"But Would it be Fair?"

The Interpretive Methodology of Chief Justice Earl Warren.

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INTRODUCTION: "A SOCIAL REVOLUTION IN THE MAKING."

"At a pace unequalled by the White House or Congress, the U.S. Supreme Court, over which the people have no control, drastically has been changing the pattern and rules by which we live.

These changes in long-established governmental practices are being made, not through new laws, but through new interpretations of the Constitution, especially the 14th

amendment, added a century ago.

Perhaps as a matter of convenience, America's current social revolution is dated from the Court's 1954 landmark decision ordering desegregation of public schools. The full impact of the last 12 years will be measured in generations.

It meant the end of the separate-but-equal philosophy delineated in the 1896 ruling of *Plessy-Ferguson*. The Court now has gone full circle since *Dred Scott*, the famed pre-Civil War case, when slavery itself was upheld by the Court.

But more than school desegregation, the Supreme Court in these 12 years also has issued orders-

Forcing the revamping of virtually all 50 State legislatures, and congressional redistricting of 33 States.

Severely limiting police detention and handling of suspects;

Sharply restricting trial court procedures, making it tougher to gain criminal convictions;

Broadening protection of freedom of expression by striking down loyalty oaths (thus giving Communists more operating room), and lessing restrictions on smut literature;

Ruling out school prayers and Bible reading in public classrooms, opening a Pandora's box of church-state issues; and

Extending an umbrella of protection over civil rights demonstrators that baffles police charged with keeping order.

Traditions and history that date to the very beginning of our Nation have been upset by the Court. For the States, it has meant a diminishing role in self-determination now assumed by the Federal complex.

And it all has been done in the name of the Constitution, which the Court began interpreting 177 years ago...."[1]

This excerpt, taken from an official Senate document printed nearly twenty five years ago, characterizes the way in which many people today still feel about the Warren Court and the Chief Justice who led it. To racists, anti-communist zealots, and conservative fundamentalist Christians who would seek to push their faith upon others, Earl Warren destroyed traditions that had lasted years, decades, and in the case of segregation, a century before he came to the Court. Yet for politically weak minorities, accused criminals, alleged communists and agnostics, to

[1]SENATE DOC. NO. 3, 90th Cong., 1st Sess, *U.S. Supreme Court Upsets Tradition* 1 (1967).

name a few, Warren created new traditions seemingly with each word he wrote in his opinions. For them, Warren was their Chancellor in equity, ready to mete out *real justice* where the status quo, perpetuated sometimes for decades by a majoritarian political process out of sloth or outright hostility, had failed.

Nor has the criticism of Warren come solely from what we might call "fringe" groups. Highly respected politicians, judges, justices and constitutional law commentators have almost had to stand in line over the last thirty seven years to have their chance to criticize his reasoning (or apparent lack thereof), not to mention his results. To them, Warren did violence not only to the basic precepts of constitutional law; respect for precedent and doctrine, consistency, and a more or less passive role for the Court, but arrogated power from the Congress and the states and in many instances took over outright the job of governing them both.

But in this age, when the current Supreme Court is busily undoing much of what Warren and his Court wrought, it may be interesting to try to understand what made a Chief Justice of the United States Supreme Court do to constitutional law and to the Country what Earl Warren did. Perhaps more interesting is the question of *how*, as the captain of the supposed "least dangerous branch" of the federal government, did Earl Warren do it? Both of these questions will be examined and, as best as possible, be answered in this paper.

Before we reach the question of how Earl Warren perceived and interpreted the Constitution, we should examine the life of a man who spent fifty of his eighty-three years on this planet in public service; a career that ultimately found Warren as the most talked about Chief Justice of this century, during one of this century's most socially divisive periods.

I. EARL WARREN: THE STORY OF A PUBLIC LIFE.

"I am certain that my lifetime experiences, even some of the earliest ones, have had an effect on the decisions I have rendered...."

Earl Warren, from him memoirs.

Earl Warren was born in Los Angeles, California, on March 19, 1891.[2] Warren's father, Methias, and mother, Chrystal were both Swedish immigrants. Methias worked for the railroad as a car repairman and car inspector. At the time Warren was born, organized labor was having its rough beginnings, and Methias Warren joined in the great but fated Pullman Company strike led by Eugene V. Debs. The Pullman strike, of course, failed, landing Debs in prison and resulting in the black-listing of an entire class of laborers. Among those black-listed was Methias Warren.

Because Warren could no longer get a job in Los Angeles, he left his family there and secured another railroad job in San Bernardino, some ninety miles away. Before long, the elder Warren secured a job with the Southern Pacific railroad and moved his family to Kern City, a small town about a mile from Bakersfield. The family included Mr and Mrs Warren, Earl, then aged five, and his sister, Ethel.

Kern City was at that time a small frontier railroad town with many of the characteristics that we today hear associated with the "old West." The town boasted saloons, gambling houses, cockfights, houses of ill repute, and occasional shootouts. Kern City was populated with an admixture of railmen, some transient, some permanent, Chinese laborers, who had been imported to lay the sprawling network of rails, seasonally transient sheep farmers, and, when the oil boom hit in 1899, roughnecks.

When Earl Warren began high school in 1903, he was, as he says, "not an inspired student." He remained similarly uninspired but at least minimally successful throughout college and law school, thus graduating with the first class to attend all three years in the new building

[2]Unless otherwise indicated, all biographical information in this Section is excerpted from EARL WARREN, THE MEMOIRS OF EARL WARREN (1977). [hereinafter MEMOIRS].

which housed the University of California, Berkley law school, now called "Boalt Hall." Warren foundered for a little over three years in private practice when World War I erupted and he joined the army. Initially a first sergeant, Warren had become an officer before his discharge.

Upon discharge from military service, Warren became a deputy city attorney of Oakland in 1919. At the same time, through an appointment from a former associate who had become a member of the state legislature, Warren was given the position of clerk to the Assembly Judiciary Committee. Thus Warren began in 1919 what would turn out to be a half-century of uninterrupted public service.

In 1920, Warren began working as a deputy district attorney in Alameda County. Almost immediately he began a fight against corruption in government that would engage him in one form or another for years to come. While a deputy district attorney, and later, as the Alameda County district attorney, Warren led many prosecution campaigns against government officials for various sorts of graft and corruption. In addition, Warren's tenure as district attorney spanned the fateful "great experiment" of prohibition and he led many attacks against violators. By extension, he actively prosecuted organized crime as well. While a deputy district attorney, Warren met his wife, Nina, with whom he fathered six children, and to whom he remained faithful until his death.

During his time as the district attorney of Alameda County, Warren also led a drive to educate the police in the latest methods of criminology and to organize the law enforcement agencies of the area and later of the state. This activity lasted throughout his tenure as both district attorney and later as attorney general, and made Warren quite popular with law enforcement. Many of these same members of law enforcement would later feel betrayed by Warren once he was on the Supreme Court. District Attorney Warren also broadened his political base in a number of other ways, such as working on campaigns and remaining good friends with a number of legislators he had worked with during his time with the Committee for the Judiciary. At the end of his nineteen years with the district attorney's office, Warren was credited with cleaning up government in Alameda County, vigorously prosecuting local gambling offenders and violators of prohibition laws, and cleaning up and markedly improving the efficiency of the district attorney's office itself. In addition, Warren pushed for and achieved

the revolutionalization of the jail system in Alameda County, which gained national recognition for its humanitarian reforms.

Warren ran for and was elected to the position of Attorney General of California in 1939 and began in earnest a campaign against organized crime. This campaign would necessitate a near open war against the gambling operations in the state, as this was where organized crime had its locus. In addition, Attorney General Warren led many campaigns against houses of prostitution, which, like organized gambling, had operated quite openly in many places in California until that time. Neither of these activities was legal in the state, but the laws on the books had not been actively enforced due to corruption within the various state and municipal arms of government. Attorney General Warren reversed that practice.

During his time as attorney general, Warren furthered his efforts to organize law enforcement and improve the training that law enforcement officers received. His efforts culminated in the establishment of a college-level education facility for the study of criminology. He also took an active part in organizing the civil defense prior to and during World War II.

As to politics, Warren was a registered Republican when that party was at its nadir. He never changed his party, but as he went through his years in political service, he eventually discarded his affiliation. He became neutral in political matters while still a district attorney, eventually giving up his position as a Republican party chairman prior to becoming attorney general. Warren never again courted the moneyed interests of the Republican party. He became an independent in the spirit of the progressive reformist Hiram Johnson and the "Bull Moose" party.

In keeping with the political neutrality that Warren had practiced since his years as the district attorney of Alameda County, when Warren decided to run for the position of Governor of California, he ran as a non-partisan and carried every county in the state but one. He began, on January 4, 1943 in the position that he would hold for an unprecedented three terms until given a recess appointment as the Chief Justice of the Supreme Court by President Eisenhower in 1953.

In his election for the position of attorney general, Warren had cross-filed his petition in all three active political parties; the Republican, the Democratic, and the Progressive, and had

carried all three nominations. As Governor, he was considered the most popular in California's history across all party lines. During his tenure as Governor, Warren became more progressive and independent of political influence, while at the same time his skill and strength as a politician constantly increased.

While Governor, Warren instituted extensive reforms in the areas of public education, the state hospital system, and the system of mental health care in California, which was still in the dark ages of the "asylums" when he became governor. An early proponent of welfare, Warren shocked many of his Republican friends by proposing a state-funded public health insurance plan. These early signs of Warren's social egalitarianism were a precursor of his performance on the Court.

However, Warren had his inconsistencies. For instance, as attorney general, Warren was actively involved in the drive which ultimately resulted in the internment of thousands of Japanese-Americans into concentration camps during World War II.[3] Also, while the Attorney General, Warren successfully blocked the nomination of a liberal University of California professor to the California Supreme Court on the grounds that he had "communist leanings." Warren also fought with then-Governor Culbert Olson, Warren's predecessor, over whether school children should be made to salute the flag. Warren thought at the time that they should. Warren admits that some of the confessions upon which he gained convictions were of the type he sought to prevent through his mandate in Miranda v. Arizona.[4] As governor, Warren defended California's system of legislative district apportionment; a system which would have failed miserably under the rule he would later establish in Reynolds v. Sims.[5]

Warren, however, did not have some sort of a "rebirth" at the time he donned a robe. By the time he reached the Supreme Court, Warren was nearly a pure progressive who had makings

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[3]Warren, not long after the internment, saw the personal hardship and loss of property that this action brought to the Japanese-Americans. He regretted his involvement throughout the remainder of his life. Very likely, this lesson in the damage hysteria can cause influenced some of his later decisions on the Court. See infra, notes 216-21 and accompanying text.

[4]384 U.S. 436 (1966).

[5]377 U.S. 533 (1964).

of a social engineer. Nor were all his actions as a state official inconsistent with the rules he would hand down once he reached the Court. While Governor, Warren supported and signed into law a bill restoring the rights of Japanese-Americans, which had been "revoked" by the Alien Land Law and providing them compensation. He also, during the height of McCarthyism, fought against and helped to defeat a University of California plan which would have terminated all professors who refused to take a loyalty oath. Warren also, with mixed success, took a case to the United States Court of Claims for Native Americans to receive compensation promised in certain treaties ratified in the 1850's but never acted upon. Of the over one thousand laws that Warren signed into law as a governor, not one was later declared unconstitutional by the United States Supreme Court.

Additionally, during his time as Governor, Warren pushed for more and more prison reform on a state-wide basis. He supported and signed into law the Prisoner's Rehabilitation Act, under which an ex-convict could institgate a proceeding for which to reestablish his civil rights and, after a period of good citizenship, be pardoned for his crime. Warren also put a stop to the cruel practice of "last minute" reprieves for prisoners on death row, preferring instead to have a personal hearing after the prisoner's sentence, at which time he would decide whether the sentence was warranted or not. If he decided it was, then no reprieve would be granted. This saved the prisoner and his family the trauma of repeated execution settings and repeated last-minute reprieves, and ended the predatory practice of some criminal defense lawyers who made their livings by building in the prisoners and their families the false hopes that such "last minute" reprieves could inspire. These acts were more indicative of the Earl Warren who would eventually be Chief Justice of the United States Supreme Court.

Warren's route to the Court was circuitous. While still Governor of California, Warren twice tried his hand at national politics, first as running mate to Thomas Dewey, and again as a presidential hopeful himself. Both attempts were unsuccessful. It was during Warren's second try at national politics, however, that he in essence paved his precarious way to the Supreme Court.

In his run for the Republican nomination for the presidency, Warren came up against General Dwight D. Eisenhower and Senator Robert Taft of Ohio, who were in nearly a dead tie.

Warren's strategy was that perhaps Eisenhower and Taft would cancel each other out and he would receive the nomination. Warren carried California and Oregon. Both Eisenhower and Taft approached him for his delegates, but Warren refused to sell out to either. Harold Stassen, another presidential hopeful, eventually released his votes to Eisenhower, who won the nomination. After Eisenhower was nominated, Warren became somewhat of an advisor to him and worked on his campaign, giving much help in the western states. Eisenhower was subsequently elected to be President.

After his election, Eisenhower called Warren, who had returned to his duties as Governor of California. Eisenhower told Warren that he could not offer him a position on his cabinet nor the position of Attorney General of the United States, but did intend to offer him a position on the Supreme Court when one became open. Shortly thereafter, Chief Justice Fred Vinson suddenly died. President Eisenhower gave Warren a recess appointment as Chief Justice on September 30, 1953. Later, Eisenhower would call his appointment of Warren "the biggest damn-fooled mistake" he had ever made.[6]

[6]DAVID O'BRIEN, STORM CENTER 100 (2d ed. 1990).

II. EXPECTATIONS FOR THE NEW CHIEF JUSTICE.

"Chief Justice Warren may never have been a judge, but since not one in over a thousand laws that he has signed as Governor in his State has been declared unconstitutional, I can see no valid objection on that ground."

Robert Gray Taylor testifying at Warren's confirmation hearings, February 2, 1954.

For the United States, the Fall of 1953 was, to quote Charles Dickens, "the best of times and the worst of times."[7] At the outset of the October 1953 term, the Eisenhower administration had been in office for nine months, and an armistice had been announced for the Korean War.[8] The economy was experiencing record expansion, as was the middle class. On Capitol Hill, on the other hand, Senator McCarthy of Wisconsin was continuing his campaign against "anti-American activities" and "subversion" in the government and elsewhere.[9] His obsession with communist infiltration had reached its "climax of paranoia" by this time and his actions would result in his censure within the next year.[10] As to the nation, people were hyper-conscious about the threat of nuclear attack.[11] The Cold War was accelerating at a rapid pace, soon to be heightened by the Soviet's launch of Sputnik I in four more years, and would reach its peak in nine years with the Cuban missile crisis.[12] Laws compelling school children to salute the flag were prevalent, as were back-yard bomb shelters and nuclear attack emergency drills. In the South, nearly every establishment of any kind was segregated. So too were many in the North. The people were encouraged by the government to conform, to not be different, to not question.

The Supreme Court during this time, in the eyes of many, was suffering from a tarnished

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[7] CHARLES DICKENS, A TALE OF TWO CITIES (1859).

[8] See William F. Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND.L.REV 205, 211 (1970).

[9] See id.

[10] Id.

[11] See id.

[12] See id.

image due to the apparent impropriety of the actions of some of its members, Chief Justice Vinson in particular, during the "steel seizure" case of 1952.[13] There were those who hoped that Warren would help to reestablish the standing that the Court had enjoyed in the eyes of the government and the people before this unfortunate series of events.[14]

In the records from the Senate Judiciary Committee's hearings on Warren's confirmation, which began on February 2, 1954, there is no real evidence that anyone imagined exactly what Warren would do once he was confirmed. There was no interview of Warren, and most of the testimony consisted of lauditory remarks by his backers, and derogatory remarks from his detractors. His supporters, most notably Senator Knowland of California, and Robert Gray Taylor, a retired banker from Delaware, praised Warren's already impressive list of accomplishments as a public servant in California. It would seem intuitive that his backers probably assumed that Warren would be "tough on crime," for during his years as a district attorney and attorney general, he was considered a "crusader." Warren's supporters probably assumed that having been intimately involved with the political process for so many years, he would be somewhat deferential to the actions of Congress. After having been a state governor for three terms, Warren's supporters probably assumed that the new Chief Justice would accord a great amount of latitude toward the states.

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[13]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Prior to this case, President Truman, having fired his attorney general, consulted Chief Justice Vinson to advise him as to the constitutionality of nationalizing the steel mills. The Country was at war in Korea, and the steel workers' union was going to strike that would have shut down the steel mills and crippled the war effort. Allegedly, Truman spent some four hours in consultation with Vinson before the president passed down his executive order seizing the mills. Eventually the president's action was declared unconstitutional by the Court in the opinion cited above, with Vinson, who had "advised" the president, dissenting. Chief Justice Vinson in particular, and the Court in general were criticized for advising the president as to a case that was likely to come before it.

[14]See ROY MERSKY & J. MYRON JACOBSTEIN, THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1972 19 (1975)(testimony of Robert Gray Taylor).

Warren's detractors at his confirmation hearings accused him of being "soft on communists," pointing to his blockage of legislation that would have required school teachers and university professors to take loyalty oaths.[15] Persons who objected to Warren's nomination also charged him with a number of unsubstantiated allegations ranging from general corruption to being "owned" by powerful liquor lobbies and organized crime.[16]
These allegations were aired during the open hearings, but not investigated. Finally, those against the nomination cited Warren's lack of judicial experience as a reason to deny his confirmation.[17]

Those who cited lack of judicial experience probably only did so in order to have one more reason to object to Warren's confirmation. However, in this case, lack of judicial experience, combined with over thirty years of government positions that demanded decisive action, was perhaps the most valid fear for those who did fear Warren's nomination. For Warren had not learned the sense of moderation and appreciation for slow change that are shared by many in the judiciary. In just three months, the Court's decision in Brown v. Board of Education[18] would demonstrate to all that Warren was not one to go slowly.

Incredibly, although Brown had been reargued the previous December, at the hearings in February on Warren's confirmation not a word was mentioned about the pendency of the case. The landmark "communist cases"[19] were still not yet visible on the horizon. Likewise, there were no hints as the Court's eventual rulings in the areas of criminal procedure[20] and

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[15] See id. at 48 (testimony of Dr. Wesley Swift of the Christian Nationalist Crusade).

[16] See id. at 106-12 (statement of Burr McCloskey).

[17] See id. at 96-97.

[18] 347 U.S. 483 (1954).

[19] E.g., Yates v. United States, 354 U.S. 298 (1957).

[20] E.g., Gideon v. Wainwright, 372 U.S. 335 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966).

apportionment of legislative voting districts.[21]

The hearings, after being shifted to unrecorded executive session on February 19, 1954, just seventeen days after they began, culminated in the voice-vote confirmation of Earl Warren as the fourteenth Chief Justice of the United States Supreme Court. In three short months, Warren would begin the process of shattering the probable assumptions of his backers. At the same time, Warren's original detractors, who wished to retain the status quo as it was in that Fall of 1953, would see their worst nightmares met and far exceeded. A social revolution had in fact begun. And the Supreme Court, with Earl Warren as its Chief, would lead the Nation into it by the nose. What follows is an attempt to explain the man and his constitutional interpretive methodology.

[21] E.g., Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).

III. WHAT WAS THE CONSTITUTION TO EARL WARREN?

"The home of the Supreme Court of the United States, facing Capital Plaza, has often been called the most beautiful building in Washington D.C. It is indeed an awesome sight as one stands before its Grecian serenity and reads the words chiseled in white marble above the main entrance. Like the building itself, the words are inspiring. They say: `Equal Justice Under Law.'"

Chief Justice Earl Warren, from his memoirs.

Although Warren's Constitution did not always begin with the text, it did include it. However, in accordance with Warren's jurisprudence, which consisted essentially of discovering, giving effect to, and protecting fundamental values,[22] if his concept of the Constitution included simply the text, then he would have been powerless, in two specific ways, to carry out much of the work that he did. First, Warren could not have effectively discovered the fundamental values that he did without an expansive concept of the Constitution which went beyond the text. Second, in order to advance and protect these substantive fundamental values or rights,[23] Warren needed more power than what the Constitution's text, standing alone, could offer.[24]

When he chose to follow them, a great source of judicial power for Earl Warren could come through Supreme Court precedents. The single best example of this proposition is found in Cooper v. Aaron,[25] wherein Warren enunciated his view that the Constitution included the Supreme Court's interpretations of it. Hence, part of Warren's "what" was the Court's precedents.[26] In this case, Warren used the power of the Brown I precedent, declared by the

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[22]See infra, Section V(B)(2)(a).

[23]To Warren, apparently the terms "fundamental value" and "fundamental right" were synonymous.

[24]The manner in which power is distributed between the coordinate branches of the federal government, and between the states and the federal government, is called "structuralism." An extensive discussion of Warren's views on and use of structuralism appears below at Section IV.

[25]358 U.S. 1 (1958).

[26]See id. at 18. "[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the

Court through Warren to be the "supreme law of the land,"[27] in the face of the governor of Arkansas, who had openly defied the Brown decisions.[28] Warren used the precedent in a structural sense to increase the Court's power over the states, holding that "[t]he principles announced in [Brown] and the obedience of the States to them, according to the command of the Constitution, are indispensible for the protection of the freedoms guaranteed by our fundamental charter..."[29] In this one line, Warren expressed why he included precedent in the Constitution; to increase the power of the Court (in this case, over the states) and why he needed the power that the precedents gave; to forward a view that the Court's duty under the Constitution was to give effect to fundamental values.[30]

This leads to the second, and really the more important aspect of Warren's concept of the Constitution. In addition to sources that would give the Court power, Warren also necessarily included sources that would shed light on what were to be considered fundamental values in this Country. As for sources outside the Constitution's text, Warren cited the Preamble to the Constitution in his memoirs.[31] Warren also quoted the Declaration of Independence a number of times in both his memoirs and his cases.[32] For instance, in his memoirs, Warren, in looking at

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supreme law of the land..." Id.

[27]Id.

[28]See id. at 4. The governor had sent state troops to the Little Rock public schools in order to enforce segregation.

[29]Id. at 19-20 (emphasis added).

[30]Both the subjects of Warren's view of the power of the Court and its souces, and his philosophy and role of the Court as the protector of fundamental values will be further discussed below. Also, Warren's views as to *stare decisis* will be discussed below. Warren used this technique for a number of purposes. For now, note that Warren's view of Supreme Court precedent as a source of power should not imply that Warren was particularly reverential toward the Court's precedents if he felt that one should be overturned.

[31]MEMOIRS, supra note 2 at 332.

[32]See, e.g., id. at 291, 335; Loving v. Virginia, 388 U.S. 1, 17 (1967)("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly *pursuit of*

the role of the Court and its propensity for controversy, stated:

Every man who has sat on the Court must have known at the time he took office that there always has been and in all probability always will be controversy surrounding that body. ... I venture to express the hope that the Court's decisions always will be controversial, because it is human nature for the dominant group in a nation to keep pressing for further domination, and unless the Court has the fiber to accord justice to the weakest member of society, regardless of the pressure brought upon it, we never can achieve our goal of `life, liberty and the pursuit of happiness' for everyone.[33]

Whether stated or implied, the Declaration of Independence wove itself through nearly all of Warren's opinions. To Earl Warren, the Declaration of Independence was an integral part of the Constitution and was one of Warren's greatest sources for finding the fundamental values that he believed this Country stood for.

In his opinions, as well as his memoirs, Warren included still other sources of fundamental rights in his concept of the Constitution. To Warren, such things as the Pledge of Allegiance[34] and the judicial oath of office[35] were evidence of what rights were endowed on Americans and implied the Court's role in finding and protecting them. In discussing one of the line of Warren Court "segregation cases," Warren in his memoirs related:

In [one] case, a black man walked into a courtroom and sat quietly in the center section rather than in the space set apart for blacks. The judge, noticing him there, ordered him to come up to the bench and told him to sit in the black section. The man said nothing and stood before the Court with his arms folded. When he failed to move promptly, the Court sentenced him for contempt. Now this was in a court of law in a state immediately adjoining the District of Columbia [Virginia], where people are expected to have faith in our pledge of `One Nation

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happiness by free men.") Id. (emphasis added).

[33]MEMOIRS, supra note 2, at 334-35 (emphasis added).

[34]See MEMOIRS, supra note 2, at 296.

[35]See id. at 332 ("... to administer justice without respect to persons, and do equal right to the poor and to the rich...") Id.

indivisible under God, with liberty and justice for all.'[36]

Warren looked upon things such as the Pledge of Allegiance and the judicial oath as Talmudic; they were evidence of the rights that the planners of the Constitution had in mind when they drafted the instrument. Warren saw indications of the framers' intent as to fundamental rights in many areas of life and in many things, such as the judicial oath, the Declaration of Independence, and the Pledge of Allegiance, that we all recite or learn, but could not be squared with the injustices that were so apparent to Earl Warren. Warren even opined in Cooper that "[t]he Constitution created a government dedicated to equal justice under law,"[37] thus quoting the words which appear above the entrance to the Supreme Court building.[38] To Warren, the Constitution was all of these things.

Warren did not, however, limit his concept of what the Constitution was to what he considered were the framers' intentions as to the fundamental rights that we all should possess. Warren also believed that in a society which is constantly evolving and progressing, we could today possess fundamental rights that our forefathers did not possess when this Country was formed. Hence, Warren's Constitution expanded over time to receive these "new" fundamental rights. Ostensibly, the measure for this expansion was public consensus; what rights we, as Americans living under our Constitution today would consider fundamental.[39]

Warren's interpretation of the Eighth Amendment in Trop v. Dulles provides an example of this expanding body of fundamental rights.[40] Warren stated that when deciding whether a particular punishment is cruel and unusual, "[t]he question is whether this penalty subjects the

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[36]Id. at 296 (emphasis added).

[37]Cooper, 358 U.S. at 19 (emphasis added).

[38]See also MEMOIRS, supra note 2, at 1.

[39]"The idea that society's `widely shared values' should give content to the Constitution's open-ended provisions -- that `constitutional law must now be understood as expressing contemporary norms' -- turns out to be at the core of most `fundamental values' positions." JOHN HART ELY, DEMOCRACY AND DISTRUST 63 (1980). [hereinafter ELY].

[40]356 U.S. 86 (1958).

individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."[41] Standing alone, this "principle of civilized treatment" appears on its face to be amenable to change over time as we become more or less civilized as a nation. However, Warren went on to spell out what he meant by these words in the lines that followed, while in the process explicitly showing that what is "civilized treatment," to Warren, would in fact change over time.

Warren first discarded the notion that the death penalty should be used as an index for what is "civilized treatment," and along with it, the notion that all punishments less than death are constitutionally acceptable.[42] Warren then said:

Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment -- and they are forceful -- the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.[43]

Thus, Warren left the obvious implication that should our society reach a point where the death penalty falls out of favor,[44] then quite possibly it also could no longer be carried out in

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[41] Id. at 99 (emphasis added).

[42] See id.

[43] Id. at 99 (emphasis added).

[44] This, of course, begs the question, "fall out of favor to *whom*?" Warren's words imply that the "whom" he is speaking of is the majority of persons in this country; when capital punishment falls out of favor with the majority, then it will be unconstitutional. However, this position would appear to be inconsistent with Warren's basic philosophy that the purpose of the Supreme Court in the area of fundamental values is to protect politically disadvantaged minorities. This philosophy is exemplified by Warren's statement that dominant groups in the nation will always press for further domination and that the Court must afford justice to the weakest member of society. MEMOIRS, supra note 2, at 334-35. Therefore, to say that capital punishment would no longer be constitutional "in a day when it [was no longer] widely accepted [by the majority]" Trop, at 99, is clearly at odds with Warren's basic philosophy.

There are, of course, those who would say that in writing these words, Warren was not speaking about a majority of Americans and did not intend to speak about a majority of

accordance with the Eighth Amendment. Thus, "what is the Constitution," or perhaps more appropriately, "what is constitutional," would evolve with our society, especially in the area of fundamental rights or values.[45]

Americans; that Warren, in this case, was speaking about his *own* acceptance of capital punishment and whether or not capital punishment comports with Warren's own constitutional concept of cruelty. This criticism is well founded, as I shall discuss, infra.

[45]Note also that Warren mentioned that capital punishment had "been employed throughout our history," thus giving the impression that if something has strong roots in our tradition, then it would not so readily be discarded by Warren. In Trop, for instance, the aggrieved party had had his citizenship revoked by the U.S. Government following his desertion in World War II. Warren noted that such a punishment was never devised by the United States Government until 1940. See id. at 100.

However, just as with the case of Warren's view on the sanctity of precedent, he was not at all consistent in his use of history. Warren on many occasions found unconstitutional practices that had taken place in this Country for many decades or, in some cases, since the Country was founded. Examples are Loving, 388 U.S. at 6 (Court overturned Virginia's miscegenation law, which had existed in one form or another since the colonial period); Brown I, 347 U.S. at 483 (Segregation of schools had existed since 1868 when the 14th Amendment was passed.); and Reynolds v. Sims, 377 U.S. 533 (1963)(Malapportioned state legislatures had existed essentially since the end of the Civil War, and in some cases longer.); Miranda v. Arizona, 384 U.S. 436 (1966)(Decision holding that arrestees must now be read their constitutional rights prior to questioning.).

IV. WHO WOULD INTERPRET THE CONSTITUTION?

"The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights."

Chief Justice Warren, Trop v. Dulles.

The question as to who interprets the Constitution can be divided into two sub-questions: "who interprets the Constitution for the national government," and "who will interpret the Constitution for the states." How a justice answers these questions will necessarily reflect his views on "structuralism;" or how power should be distributed between government bodies.[46] The former is a question which necessarily carries with it shadings of the interpreter's views on how power should be distributed between the three branches of the national government.[47] A

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[46] See WALTER MURPHY, JAMES FLEMING & WILLIAM HARRIS, AMERICAN CONSTITUTIONAL INTERPRETATION 294 (1986) [hereinafter MURPHY, FLEMING & HARRIS]. Structuralism is actually one mode of analysis an interpreter may use to interpret the Constitution. This traditionally is an analytical mode, concerned with the power structure of government, which calls for reading a clause of the Constitution in the context of the document as a whole (textual structuralism), in the context of practices within the larger political system (systematic structuralism), or in context of broader ideals that the interpreter believes underpins the document (transcendental structuralism), to determine with which part of the total government the Constitution places a certain power. See id. at 292-94.

Although he is hard to classify, Warren, given his expansive concept of what the Constitution included, more than likely fell into the "transcendental structuralism" camp. However, Warren's exact type of structuralism is not as important as seeing the extent that he exercised it and why; which was almost universally to protect fundamental values.

Modes of analysis will be discussed generally and as Warren used them below at Section V(B)(2). However, structuralism will be discussed presently, as, particularly in Warren's case, the concept is inextricably intertwined with his answer to the question of who interprets the Constitution. In addition, Warren used structuralism more as a strategy than simply as a mode with which to analyze constitutional problems. He, in general, sought ways in which the increase the power of the Court, rather to simply determine with which entity did the structural distribution of power lie.

[47] See id. at 322.

jurist, depending on his or her views on separation of powers, may, on the one side, see the role of the Court as restrained, thus deferring much of the job of interpreting the Constitution to the other two branches of the national government, the president and Congress, and indulging a presumption that the other branches' interpretations are correct.[48] That justice's decisions will reflect a great deference, for instance, toward Congress' judgment with respect to legislation.[49] This view would also place more power in the coordinate branches vis-a-vis the Supreme Court.[50] The opposite of this view would be the view that more power should be centered in one branch at the expense of the others.

Likewise, the justice's answer to the question of who interprets the Constitution for the states will be influenced by that justice's views on "federalism;" how power should be distributed between the states and the national government.[51] A jurist who believes strongly in the concept of "dual federalism;" the idea that both the states and the national government are autonomous entities which are sovereigns within their own spheres, will accord a great measure of deference to the states' interpretations of the Constitution and will accord like deference to their legislation.[52] This would be the view of a justice who believed in judicial restraint in matters of state government.[53] At the other end of the spectrum would be the justice who viewed a "centralized" form of government, with power centralized in the national government at the expense of state's power, to be superior or preferable.[54]

Note that in either case, at the "judicial restraint" end of the spectrum, that justice has given up some power; either over to the coordinate branches of the national government (usually

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[48] See id. at 322-26.

[49] See id.

[50] See id.

[51] See id. at 398.

[52] See id. at 402.

[53] See id.

[54] See id. at 401-02.

Congress) or to the states.[55] Any particular Supreme Court justice can fall into both categories of "restraint" set out above, or can fall into one without falling into the other. Earl Warren fell into neither.

During his tenure, Warren did much to increase the power of the Court. Accordingly, the power of the states and Congress to interpret the Constitution, and have that interpretation withstand the Warren Court's scrutiny, was diminished. When the legislation or act scrutinized impacted upon fundamental rights, or on the right of an individual to equality in political representation, which Warren essentially considered to be fundamental, the opposing concept of judicial restraint, both in relation to the coordinate branches of national government and between national government and the states, would fall.

Thus, we saw a centralizing of power by Warren in the Supreme Court. Again, without this increase of power, Warren would not have been able to produce and make effective the holdings that he did. In order to effectively challenge Congress and the states on the issue of fundamental rights, the protection of which Warren considered the province of the Supreme Court, the Court had to have this power. This power was necessary if the Court was to consistently "accord justice to the weakest member of society, regardless of the pressure brought upon it..."[56]

Therefore, in Warren's case, as in the case of possibly every justice, the concept of separation of powers is inextricably woven into the question of who will interpret the Constitution for the national government. Likewise, the concept of the distribution of power between the national government and the states is inseparable from the question of who will interpret for the states. So in the analysis that follows, Warren's views as to these areas of judicial structural philosophy will be treated with the respective answers to the major questions presented.

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[55]Those who are at the "judicial restraint" end of the spectrum pay prefer to phrase this line "refused to seize some power."

[56]MEMOIRS, supra note 2, at 334-35.

(a) Who Would Interpret for the National Government?

Who, in Warren's mind, would interpret the Constitution for the national government is summed up in a small excerpt from Powell v. McCormack,[57] the last major case decided while Warren was on the Court. Therein Warren stated:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.[58]

Therefore, Warren implied that Congress may interpret the Constitution, but that the Supreme Court will have the final say.

> Apparently, however, when he did use Congress' interpretation of the Constitution, it was not so much out of deference to that body as it was because Congress' interpretation coincided with what he believed the Constitution demanded. This was the case in Powell, where Warren deferred to Congress' interpretation of the Constitution as it applied, in a definitional sense, to expulsion versus exclusion of a member of the House of Representatives.[59] On the other hand,

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[57] 395 U.S. 486 (1969).

[58] Id. at 521 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)(emphasis added). This, essentially, is the same concept of judicial review that Chief Justice John Marshall introduced in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). "It is emphatically the province and duty of the judicial department to say what the law is." Id. at 177.

[59] In Powell, the question was whether or not the House of Representatives, by a simple majority vote, could exclude a representative who otherwise met the qualifications for membership in the House outlined in Art. I, Sec. 2, cl. 2 of the Constitution but for disciplinary reasons. The requirements for qualification are that the representative be at least 25 years old, be a citizen of the United States for seven years, and be an inhabitant of the state in which he was elected. In order to expel a member, the House would have to have first sworn Powell in, then attain a vote of two-thirds of the members. Judging from previous votes on the resolution, a vote of two thirds had proven unattainable. Powell, however, was excluded and not allowed to take his oath of office. Powell sued for his seat.
At trial, McCormack, the Speaker of the House, argued that expulsion and exclusion should be treated the same in this case.

when Congress determined that it would be constitutional to revoke a man's citizenship for desertion from the military during a time of war, Warren disagreed and declared the legislative Act unconstitutional.[60]

Although Warren did not hesitate to overturn Acts of Congress when they did not comport with the commands of the Constitution, throughout his tenure he did not at any time show a lack of respect for Congress or the President. Invoking tones similar to those of Chief Justice John Marshall in Marbury v. Madison,[61] Warren sounded almost apologetic when he was faced with approaching an Act of Congress for review; stressing that the Court was duty-bound to do so. Thus, in Trop he stated:

> [W]e are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. ... That issue confronts us, and the task of resolving it is inescapably ours. ... We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The judiciary has the duty of implementing the constitutional safeguards that protect individual rights.[62]

Additionally, there was really nothing dramatic in Warren's approach as to the constitutionality of Acts of Congress; it was the same sort of judicial review that Chief Justice Marshall created in Marbury.[63] This is actually a power that has been vested in the Court since

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Warren examined Congress' interpretation of the Constitution, which actually cut against McCormack's argument, and accepted it for the purposes of his ruling that expulsion and exclusion of Congressmen were not identical under the Constitution and that the House had no authority to exclude Powell in the manner that they did.

[60] Trop, 356 U.S. at 99.

[61] 5 U.S. (1 Cranch) 137 (1803).

[62] Trop, 356 U.S. at 103.

[63] Compare Marbury, 5 U.S. (1 Cranch) at 177 (Statement of Chief Justice Marshall)("The province of the court is, solely, to decide on the rights of individuals... It is emphatically the province and duty of the judicial department to say what the law is. ... [A] law repugnant to the Constitution is void..."), with Trop, 356 U.S. at 104 (Statement by Chief Justice Warren)("When

Marbury was handed down in 1803. However, many justices do not choose to exercise the power of judicial review to the extent that Warren did.[64] Through the process of his extensive use of judicial review, Warren centralized an increasing amount of power within the Supreme Court vis-a-vis the coordinate branches of the national government. Once again, this power was brought to bear by Warren especially in areas where some fundamental right was being impinged upon by an Act of Congress.[65]

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it appears that an Act of Congress conflicts with one of [the provisions of the Constitution], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them...").

[64]During Warren's tenure, the Court overturned twenty five Acts of Congress. This number is surpassed only by the Burger Court, which overturned 34 Acts of Congress. The next highest number of Acts overturned during a chief justice's tenure is fourteen. The Court under Chief Justice Renquist, who falls into the "judicial restraint" end of the spectrum, has overturned four. DAVID O'BRIEN, STORM CENTER 60 (2d ed. 1990).

[65]Note that in his memoirs, Warren stated in reference to the concept of separation of powers: "In state government, I believed in the separation of powers and the autonomy of each of the three branches within its own domain, strengthened by mutual respect between them. I was opposed to any one of the three trying to impose its will on any other." MEMOIRS at 169-70.

Of course, not just a few would say that somewhere along the line Warren changed his mind about this; that while he was on the Court he definitely imposed his will upon Congress a number of times. However, this apparent inconsistency in Warren's views and his actions can be at least partially explained.

In its context, this statement was made by Warren in reference to his work as Governor of California. He was describing the fact that he allowed the California legislature to work without interference by him. Also, the point of view from which this statement emanates is that of the executive to the legislature, not from the judiciary to the legislature. Through his years in public service, Warren came to believe that each branch of the government had its own specialized job. At the national level, Warren believed that his job as a Supreme Court justice was to ensure that Congress stayed within the confines of the Constitution in its legislation. Nonetheless, the extent to which Warren examined congressional legislation, and the extent to which the Warren Court overturned it, has, of course, been seen by many as Warren imposing his will upon Congress. In

(b) Who Would Interpret for the States?

As to the states, Warren had the same basic philosophy as he had toward the coordinate branches of the national government; that they could interpret the Constitution, but the Supreme Court would be the ultimate interpreter. Warren employed the same judicial review over the acts of state legislatures as he did over the Acts of Congress. His effect, too, was the same; Warren exercised the power of the Court with the result that a shifting of power took place from the states to the national government. A major difference, however, between Warren's treatment of cases dealing with Acts of Congress and the acts of state legislators or governors becomes apparent after reading a few of these cases. That difference essentially was Warren's apparent attitude toward the states. Whereas even if Warren overturned an Act of Congress, he was respectful, the way in which he treated the states could be construed as just the opposite.

Evidence of this "attitude" appears in such opinions as Brown v. Board of Education II,[66] Reynolds v. Sims,[67] and Miranda v. Arizona;[68] all of which read like statutes that the states would have to follow to the letter under the supervision of the federal courts. In Miranda, Warren outrightly denied the state's request that the decision be put off until the states could devise, through legislation, their own guidelines for instituting the new rule that Warren set forth.[69] In his denial, Warren stated that where constitutional rights are involved, the guidelines "must be determined by the courts."[70] Likewise, in Reynolds, Warren assigned to the federal judiciary the task of overseeing the states under the new "one man, one vote" rule, stating that "careful judicial scrutiny must ... be given, in evaluating state apportionment schemes, to the

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response to this, Warren no doubt would reply that he was doing his job; a job that he was oath-bound to carry out.

[66]349 U.S. 294 (1955).

[67]377 U.S. 533 (1964).

[68]384 U.S. 436 (1966).

[69]See Miranda, 384 U.S. at 490.

[70]Id.

character as well as the degree of deviations from a strict population basis."[71] In Brown II, Warren outlined how desegretation of public schools was to be carried out as such: "School authorities have the primary responsibility for elucidating, assessing, and solving [the localized problems associated with desegregation]; [the federal] courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."[72] These were all blatant exercises of power over the states; power that many states believed was rightfully theirs.

The states did not always lie down and take this apparent usurpation of their power.[73] The most resistance from the states, of course, came from the Court's desegregation decisions. In Cooper v. Aaron,[74] a case dealing with the Governor of Arkansas' refusal to obey the Brown

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[71]Reynolds, 377 U.S. at 581.

[72]Brown II, 349 U.S. at 299.

[73]Throughout the South, and many other places in the Country as well, signs were erected along the highways by the John Birch Society which read, "Impeach Earl Warren."

[74]358 U.S. 1 (1958). The following account of the facts giving rise to the Cooper decision are recounted in Warren's memoirs: "By passing state laws that circumvented federal ones and by engineering events so that violence would result from efforts to bring blacks into white schools, [Orval] Faubus [the Governor of Arkansas] and the Arkansas Legislature sought to counteract the integration order of Brown. When a token group of black children sought to enroll at Central High School in Little Rock, Faubus used the National Guard to forcibly prevent them from entering. The Little Rock School Board asked a federal district judige to postpone the Court-ordered desegregation of that area's schools, claiming it was hazardous to public safety. The judge refused. It was an ugly time of glistening bayonets, hate-filled mobs, red faces and screamed ephilets, a time of deep crisis when bigotry stood up nakedly and defied social progress and the nation's highest court. The rest of the United States watched with mixed feelings.

President Eisenhower invited Governor Faubus to visit him at his summer home in Rhode Island, where they discussed the problem at great length and apparently amicably - because at the conclusion Faubus returned to Little Rock as defiant as ever. This created such an uproar throughout the country that the President finally reacted. He federalized the Arkansas National Guard, putting it directly under his command, and sent special troops to help keep order. This broke the resistance of Faubus

precedents, Warren fairly demanded that the states were obliged to obey the precedents of the Court:

> [Marbury v. Madison] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath ... [to support the Constitution] [and, in Warren's words, the decisions of the Court].[75]

Again, the restriction of states's power that these words contemplates is obvious. Apparent also is the direction in which the power flowed; from the states to the Supreme Court. This was centralization, but "directed centralization."[76] In both the power relationship between the coordinate branches of the national government and the power relationship between the states and the national government, Warren caused the power to flow toward the Supreme Court through his use of judicial review.[77] Accordingly, Warren's practical answer to the question as to

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and the Little Rock mobs.

"Even then," Warren lamented, "there was no direct appeal from the White House to obey the mandate of the Supreme Court." *Warren was especially incensed that any state governor should try to tell the Court what was legal or illegal about school desegregation, which Faubus had sought to do.*" MEMOIRS, supra note 2, at 290 n. (emphasis added). Note the tone of the italicized sentence.

[75]Cooper, 358 U.S. at 18.

[76]Centralization contemplates power flowing from the states to the national government. In this case, power flowed from the states to the Supreme Court.

[77]During Warren's tenure, the Court overturned 150 state laws. In the twenty five years that preceded Warren, the Court had overturned only 141. The only Court that exceeded Warren was, again, the Burger Court with 192. The Court under Chief Justice Renquist, a conservative activist, or "judicial restraintist," has overturned but 29. O'BRIEN, STORM CENTER at

"who interprets the Constitution," both for the national government and the states, was the Supreme Court.

(C) A Diagram of the Governmental Power Structure During the Warren's Tenure.[78]

As has been stated before, the basic source of power for Earl Warren and the Warren Court was an active use of the power of judicial review. However, through the use of judicial review, and through decisions such as Brown II, Reynolds, and Miranda, Warren actually changed the power structure of the government itself, from both the perspective of the coordinate branches of the national government and from the perspective of the national government over the states. In both relationships, more power was placed in the Supreme Court. What follows is an explanation of how Warren was able to accomplish the structural power shift.

(i) Power to the Supreme Court *vis-a-vis* the coordinate branches of the national government.

It is a basic tenet of American governmental structure that the Congress makes the laws, the Executive enforces the laws, and the Supreme Court interprets the laws. This clear-cut diagram of separation of powers, however, is not quite accurate in practice. Examples of the blurring of the lines between the coordinate branches' allocation of powers are seen in such

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[78]In a discussion of Warren's manipulation of the government power structure, two questions must be addressed. First, *how* did he centralize the power in the Court; what mechanisms and phenomena worked to make or allow the power to flow? This question will be answered in the discussion that follows. Second, *why* did he wish to bring this power to the Court? As has been mentioned, the short answer is that he needed the power in order to protect substantive fundamental rights. Discussion of the "why" appears throughout this paper, but particularly in Section V(B)(2)(a), below, "Warren's Use of the Purposive Mode."

things as executive orders, wherein the Executive makes laws, and actual textual designations that Congress shall have the power to enforce certain articles of the Constitution.[79] Likewise, the lines delineating separate powers can blur as well between the Supreme Court and the coordinate branches.

Chief Justice Marshall, as has been mentioned before, was the first to seize power for the Court above and beyond what was believed to lie in that branch at the time. This was the power of judicial review that Marshall outlined in Marbury v. Madison.[80] The short rule of judicial review is that if Congress (or the Executive) makes a law which does not comport with the commands of the Constitution, that law can be struck down by the Supreme Court. This power of judicial review, of course, can also be used by the Court the review and strike down laws coming from state legislatures for the same reason. Judicial review was the basis and starting point of the Warren Court's power. However, Warren used this power, as was mentioned above, to an unprecedented extent in striking down both Congress' laws and the laws from the states.

Essentially, Warren treaded on the coordinate powers of both making and enforcing laws. The first landmark case demonstrating this proposition is Brown v. Board of Education II,[81] wherein Warren outlined the manner in which the federal courts would oversee desegregation of

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[79]Examples are found in Section 5 of the 14th Amendment which reads, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Identical provisions are found in Section 2 of the 13th Amendment, Section 2 of the 15th Amendment, the 19th Amendment, Section 2 of the 23rd Amendment, Section 2 of the 24th Amendment, and Section 2 of the 26th Amendment.

[80]5 U.S. (1 Cranch) 137 (1803).

[81]349 U.S. 294 (1955).

public schools. Brown v. Board of Education I,[82] in which the Court declared that the "separate but equal" rule, as it applied to public schools, did not comport with the Constitution,[83] was not in itself such a constitutional leap. The holding of that case merely overturned state laws prescribing that blacks and whites would go to different schools.[84] Additionally, the Brown I holding implicitly overturned Plessy v. Ferguson[85] altogether, and explicitly overturned Plessy as it applied to public education.[86] Again, the overturning of precedent is not a constitutional "big deal" in and of itself. Altogether, Brown I, in which Warren simply wrote that separate facilities in public education violated the equal protection rights of blacks under the 14th Amendment, was not an earth-shattering use of the Court's power. Nor was it a usurpation of power from the coordinate branches. Brown II, however, was different.

Section 5 of the 14th Amendment states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[87] Therefore, after the Court had determined that public schools could not be segregated and still comport with the Constitution, then Congress, by a strict textual balance of power, should have then picked up the mantle and been in charge of enforcing the 14th Amendment as interpreted by the Court. This was the plan contemplated by John Marshall in Marbury; "Congress you were wrong, therefore Congress you

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[82]347 U.S. 483 (1954).

[83]Id. at 495.

[84]See id.

[85]163 U.S. 537 (1896).

[86]Plessy itself dealt explicitly with "separate but equal" accomodations on trains which segregated blacks from whites.

[87]U.S. Const. Amend. 14, Sec. 5.

try again." However, in Brown II Warren actually took this power of enforcement from Congress.[88]

In Brown II, Warren set forth a particularized plan for desegregation of state public schools. In the first instance, public school officials would be in charge of drawing up the plans.[89] In the second instance, the federal district courts would be in charge of checking the desegregation plans and determining whether or not they comported with the mandate set forth in Brown I.[90] Finally, the federal district courts would be in charge of enforcing the plans.[91] Therefore, Warren, in Brown II, seized both Congress' power to make laws and Congress' power to enforce the mandates of the 14th Amendment. Although this power began with judicial review, the result was clearly beyond that contemplated by Marshall in Marbury v. Madison. Warren essentially said, "Congress (and states), you were wrong, therefore the Court will take it from here."

Warren's seizure of the powers to both make and enforce laws was also immediately evident in Bolling v. Sharpe,[92] which was handed down the same day as Brown I. In Bolling, a

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[88]Note that even though Brown II expressly dealt with state legislation, this reasoning is no less applicable to Congress in light of Bolling v. Sharpe, 347 U.S. 497 (1953), wherein Warren expressly applied Brown II to the federal government.

[89]"School authorities have the primary responsibility for elucidating, assessing, and solving [problems associated with desegregating the schools]." Brown II, 349 U.S. at 299.

[90]"[C]ourts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles (Brown I)." Id.

[91]"In fashioning and *effectuating* the decrees [for desegregation], the courts will be guided by equitable principles." Id. at 300 (emphasis added).

[92]347 U.S. 497 (1954).

decision that applied expressly and solely to the national government, Warren wrote that although the 14th Amendment does not apply to the District of Columbia, which is not a state, there was an "equal protection component" in the 5th Amendment which would likewise mandate that segregated public schools are unconstitutional.

In all likelihood, Congress, in light of the Brown I holding, would have eventually passed a law stating that the public schools in the District of Columbia could no longer be segregated. However, Warren did not wait for this. He again seized both the power to make law and the power to enforce it and determined that the District of Columbia's public schools would be desegregated according to the same type of plan set forth in Brown II.

The analysis and observations set forth above begs the question; how did Warren get away with usurping these powers from Congress? Two short answers, at least in the area of desegregation, can explain. First, Congress, to an extent, abdicated this power to the Court. Second, Congress did not have the ability to do anything about it.

At the time of the Brown decisions, due to the hostility to desegregation from the South, a bill that effectively mandated desegregation would not have had a chance of passing through Congress. This proposition is fairly supported by the fact that a bill dealing with civil rights and the ending of segregation on a wide scale did not pass through Congress until 1964.[93] Therefore, to congressmen who agreed that segregation was wrong, the Supreme Court was doing something that they could not do; thus they allowed the Court to make and enforce these laws.

On the other hand, the congressmen who were against desegregation were powerless to reverse what the Supreme Court had done. Their only avenue for reversing a Supreme Court

[93]The Civil Rights Act of 1964, 28 U.S.C. 1982, P.L. 88-352,

decision such as Brown I would be the amendment process. However, just as the faction in Congress who opposed desegregation could not have passed a bill mandating its demise, there was not enough support, either in Congress or among the American people, for the opposite faction to amend the Constitution to the extent that segregation would be constitutional. Thus, Congress was caught between two internal forces; one that was willing to give this power up, and the other that could do nothing to stop the abdication. Naturally, the power then flowed to the Warren Court, which at the time was the only coordinate branch willing to use it.[94]

One perception that the analysis above may instill is that this power shift to the Court would be temporary in nature, meaning that when Congress was ready to reclaim its power it could easily do so by legislation codifying the Court's holding or by amendment; a temporal limitation. Another perception deduced from the analysis above could be that the power to the Court would be limited to only its decisions surrounding desegregation; a subject-matter limitation. Note that both of these perceptions are accurate.

Temporally, through the passage of the Civil Rights Act of 1964,[95] Congress created federal causes of action for the same instances of racial bias that the Court had been dealing with

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78 Stat. 241 (July 2, 1964).

[94]This power would not have gone to the Court if it were not willing to take it up. The power could have gone to the Executive, if he were willing to draw up an executive order stating essentially what Brown II stated (which, I suggest, would have been far more unusual than the Supreme Court handing down such a mandate). Likewise, the power could have been left unused, and nothing would have been done about desegregation until 1964 with the passage of the Civil Rights Act. It is also safe to infer that without the prompting of the Supreme Court, that Act may not have come as early as it did.

[95]cite to civil rights act.

in Brown and the line of per curiam decisions that followed.[96] This Act, of course, returned the law-making power back to Congress in the area of desegregation. Additionally, this Act once again made the federal district courts forums wherein the executive branch (the Justice Department) would enforce Congress' laws, where before, in the area of desegregation, the federal courts had enforced the Supreme Court's laws. As to the subject matter limitation, the Court is essentially textually limited in this area by Article III, which states that the Court can only decide cases and controversies that are before it.[97]

Therefore, in order for the Court to seize the power to make and enforce law vis-a-vis the national government, first a case giving it an opportunity to do so must be before the Court, and second, Congress must either abdicate this power to the Court or not be in a position where it can do anything to stop the power from being seized, or both. And this power, once seized, will necessarily be limited to the subject matter of the case and will be limited temporally to a point

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[96]"Following Brown I the Court applied the conclusions in that case to a host of other activities outside of the field of education. All were short per curiam opinions or orders, some without citation and other merely citing Brown I. RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 493 (3d ed. 1989). Rotunda also provides this string cite of these per curiam decisions: "See, e.g., Muir v. Louisville Park Theatrical Association, 347 U.S. 971 (1954)(per curiam)(amphitheater in city park); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955)(per curiam)(public beaches and bathhouses); Holmes v. City of Atlanta, 350 U.S. 879 (1955)(per curiam)(municipal golf courses); Gayle v. Browder, 352 U.S. 903 (1956)(per curiam)(municipal buses); New Orleans Park Development Association v. Detiege, 358 U.S. 54 (1958)(per curiam)(public parks and golf courses); State Athletic Commission v. Dorsey, 359 U.S. 533 (1959)(per curiam)(athletic contests); Turner v. City of Memphis, 369 U.S. 350 (1962)(per curiam)(municipal airport restaurants); Johnson v. Virginia, 373 U.S. 61 (1963)(per curiam)(courtroom seating); and Schiro v. Bynum, 375 U.S. 395 (1964)(per curiam)(municipal auditoriums)." Id.

[97]U.S. Const. art. III, sec. 2.

when Congress takes the power back, either through legislation codifying the Court's holding or by proposing an amendment that is subsequently ratified.[98] This is one aspect of the nature of power between the coordinate branches of the national government vis-a-vis the Supreme Court. As previously stated, the elements were in line in 1954-55 when Warren decided Brown I and Brown II.

(ii) Power to the Supreme Court *vis-a-vis* the States.

As outlined above, the correct conclusion is that in order for the Court to assume law-making and enforcement power from the coordinate branches of the national government, there must be some sort of agreement on the part of Congress or the Executive, whichever the case may be. However, the same is not necessarily true in the case of the Court vis-a-vis the states. Aside from the rather nebulous commands of the Tenth Amendment,[99] there really is, as a practical matter, nothing that will stop a Supreme Court justice who is inclined to do so from stripping a substantial amount of power from the states. Like the Congress, a state may legislate against a Supreme Court decision only at its peril. It will only be a matter of short time before the state law is overturned. More importantly, the states cannot amend the Constitution except by application to Congress by two thirds of the state legislatures.[100] Needless to say, the issues are few that will inspire such national solidarity that at least thirty-two states are moved to

[98]U.S. Const. Art V.

[99]The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[100]U.S. Const. Art V.

petition Congress to propose an amendment.

The Congress, on the other hand, may propose amendments whenever it should deem it necessary to do so.[101] This lower practical barrier to the amendment process must weigh into an analysis of the Court's power *vis-a-vis* the coordinate branches of the national government. If the Court comes down with a decision that is completely against the will of Congress, that decision can more easily be overturned by amendment in that an amendment can more easily be proposed by that body. This goes to the ultimate fact that any power taken from Congress by the Court can be retrieved. The states practically have no such power on their own.

More importantly, however, as was the ultimate case with desegregation, Congress may codify a Supreme Court holding and reclaim both its power to make and enforce the laws. The Congress did just this with the Civil Rights Act of 1964.[102] Again, this is a power the states do not have, for two basic reasons. First, once the Supreme Court has taken a case and decided upon it, the issue, even though it began in state law, is now a "federal issue." The state may codify the Court's holding, but the holding retains its federal characteristics nonetheless and redress for any wrong by the state can still be received in federal court. Second, the state is powerless to transform this issue back into one of state law absent either another Supreme Court decision stating as much (expressly turning the issue back over to the states),[103] or an Act of Congress giving the states and federal government concurrent enforcement powers. Note that a state cannot take what is federal law and declare that it has concurrent enforcement power with

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[101]See id.

[102]28 U.S.C. 1982, P.L. 88-352, 78 Stat. 241 (July 2, 1964).

[103]Apparently, this is what is about to happen in the case of abortion.

the federal government.

The Constitution commands that it and the laws passed pursuant to it are to be the "supreme law of the land."[104] In addition to this clear textual command, the actual structure of our representative government favors centralization. And if the federal government is inclined to centralize power away from the states and toward itself, there is little the states can do to stop it. The same thing applies to the Supreme Court as a branch of the national government. If enough justices on the Supreme Court are inclined to centralize power in the national government, the Court has that power. Earl Warren was so inclined, as were a majority of the members of his Court.

A case exemplifying this proposition is Reynolds v. Sims.[105] In Reynolds, Warren, on 14th Amendment grounds, held that state legislatures must be apportioned on a strict population basis in such a way that every voter's vote must, as closely as practicable, be weighted the same.[106] This was Warren's famous "one man, one vote" rule. Like Brown II before it, Reynolds did not just declare that a certain apportionment system was unconstitutional, but set forth highly particularized specifications as to how the decision would be carried out. Additionally, just as with Brown II, the drafting of apportionment plans would be carried out by state agencies and scrutinized by the lower-level federal judiciary, which was itself charged with carrying out the Reynolds decision.[107]

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[104] U.S. Const. Art VI.

[105] 377 U.S. 533 (1964).

[106] See id. at 568.

[107] See id. at 581.

In contrast to the apparent abdication of power on the part of Congress in Brown II, the states' legislatures involved in Reynolds were vehemently opposed to the decision. Reapportionment by population would mean that many incumbent state legislators would lose their jobs. However, realistically the states were powerless to do what Congress could in a case where a substantial majority opposed the holding of the Court: propose a constitutional amendment.[108] Thus, power was not abdicated to the Court by the states, but seized from the states by the Supreme Court.[109]

Another example of Warren's strategy of centralization is Miranda v. Arizona,[110] in which the Court determined that interrogation of an arrestee by law enforcement, without first notifying him of his constitutional rights to remain silent and to counsel, violates the arrestee's Fifth Amendment privilege against self-incrimination.[111] In Miranda, Warren again handed down to the states a comprehensive and detailed mandate as to how arrestees would be notified of their constitutional rights prior to interrogation.[112] Again, the federal courts would enforce the

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[108]Note that 33 of 50 states had to be redistricted under Reynolds. If all of these states had wished to apply to Congress to propose an amendment, the count would still have been one state shy of the two thirds, or 34 states, required for proposal of an amendment.

[109]This power, of course, was the power of the states to determine the apportionment of therir own legislatures. Thus, the power was still limited by subject matter. However, as to a temporal limitation, as a practical matter, the seizing of power could only be limited temporally by the Court itself, by coming down with a decision that the matter at issue would be returned to the states.

[110]384 U.S. 436 (1966).

[111]See id. at 467.

[112]This rule was already followed by the federal law enforcement agencies.

decision; not explicitly such as in scrutinizing a plan for reapportionment, but implicitly, by overturning convictions against defendants who had had their "Miranda rights" violated.[113]

Although in terms of taking states' power, Miranda was not as dramatic a case as was Reynolds, the principle effect was the same. Warren was centralizing power in the federal government, via the Supreme Court, away from the states, and the states could do nothing about it.[114]

(iii) Why the power was taken and how it was used.

This manipulation of the government power structure, which resulted in a shifting of power away from the coordinate branches of the federal government toward the Court and centraling power away from the states to the national government via the Supreme Court, could be called the hallmark of a liberal activist justice.[115] This was the nature of both Warren and the Court over which he presided. Thus, Warren's answer to "who interprets the Constitution" is necessarily the Supreme Court. Warren's answer to "why does the Supreme Court need the additional power that he pulled toward it" will be exposed in the next major section of this paper; "How Did Warren Interpret the Constitution?" However, the short answer to this query can be given as such: Warren carried forward a liberal agenda which stressed the protection of

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[113]See id. at 490.

[114]Note that none of the cases examined here, Brown, Reynolds, nor Miranda, are exclusively examples of the Court taking power from either Congress or the states. All of these cases have elements of both situations and can apply either way.

[115]A "conservative activist Court," on the other hand, will generally abdicate power to Congress (or refuse to use the power it has against Congress) and, through decisions, give more power to the states. This pattern generally carries forth the agenda of a conservative activist Court.

fundamental rights of individuals and discrete, often unpopular political minorities. In order to do so, Warren's Supreme Court would need this extra power in order to prevail against generally hostile majoritarian political bodies; Congress and the state legislatures.

V. HOW CHIEF JUSTICE EARL WARREN INTERPRETED THE CONSTITUTION

"He was the fountain of all justice, and in him, acting with the advice and consent of his witan, court or council, resided the final power to do what justice and right required."

W. Walsh, WALSH ON EQUITY 2 (speaking about the king's prerogative to do equity among his subjects).

To those with even a cursory understanding of American constitutional history and the history of the Supreme Court in this Country, it need hardly be mentioned that Earl Warren was and remains one of the most maligned Supreme Court justices in our history. From laymen, most of the criticism comes from ideological conservatives who strongly disagree(d) with his results.[116] For those with more of a background in legal or constitutional education, the reasoning in Warren's cases usually provided an easy target. For example, Judge Bork recently wrote:

An adequate discussion of the Warren Court's unprincipled activism, manifested in both constitutional and statutory law, would take up an entire book.[117] I can touch on only a few instances, but my dissatisfaction with that Court's performance, far from being idiosyncratic, was widely shared at the time. Professor Milton Handler, of the Columbia law school, summed it up: "Eminent scholars from many fields have commented upon [the Warren Court's] tendency towards over-generalization, the disrespect for precedent, even those of recent vintage, the needless obscurity of opinions, the discouraging lack of candor, the disdain for the fact finding

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[116] See, e.g., D. Kirkpatrick, *U.S. Supreme Court Upsets Tradition, 90th Congress*, 1st Sess. Sen. Doc. No. 3 (Jan. 26, 1967). See supra note 1, and accompanying text.

[117] To Judge Bork's credit, he only cited Warren and the Warren Court some 20 times in the index of his book "The Tempting of America," and out of 355 pages of text, only dedicated one 31- page chapter to Warren-bashing; an admirable display of self-restraint.

of the lower courts, the tortured reading of statutes, and the seeming absence of neutrality and objectivity." That catalogue is just, perhaps even merciful, and it described a Court that had spun out of control.[118]

(A) A Cohesive Interpretive Methodology?

If an adequate discussion of Warren's "unprincipled activism" would take Judge Bork an entire book to cover, an attempt at a cohesive, workable, and consistent theory based upon traditional parameters which described how Warren interpreted the Constitution might take a twelve-volume treatise, and yet would still fail. After it all, there would still remain nagging inconsistencies. The simple explanation is that Warren did not have a cohesive, workable, and consistent theory or approach to his interpretation of the Constitution in the sense that other justices such as Black or Harlan did. Warren's outcomes were unpredictable and often his decisions were supported by little or no precedent.[119]

However, if we admit from the beginning that Warren did not employ a traditional method for constitutional interpretation, the job of describing how Earl Warren interpreted the Constitution actually becomes easier. If we admit from the beginning that any attempt to explain in traditional terms Warren's interpretive methodology is doomed to fail, this frees us up to explore unconventional avenues, over which an explanation may be found. This will provide little solace to those who have been trying unsuccessfully for over thirty years to derive a cohesive theory of Warren's Constitutional interpretation. Nor can this outright "admission of

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[118]ROBERT BORK, THE TEMPTING OF AMERICA 73 (1990) [hereinafter BORK].

[119]See, e.g., Brown I.

defeat" be construed as a final victory for the conservative activists who support the direction of today's Court. That camp must be reminded that its approach is but the mere reciprocal of Warren's "liberal activist" approach.

In explaining how Warren interpreted the Constitution, my proposition and general premise will be this: When Earl Warren sat as Chief Justice on the Supreme Court, the Court acted as a court of equity, with Warren as its Chancellor. Remember, of course, that equity is almost always the exact opposite of certainty and predictability.

In the course of the following analysis, I will fit Warren into the traditional classifications used to define the contours of a Supreme Court justice's interpretive style. As will be shown, certain of these "traditional" classifications are quite amenable to such a justice. However, I apply these classifications in light of my basic premise that Warren sat as a justice in equity throughout his tenure. Without this basic premise, I would fail to either properly classify Warren or to explain his inconsistent results. First, some general background on the Chancellor's Court must be discussed.

(1) Equity in the Chancellor's Court.

Equity, an Anglo system of remedial law which began sometime prior to the thirteenth century, was originally grounded in the "king's preogative of grace" to do justice among his subjects in cases where the remedy at law had failed.[120] By the first half of the fourteenth century, the king had begun to administer his "prerogative of grace" through his Council.[121] At that time, the government of England consisted essentially of the king, the Parliament, which met

[120]See WILLIAM F. WALSH, WALSH ON EQUITY 1-2 (1930). [hereinafter WALSH].

[121]See id. at 12-13.

four times a year, and the king's Council.[122] When Pariament was not in session, the king and his Council were the government of England.[123] The court system of England during that time was bifurcated; one one side was the King's Court, which consisted of two divisions, the King's Bench and the Court of Common Pleas, both "law courts," and on the other side was the Court of Chancery, the king's court of equity, which was headed by the Chancellor.[124]

(2) The Role of the Chancellor.

Professor Walsh describes the role of the Chancellor as such:

> The Chancellor was the chief law member of the Council. As Secretary of State and Prime Minister to the king he was the most powerful and important executive officer of the state, next to the king. ... [The Chancellor must have also had great power in bringing cases before the Council]. These facts, and the further fact that the Chancellor ... was usually a great ecclesiastic, versed in ecclesiastical and moral law, made it very natural that petitions to the Council, or to the king, or to both, should be referred to him as a committee of the Council to hear and determine and to do justice as reason and conscience might dictate.[125]

As stated, whereas the law courts adjudged cases on the basis of the rules of common law, the Chancellor handed down decisions based upon "principles of equity, reason and

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[122] See id. at 13.

[123] Id.

[124] Id.

[125] Id. at 14.

conscience."[126] As will be discussed, these were essentially the same principles applied by Warren. And these amorphous "principles of reason and conscience" drew as much fire at the time of the Chancery as they did when Warren applied them on the Supreme Court.[127] As to who's "reason and conscience" the Chancellor appealed to, Professor Walsh stated that it was "[r]eason and conscience as a general principle, not the individual Chancellor's idea of right and wrong in particular cases."[128] Thus, "the enlightened `reason and conscience' of the time [may require] that [equitable] relief be given even where otherwise, the result at law would be obviously unjust," or where the general interests of the public could only be protected through an equitable remedy.

(3) The Power of the Chancellor.

The Chancellor, with power second only to that of the king, used his position to effect a type of justice that the courts at law were not equipped to administer. As to raw power, many of the cases that the Chancellor disposed of were cases of "outrage;" those involving defendants powerful enough to defy the power of the courts of law.[129] This "raw power" of the Chancellor, however, was also the basis for the relief that the Chancery was able to offer. Whereas the

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[126] Id. at 18.

[127] "Equity is a roguish thing. For law we have a measure ... 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 a Chancellor's foot." Id. at 41 (quoting Seldon, through 1 Holdworth, Hist. Eng. L. 467, 468).

[128] Id. at 42. Cf. Trop v. Dulles, supra note 40, and accompanying text (Warren's statement that what is "cruel and unusual" must be determined according to the present-day "principle of civilized treatment.")

[129] See id. at 18.

courts of law allowed money damages almost exclusively, the Chancellor provided specific relief, in the form of decrees enforced "in personam;" against the defendant's person. The Chancellor could issue injunctions, specific performance, and a host of other decrees that the law courts simply did not have the power to offer.

Further evidence of the Chancellor's power was in that he was not bound by precedent. The Chancellor would, if a practice had been developed, follow equitable rules that he had decided in the past, but was never bound to do so if the facts did not warrant such action.[130] The Chancellor's law did not cherish precedent or unwaveringly respect procedure; that was the rule of the courts of law. The Chancellor's Court looked not at the rules, but at the facts and the result that would follow from its ruling. Hence, one coming into the Chancellor's Court wanting equity would be required to do equity, and one who came before the Chancellor with "dirty hands" would not receive a favorable ruling, even where the day before one more innocent with the same type of case had.

Because the law of equity looked at the results rather than rules and process, the Chancellor had it within his discretion to break from the rules when "reason and conscience" demanded that he do so. This "discretion" to follow reason and conscience was the hallmark attribute of the power of the Chancellor. Although he did not approach his cases in a purely personal, arbitrary, or unprincipled manner, the Chancellor had the power to break from precedent and return to precedent as "reason and conscience" necessitated.[131]

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[130] See id. at 41-43.

[131] "Chancery undoubtedly developed and applied a system of equitable principles which was followed in a quite definite way, demonstrating the falsity of the notion that the Chancellor had or claimed to have the power to determine arbitrarily according

(4) "Chancellor" Earl Warren.

By design, the Chancellor would step in when the remedy at law had failed to deliver the justice demanded by the case. This same concept is loosely correct in regard to Earl Warren, but as Peter Charles Hoffer more accurately states in his book The Law's Conscience, [Warren] did not stop with the traditional rationale for equity, that it was limited to particular cases of injustice. [Warren gave his equity in cases of] systematic injustice, perpetuated by institutions whose purpose was illegal under the most principled reading of the Constitution.[132]

The primary "surface" parallels or, perhaps, "physical characteristics" exposed so far between the Chancellor's Court and the Supreme Court under Earl Warren are (1) a strong power base in each Court,[133] (2) decisions essentially in the form of "decrees,"[134] and (3) judgments based largely on principles of "reason and conscience."[135] Other parallels of this general nature, such as occasional disregard for precedent and the application of equitable maxims such as the "clean hands" rule will be

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to his individual conscience what justice demanded in each particular case." Id. at 281. However, "in every case in equity the [Chancellor] in his discretion [could] refuse equitable relief even though all requirements for such relief [were] established according to admitted equitable rules, if under the facts of the special case reason and conscience require[d] that relief be denied, or be given only on stated terms and conditions." Id. at 282.

[132]PETER CHARLES HOFFER, THE LAW'S CONSCIENCE; EQUITABLE CONSTITUTIONALISM IN AMERICA, 223 n.24. (1990).

[133]In the case of power, as has been discussed, the Chancellor was granted the power outright by the king, whereas Warren centralized power in the Court through manipulation of the government power structures between the coordinate branches and between the federal government and the states.

[134]As discussed supra, decisions like Reynolds, Brown II, and Miranda read like statutes or equitable decrees.

[135]See, e.g., the discussion in the "What" section, supra, esp.

discussed below.

The next level study, however, will be the "ideological" parallels between the Chancellor's Court and the Supreme Court under Earl Warren. At the next level we go beneath the surface of "reason and conscience." It is there that we may see how Earl Warren interpreted the Constitution.

(B) The "Traditional" Interpretive Parameters.

As an aid to outlining how a particular justice interprets the Constitution, a three-tiered model has been developed.[136] This model of interpretive classification first considers the justice's approaches to constitutional interpretation; the most basic ways in which the justice-interpreter perceives the Constitution.[137] Next, the justice's modes of analysis are treated.[138] Modes of analysis are essentially ways in which the justice implements his approach in order to interpret the Constitution.[139] Finally, the justice's techniques for interpretation are examined.[140] The justice's techniques for interpretation are his "interpretive tools,"[141] and incorporate both his approaches to the Constitution and his modes of analysis.[142]

(1) Earl Warren's Approach to the Constitution.

Trop v. Dulles at note 40.

[136]See MURPHY, FLEMING & HARRIS, supra note 46, at 289.

[137]Id.

[138]Id.

[139]Id.

[140]Id.

[141]Id.

[142]Id.

A justice's "approach" to interpretation is an abstraction based on his opinions and other writings by or about the justice himself.[143] There are three subcategories under the general heading "approach to interpretation" which, when treated separately, better pinpoint the justice's place in the interpretative continuum. In keeping with the general theme of this first category, all of its subcategories classify the ways in which the justice perceives the Constitution. These subcategories, represented as questions, are (i) does the Constitution consist only of the text, or does it transcend the text, and if so, how? (ii) is the meaning of the Constitution fixed or does it change over time? and (iii) does the Constitution represent rules to be followed, or does it embody an aspirational vision of a greater society?[144] Every justice will fall somewhere between these ends of the continuum for "approaches."

(i) Textualism v. Transcendence.

As discussed thoroughly in the section supra entitled "What was the Constitution to Earl Warren?," Warren perceived that the Constitution included the text, but embodied much more. To Warren, the Constitution transcended the text to include the principles set forth in the Declaration of Independence,[145] the Pledge of Allegiance,[146] the Preamble to the Constitution,[147] the judicial oath of office,[148] and even the words inscribed above the entrance to the Supreme

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[143] Id.

[144] Id.

[145] See, e.g., MEMOIRS, supra note 2, at 296.

[146] See id.

[147] See id. at 332.

[148] See id.

Court building.[149] As discussed above, to Warren, all of these documents and sayings were evidence of the principles for which the Constitution stood, and as such Warren included them in his concept of the Constitution itself.[150]

(ii) A Fixed v. A Changing Constitution.

To Warren, the Constitution, or more precisely "what is constitutional" could change over time. Though not explicitly stated by Warren, this concept weaves its way through many of his opinions. In Trop v. Dulles,[151] Warren came close to explicitly setting forth his view that "what is constitutional" can change over time when he stated that capital punishment was still constitutional because it is still widely accepted in our society.[152] The strong implication that the Eight Amendment's definition of "cruel and unusual" can change over time is obvious.

In other opinions, Warren more or less implied that the meaning of the Constitution could change. Thus in Miranda v. Arizona,[153] wherein Warren states that "our contemplation cannot be only of what has been but of what may be,"[154] one must, to an extent, look between the lines to see Warren's changing Constitution. Warren, in his own words, dispels any ambiguity in his

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[149]See Cooper, 358 U.S. at 19.

[150]Note that Warren divined "fundamental values" from these sources. These other sources could be called Warren's guide of what is the "reason and conscience of the day," like that used by the Chancellor in his court.

[151]356 U.S. 86 (1958).

[152]See id. at 99. See also supra, note 40, and accompanying text (discussion on Trop and the "expanding Constitution" concept).

[153]384 U.S. 436 (1966).

[154]Id. at 443 (quoting Weems v. United States, 217 U.S. 349, 373 (1910).

next few lines, wherein he puts this proposition into context. Warren goes on to state that unless its meaning changes,

> a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. ... The meaning and vitality of the Constitution have developed against narrow and restrictive construction.[155]

Evidence of Warren's view of a changing Constitution is also readily found in Brown v. Board of Education I,[156] wherein, for the purposes of his analysis and holding, Warren went to great lengths to separate public education in 1954 from public education at the time of the framing of the Constitution and from the time that the 14th Amendment was adopted.[157] Warren stated that:

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[155]Id. at 443-44 (quoting Weems v. United States, 217 U.S. 349, 373 (1910). Note the implications for the power of the Court and the implied willingness of Warren in these words to (1) break from precedent, and (2) protect fundamental rights. In addition, Miranda itself read like a "Chancellor's decree," delineating exactly how and when criminal arrestees would be notified of their constitutional rights, and how the decree would be enforced; (1) through the federal courts, by making this part of the arrest a "federal issue," and (2) by reversing convictions.

[156]347 U.S. 483 (1954).

[157]See id. at 492. Warren analyzed the progress of education as the primary reasoning, which he combined with an explicit use of moral philosophy, to form the basis upon which to substantiate the Court's holding that "separate but equal" educational facilities violate the Equal Protection Clause of the 14th Amendment. This reasoning has been continuously blasted by Warren's critics. Judge Bork, for instance, would have arrived at the same holding as Warren did, but would have based it on the "original understanding" of the framers of the 14th Amendment

> [i]n approaching [the problem of school segregation], we cannot turn the clock back to 1868 when the [14th] 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

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that the Equal Protection Clause demanded that all persons simply be afforded "equality under the law." This would have relieved the Court of the sticky problem of explaining away the fact that the same Congress that framed the 14th Amendment also passed the first bill providing for "separate but equal" educational facilities. Bork states that over time, we had been shown that segregation did not afford "equality under the law," therefore, even if the framers mistakenly thought that it did, it could still be declared unconstitutional without violating the original understanding of the 14th Amendment. The reason is that the framers actually *intended* to ensure equality. If segregation actually *denied* equality, which over time it had, then it was unconstitutional. See BORK, supra note 117, at 82.

Warren did analyze the segregation problem in terms of equality, but did so on more ephermal grounds such as "intangible factors" which tended to have a detremental effect on colored children. See Brown I, 347 U.S. at 494. Warren also, in a possible slight to the Court which decided Plessy v. Ferguson, 163 U.S. 537 (1896), outlined some research that had been done on these "intangible factors." See Brown I at 495 n.11. The Plessy Court had outlined various research findings stating that segregation had no untoward affects on blacks. After outining his "intangible factors" analysis, Warren broadly proclaimed that "in the field of public education, the doctrine of `separate but equal' has no place," and that "separate educational facilities are inherently unequal." Id. at 495. It followed, Warren reasoned, that they violated the Equal Protection Clause.

Warren decided Brown I as if the tangible factors between the segregated schools were exactly equal; a presumption he did not have to make, as the history of segregated schools would have clearly supported the opposite presumption. His presumption was probably based in large part on the fact that at the time of Brown I, some states had been racing to "equalize" their school systems in light of the ever-increasing threat that a holding such as Brown may come down. Therefore, Brown I was a "practical decision;" one that would cover cases where these school systems may succeed in equalizing. This strategy was shrewd, forward-looking, and definitely more appropriate in the drafting of an Act of Congress than of a judicial opinion. It is this type of reasoning that provides the stone upon which critics like Judge Bork continue to sharpen their daggers. Of course the prospect of the Court reaching the "right decision" through the "wrong reasoning" would probably not have fazed Warren in the least.

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.[158]

The implications of Warren's reasoning are clear; whereas "separate but equal" educational facilities may have been considered constitutional in the past, they no longer could be. Thus, even if the Constitution itself does not change, what is unconstitutional can and will.

(iii) The Constitution as Rules v. the Constitution as Vision.

This continuum sets at one pole "those who view the Constitution [primarily] as a set of rules to be obeyed" and at the other end "those who believe the Constitution also radiates aspirations that require interpreters to look beyond its rules toward larger goals, such as human dignity and autonomy."[159] Those who subscribe to the former view essentially find constitutional values only in the text of the document itself.[160] Those who subscribe to the latter view interpret in a style that "requires discovering the Constitution's spirit, its underlying values, and [its] aspirations."[161] Such interpretation also demands "faithful but imaginative adherence to that spirit, [and] to the basic values that spawn its hopes for the good life."[162]

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[158] Brown I, 347 U.S. at 492. Warren, of course, was not even *referring* to "original understanding" or "framer's intent" in these lines, but the history of public education in America. This sort of analysis is what particularly irks interpreters such as Judge Bork. Warren in essence based the Brown decision more on the *history of education* than on the history of the 14th Amendment.

[159] MURPHY, FLEMING & HARRIS, supra note 46, at 290-91.

[160] See id. at 291.

[161] Id.

[162] Id. As an example, an aspirational interpreter would

As a general proposition, Warren, of course, fell into the latter category. This much is purely intuitive and also is strongly intertwined in the answer to the question of what was the Constitution to Earl Warren covered above. The fact that Warren was a "constitutional aspirationalist" could be deemed the end result of his interpretational approach. However, in practice Warren did speak of "rules." Thus in Trop v.Dulles,[163] Warren stated:

> The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.[164]

The rules of which Warren here speaks, however, are not rules in the sense outlined by Murphy, Fleming and Harris. Warren is clearly not speaking of finding fundamental values in the text of the Constitution. What Warren is doing is again finding within the Constitution a source of power for the Court. This, of course, comports with one of the general themes of Warren's tenure outlined above.[165] The "rules of government" to Warren also insured that the

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incorporate the Preamble as evidence of the Constitution's spirit or the values underlying it, whereas an interpreter who sees the Constitution primarily as a set of rules would see the Preamble as "rhetorical flourish." Id.

[163]356 U.S. 86 (1958).

[164]Id. at 103-04. Note also the implications for the question of *who*, according to Earl Warren, would interpret the Constitution for the national government. See supra at Section IV(a).

[165](1) Warren manipulated the power structure of the government vis-a-vis the states and the coordinate branches of the national government, especially Congress, to increase the

Supreme Court could, and actually had a duty to overturn legislation that violated the "principles that limit governmental powers in our Nation."[166]

To Warren, however, these were also rules in the sense that they bound Congress, the Executive, and the states to a "constitutionally minimum standard" of recognition and protection of fundamental values in their respective legislation. This concept of the Constitution as setting forth a minimum floor for recognition of fundamental values is not explicitly stated by Warren but is strongly implied through language such as that set out above. This view is also implicit in the tone, and certainly in the result, of nearly all of Warren's "landmark" opinions. To Warren, if a piece of legislation violated fundamental values, then in most cases the governmental body that passed it exceeded its limits imposed by the Constitution and the Court was duty-bound to nullify it.

Two questions are begged in the statement preceding; first, what are the fundamental values that are encompassed by this "rule" of the Constitution, and second, in what cases and to what extent can they be limited before the government exceeds its limits? The second of these questions will be answered in the section below in which Warren's mode of "purposive analysis" is treated.[167] However, it is in the process of answering the first of these two questions that Warren is clearly shown to fall into the category reserved for "constitutional aspirationalists" and not those who see the Constitution primarily as a set of rules. An interpreter in the latter

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power of the Court. The two other themes are (2) Warren set forth opinions that read and were implemented like the Chancellor's equitable decrees, and (3) Warren based his judgments on the "reason and conscience" of the day.

[166]Trop, 356 U.S. at 103.

[167]See infra Section V(B)(2)(a).

category looks no further than the text of the Constitution in order to find fundamental values. As we have seen, Warren in no way limited himself to the text.

Again, just what Warren looked to in order to find sources or evidence of the fundamental values that the Constitution protects are outlined in the section above entitled "What was the Constitution to Earl Warren." And as discussed above, Warren did not stop at the text, but included many other sources such as the Preamble, the Declaration of Independence, the Pledge of Allegiance, the judicial oath of office, and even the words inscribed above the Supreme Court building; "Equal Justice for All."[168] In addition, we should not be led to believe that Warren would stop there. He would probably include anything that was time-worn, traditional in this Country, and embodied our values as American citizens or were evidence of the promises of our founding fathers of what "fundamental values" were intended to be protected. This practice, of course, is purely aspirational and plants Warren squarely into the "Constitution as Vision" camp of interpreters.

(2) Earl Warren's Mode(s) of Analysis.

mode of analysis is the method a particular justice uses to discern the meaning of the Constitution.[169] Obviously, the particular approach(es) the justice takes; his basic perceptions of the Constitution, will influence the mode(s) he chooses for which to discern constitutional meaning.[170] Of the number of modes of analysis that are available to interpreters, Warren

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[168] See supra Section III.

[169] See MURPHY, FLEMING & HARRIS, supra note 46, at 291.

[170] See id.

applied only one, the "purposive mode," consistently.[171] This mode was applied by Warren in all of his "landmark opinions," especially those in which he set out to discover the meaning of the Fourteenth Amendment's Equal Protection Clause. Warren used other modes of analysis, but did so basically to supplement the meaning he found through application of the purposive mode.[172]

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[171]Murphy, Fleming and Harris have outlined the following modes: (1) verbal analysis; the analysis of the text of the Constitution in order to discern its meaning, (2) historical analysis; use of history to give meaning to the text, i.e. "framer's intent" or traditions in our Country, (3) structural analysis; looking at particular clauses in the context of the entire document, or in the context of the role in which the Constitution plays in our political environment, (4) doctrinal analysis; looks towards the Constitution's "rules," i.e. what previous interpreters have said; closely akin to "stare decisis," (5) prudential analysis; looks toward the broader implications on public policy effected by the interpretation, and (5) purposive analysis; looks toward the Constitution's "general aims," and is closely akin to the "aspirational approach" to the document. See MURPHY, FLEMING & HARRIS, supra note 46, at 292-301.

If Warren used a verbal analysis at all, it is not present in any of what are generally considered his "landmark opinions," and hence will not be treated here. Additionally, there is only one major occasion where Warren made a decision out of "prudence." This is in Brown II, wherein, at the urging of Felix Frankfurter, he placed the line "with all deliberate speed."

By far, Warren's most widely used mode, and the only one that he used *consistently*, was the purposive mode of analysis. Warren also made extensive use of structuralism in his analysis of the power relationships between the Court, the coordinate branches of the federal government and the states. Warren's structuralism is discussed at length above at Section III. Warren used the historical and doctrinal modes as well. However, Warren would quickly abandon these modes if they did not achieve the result he was looking for. Examples of Warren's use and abandonment of these modes will be covered below.

[172]See e,g,. Powell v. McCormack, 395 U.S. 486 (1969) (Warren made an extensive historical analysis, dating back to 17th century English history, of the Speech and Debate Clause, U.S. Const. Art. I, sec. 6, and the reasons for its placement in the Constitution, See id. at 501-06, then made an extensive historical analysis of the distinction between expulsion versus exclusion of a congressman, See id. at 506-12, in order to supplement his decision that to *exclude* a representative on the basis of a majority vote in the House of Representatives was

At other times, Warren would use a different mode, find an apparent meaning that did not comport with the meaning he had found (or would find) through his preferred mode of analysis, and explicitly abandon the conflicting meaning altogether.[173] Although initial and heaviest emphasis will be placed on Warren's use of the purposive mode of analysis, other modes he used will be covered, mainly to show how they interacted with Warren's use of the purposive mode or to point up his inconsistency in their use.

(a) Warren's Use of the Purposive Mode of Analysis.

Closely related to the "aspirational" approach to the Constitution, the purposive analysis, sometimes referred to as "teleological analysis," attempts to discern what the general aims of the Constitution are and then uses the answers to organize interpretation.[174] Within the purposive mode are three subcategories which characterize three possible roles (purposes) for the Court. The first subcategory, called the "doctrine of clear mistake," embodies a theory of judicial

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unconstitutional. However, Warren reached the same conclusion through the purposive analysis of protecting the political process and the fundamental right of the representative's constituents to have the representative of their choice. See id. at 535.

[173]See, e.g., Brown v. Board of Education I, 347 U.S. 483 (1954)(Warren considered the "circumstances surrounding the adoption of the Fourteenth Amendment ... then-existing practices of racial segregation, and the views of proponents and opponents of the Amendment" before determining that "although these sources cast some light, ... [a]t best they are inconclusive." Id. at 489. Warren then went on to employ the purposive mode of analysis in order to give effect to fundamental values in accordance with his aspirational view of the Constitution; hence he flew in the face of the meaning discerned through this historical analysis and desegregated the public schools, something that had been in this Country's history and traditions for a century.

[174]MURPHY, FLEMING & HARRIS, supra note 46, at 297.

restraint. This doctrine essentially holds that the Court should strongly presume legislation constitutional, and invalidate acts of legislative bodies only when the lawmakers have made a "very clear" mistake.[175] Obviously, Warren never subscribed to the use of the doctrine of clear mistake. To do so would have been inconsistent with both his personal philosophy and his view as to the role of the Court.[176] More importantly, employing this mode would have been mutually exclusive with Warren's goals for himself and for the Court.

However, Warren subscribed whole-heartedly to the remaining two subcategories within the purposive mode of analysis; the notion that the role of the Court includes (1) protecting and keeping open the political process (reinforcing representative democracy), and (2) finding and giving effect to fundamental values. But, as will be seen, Warren blended the first role into the second. Thus, in Reynolds v. Sims,[177] political participation of individuals was essentially protected by Warren as any other fundamental value would be.[178]

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[175]See id. at 297-98.

[176]Actually, in a general sense, for a liberal activist justice to subscribe to the doctrine of clear mistake would clearly be oxymoronic.

[177]377 U.S. 533 (1964).

[178]Murphy, Fleming and Harris recognize that fundamental values may include protecting participation in the political process. MURPHY, FLEMING & HARRIS supra note 46, at 299.

John Hart Ely, on the other hand, suggests that the great bulk of Warren's jurisprudence falls into the category of protecting political representation; that by protecting, say, minorities' ability to participate in government, Warren gave effect to their fundamental values almost as a by-product, or facilitated a means for them to obtain and protect for themselves what is fundamental to them. Hence, Ely states that "the pursuit of these `participational' goals of broadened access to the processes and bounty [defined as receipt of benefits and exemption from harms] of representative government, as opposed to the more traditional and academically popular insistence upon the

(i) Reinforcing Representative Democracy.

Murphy, Fleming and Harris describe the mode of reinforcing representative democracy as a "mode which stresses the democratic element in the political system and prescribes a judicial role to support open political processes."[179] Essentially, the justice who employs this mode sees the Court as having the responsibility of policing the political process to ensure that all citizens can freely participate.[180] Of course, the usual candidates for impaired participation in the political process are minorities, who may be shut out of the process altogether. Thus, John Hart Ely posits:

Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection

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provision of a series of particular substantive goods or values deemed fundamental, was what marked the work of the Warren Court." ELY, supra note 39, at 74-75. I do not completely agree. See infra, Section V(B)(2)(a)(iii).

[179]MURPHY, FLEMING & HARRIS, supra note 46, at 298.

[180]See id. The genesis of this mode was the famous footnote 4 from United States v. Carolene Products Co., 304 U.S. 144 (1938), which suggested that the Court may have to employ a higher level of scrutiny (than mere rational review coupled with a presumption that the legislation was constitutional) in examining legislation that restricts political processes generally, or prejudices the participation of discrete and insular minorities in the political process. See id. Note how the second instance listed here as a possible case for stricter scrutiny actually suggests that participation in the political process may be a "fundamental value" which can be denied to minorities.

afforded other groups by a representative system.[181]

Hence, it is when the system "malfunctions," when politically weak segments of the public are shut out, that the justice who envisions the Court's role as that of reinforcing representative democracy will step in and correct the malfunction.[182] This was the role that Warren assumed in Reynolds v. Sims,[183] his landmark malapportionment decision.

In Reynolds, Warren implemented, on equal protection grounds, the "one man, one vote" rule set forth two years earlier in Baker v. Carr[184] to hold that all state legislatures, both the houses and the respective senates, must be apportioned on a population basis so that each state citizen's vote would be substantially equal to any other's, whether he lives in an urban or rural area.[185] Thus, Warren penned the now famous words: "Legislators represent people, not trees or acres ... [and are elected by] voters, not farms or cities or economic interests."[186] In the lines that followed, Warren set forth his view that

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[181]ELY, supra note _____ at 103.

[182]See id. at 103-04.

[183]377 U.S. 533 (1964).

[184]369 U.S. 186 (1962).

[185]See Reynolds, 377 U.S. at 568. In one state represented in the litigation, Alabama, the apportionment of the legislature had been based on a census that was sixty years old, thus, no account had been made for shifts in the population for that time; a time in which many people had moved from the rural communities to the cities. Therefore, the result was that individuals who lived in urban communities suffered a net dilution in their votes for state legislators, because they still were apportioned a fewer number of legislators based on the 60 year-old census, and the persons who lived in the more rural communities realized a net strengthing of their votes for the same reason. The senatorial districts had become likewise malapportioned over time. Essentially, the minority of the citizens chose the majority of the state legislators.

[186]Id. at 562.

> [a]s long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. ... Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. ... Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. ... To say that a vote is worth more in one district than in another would run counter to our fundamental ideas of democratic government. ... Free and honest elections are the very foundation of our republican form of government. Discrimination against any group or class of citizens in the exercise of these constitutionally protected rights of citizenship deprives the electoral process of integrity. ... The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.[187]

This long quote from Warren, coupled with the remainder of his opinion in Reynolds, which itself was essentially an equitable decree (to be enforced by the federal courts) that state legislatures would henceforth be apportioned on a population basis, represents a paradigm for the application of the purposive mode of analysis by a justice who sees the role of the Court as reinforcing representative democracy. There is little doubt that in the area of voter's rights, Warren not only fit this paradigm, but had an active part in creating what the paradigm is today.

Warren's view that each person's ability to take part in the political process is constitutionally protected, and his belief that it was the Court's role to extend the protection, presented themselves in

[187] Id. at 562-64 [citations omitted].

other opinions by the Chief Justice. For instance, in Trop v. Dulles,[188] Warren expressed concern that by stripping away a man's citizenship, the government is also taking away "his status in the national and international political community."[189] Likewise, shades of Warren's mindset are evident in Walker v. City of Birmingham,[190] wherein Warren recognized that public streets should be available to the people "for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[191] Thus, Warren recognized that in order to keep the political processes completely open, the availability of the avenues of political communication must also be protected by the Court. Finally,

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[188]356 U.S. 86 (1958).

[189]Id. at 101.

[190]388 U.S. 307 (1967). In Walker, certain black individuals had planned to stage a civil rights march. The city official in charge of issuing permits for such marches had flatly refused to issue one for the march, and declared that he would never issue one to Walker for that purpose. Walker planned to march notwithstanding the denial. Upon hearing of these plans, the city officials obtained from a state court an ex parte injunction restraining the march. In the face of the injunction, Walker marched anyway. He was subsequently arrested. Walker pled, among other things, that the city ordinance was overbroad. The Supreme Court found against Walker, not because his constitutional claims were invalid, but because he had flaunted the authority of the state court. Earl Warren vigorously dissented.

In his dissenting opinion, Warren relates: "[The city's] complaint [requesting an ex parte injunction] recited that petitioners were engaging in a series of demonstrations as `part of a massive effort ... to forcibly integrate all business establishments, churches, and other institutions' in the city, with the result that the police department was strained in its resources and the safety, peace, and tranquility were threatened. It was alleged as particularly menacing that petitioners were planning to conduct `kneel-in' demonstrations at churches where their presence was not wanted. *The city's police dogs were said to be in danger of their lives*." Id. at 326 (Warren, C.J. dissenting). One can just see Warren cringe as he wrote these lines.

[191]Id. at 328-29 (Warren, C.J. dissenting).

in Powell v. McCormack,[192] when Warren wrote for a majority declaring unconstitutional the exclusion of a congressman on a majority vote of the House of Representatives, he based his decision in part on his belief that "[a] fundamental principle of our representative democracy is ... that the people should choose whom they please to govern them."[193]

> Warren, paraphrasing Abraham Lincoln, related in his memoirs that
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> ours is a government of all the people, by all the people, and for all the people. It is a representative form of government through which the rights and responsibilities of every one of us are defined and enforced. If these rights and responsibilities are to be fairly realized, it must be done by representatives who are responsible to all the people...[194]

And of course to Warren, part of the role of the Supreme Court was to ensure that the representatives would be responsible to all the people, that all people would have the opportunity to have the representation of their choice, that no person would be arbitrarily denied his access to the political process, and that all would benefit from our constitutional form of representative government.

(ii) Discovering and Giving Effect to Fundamental Values.

Although a distinction can be drawn between a "fundamental value" and a "fundamental right,"[195] in Warren's case the two terms were, more often than not, interchangeable. And as

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[192]395 U.S. 486 (1969).

[193]Id. at 547 (citations omitted).

[194]MEMOIRS, supra note 2, at 308.

[195]Murphy, Fleming and Harris explain the distinction as such: "[T]he first term [fundamental right] is narrower than the second, since rights might be only specific reflections of more abstract values and not all values need be associated with rights." MURPHY, FLEMING & HARRIS, supra note 46, at 929. The

active as Warren was in ensuring that the political processes remained open to all, he was more so in the area of discovering and protecting fundamental values. For a justice such as Warren, who employs an analytical mode which gives effect to fundamental values, the role of the Court is to first find what substantive, fundamental values we as Americans possess,[196] and then defend these values against government interference.[197] In the bulk of Warren's Fourteenth Amendment jurisprudence, this was the mode that he used.

Even when he employed an analysis based upon reinforcing representative democracy Warren referred to an individual's right to participate in the political process as "fundamental." Thus, in Reynolds v. Sims,[198] the opinion in which Warren came closest to using the mode (of reinforcing representative democracy) in the purest sense, he stated nonetheless that it was a case

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term "fundamental value," according to Murphy, et al., is more of an abstraction than is the term "fundamental right." See id.

[196]Warren's method for finding what fundamental values are concomitant with American citizenship is essentially covered in Section III, "What Was the Constitution to Earl Warren," above. A justice such as Warren who employs the mode of giving effect to fundamental values will necessarily define what the Constitution is in broad terms, such as Warren did, to include such things as the Preamble and the Declaration of Independence. In defining the Constitution to include these other materials, the interpreter is provided with evidence of what fundamental values we as Americans possess. Also, such an interpreter will rely heavily on the "aspirational" approach to the Constitution, as Warren did, thus he will look beyond the text of the document itself and toward the broad underlying principles that he believes the document stands for. The next step of course, is to determine who will protect these values against arbitrary deprivation by the government (or segments of the government). A justice, such as Warren, who analyzes the Constitution in terms of protecting fundamental values will assume that role for the Court. See MURPHY, FLEMING & HARRIS, supra note 46, at 929.

[197]See MURPHY, FLEMING & HARRIS, supra note 46, at 299, 929.

[198]377 U.S. 533 (1964).

that "`touches a sensitive and important area of human rights,'and `involves one of the basic civil rights of man...'"[199] Hence, a strong argument can be made that in his voting rights cases, Warren was protecting individuals' access to the political process, yes, but to Warren, having access to the political process was a fundamental right to be protected by the Court.[200]

On the other hand, in terms of analyzing the Constitution using the mode of protecting fundamental values in a "pure" sense, in no case is Warren's position more clearly stated than in Loving v. Virginia,[201] where the Court invalidated a state statute prohibiting interracial marriages, and overturned the convictions of a couple who had been prosecuted under it.[202] In Loving, Warren examined both the fundamental rights of marriage and to not be discriminated

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[199] Id. at 561 (quoting Skinner v. Oklahoma, 316 U.S. 535 (1942). Skinner was a case which involved the court-ordered castration of convicted petty criminals. The mere fact that Warren quoted this particular case, which dealt with the right to procreate, in a case which dealt with malapportionment itself says a lot about how Warren viewed the right to vote and have one's vote counted.

[200] Again, this would have the effect of bringing Warren's decisions on malapportionment and voters' rights in line with the great bulk of his other opinions as examples of Warren giving effect to fundamental values.

[201] 388 U.S. 1 (1967).

[202] See id. at 12. The Lovings had been sentenced to one year in prison for their interracial marriage. The state court, however, suspended the sentence for twenty-five years on the condition that they move out of the state for that period of time. The Lovings moved to the District of Columbia and sued.
In his opinion, Warren relates a portion of the trial judge's opinion that reads: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." Id. at 3. Again, one can see Warren literally seething as he wrote the opinion.

against on account of one's race.[203] After using a fairly run-of-the-mill doctrinal means-end analysis to determine that the miscegenation statute denied the Lovings equal protection of the laws, Warren went still further, declaring:

> 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.[204] Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. 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. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State.[205]

There can be little doubt that in this passage Warren was "discovering" and "protecting" fundamental values.[206] And to Warren, the role of the Court in cases such as Loving was to protect the

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[203] See id.

[204] Note the words from the Declaration of Independence.

[205] Id. at 12. (citations omitted)(emphasis added). Note that Warren was not afraid to use a little substantive due process. The basic fact is that substantive due process, which most people today consider to be "a bad thing," is simply the Court discovering, giving effect to, and protecting fundamental (substantive) values/rights. In the line of cases normally associated under the general heading of Lochner v. New York, 198 U.S. 45 (1905), the Court was protecting the substantive fundamental right to "freedom of contract." In Loving, Warren protected the discovered fundamental right to enter into an interracial marriage.

[206] To say that with this language he was actually using the analytical mode of reinforcing representative democracy is really to much of a stretch for simple logic to bear.

fundamental rights of the individual from a majoritarian government that would seek to curtail them, for whatever reason.

Warren, in other "landmark" opinions, discovered and gave effect to other fundamental values/rights besides those associated with race discrimination. In Miranda v. Arizona,[207] for instance, the case in which the Court determined that the Fifth Amendment privilege against self-incriminaton mandated that police communicate to an arrestee his constitutional rights prior to interrogation, Warren stated:

> [T]he constitutional foundation underlying the privilege [against self-incrimination] is the respect a government - state or federal - must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[208]

Warren at times even explicitly called some discoverable substantive rights "inalienable," or implied through his language that they were so. For instance, in Reynolds v. Sims,[209] Warren spoke of a citizen's "inalienable right to full and effective participation in the political processes

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[207]384 U.S. 436 (1966).

[208]Id. at 460.

[209]377 U.S. 533 (1964).

of his State's legislative bodies."[210] Likewise, in Trop v. Dulles,[211] Warren spoke about the nature of one's right to citizenship in words and a tone that strongly implied that the fundamental right to one's citizenship was "inalienable." Thus, Warren opined:

> It is my conviction that citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers. ... As long as a person does not voluntarily renounce or abandon his citizenship, ... I believe his fundamental right of citizenship is secure.[212]

Although Warren was wholly inconsistent in his use of all the other traditional analytical modes, his consistency in the use of the purposive mode, especially the mode of discovering and giving effect to fundamental values, was absolutely unwavering. And as will be seen, this mode, coupled with Warren's aspirational approach to the Constitution, and his expansive concept of "what" the Constitution was will dovetail almost perfectly into Warren's preferred analytical technique for interpreting the Constitution, a technique of "constitutional equity" based almost entirely upon principles of moral or political philosophy.

The problem for most people, of course, with a justice who "discovers" and "gives effect to" substantive fundamental rights is in the first step of the process; the "discovery." First, there is the obvious question; "From where does the justice "discover" these fundamental values?" A

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[210] Id. at 565. It can also be assumed that to Warren, a fundamental value was equal to a fundamental right which was the same as an inalienable right.

[211] 356 U.S. 86 (1958).

[212] Id. at 92-93.

number of theories have been developed that attempt to answer this question.[213] However, it is the "ominous" and the almost necessary answer to this question that is the most troubling aspect for most. John Hart Ely characterizes this much-feared answer as such:

> The view that the judge, in enforcing the Constitution, whould use his or her own values to measure the judgment of the political branches is a methodology that is seldom endorsed in so many words. As we proceed through the various methodologies that are [such as natural law, etc.], however, I think we shall sense in many cases that although the judge ... in question may be talking in terms of some "objective," nonpersonal method of identification, what he is really likely to be "discovering," whether or not he is fully aware of it, are his own values.[214]

To many people, perhaps even most, the concept of a Supreme Court justice deciding cases on the basis of personal values is the ultimate constitutional "bad thing." According to John Hart Ely, and really according to common sense also, any time a justice "discovers" fundamental values, what he finds will necessarily, to a greater or lesser extent, reflects his own value system. The problem, of course, is "that there is absolutely no assurance that the Supreme Court's life-tenured members ... will be persons who share your values."[215]

As to what was the objective "Rosetta Stone" that Warren used to divine fundamental values, the answer to this question is really the same as the answer to the question of "what was

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[213]John Hart Ely, for instance has come up with six different "Rosetta Stones" from which a justice may discover fundamental values: natural law, neutral principles, reason, tradition, concensus, and "predicting progress." ELY, supra note 39, at 44-70.

[214]Id. at 44.

the Constitution to Earl Warren?" However, there is good evidence that Warren used his own personal values as well. The best evidence of this, of course, is that he admitted doing so.

In Warren's memoirs, he states that "[i]t is literally impossible for a person to eliminate from his reasoning process his experiences in life up to that point. I am certain that my lifetime experiences, even some of the earliest ones, have had an effect on the decisions I have rendered - not deliberately, but because human nature compels it."[216] Common sense fairly dictates that when Warren tells us that he decided cases in light of his personal experiences, what he meant is that he decided cases in light of the values and beliefs he had acquired through his personal experiences. The case of the Japanese internment during World War II provides a probable example of how Warren's personal experiences affected the decisions he would later make on the Court.

During the War, Warren was Attorney General of California and quite active in organizing that State's civil defense program.[217] At that time, the anti-Japanese sentiment had grown strong on the West Coast, partially due to Pearl Harbor, partially due to the sheer number of Japanese-Americans in that area, and partially due to the great amount of anti-Japanese propaganda that was being circulated.[218] Rumors had been spread that certain groups of Japanese-Americans, still loyal to the Emperor, were planning a sabotage campaign against

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[215] Id.

[216] MEMOIRS, supra note 2, at 7-8.

[217] See id. at 144-49.

[218] And, as Warren recalls in his memoirs, partially because of resentment against the Japanese-Americans for generally being successful business people. See id.

military targets within the United States.[219] In response to the rumors and the general sentiment, a number of forces joined together, one of which was then-Attorney General Earl Warren, and pursued legislation with which to intern the Japanese-Americans into concentration camps.[220] As a result of this action, many families were separated, and a great number of Japanese-Americans lost their property and businesses.[221]

Warren, as he states in his memoirs, afterward regretted his involvement in the actions which culminated in the internment of the Japanese-Americans which ultimately caused them all such great hardship.[222] Once on the Court, as we all know, Warren fervently championed "Equal Justice Under Law." Additionally, Warren's personal experiences as a District Attorney, a vantage point from which he could see the potential abuses that law enforcement could inflict against arrestees, must have influenced his reasoning to an extent in Miranda v. Arizona,[223] as well as his other cases dealing with criminal procedure. His lifetime of experience as an elected official most probably instilled in him certain beliefs as to the value of representative democracy in this Country, beliefs which he took to the Court and, as he admits, "had an effect on the decisions [he] rendered."[224]

Additionally, it is in this expansive use of the analytical mode of discovering, giving effect to, and protecting fundamental values or rights that Earl Warren and the English

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[219]See id.

[220]See id.

[221]See id.

[222]See id.

[223]384 U.S. 436 (1966).

[224]MEMOIRS, supra note 2, at 7.

Chancellor find some of their strongest parallels. The Chancellor analyzed the cases before him according to the "enlightened reason and conscience" of the day.[225] Although this analysis by the Chancellor was not arbitrary, and was based upon broad principles of public policy, still it would be naive to claim that the personal values of the Chancellor never weighed into his decisions. Nonetheless, his decisions were principled. Likewise, Warren, although he admitted that his personal values affected his reasoning, like the Chancellor, was bound by principles; those fundamental principles that are granted to every American citizen as evidenced by the Constitution and all the other sources Warren used which made up his fundamental values "Rosetta Stone." Therefore, when Robert Bork speaks of Earl Warren's "unprincipled activism,"[226] he is only half correct; Warren was most definitely "activist." However, he certainly was not "unprincipled."

Ultimately, the real problem that people like Judge Bork, and admittedly many others, have with Warren's jurisprudence is the same problem that the eighteenth century Englishmen had with the Chancellor. There at times was no consistency in his decisions; often in their reasoning and sometimes even their results, and trying to get a firm, consistent grasp on the "principles" that Warren followed can seem at times like trying to catch whispers or thoughts.

(iii) Final Argument: "Warren the Constitutionalist."

Murphy, Fleming and Harris outline two competing political theories that interpreters can adopt in conceptualizing and analyzing the Constitution; "representative democracy" and

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[225]See WALSH, supra note 119, at 42.

[226]BORK, supra note 117, at 73.

"constitutionalism."[227] These two theories describe two different ways in which an individual's rights will be protected.[228]

According to representative democrats, if five conditions exist, and these five conditions are operative, then the "free market place of political ideas" will be open, people will participate in government, and their rights will be protected because through their representatives they make the laws.[229] The assumption is that the people will not tyrannize themselves with unjust laws.[230] The five necessary conditions are as follows:

> (1) Popular election for limited terms ... that allow the majority's representatives to govern in fact and not merely in name; (2) Universal adult suffrage with only minimum restrictions to protect against fraud; (3) [Equally apportioned electoral districts]; (4) [Free access to the ballot] ... with only minimal restrictions to protect against frivolous candidates; and (5) [Wide freedom of political communication, both written and oral].[231]

In the generation of public policy and in the protection of human rights, representative democratic theory relies mainly on the electoral political process.[232] It would follow that the Court's role, according to representative democrats, would be of simply guarding the process itself; just making sure that these five elements exist and are operational. Beyond that, the people themselves, once they have the ability to choose, will protect their own rights through

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[227]See MURPHY, FLEMING & HARRIS, supra note 46, at 23.

[228]See id. at 29.

[229]Id. at 24.

[230]See id. at 25.

[231]Id. at 23.

[232]Id. at 26.

their activity in the political process.

John Hart Ely, in his book Democracy and Distrust, attempts to place the great bulk of Earl Warren's jurisprudence in this category and seeks to minimize Warren's giving effect to substantive rights or values.[233] Focusing upon decisions such as Reynolds v. Sims,[234] Powell v. McCormack,[235] Kramer v. Union Free School District,[236] and Walker v. City of Birmingham,[237] would tend to strongly support his proposition. However, decisions such as Loving v. Virginia,[238] Miranda v. Arizona,[239] Trop v. Dulles,[240] and Brown v. Board of Education[241] can

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[233]See ELY, supra note 39, at 73. Ely apparently attempts to "legitimize" Warren by characterizing him as almost across the board using the mode of "reinforcing representative democracy." The reason I put "legitimize" in quotes is that I see no reason to attempt to legitimize the man or his jurisprudence. First of all, those who are the target audience of such a "legitimization" would never buy it anyway and will still condemn Warren. Secondly, Warren openly admits that he uses his own personal values, which he characterizes as "deciding cases in light of his personal experience." Hence, to attempt to explain Warren any other way is to an extent inaccurate and possibly even intellectually dishonest. In short, why not call a spade a spade?

[234]377 U.S. 533 (1964)(malapportionment).

[235]395 U.S. 486 (1969)(protection of peoples' right to have the representative of their choice).

[236]395 U.S. 621 (1969)(right to vote in school district elections restricted to those who own or lease taxable real property in the district and that are parents of children who go the the district's schools unconstitutional).

[237]388 U.S. 307 (1967)(Warren, C.J. dissenting)(protection of peoples' right to free communication on political matters).

[238]388 U.S. 1 (1967)(anti-miscegenation laws unconstitutional).

[239]384 U.S. 436 (1966)(arrestees must be notified of constitutional rights to remain silent and to counsel prior to interrogation).

only be explained in the most oblique way, if at all, as facilitating representative democracy.

Constitutionalist theory, on the other hand, rejects the primacy of the political process as a means of protecting fundamental rights.[242] The constitutionalist will have an inherent distrust of the majoritarian political process as it applies to the protection of the rights of the individual. "For the constitutionalist, a law unanimously enacted by a Congress chosen after long, open public debate and free elections and signed by a President similarly chosen would have no legitimacy if the statute invaded individual autonomy or violated human dignity."[243] The constitutionalist believes that "[W]hen government acts within its proper sphere, it must respect certain procedural rights ... even when the people and their representatives wish otherwise."[244] The role of the Court, then, would be to protect the individual's substantive fundamental rights from the vagaries of the majoritarian political process. The individuals targeted for the Court's protection will necessarily be ones belonging to a relatively politically weak minority.

In classifying Warren in cases such as Loving, Miranda, Trop, and Brown, it makes for more sense to describe him as a constitutionalist than as a representative democrat. This classification is amply supported by Warren's reasoning in the majority of his "landmark"

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[240]356 U.S. 86 (1958)(expatriation as a punishment for desertion unconstitutional / citizenship is an "inalienable right").

[241]347 U.S. 483 (1954)(segregated public schools constitutionally impermissible).

[242]See id. at 27.

[243]Id.

[244]Id. at 29.

decisions as well as in his non-judicial writing.[245]

Standing at their extremes, these two theories would be mutually exclusive, for the extreme constitutionalist, through his persistent intervention, would not allow the political process to operate. Likewise, the extreme representative democrat would defer so much to elected majoritarian government that the rights of minorities would necessarily suffer. However, in non-extreme forms, the two theories can fit together.[246] Murphy, Fleming, and Harris state that in order for an interpretive theory to be persuasive, though, it must be shown that the interpreter employed "rigorous and consistent use" of the methods attributed to him.[247] With the analysis standing as it is, it appears as though Warren sometimes "protected representative democracy," and sometimes "gave effect to fundamental values." An apparent inconsistency still exists.

In resolving this inconsistency, I take issue with Ely's conclusion that in the great bulk of his decisions Warren intended primarily to facilitate access the political process. Instead, Warren should rightly be classified as a staunch constitutionalist who was fiercely protective of the substantive fundamental rights of the individual. And because Warren believed that our society "ostensibly [was] grounded on representative government,"[248] access to the political process was simply one of the substantive fundamental rights that he protected. On the other hand, I will

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[245]"[U]nless the Court has the fiber to accord justice to the weakest member of society, regardless of the pressure brought upon it, we never can achieve our goal of `life, liberty and the pursuit of happiness' for everyone." MEMOIRS, supra note 2, at 334-35.

[246]See id. at 28-29.

[247]Id. at 313.

[248]Reynolds, 337 U.S. at 565.

agree with Ely to the extent that Warren's holdings on the fundamental right to access to the political system have been some of his most resilient over time. While many of Warren's holdings are now teetering, the "one man, one vote" rule does not seem to be one that the Rehnquist Court is inclined to limit. Warren may have seen this rule's natural strength, for he referred to it as the most important that his Court handed down.

(b) Other Modes Used by Warren.

Aside from the purposive mode, the only modes that Warren used with any regularity were the historical, doctrinal, and structural[249] modes of analysis. However, as stated before, he by and large did not use them consistently.[250] Therefore, in the analysis that follows, examples will be given showing Warren using these other modes, the purposes for which he used them, and the differing results he achieved.

(i) Warren's Use of the Historical Mode.

Murphy, Fleming and Harris state that most interpreters, one way or another, use historical analysis.[251] According to the authors, those who see the Constitution as having a fixed meaning may find what they believe to be correct answers through use of historical analysis.[252] On the other hand, those who see the Constitution as having a changing meaning will use historical analysis to discover patterns of development and adjustment, and to seek knowledge of

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[249]"Of necesity, deciding distributions of powers among thhe branches of the federal government and between federal and state governments are all exercises in structuralism." MURPHY, FLEMING & HARRIS, supra note 46, at 294. Warren's use of structuralism is discussed at length above at Section IV.

[250]An exception is the structural mode.

[251]See MURPHY, FLEMING & HARRIS, supra note 46, at 292.

[252]See id.

the past in order to better understand the present.[253] Hence, those who see the Constitution's meaning as changing are "more likely to see history as clarifying than as solving current problems..."[254]

Earl Warren used history often and used it for a number of differrent purposes. The types of history he used generally fall into two major subcategories; (1) history as to the subject-matter of the case, and (2) legislative history.[255]

Examples of Warren exploring the history surrounding the subject-matter of a case are seen in Brown v. Board of Education,[256] where Warren examined the history behind both public education and segregated public education in the United States, Miranda v. Arizona,[257] where Warren exhaustively explored the history of coerced confessions, Loving v. Virginia,[258] wherein Warren examined the history of miscegenation laws, and Walker v. City of Birmingham,[259] where Warren examined the history of the ex parte injunction and its abuses. In this sense of

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[253] Id.

[254] Id.

[255] Another more innocuous way in which Warren used a historical mode of analysis was simply to define terms. Thus, in Powell v, McCormack, 395 U.S. 486 (1969), where the issue was whether Adam Clayton Powell was excluded or expelled pursuant to a majority vote in the House of Representatives, Warren appealed to the history of the use of those two terms to define their true meaning. See id. at 506-12. Likewise, in Trop v. Dulles, 356 U.S. 86 (1958), Warren appealed to legislative history to define what is a "penal" statute. See id. at 94-95.

[256] 347 U.S. 483 (1954).

[257] 384 U.S. 436 (1966).

[258] 388 U.S. 1 (1967).

[259] 388 U.S. 307 (1967).

Warren's use of history, it is an accurate statement that he was "interested in discovering patterns of development and adjustment."[260] And although the historical analysis apparently did elucidate the problems at hand, both for Warren and the readers of his cases, it is clear that the answer to the problem was derived through the use of purposive analysis, which is also present in each of these cases.[261]

The second way in which Warren used history was in examining the legislative history behind a statute, constitutinonal amendment, or the Constitution itself. In this use of history, just as with examining the history of the subject-matter of a case, Warren apparently was not looking for answers, but simply to elucidate the problem and perhaps look for alternatives. For example, in Brown v. Board of Education I,[262] Warren examined "the circumstances surrounding the adoption of the Fourteenth Amendment in 1868[, which included] ... consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment."[263] If Warren had believed that the Constitution had a "fixed meaning," then the historically correct decision might very well have been that segregation should stay, since historically it existed in this Country even at the

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[260]MURPHY, FLEMING & HARRIS, supra note 46, at 292.

[261]Murphy, Fleming & Harris imply that for one who sees the Constitution as having a changing meaning, the use of historical analysis will not, on its own, supply answers, but simply possible *alternatives*. See id. Intuitively this makes sense, since as our society progresses, the purely historical answers would necessarily become obsolete. Therefore, once a number of alternatives are found through historical analysis, another mode must be used for which to derive the correct answer. For Warren, that mode was almost invariably the purposive mode, and, more often than not, the "fundamental values" component of that mode.

[262]347 U.S. 483 (1954).

time that the Fourteenth Amendment was passed. Warren, however, dismissed the legislative history behind the Fourteenth Amendment and one hundred years of history regarding segregation in five sentences:

> This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.[264]

Warren explicitly summed up his general distrust of legislative history and its inherent riskiness as an anchor for constitutional analysis in United States v. O'Brien.[265] In that case, wherein Warren wrote for the majority holding that burning a draft registration card was not protected speech, he stated:

> Inquires into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading

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[263] Id. at 489.

[264] Id.

[265] 391 U.S. 367 (1968).

> Congress' purpose. ... [However, the matter is different when we are asked to void a facially constitutional statute based on floor debates and legislative history]. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.[266]

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[266] Id. at 383-84. Note that the language from this case is almost exactly the same as that in Brown I, but with the opposite result; O'Brien lost. In both cases, the legislative history was, arguably, "inconclusive," therefore Brown wins and O'Brien loses.

We could attempt to explain the inconsistency in at least two possible ways, neither of which suffices. First, as Warren stated, the statute in O'Brien was consititutional on its face, whereas the segregation laws in Brown I were not. One problem with this explanation is that the laws in Brown I were not facially unconstitutional until declared so in that case. Although Warren stated in Cooper that both the text and the Court's precedents were the supreme law of the land, in reality his respect for precedent did not run very deep. Also, in his dissent in Shapiro v. Thompson, 394 U.S. 618 (1969), Warren not only examined the legislative purpose behind what he considered a facially constitutional statute, but based his reasoning and decision upon it; a blatant inconsistency in method. See id. at 644-45.

Second, we can attempt to explain the reasoning on doctrinal grounds. In Brown, the states had no "substantial" or "compelling" reason for segregation, whereas in O'Brien the federal government had a "substantial purpose" for its statute. However, Warren would discard doctrine as quickly as he would discard precedent; "separate but equal" is one obvious example. Alas, in the end, we still do not have an answer that we can apply in a general way to Warren's jurisprudence.

The ultimate problem is this: the use of these other analytical modes; doctrine, precedent, and history, may be able to explain Warren's decision in any one case, but they do not explain his overall interpretive methodology in a broad sense. Therefore, really the only workable way to explain the persistent inconsistency is that in O'Brien, Warren did not feel it necessary to use his fundamental rights "trump card," for he did not feel that the "outcome" was unjust.

On the other hand, in his dissent in Shapiro v. Thompson,[267] Warren both examined the purpose behind what he called a facially constitutional statute and based his decision on the evidence of that legislative purpose. Nonetheless, it can safely be said that Warren's general attitude toward legislative history was a presumption of distrust. He usually saw it for what he apparently believed it was; political posturing on the part of the legislators.[268] In all cases, if the history behind a statute or constitutional amendment did not comport with the results achieved through Warren's preferred mode of analysis of giving effect to fundamental values, he was quick to dismiss it.[269]

(ii) Doctrinal Analysis.

Murphy, Fleming and Harris state that "doctrinal analysis focuses on what previous interpreters have said the Constituion means..."[270] This mode, according to the authors, is more congruous with one who sees the Constitution as changing over time, than one who sees the meaning of the Constitution as static and changing only through amendment.[271] Warren actually made fairly expansive use of doctrinal analysis. Some examples are Warren's use of a "means-

[267]394 U.S. 618 (1969).

[268]Undoubtedly, Warren's long experience as an elected official, particularly as a state governor, gave him special insight into the legislative process.

[269]Cf. Brown v. Board of Education, 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967); Trop v. Dulles, 356 U.S. 86 (1957)(all cases decided by Warren according to fundamental values and in the face of legislative history arguably militating against the decision that Warren ultimately reached).

[270]MURPHY, FLEMING & HARRIS, supra note 46, at 295.

[271]See id.

end" analysis in cases under the First or Fourteenth Amendment,[272] and the "community standards" test for obscenity cases.[273]

However, as was the case with historical analysis, Warren's use of the doctrinal mode must be qualified. For although he more often reached "answers" through this mode,[274] it can only be assumed that if the "answers" derived violated some fundamental value, that the doctrine would be expressly thrown out or simply not used at all.[275] Hence Warren's use of doctrinal

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[272]See, e.g., United States v. O'Brien, 391 U.S. 367 (1968)(Warren found that the government's statute preventing the burning of draft cards represented a narrowly tailored means to forward the sufficiently important end of ensuring a smooth running draft); Shapiro v. Thompson, 394 U.S. 618 (1969)(Congress should be held only to rational review when considering a regulatory scheme in furtherance of interstate commerce).

[273]See Jacobelis v. Ohio, 378 U.S. 184 (1964)(Warren, C.J. dissenting).

[274]See, e.g., Shapiro, 394 U.S. at 651 (Warren, C.J. dissenting)("Our cases require only that Congress have a rational basis for finding that a chosen regulatory scheme is necessary to the furtherance of interstate commerce.") Id. In Shapiro, Warren determined that Congress did.

[275]Brown I is a prime example. In that case, Warren threw out the doctrine of "separate but equal" as it applied to public schools. But, as covered above, Warren first arranged his reasoning so that it was assumed that all "tangible" factors in the "separate but equal" analysis would be equal. Therefore, rather than being limited to finding that the schools in question were not individually equal, Warren was able to declare that they could never be equal based upon his "intangible factors," which were evidenced through psychological studies. In this way, Warren pointed to an inherent flaw in the separate but equal doctrine itself and overruled it as such. Aside from this "scientific evidence," Warren's analysis was of fundamental values.

However, the interesting thing about Warren's "doctrinal approach" was that it only focused on the "separate but equal" doctrine itself. This was really a reflection of the tack the Court was taking over time to tear the "separate but equal" doctrine down. See Sweatt v. Painter, 339 U.S. 629 (1950) (Court relied in part of "intangible factors," but expressly reserved

analysis, like his use of historical analysis, was many times "outcome dependent," and was always subject to the same fundamental values "trump card."

(3) Earl Warren's Analytical Technique.

According to Murphy, Fleming and Harris, an interpreter's analytical techniques are the conceptual tools that he uses to apply his approach(es) and mode(s) of analysis to specific constitutional problems.[276] The authors explain six of the most frequently used techniques.[277] In

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the question of overruling Plessy v. Ferguson because the tangible factors were sufficiently disparate that relief for plaintiff did not require it). But in overruling Plessy, Warren, instead of giving a dissertation on the progress of public education and its importance to this Nation, could have simply followed up with a basic doctrinal "means-end" analysis. His reasoning could have gone as follows: any classification based on race is inherently suspect, therefore the states will have to have a compelling reason for segregation. The states could not come up with one, therefore these segregation laws are unconstitutional. This line of reasoning would have represented the continued implementation of footnote 4 from United States v. Carolene Products, 304 U.S. 144 (1938), which had already been implemented against Jim Crow laws since the year it was decided. See Missouri ex rel. Gaines v. Canada, 305 U.S. 580 (1938) (Missouri plan to provide legal education to blacks by paying their out of state tuition held unconstitutional).

Although straight doctrinal analysis may still have displeased some scholars and commentators, and the proponents of segregation would have hated the result anyway, Brown I itself would undoubtedly have carried a greater measure of legitimacy in its reasoning.

[276]See MURPHY, FLEMING & HARRIS, supra note 46, at 301.

[277]See id. The techniques are: (1) literalism; ascertaining meaning from a literal reading of the text of the Constitution, (2) deductive inference; analyzing the clauses of the Constitution, then discern its premises, arguments and conclusions, (3) inductive reasoning; constructing the issues and materials associated with a particular case into constitutional principles which have wider application, (4) discerning the intent of the framers, (5) stare decisis; adhering to precedent, (6) balancing; weighing the competing interests. See id. at 302-12.

addition, the authors outline one other category of interpretive tool, but do not actually call it a "technique" per se. This other "technique" is the practice of deciding cases according to moral and political philosophy.[278] According to the authors, "[t]o some extent, all approaches, modes, and techniques are suffused with assumptions about moral and political philosophy."[279] However, for Warren, many times his technique was to decide cases apparently solely upon principles of moral or political philosophy, or, more appropriately in Warren's case, constitutional "reason and conscience," "ethics," or simply "fairness." And even when he used other techniques of analysis, the elements of fairness, reason, and conscience were always there.

In this manner, Warren was most like the Chancellor of the pre-modern English courts of equity. For, even when he employed what some considered to be "traditional" modes of analysis such as the doctrinal mode, the fact that reason and conscience entered into his decisions is always apparent upon reading a Warren opinion. Additionally as well, this was the reason that Warren needed the extra power that he obtained for the Court, just as the king's Chancellor needed the full power of the crown to implement his decrees. For in order to make decisions based upon reason and conscience, and then draft and implement the types of opinions that were necessary for forwarding these principles, without a great amount of power, Warren's opinions themselves would have been "little more than good advice."[280]

In his essay, "A Man Born to Act, Not to Muse," Anthony Lewis states:

Often the framework of the argument [in a Warren opinion] seems ethical rather than

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[278] See id. at 312-13.

[279] Id. at 312.

[280] Trop, 356 U.S. at 104.

legal, in the sense that one expects the law to be analytical. Chief Justice Warren's opinions are difficult to analyze because they are likely to be unanalytical. ... [I]n the absence of other formal methods of weighing ethical considerations in life, the Chief Justice evidently felt that the law and the courts must do so to a significant degree.[281]

The most apparent instances in which Warren decided cases according to reason and conscience are his opinions construing the Fourteenth Amendment. And even if Warren's opinions which relied heaviest on principles of reason and conscience did not contain what could be called a "traditional constitutional analytical framework," they did follow a loose pattern. Often, Warren would first display the facts of the case in a manner that allows the reader to be as shocked about them as he was. Thus in Loving v. Virgina,[282] Warren gave the reader the opportunity to see the abject ignorance of the state trial judge below, who wrote an opinion stating in part that "the fact that [God initially] separated the races [over different continents] shows that he did not intend for the races to mix."[283] In Walker v. City of Birmingham,[284] Warren made a point of incorporating into his angry dissent the injunction order of the state trial court, of which gave as one reason for the injunction that the "city's police dogs [would] be in danger for their lives" if the black defendants held a demonstration in the city streets.[285]

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[281]Anthony Lewis, *A Man Born to Act, Not to Muse*, (from, LEONARD LEVY, editor, THE SUPREME COURT UNDER EARL WARREN 158 (1972)).

[282]388 U.S. 1 (1967).

[283]Id. at 3.

[284]388 U.S. 307 (1967).

[285]Id. at 326 (Warren, C.J. dissenting). Nearly everyone can close their eyes and still see the news footage of white police officers in the South releasing their German Shepherd police dogs upon black demonstrators.

Likewise, Warren detailed the history of abuses against arrestees through custodial interrogations in Miranda v. Arizona,[286] and examined the impact of segregated schools upon black children in Brown v. Board of Education.[287] Warren would then go forward with some sort of interpretive mode, usually initially doctrine or history, but would invariably end up with the purposive mode of giving effect to fundamental values. Finally, however, Warren's analysis would always invariably turn to what could be called "constitutional reason and conscience."

The reason and conscience used by Warren, like that used by the Chancellor, reflected both the principles that Warren believed the framers of the Constitution intended and the "principles of the day," which accounted for social progress. Thus, Warren's constitutional reason and conscience reflected his aspirational approach to the Constitution. And some precept of this constitutional moral or political philosophy would almost always be present whether it was actually stated or implied. Thus, in Trop, Warren spoke of expatriation as a punishment which was "offensive to cardinal principles for which the Constitution stands,"[288] but that capital punishment was still constitutional because it was still widely accepted.[289] In Cooper v. Aaron,[290] Warren stated his belief that "[t]he Constitution created a government dedicated to equal justice under law,"[291] and in Bolling v. Sharpe,[292] Warren observed that both the due

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[286]384 U.S. 436 (1966).

[287]347 U.S. 483 (1954).

[288]Trop, 356 U.S. at 102.

[289]See id.

[290]358 U.S. 1 (1958).

[291]Id. at 19.

[292]347 U.S. 497 (1954).

process and the equal protection clauses stem from "our American ideal of fairness."[293] In Trop, Warren stated that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[294]

Even when Warren did not use words of "conscience and reason" or "fairness" in his opinions, one can many times tell from looking at the result that these factors weighed into his analysis. For instance, in Reynolds v. Sims,[295] Warren expressed his belief that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen."[296] To Warren, in a nation that ostensibly was based upon principles of representative democracy, to have one person's vote count two, five, ten, or twelve times that of another was simply unfair.

This notion of fairness is the same basic ideal that formed the basis for the Chancellor's decisions in equity. The primary reason that people came before the Chancellor was that the remedy at law produced a harsh outcome; hence was "unfair." In the case of the Supreme Court, the situation is slightly different. Obviously the plaintiffs have not already gone to the "Supreme Court of Law." Also, Warren did not battle individual cases of injustice such as the Chancellor did, where the plaintiff could not get a just remedy through the system, but cases of "systematic injustice," where the system itself was bad.[297]

Other parallels between the Chancellor and Earl Warren also apply. For instance, when a

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[293]Id. at 499.

[294]Trop, 356 U.S. at 100.

[295]377 U.S. 533 (1964).

[296]Id. at 567.

[297]See PETER CHARLES HOFFER, THE LAW'S CONSCIENCE 223 N.24 (1990).

plaintiff came before Warren, just as when a plaintiff came before the Chancellor, that plaintiff must have had "clean hands." Thus, in cases where the plaintiff was a pornographer,[298] or the "aggrevied" party was a gambler who did not register his activity for tax purposes, there would be no relief flowing from Chancellor Warren.[299]

(i) Other Techniques.

To a greater or lesser extent, Warren used three other techniques for interpreting the Constitution; stare decisis, intent of the framers, and balancing. However, at the same time, there are opinions or other writings by Warren wherein he specifically blasts each of these techniques.

First, with stare decisis, Warren was ambivalent as to its reliability as an all-purpose interpretive technique. Warren himself said that "we have always had the view that in

[298]Jacobelis v. Ohio, 378 U.S. 184 (1964)(Warren dissented to the Court's decision to review independently each case of obscenity as to whether it is protected under the First Amendment, but would have given great latitude to the states to control their communities under the "community standards test" from Roth v. United States, 354 U.S. 476 (1957)). Note that while Warren was a district attorney, he led a campaign to close the houses of prostitution in the Alameda area.

[299]Marchetti v. United States, 390 U.S. 39 (1968)(Warren dissented to the Court's decision that to make an illegal gambler register under the Internal Revenue Code would violate his Fifth Amendment privilege against self-incrimination since he could then be prosecuted for his gambling activities). Warren in his memoirs reminices that as a child working as a runner for the railroads, he "saw men rush from the pay car to the gambling houses and not leave until they had lost every cent of their month's laborious earnings." MEMOIRS, supra note 2, at 30. Warren also saw the conditions of the homes and families of these men. See id. at 31. Later, as district attorney of Alameda County and as attorney general, Warren conducted several prosecution campaigns against organized crime and its gambling

constitutional cases stare decisis is not absolute, that constitutional questions are always open for re-examination..."[300] Warren definitely believed in this, to the extent that many have branded him as having "no respect for precedent."[301] However, Warren did employ this technique in some of his opinions.[302] Needless to say, however, in many others Warren or the Warren Court felt no trepidation whatsoever in overturning precedent.[303] The turning issue as to whether Warren would follow precedent or strike it down was, presumably, "would the result be fair?"

As to deciding cases in accordance with the intent of the framers, Warren's adherence depended upon what was the evidence of the intent. For instance, in the area of fundamental values, Warren went by what he considered the framers' intent as evidenced by such things as the Declaration of Independence. However, his faithfulness to the framers' intent decreased markedly when the evidence of that intent was legislative history or debates, which Warren flatly considered to be "inconclusive at best."[304] However, when the interpretation of the framers' intent from historical sources and even debates coincided with what was the "fair" result in

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ventures.

[300]Anthony Lewis, *A Talk with Warren on Crime, the Court, the Country*, (published in LEVY, editor, THE SUPREME COURT UNDER EARL WARREN, at 173).

[301]See BORK, supra note 117, at 73.

[302]See, e.g., Jacobelis v. Ohio, 378 U.S. 184 (1964)(Warren, C.J. dissenting)(The "community standards" test from Roth v. United States, 354 U.S. 476 (1958) should control case at bar.")

[303]See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954)(explicitly overruled Plessy v. Ferguson, 163 U.S. 537 (1896)); Gideon v. Wainright, 372 U.S. 335 (1963)(explicitly overruled Betts v. Brady, 316 U.S. 455 (1942)).

[304]See Brown I, 347 U.S. at 489. See also, Loving, 388 U.S. at 9 (quoting the same language from Brown I.).

accordance with the fundamental principles of the Constitution, Warren did accord it a measure of deference. Hence, in Powell v. McCormack,[305] Warren examined the framers' intent behind the speech and debate clause and the power of Congress to expel a member and stated in qualified language:

> Had the intent of the Framers emerged from these materials with less clarity,[306] we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them."[307]

As for the technique of balancing, Warren went to extremes. In some cases, Warren in no uncertain terms denounced balancing as an interpretive technique for solving constitutional problems. For instance, in Miranda v. Arizona,[308] Warren declared that "[w]here rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."[309] This broad statement would lead the reader to believe that in all cases, Warren would preserve a constitutional right no matter what the countervailing interests of Congress may be. However, in practice, Warren actually did not so strictly eschew balancing,

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[305]395 U.S. 486 (1969).

[306]Note "with less clarity" could be construed as a code word for "unfair." Cf. Brown I, 347 U.S. at 489 (intent of the framers of the Fourteenth Amendment in that case was, at best, inconclusive).

[307]Id. at 547.

[308]384 U.S. 436 (1966).

[309]Id. at 491.

even when fundamental rights were being balanced. For example, in Shapiro v. Thompson,[310] where the issue was whether Congress or the states could impose upon welfare recipients a one-year residency period prior to receipt of funds, Warren balanced the interests of Congress and the states in efficient disbursement of welfare funds against the incidental burden on an individual's fundamental right to travel freely between states.[311] Warren, in his dissent, concluded that the government's interests should prevail.[312] Likewise, dissenting in Marchetti v. United States,[313] Warren was willing to balance an illegal gambler's Fifth Amendment privilege against self-incrimination against the government's interest in tax collection. In his dissent in Jacobelis v. Ohio,[314] Warren balanced the First Amendment rights of a pornographer against the public's interest in preventing the distribution of obscenity. Therefore, in balancing, Warren was inconsistent as always. The only way to really resolve these inconsistencies is to say that Warren would balance interests, when this balancing would derive what he considered to be a fair and just result.[315]

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[310]394 U.S. 618 (1969).

[311]See id.

[312]See id. at 648 (Warren, C.J. dissenting).

[313]390 U.S. 39 (1968)(Warren, C.J. dissenting).

[314]378 U.S. 184 (1964).

[315]Shapiro v. Thompson, 394 U.S. 618 (1969), on its face, is the hardest of these inconsistencies to explain. This was not a case where a gambler or pornographer was involved, but poor families; usually a class vigorously protected by Warren. However, recall that Warren had been the governor of California, and during his tenure in that office was an advocate of welfare and had even proposed a state health plan. As a former governor, Warren no doubt was well aware of the intricacies and problems involved with social aid-type legislation.
The residence requirements for receipt of welfare were

(C) Revisited: A Cohesive Interpretive Methodology?

Archibald Cox, in writing for the Harvard Law Review, observed that after Warren became Chief Justice, lawyers at the bar found that arguments based upon precedent, accepted legal doctrine, and long range institutional concepts concerning the proper role of the judiciary and the distribution of power in a federal system foundered upon Chief Justice Warren's persistent questions, "Is it fair?" or "Is that what America stands for?" Such questions were profoundly disturbing to those engrossed by the intellectual and institutional side of the law... What the Chief Justice was saying of the legal system parallels the message of the student explaining his generation with simple honesty: "We take seriously the ideals we were taught at home and in Sunday School."[316]

These words sum up both Warren and his interpretive methodology. In essence, what Warren did was first look at the result and then work backwards. In terms of a cohesive "traditional" interpretive methodology as to reasoning, there was none. Warren's opinions run nearly the gamut of what are considered traditional "modes" and "techniques" with no apparent

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designed to keep recipients from simply "shopping" from state to state for the highest possible welfare payments. This, reasoned Warren after reading extensively the legislative history behind the welfare statutes, would free the states up to devise better and better plans without the fear that they would be looted by an influx of these "welfare shoppers." See id. at 646 (Warren, C.J. dissenting).

Therefore, the decision itself could be explained as Warren the former governor seeing through the emotion-charged case of the poor being denied the fundamental right to travel and looking at the broader policy served; more efficient and higher quality welfare for the benefit of all poor families. While the stark inconsistency remains; Warren *was* willing to balance government's interests against individual fundamental rights, the reasoning above helps to explain *why* he was inconsistent in this case.

[316]Archibald Cox, *Chief Justice Earl Warren*, 83 HARV. L. REV. 1, 2 (1969).

underlying pattern. But beyond the purely academic aspect of sound reasoning, Warren's interpretive methodology can be described as coherent and consistent to the extent and in the same manner as that of the Chancellor I have compared him to. The question should not be "Did Warren decide his cases correctly?" but "Did he decide them rightly?" Needless to say, this is even an arguable point for many constitutional law commentators thirsting for more reason and even for many Americans who still do not like the results of his opinions. However, in regard to the general principles that Warren instituted; that the law should simply treat each person equally and fairly, for most everyday, average Americans, the answer to this question, over time, has definitely been a resounding "yes." Therein quite possibly lies the consistency of Warren's interpretive methodology.

VI. EARL WARREN'S EFFECTS ON THE COURT, THE CONSTITUTION, THE COUNTRY.

"[P]erhaps not since the days of John Marshall have Americans sensed that a change in the Chief Justice of the United States could so profoundly affect their Government and their society."

Anthony Lewis, "A Man Born to Act, Not to Muse."

During an interview just after his retirement from the Court, Warren was asked whether he thought that the Court's decisions in the three major areas of race, voter's rights, and criminal procedure would last. Warren was cautiously optimistic:

> In all three of those areas, ... I believe that our decisions are consistent with the principles of the Constitution ... but I would not predict. Different men see things in different ways, and it might be that others will see them differently. That is for those who are on the Court [in the future] to determine.... But I believe the decisions are wholesome, in the best interests of society according to constitutional principles, and in keeping with the life of our nation. Naturally, I would hope that they would remain.[317]

There can be little doubt that the Supreme Court of today sees things in sometimes dramatically different ways than Warren saw them. Many of the Warren decisions have already fallen or are in danger of falling in the foreseeable future. This is particularly true in the area of criminal procedure, which has taken some giant steps backward from the early days of Miranda and its immediate progeny.[318] Also, in the area of race, the Court of today is threatening to tear

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[317]Anthony Lewis, *A Talk with Warren on Crime, the Court, the Country,* from LEONARD LEVY, editor, THE SUPREME COURT UNDER EARL WARREN 173-74 (1972).

[318]Much of the reversal in direction has stemmed from the recent urgency surrounding the "War on Drugs," which, as

down some of what Warren's court built. However, with the possible limited exception of criminal procedure,[319] the general principles that Warren enunciated are in no danger of falling. In many ways, Warren took the Nation far enough so that it can never go completely back.

The effects that Earl Warren had on the Constitution, the Court and our Country are patently obvious. To this generation, the thought of blacks and whites drinking from separate drinking fountains and attending separate schools (as a matter of positive law anyway) are completely foreign. Note the general shock when younger people hear stories on the evening news about South Africa's system of apartheid, a system that only began to see its end in this Nation when the Warren Court handed down Brown I and its progeny. Thanks to Earl Warren, and to Hollywood, millions of Americans who have never even been arrested know that should they ever be, they will "have the right to remain silent...."[320] These are indicators of the breadth of the effects that Earl Warren has had on this Country. These are also examples of some of Warren's longer lasting effects.

Some of Warren's practices, however, have gone into decline in recent years. For example, Warren's use of decree-type opinions was only rivaled in the earlier days of the Burger Court. The greatest example of its use by that Court, of course, was Justice Blackmun's majority

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individual rights give way to the "common good," may someday be this generation's version of the Committee for the Investigation of Un-American Activities.

[319]Miranda itself is clearly in no danger. However, it is being narrowed, particularly in the areas of how one can "waive" his Miranda rights, and whether not some "slight" deviation of the Miranda standard is reversible error or "harmless" error.

[320]Miranda v. Arizona, 384 U.S. 436 (1966).

opinion in Roe v. Wade.[321] However, with certain exceptions,[322] the Rehnquist Court has generally eschewed setting forth decrees of any type, generally preferring instead to defer to Congress' or the states' lawmaking. Many times, this shift comes under the rubric of the Court declining to use "remedial powers."[323] This "restraint" on the part of the Rehnquist Court represents the handing back of power to the coordinate branches of government and to the states. As Warren said, "Different men see things different ways..."

What the Court today sees differently is probably not so much the general principles that Warren stood for than the way in which Warren chose to implement them. In short, the role of the Court has been constricted from what Warren had built it up to. However, what Warren provided was a precedent; a sort of modern day demonstration of what the "least dangerous branch" of government is capable of doing. The roles that Warren and his Court assumed, those of law giver and law enforcer, perhaps may not be exercised by the Court at present, but neither can the Court itself remove them. Other structural aspects of the Warren Court remain as well. For instance, the political question doctrine enunciated in Baker v. Carr[324] and Earl Warren's expansion of it in Powell v. McCormack[325] remain unchanged, even if unused. In the future,

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[321]410 U.S. 113 (1973).

[322]See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986) (setting forth particularized rule set to prevent racial discrimination in prosecutor's use of peremptory challenges, with remedy being reversed conviction; decision somewhat reminiscent of Miranda).

[323]See, e.g., Missouri v. Jenkins, 110 S.Ct. 1651 (1990); Spallone v. United States, 110 S.Ct. 625 (1990).

[324]369 U.S. 186 (1962).

[325]395 U.S. 486 (1969).

another Court may again "see things in a different way," and may again set this power in motion. In Earl Warren, this "Court in the future" has a model.

But beyond the obvious effects of Warren's decisions, and the effects he had on the structure of the government, lie the effects that Warren had on the American people's attitude toward the Court. Warren's conduct on the Court and the power of the Court under Warren had a visible change in how many Americans now view the Court itself. To an extent, this change in attitude may be evidenced by the now protracted and sensational confirmation hearings that justice-nominees must now endure before confirmation. The Senate, and by extension the people, recognize that a Supreme Court justice has power, and is placed in his or her position for life. This possibly was an attitude at least partially inspired by Warren as the "arrogator of power."

However, "Warren the Chancellor" inspired a different attitude to a different class of people. To this class, generally made up of the politically weak, the discrete and insular minority, the unliked or unaccepted, he was "Warren the protector." From this class, a generation has been raised to believe and to expect that when the system has failed them, or their elected officials will not listen or respond, then they only need turn to the Supreme Court for justice. This attitude is one of Earl Warren's true legacies. It is to an extent one of Warren's sadder legacies as well. For the notion that the Supreme Court would be the great protector of individual rights had no foundation in fact prior to Earl Warren's ascent to the bench. And the Court has to a great extent again shed that role. In the two hundred and five years since our Country was founded, the Supreme Court as a great protector of individual rights, with minor exception, was essentially a thirty year-long anomaly. Some would say that these individuals

were lulled or even deceived by Warren into thinking that the Supreme Court is the proper venue for which to affect political change.

The happier side of this legacy was that Warren, for a time at least, gave to all individuals a sample of what it is like to be more or less equal in a system of representative democracy. In addition to his campaign to remove racial prejudice from the written law, Warren's facilitation of the fundamental right to enter the political process is one of his effects that has lasted best over time. In a sense, Warren opened the door so that individuals could walk through and claim what is theirs by right as Americans. Now, these same individuals are at least better equipped to do so, on their own, through the Congress and state legislatures.

Never again will this Country believe that "separate" can be "equal." Perhaps more importantly, never again shall we deviate too far from "one man, one vote." Warren during his life stated that Baker v. Carr[326] was the most important decision that the Court handed down during his tenure, and that Reynolds v. Sims[327] was the most important opinion that he ever wrote. In Reynolds, Warren the Chancellor not only facilitated individuals' realization of their constitutional individual rights, but also took steps to facilitate individuals' power within the political process. Even when the fundamental rights gloss of that decision has rubbed off, the "one man, one vote" principle remains. Warren's hope today would probably be that these individuals can now protect their own rights through that process. For, in the grand scheme, it is probably easier (and more proper) to change the face of a legislature than it is to change the face of the United States Constitution. This is true, however, only if one has the access with which to

[326]369 U.S. 186 (1962).

[327]377 U.S. 533 (1964).

affect that change. To Warren, this access was a fundamental right. And if a point comes where these individuals are again shut out of the process, then possibly another Chancellor will rise to protect them, for even though it is not often used anymore, the Court still has that power also.

CONCLUSION.

It is said that there is no such thing as a "great man," but only ordinary men who are forced by circumstances to do extraordinary things. This was true of Earl Warren. Warren was no great philosopher. Admittedly, Warren was no great jurist. Perhaps Warren's greatest strength while on the Court was that he was an able statesman and politician who could more often than not convince a majority to see an issue as he did. Moreover, Warren was a man of his times. The United States of America during Warren's tenure was going through upheaval in almost every area of society. Rather than adhere to the status quo, Warren chose to address the issues squarely, and to make decisions about them that were right, even if not "correct" in such things as reasoning or traditional constitutional interpretive methodology. For sixteen years, Chief Justice Earl Warren was an ordinary man who did great things for this Nation and its people. Unlike so many, during that divisive time he did not shrink from the challenges that lay before him. In his memoirs, Warren wrote a fitting epitaph:

> Every man on the Court must choose for himself which course he should take. Conformity to the wishes of the powerful would be the easiest by far. To habitually ride the crests of the waves through the constantly recurring storms that arise in a free government, always agreeing with the dominant interests, would be a serene way of life. It is comforting to be liked, and it would be pleasant to bask in the sunshine of perpetual

public favor. As tempting as that might be, I could not go that way. Of necessity, I chose the latter course because that is the only means by which I could find satisfaction in my work. So many times in life the only permanent satisfaction one can find comes from bucking an adverse tide or swimming upstream to reach a goal. The fulfillment of that goal, according to my lights, rested in the discharge of my constitutional oath of office to "... support and defend the Constitution of the United States against all enemies, foreign and domestic ..." and the judicial oath to "... administer justice without respect to persons, and do equal right to the poor and to the rich..."[328]

[328]MEMOIRS, supra note 2, at 332.