disapproval after the 1963 Term by limiting the Supreme Court justices’ pay raise to $4500 even while providing a full $7500 for other federal judges. Schwartz, supra note 74 at 542.

258 Schwartz, supra note 74 at 542 (quoting Sen. Goldwater).
trying to achieve social goals through ‘illegal’ means. He pledged to overturn the Court’s criminal law decisions, saying that he would appoint as Justices only ‘seasoned men who will support the Constitution.’”

Specific criticism long abounded about the Warren Court’s approach to state-federal relations. In 1958, the “unofficial Conference of [State] Chief Justices voted 36-8 to endorse a report critical of the trend in [U.S.] Supreme Court decisions. Complaining that the high court had progressively shifted power from the states to the federal government, the state justices warned of a perceived Supreme Court tendency to make policy,” recalls Cray. The Warren Court incorporation decisions of the 1960s just added fuel to the fire, to the point where there was a serious possibility for passage of a proposal, supported by many state legislatures, to create “a Court of the Union made up of the chief justices of the fifty states, with power to overrule Supreme Court decisions” - a prospect that Earl Warren found particularly threatening.

Support. Even while the Warren Court endured much withering criticism, it was also the object of copious high praise. Characterizing June 15, 1964, when the Court handed down Reynolds v. Sims (mandating that all voting districts must be apportioned on the basis of “one-person, one-vote”), as “one of the great days in the Supreme Court’s history,” for example, the esteemed New York Times reporter Anthony Lewis asked rhetorically, “Where

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259 Id. at 542.
260 Cray, supra note 2 at 352.
261 Cray supra note 2 at 391.
262 See supra notes 149-171 and accompanying text.
would we be today if the Supreme Court had not been willing ten years ago to tackle the
great moral issue of racial discrimination that Congress had so long avoided?”263

For its part, the Washington Post editorialized around the same time, “not since the formative
days of the Republic when John Marshall presided over its deliberation has the Supreme Court
played so dynamic a part in American affairs as during the dozen years since Earl Warren
became Chief Justice of the United States [Supreme Court].”264 “[T]he early 1970s were full of
reminders of Warren’s esteem,” recalls journalist Jim Newton, “as the Warren Court pivoted
from its place as object of controversy to one of lionization and nostalgia.”265

The Warren Court’s influence spread abroad as well. “Protection of the rights of the accused
in criminal process, from the first moment of law enforcement action through arrest,
questioning, trial, and punishment, comprises one of the most widely discussed and most
frequently emulated elements of the Warren Court legacy in foreign law,”266 reports
Professor Scheiber. “A line of provisions in the 1987 Korean constitution and the subsequent
decisions of its constitutional court read like a catalogue of the major reforms that the Warren
Court imposed on America’s law of criminal procedure.”267 Elsewhere, “[the] Supreme
Court [in Canada] expanded the constitutional rights of criminal defendants because of Earl
Warren.”268 Reformers in Latin America looked to the Warren Court as inspiration “as a
judicial body that articulates the ideals of equality, liberty, and justice – and through its

263 Schwartz, supra note 74 at 507 (quoting Anthony Lewis).
264 Cray, supra note 2 at 478.
265 Newton, supra note 65 at 510.
266 Scheiber, supra note 5 at 23.
267 Id. at 22.
268 Id. at 24.
decisions becomes an inspiration and an engine for social and political change…. [In particular, it] elevat[ed] the ideal of judges ‘willing to stand against the political branches in defense of the marginalized.’”

Earl Warren himself, as the face of the Supreme Court that through a decade and a half of progressive jurisprudence created a more fair, just, and humane America, received many personal plaudits as well. The *St. Louis Post-Dispatch* reported in 1966, for example, “More and more, Justice Warren is being hailed as one of the great Chief Justices in history, a towering figure ranking with John Marshall and Charles Evan Hughes.” *The New York Times Magazine* labeled him “the greatest Chief Justice in the nation’s history,” period.

Internationally, from the time he delivered the Court’s unanimous opinion in *Brown v. Board of Education* in 1954, Warren was virtually lionized. “Within an hour of the [*Brown*] decision, the VOSA broadcast news of the opinion,” reports Cray. “Before nightfall, reports of *Brown* in 34 languages were proclaiming the ruling a victory in the diplomatic wars between East and West for the allegiance of unaligned nations.” The *San Francisco Chronicle* opined, “To the vast majority of the peoples of the world who have colored skins, it will come as a blinding flash of light and hope.” “[Warren] has emerged,” observed *Washington Post* columnist John P. Mackenzie, “as a world figure and symbol of an American commitment to equal justice to all races and income levels.”

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269 Id. at 23.
270 Cray, *supra* note 2 at 478. See also Newton, *supra* note 65 at 510.
271 Cray, *supra* note 2 at 292.
272 Id. (further stating, “*Brown* unexpectedly raised the man who made that possible into a world figure.”).
273 Id. at 479.

B. Human Rights and Public Virtue

*Human Rights.* A palpable subtext running through the Warren Court’s jurisprudence was its recognition of basic human rights. “This human rights consciousness[,] had its birth in the aftermath of World War II, in the years just preceding the appointment of Earl Warren as chief justice,” explains Harvard law Professor Vicki Jackson. “The ‘zeitgeist’ in which the Court operated was one conditioned by the horrors of World War II and its legalized international aftermath.” Indeed, “the Warren Court both anticipated and reflected a burgeoning recognition of worldwide standards of human rights and human dignity.”

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274 Id. at 515. At the same Conference two years earlier, he was recognized “for his landmark decisions upholding human rights which have justly earned him worldwide esteem as a champion of the liberty of man.” Id.
275 Id. at 293.
276 Jackson, supra note 115 at 139.
277 Id. at 138.
cases“rais[ed] the floor of basic constitutional norms designed to protect individuals from unfair treatment by any government, state or federal,… [and] can be seen as harbingers of what has become a more generalized human rights consciousness among jurists around the world.”

*Brown v. Board of Education* in 1954 was the first Warren Court case suggesting human dignity is a constitutional principle, holding that official school segregation of schools was unconstitutional because it caused among blacks “a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” This constitutional principle was then further “hammered out during the civil rights era of the 1960s,” explains Professor Bruce Ackerman, when “Congress and the president broadened and deepened the nation’s commitment to *Brown’s* anti-humiliation principle.”

As noted, Chief Justice Warren was willing to have the Court move in unprecedentedly assertive ways to impose upon the states the human rights principles contained first in the Fourteenth Amendment equal protection clause (*Brown*) and later the Bill of Rights (the incorporation cases). “Warren [insisted that he] respected the value of federalism,” Professor Scheiber reports, “yet he did not accept the idea that the balances of national versus

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278 See *supra* notes 173-200 and accompanying text.

279 Jackson, *supra* note 115 at 138. This consciousness is reflected “in international documents and in the new constitutions adopted in other federal systems such as Germany, India, and, later on, Canada.” Id. See also Scheiber, *supra* note 5 at 10-12.

280 *Brown*, 347 U.S. at 494.


282 See *supra* notes 133-148 and accompanying text.

283 See *supra* notes 173-200 and accompanying text.
state authority struck by the Framers and Congress, either in 1787 or in the post Civil War era, were intended to ‘remain unchanged as long as the nation existed.’”\(^{284}\)

Indeed, the Warren Court believed deeply in the U.S. Constitution as an instrument for equal justice in the context of a more globally-interconnected modern world. “The Warren Court’s references to the universal Declaration of Human Rights and to other aspects of the nascent structure of international human rights reflected,” Professor Jackson asserts, “not a late twentieth century cosmopolitan universalism, but rather an optimistic and patriotic faith in both the United States Constitution as fundamental law … and the United States as a world leader in human rights commitments.”\(^{285}\)

*Public Virtue.* Another characteristic of the Warren Court was its implicit (at least) recognition of the importance of encouraging a sense of “public virtue” (or common good) in society. This principle, time-honored from the nation’s founding, is epitomized by Earl Warren’s 1953 comment as he moved from California governor to the U.S. Supreme Court: “I am glad to be going to the Supreme Court because now I can help the less fortunate, the people in our society who suffer, the disadvantaged.”\(^{286}\)

Time and again, the Court that bore Warren’s name practiced this sort of principled public-minded altruism, employing principles that would later become associated with John Rawls’s “justice-as-fairness” approach (based on providing fairly for even the least-advantaged members

\(^{284}\) Scheiber, *supra* note 5 at 18.

\(^{285}\) Jackson, *supra* note 115 at 187. “Sensitivity to international democratic norms was a marked feature in the Warren Court’s jurisprudence.” The Supreme Court in the twenty-first century, by contrast, has been very much more insular. Id.

\(^{286}\) Cray, *supra* note 2 at 255.
of society). Rawls’s “original position may derive from rules that stress rationality and self-interest,”\textsuperscript{287} Professor Bruce Antkowiak explains, “but the veil of ignorance changes societal decision-making from an exercise in selfishness to one of public-mindedness. When the veil [is lifted], a sense of shared, common good emerges that society affirms publicly. In affirming this common good, the society becomes ‘well-ordered.’”\textsuperscript{288}

This concept would be very familiar to America’s founding generation, which had deeply-held ideas of public virtue – literally, “Public Spirit” - and what constituted virtuous conduct. “Virtue was the common bond that tied together the Greek, Roman, Christian, British, and European ideas of government and politics to which the founders responded,” explain Richard Vetterli and Gary Bryner. “It was understood by the founders to be the precondition for republican government, the base upon which the structure of government would be built…. The ideal of virtue was an important source of personal restraint and willingness to contribute to the common good.”\textsuperscript{289}

As Thomas Paine, America’s revolutionary polemicist and best-selling eighteenth-century author insisted, “Public good is not a term opposed to the good of individuals. On the contrary, it is the good of every individual collected. It is the good of all, because it is the good of every one.”\textsuperscript{290} Paine also commented elsewhere, “When it shall be said in any

\textsuperscript{287} Antkowiak, \textit{supra} note 40 at 569.
\textsuperscript{288} Id. at 601.
\textsuperscript{289} Richard Vetterli and Gary Bryner, Public Virtue and the Roots of American Government, BYU Studies 1-2 (1987) (stating, “The idea of virtue was central to the political thought of the founders of the American republic. Every body of thought they encountered, every intellectual tradition they consulted, every major theory of republican government by which they were influenced emphasized the importance of personal and public virtue.”).
country … my poor are happy, neither ignorance nor distress is to be found among them; my jails are empty of prisoners, my streets of beggars; the aged are not in want; the taxes are not oppressive …; when these things can be said, then may that country boast its constitution and its government.”291 Paine believed that virtuous nations have special responsibilities for the well-being of the weak, poor and vulnerable. He advocated, therefore, for such policies as progressive taxation, aid to the unemployed, and free public education.292

Throughout the following two centuries, as articulated by many prominent progressive thinkers, the ideas of public virtue and common good comprised a large sweep of the American social and political landscapes. Though battered in the uber-capitalist frenzy of recent decades, ideas extolling the common good do still exist today. As one of the foremost moral authorities of recent times, Pope John Paul II (1920-2005), put it, human beings should seek to pursue the common good – “[the] good of all and each individual, because we are really responsible for all.”293 Not surprisingly, the ideas of public virtue and common good go hand-in-hand with the Golden Rule (“do unto others as you would have them do unto you”), an idea that has long been practiced in one form or another by all of the world’s major religions.294

Earl Warren believed in these principles. A couple years after leaving the Court, he commented in a New York Times op-ed that social welfare programs are “‘not an evil work’ when millions of Americans went to bed hungry each night,” while noting ironically,

293 Quoted in Michael Gerson, Elevated by the Common Good, Washington Post, May 7, 2013.
294 See supra note 10 and accompanying text.
“[w]hen hundreds of millions of dollars are given to bankrupt railroads, failing defense manufacturers, shipping interests and the like, the words ‘welfare’ or ‘relief’ are not used. Instead such things are done to ‘strengthen the economy.’”295

Fortunately, traditional ideals of public virtue and concern for the common good have not disappeared entirely from the public discourse in the twenty-first century. As President Barack Obama stated in his Second Inaugural Address on January 20, 2013, “preserving our individual freedoms ultimately requires collective action…. For we, the people, understand that our country cannot succeed when a shrinking few do very well and a growing many barely make it…. We, the people, still believe that every citizen deserves a basic measure of security and dignity.”296 The president essentially invoked the veil-of-ignorance paradigm in recognizing “that no matter how responsibly we live our lives, any one of us at any time may face a job loss, or a sudden illness, or a home swept away in a terrible storm.” Obama insisted, “[t]he commitments we make to each other through Medicare and Medicaid and Social Security, these things do not sap our initiative, they strengthen us. They do not make us a nation of takers; they free us to take the risks that make this country great.”297

Responding to Obama’s Rawlsian remarks,298 conservative-leaning New York Times columnist David Brooks comments, “[Obama’s speech] surely has to rank among the best of the past half-century. . . . [Obama’s] critique was implicit…. There has been too much ‘me’

295 Cray, supra note 2 at 516.
297 Id.
-- too much individualism and narcissism, too much retreating into the private sphere. There hasn’t been enough ‘us,’ not enough communal action for the common good.”\textsuperscript{299} And elsewhere, \textit{Washington Post} columnist Michael Gerson suggests, “American politics would be elevated by a renewed commitment to the common good, … [making it] more civil, admirable and humane.”\textsuperscript{300}

\textit{C. Rawlsian Justice-as-Fairness as Judicial Guiding Principle}

This Article suggests it would be useful, in order to create a more fair, just, humane America, to look to Rawlsian justice-as-fairness theory for guidance in judicial decision-making. In light of common law imperatives of \textit{stare decisis}, an acceptable way for judges to proceed would be to adopt as a normative ideal the (essentially-Rawlsian) equity-based fairness-jurisprudence approach employed so effectively by the Warren Court in the years from 1953-1969.

John Rawls reasoned that justice-as-fairness principles may serve, at the very least, “as a guiding framework, which if jurists find it convincing, may orient their reflections, complement their knowledge, and assist their judgment.”\textsuperscript{301} And it is proper for judges to look to political philosophy for guidance. “Judges … cannot ignore political philosophy as if it were a subject foreign to their way of thinking,”\textsuperscript{302} argues Professor Griffin. “In many

\textsuperscript{300} Gerson, supra note 293.
\textsuperscript{301} Rawls, supra note 11 at 87; see also Griffin, supra note 15 at 777.
\textsuperscript{302} Griffin, supra note 15 at 779.
decisions, judges in fact act as applied political philosophers, and how a judge construes our democracy and its values has a profound influence on his or her judgments. Avoiding political philosophy means doing bad philosophy, not doing without it.” And “Rawls’s theory remains the best and most relevant theory of justice available.”

Justice-as-fairness decision-making, as based primarily in a properly expansive equal protection clause and due process clause, is neither inappropriate nor arbitrary. Indeed, its approach of reasoning from behind a veil of ignorance is probably more objective than many decisions claiming to be based on the often uncertain or ambiguous “original intent” of long-deceased ancestors. The noted historian Joseph Ellis reports that the original intent doctrine “has always struck most historians of the founding era as rather bizarre. For they, more than most, know that the original framers of the Constitution harbored deep disagreements over the document’s core provisions, that the debates in the state ratifying conventions further exposed the divisions of opinion.” Further, original intent doctrine “requires you to believe that the ‘miracle at Philadelphia’ was a uniquely omniscient occasion when 55 mere mortals were permitted a glimpse of the eternal verities and then embalmed their insights in the document. Any professional historian proposing such an interpretation today would be laughed off the stage.” Ellis concludes: “That four sitting justices on the Supreme Court - Antonin Scalia, Clarence Thomas, John Roberts and Samuel Alito - claim to believe in it, or some version of it, is truly strange.”

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303 Id.
Professor Antkowiak uses a probable cause determination to show how a judge might perform a Rawlsian justice-as-fairness analysis:

A court’s probable cause determination … always affects three distinct parties: [defendant, victim, society] … When positioned behind a veil of ignorance, the three parties (in effect, us projected into the different roles) negotiate a rule. . . . As the negotiator may turn out to be the victim of the crime under investigation, he would not want to hamstring police officials by limiting their search powers so extremely that searches would only occur when the perpetrators were kind enough to expose the evidence to plain view. As the negotiator may turn out to be the person whose privacy the search invades, however, the negotiator must at least presume that the invasion of privacy would be troubling in any event and shocking if a mistake resulted in a truly … innocent person’s home being searched. Finally, the negotiator may turn out to be a neighbor [i.e., society in general]. . . . That neighbor wants to view the search involving the other two with a sense of security at the reasonable ability of police to enforce the criminal laws but without the fear that police are empowered to wield an unbridled and arbitrary authority to intrude on privacy. . . . For a judge, the question of probable cause thus becomes: would a rational, self-interested person adjudicating this case find the amount of evidence presented … sufficient to justify [the search] regardless of whether they would turn out later to be the victim of the crime, the person searched, or the neighbor down the street? If yes, probable cause exists. 305

305 Antkowiak, supra note 40 at 597-598.
It is “[t]hrough contemplation of the process of original position [that] judges may find their decisions will weather the test of time,” Antkowiak posits. “The court can come home to reason by seeing what probable cause would mean when viewed through the rational process of the original position and the common good that process seeks to bring about.”306 Finally, “the application of Rawls’s process [will not] always and invariably produce the same answer in each judge who applies it,” Antkowiak emphasizes. “The human factor in judges is all too real. . . . But Rawls’s teachings do chart a common course, one that accounts for . . . both the primacy of the individual and the individual’s need for an ordered society.”307

Rawls believed that “[h]istorically one of the main defects of constitutional government has been the failure to insure the ‘fair value of political liberty,’ ”308 the right to participate equally fully and meaningfully in a democratic society. “Disparities in the distribution of property and wealth that far exceed what is compatible with political equality have generally been tolerated by the legal system.”309 This is a major problem today in America. As Justice Louis Brandeis once warned in the decades following the last Gilded Age, “[w]e can have democracy in this country or we can have great wealth concentrated in the hands of a few, but we cannot have both.”310

306 Id. at 605-606.
307 Id. at 599.
308 Griffin, supra note 15 at 770.
309 Id.
It should be emphasized that, according to Rawls, “full and meaningful participation” does not require absolutely equal participation. “Given the inequalities in economic goods allowed by the second principle of justice, … each citizen does not enjoy the same opportunity to exercise those rights,” Griffin explains. “It appears that some citizens will be more able to pursue expensive conceptions of the good and that others will have a greater ability to influence the political process.” Therefore, “[w]e cannot expect absolute equality, but we take whatever steps we can to ensure that everyone has a fair chance to hold public office, to be informed about political issues, to place items on the public agenda, and generally to influence the political process.”

There is no doubt that the post-Warren-era Supreme Court’s decisions have failed to attempt to meet a standard of “taking whatever steps we can to ensure that everyone has a fair chance” to participate meaningfully in political process. First, money in politics is out of control. The wealthy enjoy a massively disproportionate voice and role in the process, as enabled by the Court’s decidedly non-Rawlsian, overly-broad formalistic interpretations of the First Amendment’s protection of free expression first in 1976 in *Buckley v. Valeo*, and most recently in 2010 in *Citizens United v. FEC*. Rawls, who advocated “the independence of political parties from concentrations of private economic power, public financing of campaigns and elections, limits on political contributions, and subsidies to encourage a full airing of opinions on public issues,” was highly critical of *Buckley* for “failing to recognize the legitimacy of the fair value [of political liberty] argument as a rationale for [upholding] the

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311 Griffin, supra note 15 at 770.
campaign finance legislation the Court ruled unconstitutional.”

Second, for millions of citizens, the fair chance of meaningful participation in the political process has been severely compromised by the Robert’s Court’s recent gutting of the Voting Rights Act in Shelby County v. Holder, a case demonstrating a disturbing lack of concern for the corollary to the one-person, one-vote principle that the states should make every effort to enable and encourage all eligible voters to vote.

New York University professor Burt Neuborne captures well the frustration with the post-Warren Supreme Court in a letter to the New York Times:

Fifty years of Supreme Court tinkering with our political system has resulted in a democracy so dysfunctional that no rational person would choose it.

The people, through their elected representatives, gave us an effective Voting Rights Act to protect minority voters. The Supreme Court told us that we don’t need it anymore. The people gave us a campaign finance law limiting the expansive political power of the rich. The Supreme Court told us that unlimited campaign spending by the 1 percent doesn’t corrupt the democratic process.

The people gave us a practical way to allow underfunded candidates to compete with rich ones. The Supreme Court told us that it was unfair to the rich. The people walled off the vast trove of corporate wealth from our

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314 Griffin, supra note 15 at 770.
315 133 S.Ct. 2612 (2013).
elections. The Supreme Court told us that unlimited corporate electioneering was good for us.

The people drew legislative lines to help racial minorities recover from centuries of political exclusion. The Supreme Court told us that it was a dangerous form of racism.

But when today’s politicians entrench themselves in power by putting hurdles in the way of poor people voting, gerrymandering district lines to assure the re-election of incumbents, and stacking the electoral deck in favor of the majority party, the Supreme Court just stands by.

In the dysfunctional democracy the justices have made, the Supreme Court can even pick a president.

The extreme wings of each major party control the nominating process. Poor people have to jump through hoops to vote. The party in power controls the outcome in too many legislative elections. And the superrich have turned too many of our elected representatives into wholly owned subsidiaries, and most of our elections into auctions.

Madison would weep.\textsuperscript{316}

The decisions of the Burger, Rehnquist and Roberts Courts are placed in particularly harsh light when compared with those of the Warren Court half a century ago. The Warren Court \textit{did} in fact attempt to meet a standard of “taking whatever steps we can to ensure that everyone has a fair chance” to participate meaningfully in the political process. Dubbed the “fair politics”

institution by some,317 the Warren Court played a vital role in guaranteeing the political liberty of all Americans with its landmark “one-person, one-vote” reapportionment cases. Indeed, “Chief Justice Warren claimed the reapportionment decisions as his Court’s greatest accomplishment because more than any other decisions … they attempted to create a fair society in which everyone has an equal chance…. [P]olitics should provide ‘fair and effective representation for all citizens.’”318

Were they to adopt a Rawlsian-based justice-as-fairness approach to the campaign finance and voting rights cases, the justices in the majority in Citizens United and Shelby County (Chief Justice John Roberts, Justices Samuel Alito, Anthony Kennedy, Antonin Scalia and Clarence Thomas) would imagine from behind the veil-of-ignorance that they might themselves be members of at-risk minority or other groups whose votes are in danger of being compromised by questionable districting practices and overly onerous registration requirements, or that they might be part of the vast majority of Americans who do not have great wealth or power, but who nonetheless care deeply about the issues confronting the nation. When they see hurdles being erected making it more difficult for the less advantaged to vote, however, and the massively-outsized influence that those with great wealth or power are able to exert (with no possibility that they will ever be able to come close to have that sort of voice), they justifiably believe the system is rigged. Situated among the at-risk individuals, however, each justice, acting in his own self-interest, presumably would opt for a system striking down impediments to voting and upholding more stringent limits on campaign finance.

317 Anderson & Cain, supra note 87 at 43.
318 Id.

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In short, a justice-as-fairness approach as described would enable the judiciary (not least the U.S. Supreme Court) to impartially address the social and political realities of the twenty-first century - a substantial improvement in administering justice for an institution too-often tarnished with the taint of bias and privilege.

Conclusion

This Article has offered a look back to the United States Supreme Court’s jurisprudence during the years 1953-1969 when Earl Warren served as Chief Justice, and provided a summary review of political theorist John Rawls’s groundbreaking “justice as fairness” theory of justice. The Article has suggested that by combining elements of both, it is possible to devise an improved approach to judicial decision-making that would better serve America’s core principles of liberty and equal justice for all.

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