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WARREN
COURT

A Retrospective

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SPOOK OF EARL
The Spirit and Specter
of the Warren Court

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I have been assigned the task of criticizing the Warren Court, which, in the context of this love-fest, is rather like being asked to disclose embarrassing things about Santa Claus at a Christmas Party, or perhaps like being the master of ceremonies at a Mother Teresa roast. On the other hand, for a conservative like myself, what could be a more tantalizing target? After all, I have actually been hired to take potshots at the very embodiment of judicial activism, the antithesis of judicial restraint, the big, bad Warren Court. Where, oh where, does one begin?

Any criticism of the Warren Court—at least any honest and fair criticism—must start with the acknowledgment that this was a truly great Court, that many of its members were giants of our modern jurisprudence. It was a Court imbued with vision and courage at a time in our nation's history when vision and courage were scarce commodities. I am referring in particular to the Court's desegregation cases, starting with *Brown v. Board of Education*¹ and, perhaps more importantly, following through with the later cases² in the face of fierce political opposition and popular defiance.³ Had the Warren Court done nothing else of substance, it would surely rank among the greatest of Supreme Courts.

Good as it was for the country that the Warren Court confronted the desegregation cases so early in its tenure, it may not have been the best thing for the Court itself. Let us face it: Effectively overruling a fifty-eight-year-old precedent,⁴ staring down angry Southern politicians, precipitating a constitutional crisis when the president was required to call out federal troops to force Arkansas to integrate its schools,⁵ suffering the vilification of so many citizens and ultimately coming out triumphant—all that is pretty heady stuff, even for the likes of Supreme Court Justices. The experience must have taught the Justices, and Earl Warren in particular, a thing or two: the importance of sticking to principle, the need for persistence, the absolute necessity of ignoring popular discontent with constitutionally based decisions.⁶ Earl Warren himself learned of the influence a Chief Justice could have on his colleagues and the crucial importance of leadership within the Court.⁷

But there were some other lessons the Court no doubt learned from the desegregation cases, lessons that may have contributed to some of its more dubious later

actions. The first concerned power: by precipitating a sea change in the area of race relations, the Court sensed the full sweep of its authority. If it could force the integration of schools and colleges, bus terminals⁸ and other public facilities in states where many still thought about the days of slavery with nostalgia, what was there the Court could *not* do? The second lesson, more subtle but perhaps more important, had to do with justice. As Richard Kluger's book about the *Brown* decision proclaims,⁹ what was at stake there was not merely an abstract constitutional principle, but also a matter of "simple justice." Now it is certainly a happy coincidence when the constitutional result is also the morally just result. But the two do not inevitably go together: For example, it may be constitutional to impose an income tax,¹⁰ but few taxpayers think their taxes are just. The Constitution says aliens are entitled to less solicitude than American citizens,¹¹ but some argue that justice requires equal treatment for *all* people. And in what is perhaps the most egregious example of constitutional injustice, Article Two, Section One, requires that a candidate for president be a natural-born citizen and, alas, although I am a citizen and was born quite naturally, . . . well, you understand.

It is, of course, impossible to know for sure, but I suggest that the struggle and eventual triumph of the Court in the desegregation cases may have imbued some of its members—and Chief Justice Warren in particular—with the notion that the Court can serve as a powerful force for good, and that it should use its enormous power to make society more just—or at least to bring society into line with the Court's vision of justice. Chief Justice Warren wrote in 1955 that "it is the spirit and not the form of law that keeps justice alive."¹² But if doing justice, rather than following the Constitution, becomes the prime objective, the constitutional lever for achieving that just result becomes a secondary consideration; means to the end are mined from the crevices between the lines of constitutional text, or fabricated by stretching constitutional language beyond recognition. But focus on righting wrongs the Court did, seemingly pursuing a manifesto like that admirably expressed on Earl Warren's gravestone:

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.¹³

Perhaps the best example of the Warren Court's penchant for tackling major social problems is the redistricting cases of the early and mid-1960's.¹⁴ The central claim in these cases was relatively straightforward, and like the desegregation cases, these inspired an appeal to simple justice: The fellow down the road casts a vote that is twenty times more powerful—sometimes a hundred times more powerful—than mine. That is just as if I get to vote once while he votes twenty times. Now is that fair?

Claims of such inequity grew out of the failure of many states to reapportion

political districts to keep pace with growing and shifting population patterns. In the nation as a whole in 1961, counties with a population under 25,000 had more than twice as many representatives as counties of over 100,000.¹⁵ In thirteen states, districts encompassing less than a third of the population could elect solid majorities in both houses of the legislature.¹⁶ The Tennessee legislative districts challenged in *Baker* had population disparities exceeding 22 to 1. In 1960, one California state senator represented 14,000 constituents, while another—the one from Los Angeles—represented six million.¹⁷ The Court had last confronted malapportionment in 1946 in *Colegrove v. Green*,¹⁸ when it held the issue nonjusticiable under the political question doctrine. By 1962, however, the Court was ready to deal with the issue and overruled *Colegrove*, much to the dismay of Justice Frankfurter, the author of the famous plurality opinion in that case.

Reversal of precedent is nothing new, and recent precedents are more easily overruled than ancient ones.¹⁹ But what the Court did in *Baker v. Carr*, *Reynolds v. Sims*, and the other reapportionment cases was not merely to reconsider a judgment made just sixteen years earlier. By everyone's acknowledgment, what the Court did was to defy a century of constitutional history,²⁰ not to mention the language of the Fourteenth Amendment.²¹

The problem, as the Court saw it, was this: Although the system in many states had fallen badly out of kilter, apportionment decisions were the province of state legislatures, which had every incentive to maintain the status quo. As the Court well understood, all legislators, regardless of political persuasion and party affiliation, put one interest above all others: their own reelection. Legislators from low-population rural areas, who had lost voters to higher-density urban areas, would never vote for a plan that exported their jobs to a bunch of lucky city boys. In many states there was no other mechanism for achieving the redistricting that the legislature refused to perform. Consequently Tennessee had not been reapportioned since 1901,²² even though state law called for reapportionment every ten years.²³ The political system, then, was sort of like a large turtle that had fallen on its back and could not right itself without help from an outside force, and the Court saw itself as that force.²⁴

The reapportionment cases thus had two of three key ingredients in common with the desegregation cases: an apparent injustice and the power to do something about it. More tenuous was the third ingredient, the one the Court needed to legitimate its actions: a constitutional basis for its decision. Many years earlier, in *Luther v. Borden*,²⁵ the Court had rejected the Constitution's Guaranty Clause—which purports to ensure a republican form of government—as a source of judicial authority to second-guess the legitimacy of state governments.²⁶ The Court might have reconsidered or narrowed *Luther*, but instead it reached into the magic hat of equal protection, which had served so well in the desegregation cases, and pulled out the novel doctrine of “one man, one vote.”

“One man, one vote” ranks right up there with “a chicken in every pot” and “two cars in every garage” as one of the all-time great political slogans, but it leaves a lot to be desired as a constitutional doctrine. To begin with, using the Equal Protection Clause, which concerns individual rights, to resolve structural questions of governance is itself a bit of a stretch. By and large, individual rights and government structure are covered by separate provisions in the Constitution;

equal protection seems eminently better suited to the former type of issue than to the latter.

More important, however, applying equal protection principles to questions of governance raises exotic questions about just exactly what equality means in that context. In the Court's view, equality is achieved by giving every voter not only a single vote, but also an equally weighted vote. According to the Court, in one of its most celebrated phrases, "Legislators represent people, not trees or acres."²⁷ Well, that's certainly a constitutional conversation-stopper; the only thing one can say in response is "So what?" To derive the principle that everyone's vote must have an equal weight, regardless of other circumstances, takes more than this colorful rhetorical flourish. In its struggle to find a constitutional rationale for its decision, the Court suggested that to give someone a vote that is weighted less than someone else's diminishes the first person's rights of citizenship. But this is a circular argument, for there is nothing about the right of citizenship per se that calls for an equally weighted vote—unless the Court says it does.

In fact, as is pointed out by Justice Frankfurter's dissent in *Baker*,²⁸ and Justice Harlan's in *Reynolds*,²⁹ it is perfectly plausible and rational to give votes different weights depending on other circumstances; indeed, to do so may serve the purpose of equality. The classic example, of course, is the U.S. Senate, where voters in Nevada and Rhode Island get to cast votes twenty-eight times more powerful than voters in California.³⁰ Does this make the voters of California second-class citizens? Would true equality be better served if both houses of Congress were elected based on population alone, and the interests of such people-poor states as Nevada and Alaska were overlooked?

The fact is, legislators *are* elected by people but, in a very real sense, they also represent the nonhuman resources in their districts, such as forests and acres of arable land. At least one of the members of the *Reynolds* majority, Justice Douglas, seemed to recognize this idea later in *Sierra Club v. Morton*,³¹ where he argued that trees and other inanimate objects should be given standing for purposes of environmental litigation. One might have asked Justice Douglas, if trees should be entitled to sue in court, why shouldn't they also be represented in the legislature?

A plausible argument can also be made that strict equality of numbers does not accurately measure true equality of participation in government: The remoteness of rural voters from government services, and the difficulty rural voters have in gaining access to their representatives, might justify burdening these representatives with smaller constituencies.

At bottom, what the Warren Court did in the reapportionment cases was to rely on a particular political theory—the theory of strict voter equality—rather than a constitutional principle. In the years that followed, the country's political structure has been recast in the Court's image, as exact population equality became the hallmark of subsequent reapportionments.³²

Whether this is a good thing or not is difficult to say. The tendency, of course, is to believe we live in the best of all worlds and to consider alternative realities as necessarily inferior. But let me try to conjecture at least some possible ill effects of totemistic adherence to population equality as the hallmark of reapportionment. The major effect of apportionment based on population to the exclusion of other

criteria is that political power follows the voters the way water flows downhill. And a good thing, too, you might say. But perhaps, as the song goes, it ain't necessarily so.³³

The tendency for votes to ebb and flow with demographics has meant that political power has shifted from rural areas to urban ones, and then from the inner cities to the suburbs.³⁴ Is it really wise, is it prudent, to have political power readily mimic, and thus reinforce, demographic changes? We are indeed a society of voters, but we are also a society of land and forests, of governments and institutions. There is something to be said for the view that voters should not be able to take their political power with them quite as easily as they root up their possessions, leaving those who stay behind—those on the farm, those in the inner city—with a decaying infrastructure and no political base to sustain it.

A system, such as existed in many states before *Baker* and *Reynolds*, where shifts in political power lag substantially behind shifts in population density, tends to discourage the easy decision to abandon one place for another, which we in America have come to take for granted. Are you unhappy with local schools? Don't like the traffic? Not enough police protection? Find yourself greeting new neighbors with "There goes the neighborhood"? Don't bother sticking around and trying to make it work. The cheap and easy answer is to pick up your marbles and move elsewhere, exacerbating the problems in the place you are leaving, and adding new problems to the one you are going to.

The strict population-based model may also have had some deleterious effects on racial and ethnic reapportionment. When it comes to providing remedies for such things as minority vote dilution, strict adherence to "one person, one vote" is usually a hindrance, not a help.³⁵ As Professor Lani Guinier observes, "The upshot of absolute population equality as the basis for representation is that equipopulous districts are more important than districts that preserve communities of interests or leave neighborhoods intact."³⁶ There's something to be said for a regime that allocates greater political power to a neighborhood ravaged by white flight—based precisely on the notion that schoolhouses, parks, libraries, and public swimming pools don't vote, but do require a political base for their continued upkeep. Such a regime might provide a far more honest and satisfying solution to the practical political problems of minorities than do endless quibbles about whether a district's lines are sufficiently straight or encompass precisely the right number and ethnic mix of voters.³⁷

Whether or not you are persuaded that the one person—one vote system of governance is worse than the alternatives, it is nevertheless troubling that such a profound, such a pervasive and permanent change in the way we operate as a society, was effected by the judgment—the *political* judgment—of nine government officials who themselves are insulated from the political process.

Nor was reapportionment the only area where the Warren Court saw its mission as righting serious injustice with relatively little guidance from the constitutional text. Another area is criminal procedure, where the Court erected a number of rules governing the admissibility of evidence against defendants in criminal cases. That there was a need for restraining unfair and often unlawful police tactics is pretty clear, so it is difficult to take issue with the Court's objectives. Yet one cannot but

marvel at the *deus ex machina* boldness of, for example, the *Miranda* litany³⁸ or the “reasonable expectation of privacy” standard derived from *Katz v. United States*.³⁹

Nevertheless, you say, we ought not to quibble too much with the Court’s methods: After all, it did manage to curb widespread police misconduct. Well, I was asked to contribute to this volume precisely to quibble, so I had better quibble with gusto. To begin with, there may well be more police misconduct still going on out there than we like to believe; it is hard to know, but some clues suggest that the rules adopted by the Supreme Court may only have driven the problem underground. The recent report of New York’s Mollen Commission, for example, faces up to the open secret, long shared by prosecutors, defense lawyers and judges, that perjury is widespread among law enforcement officers.⁴⁰ As Alan Dershowitz has written,⁴¹ new rules about what goes in the courtroom haven’t changed the conduct of the police so much as encouraged them to perfect the fine art of “testilying.” The advent of the home video camera has also started to offer us a glimpse of how police sometimes act when they don’t think their conduct will be revealed in court.⁴²

If these indications are typical, it may well be that we have only marginally dealt with the misconduct problem, but have added to it another, more serious problem. We may have engendered among law enforcement officials the Dirty Harry ethic—that constitutional rules are obstacles, placed in their path by criminal-coddling, pointy-headed, liberal judges, and that conscientious police officers must lie in court and otherwise cover up for each other. Perhaps it would have been wiser to leave the problem of police misconduct to the political branches of government, rather than fostering the complacent faith that there is no need to do anything because the courts—under the banner of the Constitution—have solved the problem.

And, while I’m quibbling, let me point out how very little is left of the Warren Court legacy in this area. The exclusionary rule is now so riddled with exceptions that it is the rare case indeed when evidence seized in a questionable manner is actually thrown out. The “reasonable expectation of privacy” standard, having had no constitutional mooring to begin with, and being devoid of objective meaning in any event, has become a means more of validating dubious searches than of throwing out unlawful ones.⁴³ And the expansion of federal habeas supervision over state convictions, itself a bold Warren Court departure from almost two centuries of precedent, alas is still with us, particularly in death penalty cases. But it is now so mired in the procedural quicksand of exhaustion, deliberate bypass, adequate and independent state grounds, abuse of the writ, and retroactivity, that the question of whether the defendant had a fair trial often gets lost in the process.⁴⁴ Nor, on the other side, should we overlook that the availability of federal habeas review—and the stay of execution that often comes with it—has turned the great writ into a procedural endgame that many death row petitioners use to postpone the inevitable, sometimes for years or decades.⁴⁵

Perhaps as troubling as the areas where the Warren Court chose to mold society in its own image are the areas it ignored. As Professor Richard Epstein has pointed out, this was a quiescent time for Takings Clause jurisprudence. In the same vein, between 1953 and 1969, there were only four copyright cases before the Court. Only three cases even mention the Contract Clause;⁴⁶ the majority actually addressed (but

of course rejected) the Contract Clause claim in only one of the three,⁴⁷ while in the other two cases the Contract Clause claim merited mention, and rejection, only in the dissent.⁴⁸ There were a mere three trademark cases, only one of which even discussed a substantive aspect of trademark law.⁴⁹ The Court just was not much interested in the problems of the business and property owner. The Court did take a variety of cases involving labor law and antitrust, but the results were overwhelmingly against business and property interests.⁵⁰

Every Court, of course, reflects the philosophy and interests of its members, but evenhandedness is particularly important for an activist Court, as the Warren Court surely was. The Constitution features a variety of clauses protecting property and contracts no less prominently than those protecting speech, religion, and the other rights the Warren Court was so fond of enforcing. When a Court is activist—that is, when it reads constitutional protections broadly—it easily becomes subject to the charge that it is not following the Constitution but rather pursuing its own judgment of good and bad. The charge is less likely to stick if the Court adopts an activist stance toward all constitutional claims, not merely those the judges happen to favor as a matter of policy.

It is impossible, alas, to accuse the Warren Court of an overwhelming degree of evenhandedness when it comes to constitutional claims. Contrast, for instance, the following two Warren Court cases: *New York Times v. Sullivan*⁵¹ and *Williamson v. Lee Optical*.⁵² What can I possibly say about *Sullivan* that has not already been said? You could, of course, read the opinion again, or, better yet, read Anthony Lewis's excellent book, *Make No Law: The Sullivan Case and the First Amendment*. Or, best of all, read the brilliant review of Tony's book in the *Columbia Journalism Review*, authored by a certain Ninth Circuit Judge whose name modesty forbids me to mention.⁵³ Suffice to say that Justice Brennan, speaking for a unanimous Court, gave the First Amendment a broad and generous reading. Never mind that the constitutional text only prohibits laws abridging freedom of speech and freedom of the press, and here the Court was dealing with a libel lawsuit. The *effect* of such a lawsuit would be no different than a law prohibiting publication outright, Justice Brennan said, because the crushing liability from a verdict would effectively stifle free expression.⁵⁴

Now, I have no trouble at all with *Sullivan*. In fact, I think it's an excellent example of the vigor with which judges and Justices should approach constitutional provisions that protect individuals from government oppression.

Contrast this, however, with the other case I mentioned, *Williamson*. There the Court considered an Oklahoma law that forbade opticians from grinding lenses, or even fitting a customer's own lenses to a new set of frames, without a prescription from an ophthalmologist or an optometrist.⁵⁵ The district court had found that an optician could, with the simplest measurement, determine the power of a lens, even a broken one, and grind a new one of equivalent power.⁵⁶ And making a new frame for existing lenses certainly seems not to require a vast amount of medical expertise. Plainly what had happened was that the ophthalmologists and optometrists had simply out-lobbied the opticians: They had convinced the Oklahoma legislature to give them a monopoly at the expense of both the consumer and the opticians.

How did the Supreme Court react? It struggled mightily to stay awake. Ex-

tremely uninterested in interfering with legislative judgements in the economic sphere, the Court bent over backwards to validate the entirely irrational and inefficient legislative judgment.

To be sure, *Sullivan* and *Williamson* are different in many ways and one cannot fault the Court merely for upholding a novel constitutional claim in one but not in the other. There is, however, a contrast in the zeal with which the two opinions go about their constitutional task. In *Sullivan*, Justice Brennan literally breathes life into the terse words of the First Amendment. He considers carefully not only what the language says, but what it *means*, what its purpose is. The amendment embodies “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.”⁵⁷ Justice Black’s concurrence characterizes the libel suit against the *New York Times* as not merely a private dispute between private parties—as it easily and fairly *could* have been characterized—but as a “technique for harassing and punishing a free press”⁵⁸ for supporting civil rights activities within the state of Alabama. “To punish the exercise of [the] right to discuss public affairs or to penalize it through libel judgments,” Black argues, “is to abridge or shut off discussion of the very kind most needed.”⁵⁹

Contrast the ringing declarations of constitutional principle in *Sullivan* with this memorable prose from *Williamson*: “An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation . . . it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health.”⁶⁰ So it makes perfect sense to regulate the sale of frames because frames are connected to lenses and lenses pertain to eyes, and the eyebone’s connected to the thighbone, and the thighbone’s connected to the trombone. Even if you don’t find this as silly as I do, you do have to wonder what *Williamson* would have looked like if the underlying claim there—namely that opticians and consumers were being sold down the river so that optometrists and ophthalmologists could get rich—had been treated with as much respect and empathy as the *New York Times*’s claim in *Sullivan*.

And herein lies my final quibble with the Warren Court—and a fairly major quibble it is. By staking out certain constitutional areas in which it took an intense interest, and giving short shrift to others, the Warren Court contributed to the now widespread perception that there really *is* no such thing as constitutional law, that it’s all a matter of the philosophy of the particular judges who are making the decision. This is a view that has come to dominate the thinking in our law schools and in the profession. It is certainly the view held firmly by those who pick judges and Justices in Washington, regardless of political party. The effort to create constitutional law by picking just the right individual (or by blocking the wrong individual) is the name of the game for both Democrats and Republicans. This attitude, if it persists, will mean that the Warren Court has essentially made itself obsolete. Who, after all, in the current climate would dare nominate, much less confirm, a former member of the Ku Klux Klan?⁶¹ A politically active and highly outspoken law school professor?⁶² A politician who was responsible for the wartime internment of Japanese Americans, and who then opposed their return saying, “If the Japs are released, no one will be able to tell a saboteur from any other Jap”?⁶³

The Warren Court is often compared to a bevy of Platonic Guardians.⁶⁴ But to

my mind there's a better Greek analogue for the Court: Icarus, whose flight toward the sun was noble, daring, dazzling, and set air travel back years. The Court at times shook the surly bonds of precedent and text, and struck out for the sun of Justice itself. In doing so, it may have clipped the wings of future Courts. But it has also forever changed the way we look at the sun.

Notes

I thank Mark Ouweleen, my law clerk, for his valuable assistance with this article.

1. 347 U.S. 483 (1954).
2. See, e.g., *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) (compelling integration of schools and other facilities); *Green v. County School Bd.* 391 U.S. 430 (1968); *Evans v. Newton*, 382 U.S. 296 (1966); *Heart of Atlanta Motel, Inc. v. United States* 379 U.S. 241 (1964) (Civil Rights Act of 1964 prevents hotels and restaurants from refusing service to blacks); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Goss v. Board of Education* 373 U.S. 683 (1963) (invalidating transfer plans that allowed students to attend schools outside their districts in which their race was in the majority); *Burton v. Wilmington Parking Authority* 365 U.S. 715 (1961) (using doctrine of state action to compel private establishments to admit blacks); *Cooper v. Aaron*, 358 U.S. 1 (1958) (reaffirming *Brown*).
3. See *Cooper v. Aaron*, 358 U.S. at 15–16 (criticizing violent resistance to *Brown*); Freyer, “Hugo L. Black and the Warren Court in Retrospect,” in *The Warren Court in Historical and Political Perspective* 86, 94 (Tushnet ed., 1993); Tushnet, *The Warren Court as History*, in *id.* at 1, 25–26.
4. *Plessy v. Ferguson*, 163 U.S. 537 (1896).
5. President Eisenhower sent federal troops to protect nine black high school students entering Little Rock’s Central High School from crowds encouraged by Governor Orval Faubus. See Spritzer, “Thurgood Marshall: A Dedicated Career,” 26 *Ariz. L.J.* 353, 364 (1994).
6. See Bork, *The Tempting of America* 77 (1990) (“Much of the rest of the Warren Court’s history may be explained by the lesson it learned from its success in *Brown*.”).
7. See Schwartz, *Super Chief: Earl Warren and His Supreme Court* 204 (1983) (“As [Justice Potter] Stewart sees it, Warren may not have been an intellectual, but ‘he had instinctive qualities of leadership.’”).
8. *Pierson v. Ray*, 386 U.S. 547 (1967).
9. Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (1975).
10. U.S. Const. Amend. XVI.
11. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 77–80 (1976) (conditioning alien eligibility for federal medical assistance benefits on five-year residency and application for permanent residence; classification based on alienage need only be reasonable under the Fifth Amendment).
12. Warren, “The Law and the Future,” *Forbes*, Nov. 1955, 106, 224.
13. White, “Warren Court,” in *Encyclopedia of the American Constitution* 2023, 2031 (Levy et al., eds. 1986).
14. *Baker v. Carr*, 369 U.S. 186 (1962) (ruling that political question doctrine does not bar Court from considering reapportionment cases); *Gray v. Sanders*, 372 U.S. 368 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amend-

ments can mean only one thing—one person, one vote.”); *Reynolds v. Sims*, 377 U.S. 533 (1964) (one man, one vote); *Lucas v. Forty-Fourth Gen. Ass’y*, 377 U.S. 713 (1964) (invalidating Colorado’s districting plan which apportioned only one house of the state legislature on population basis).

15. Anderson, Note, “When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante,” 42 *Stan. L. Rev.* 1549, 1555 (1990) (citing David and Eisenberg, *Devaluation of the Urban and Suburban Vote* 64 (1961)).

16. *Ibid.* (citing National Municipal League, *Compendium on Legislative Apportionment* 45 (1961)).

17. Weaver, *Warren: The Man, The Court, the Era* 238 (1967).

18. 328 U.S. 549 (1946).

19. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (reversing *National League of Cities v. Usery*, 426 U.S. 833 (1976)); see also *Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling cases that only four and two years earlier had held victim impact evidence inadmissible during the penalty phase of a capital trial); *id.* at 853–54 (Marshall, J., dissenting) (arguing that the majority’s willingness to reconsider an opinion merely because it was narrowly decided over strong dissents undermines the rule of law and invites open defiance of precedents).

20. See *Reynolds v. Sims*, 377 U.S. at 590–91, 595–608 (Harlan, J., dissenting) (arguing that history shows the Fourteenth Amendment was intended to be inapplicable to state legislative apportionment, as courts recognized until 1962); Bork, *The Tempting of America* 85 (1990); Berger, “Robert Bork’s Contribution to Original Intention,” 84 *Nw. U. L. Rev.* 1167, 1183–85.

21. *Reynolds*, 377 U.S. at 593 (Harlan, J., dissenting) (claiming that Section 2 of the Fourteenth Amendment recognizes that states may abridge the right to vote).

22. See *Baker v. Carr*, 369 U.S. at 191.

23. *Id.* at 188.

24. In Colorado, however, there was a provision for a referendum, through which the electorate could resolve problems in apportionment. Nevertheless, in *Lucas*, the Court invalidated an apportionment scheme for violating “one man, one vote” even though the electorate had just approved that scheme. Go figure.

25. 48 U.S. 1 (1849).

26. For a perspicuous examination of the history and meaning of the Guaranty Clause, see generally Amar, “The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem,” 65 *U. Colo. L. Rev.* 749 (1994).

27. *Reynolds v. Sims*, 377 U.S. at 562.

28. 369 U.S. at 301–24.

29. 377 U.S. at 608–10.

30. Calculated using the following highly scientific method: Since all states have the same number of senators, simply divide California’s population (about 26 to 27 million) by that of Nevada or Rhode Island (each about 970,000), and then do a lot of rounding off.

31. 405 U.S. 727, 741–43 (1972) (Douglas, J., dissenting).

32. See Issacharoff, “Judging Politics,” 71 *Tex. L. Rev.* 1643, 1647–48 (1993) (“In the great reapportionment cases of the 1960’s . . . the Supreme Court placed its decisive mark on the political institutions of this country more formidably than at any other point save perhaps the initial establishment of the power of judicial review in *Marbury v. Madison*”). Equipopulous apportionment became the sole measure of the fairness of the electoral process, reaching the point of absurdity in *Karcher v. Daggett*, 462 U.S. 725

(1983), where the Court invalidated New Jersey's congressional districting scheme not so much because of the manifest partisan gerrymandering, but because of a statistically insignificant deviation from the equipopulation principle. See Issacharoff, *supra* at 1650–56.

33. Gershwin, “It Ain’t Necessarily So,” in *Porgy and Bess*.

34. For a general discussion of such population shifts, see Jackson, *Crabgrass Frontier: The Suburbanization of the United States* (1985).

35. Computer technology has made it easy to design districts that are reasonably compact, perfectly equipopulous, and terribly gerrymandered. Minority voting strength can be diluted by “packing” minority voters to limit their influence to one or a few districts, and by “spreading” voters so that they constitute a small and powerless minority in a number of districts. See Guinier, “Groups, Representation, and Race-Conscious Districting: A Case of the Emperor’s Clothes,” 71 *Tex. L. Rev.* 1589, 1615 (1993). The focus on “one man, one vote” cannot eliminate these practices.

36. *Id.* at 1607.

37. In *Lucas*, Justice Stewart criticized the Court for privileging the personal right to vote over the efforts of local government to represent regional needs, communities of interest, or political subunits. 377 U.S. at 750 (Stewart, J., dissenting). See also Guinier, *supra* note 35, at 1607.

38. *Miranda v. Arizona*, 384 U.S. 436 (1966).

39. 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

40. Mollen, et al., “Report of the Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department” 36–43 (1994) (“Our investigation indicated . . . that [perjury] is probably the most common form of police corruption facing the criminal justice system . . .”).

41. See Dershowitz, “Controlling the Cops: Accomplices to Perjury,” *N.Y. Times*, May 2, 1994, at A17.

42. Of course the videotape of Los Angeles police beating Rodney King is the most famous example, but there are others. In May of 1994, police on Staten Island were videotaped beating a young handcuffed prisoner. See “Tape May Lead to Cops in Beating,” *Record*, May 4, 1994, at A4. In July of 1994, an officer in the Los Angeles suburb of Compton repeatedly beat prone seventeen-year-old Felipe Saltero under the watchful eye of a neighbor’s videocamera. See “Facts on File,” *World News Digest*, Dec. 22, 1994, at 960 G1. In November of 1994, two Buffalo police officers were filmed in an exchange with two young men that sparked allegations of police brutality. Gryta, “Dillon Weighing Appeal in Zenner St. Incident,” *Buffalo News*, Nov. 4, 1994, at 4.

43. See, e.g., *California v. Greenwood*, 486 U.S. 35 (1988) (ruling that there can be no reasonable expectation of privacy in discarded garbage left for collection outside home); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (ruling that the taking of precision aerial photographs from navigable airspace is not a search prohibited by Fourth Amendment); *Oliver v. United States*, 466 U.S. 170 (1984) (ruling that the Fourth Amendment protection does not extend to areas or activities conducted in “open fields”); *United States v. Place*, 462 U.S. 696 (1983) (ruling that a canine sniff of luggage is not a search under Fourth Amendment); see also *United States v. Pinson*, 24 F.3d 1056 (8th Cir. 1994) (ruling that the use of a thermal imager is not a search because there is no reasonable expectation of privacy in heat emissions).

44. “What matters to the overwhelming majority of this Court is not whether an individual was convicted in an unconstitutional manner . . . but rather, (a) when did we, the Supreme Court, first make it absolutely clear that the rights which were admittedly

violated were protected by the Constitution? (b) when did the unlawfully incarcerated . . . defendant file his claim, and did he successfully wend his way through every possible procedural obstacle erected by the state? and (c) did the state consider the question fully and fairly, even if erroneously? But not, I repeat, whether the constitutional rights of the defendant were violated.” Reinhardt, “The Supreme Court, the Death Penalty, and the *Harris Case*,” 102 *Yale L.J.* 205, 206–07 (1992).

45. See, e.g., *United States v. Frady*, 456 U.S. 152 (1982) (Frady, originally sentenced to death for first-degree murder in 1963, filed at least nine collateral attacks over twenty years.).

46. *City of El Paso v. Simmons*, 379 U.S. 497 (1965); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Maryland Cas. Co. v. Cushing*, 347 U.S. 409 (1954).

47. *El Paso*, 379 U.S. at 509.

48. See *Louisiana Power & Light*, 360 U.S. at 34 (Brennan, J., dissenting); *Cushing*, 347 U.S. at 428 (Black, J., dissenting).

49. That one is *Fleischmann Corp. v. Maier Brewing*, 386 U.S. 714 (1967), which held that attorneys’ fees are not available in trademark infringement cases under the Lanham Act. The other two are *Hudson Distributors v. Eli Lilly*, 377 U.S. 386 (1964) (McGuire Act exempts from the prohibitions of the Sherman Act price schemes authorized by state statute permitting trademark owner to set minimum retail prices for his products), and *Switzerland Cheese Ass’n v. E. Horne’s Market, Inc.*, 385 U.S. 23 (1966) (ruling that denial of summary judgment is not an interlocutory order because does not reach the merits).

50. See Spaeth, *The Warren Court: Cases and Commentary* 34–35 (1966).

51. 376 U.S. 254 (1964).

52. 348 U.S. 483 (1955).

53. A Certain Ninth Circuit Judge, “The Bulwark Brennan Built,” *Columbia Journalism Review* 85 (Nov.–Dec. 1991).

54. *Sullivan*, 376 U.S. at 277–78.

55. 348 U.S. at 485.

56. *Id.* at 486.

57. 376 U.S. at 270.

58. *Id.* at 295 (Black, J., concurring).

59. *Id.* at 297 (Black, J., concurring).

60. 348 U.S. at 490.

61. There was talk during Justice Black’s confirmation hearings that he might have been a member of the Klan. Black said nothing. After his confirmation, the *Pittsburgh Post Gazette* presented proof that Black had been in the Klan from 1923 to 1925. Lewis, “Justice Black at 75: Still the Dissenter,” in *The Supreme Court Under Earl Warren* 128, 128–29, 133 (Levy ed., 1972).

62. Many considered Harvard law professor Frankfurter a left-wing radical, in part because of his role in publicizing and criticizing the murder convictions of anarchists Sacco and Vanzetti. See Lewis, “An Appreciation of Justice Frankfurter,” in Levy ed., *supra* note 61, at 122–23.

63. Lewis, “Earl Warren,” in *Encyclopedia of the American Constitution* 2019, 2020 (Levy et al. eds., 1986).

64. “For myself, 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.” Hand, *The Bill of Rights* 73 (The Oliver Wendell Holmes Lectures, 1958). See Lewis, 4 *Justices of the*

United States Supreme Court 1789–1969, at 2726 (1969) (stating that Warren was the “closest thing the United States has had to a Platonic Guardian, dispensing law from a throne without any sensed limits of power except what was seen as the good of society. Fortunately he was a decent, humane, honorable, democratic Guardian.”), quoted in Berger, “Insulation of Judicial Usurpation,” 44 *Ohio St. L.J.* 611, 638 (1983); White, “Earl Warren as Jurist,” 67 *Va. L. Rev.* 461, 542 (1981).