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The Constitutional Conservatism of the Warren Court

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The Constitutional Conservatism of the Warren Court

Justin Driver*

Scholarly debate about the Warren Court casts a long shadow over modern constitutional law. The essential contours of this debate have now grown exceedingly familiar: where liberal law professors overwhelmingly heap praise upon the Warren Court, conservatives generally heap contempt. Although some liberals have begun contending that the Warren Court overstepped the bounds of judicial propriety, such concessions do not reconfigure the debate's fundamental terms. Conspicuously absent from scholarly discourse to date, however, is a sustained liberal argument contending that the Warren Court made substantial mistakes—not by going excessively far, but by going insufficiently far in its constitutional interpretations. This Article supplies that missing perspective by providing a historically contextualized critique of the Warren Court's jurisprudence, identifying significant opinions in which the Court

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issued conservative constitutional rulings even though plausible routes led to liberal outcomes. Examining the Warren Court's overlooked tradition of constitutional conservatism not only demythologizes that institution and brings sharper focus to the constitutional past; it may also help to inspire a progressive reenvisioning of the constitutional future.

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INTRODUCTION

National magazines have seldom found occasion to chronicle the latest academic debates unfolding in law reviews. But in *Life's* issue dated May 22, 1964—not far from a hard-hitting cover story analyzing the ascendance of Barbra Streisand¹—Ernest Havemann wrote an article addressing the polarized reactions that the Warren Court had generated within the corridors of legal academia.² “[T]he professors who write for the law reviews are convinced that the Warren Court has gone further than any before it in altering the rules of American law and revolutionizing the traditional system of checks and balances among the Court, the Congress and the President,” Havemann noted. “Some like the result and some deplore it—but all are agreed that the Warren Court is making history and will profoundly affect the future of the U.S., for better or for worse, at least for many years to come and possibly forever.”³

1. See Shana Alexander, *A Born Loser's Success and Precarious Love*, LIFE, May 22, 1964, at 52 (“Today Barbra Streisand is the drummer boy leading the charge, Cinderella at the ball, every hopeless kid's hopeless dream come true.”).

2. Ernest Havemann, *Storm Center of Justice*, LIFE, May 22, 1964, at 108, 110.

3. *Id.* at 110.

Life was not the only national publication in May 1964 to afford law professors their moment in the sun. That month marked the tenth anniversary of the Supreme Court's decision in *Brown v. Board of Education*,⁴ an event that also prompted *Newsweek* to observe "the Warren Court has stirred up an academic debate" that was "searching and serious" among "the savants of the law schools."⁵ The article featured quotations from three anonymous law professors, two of whom viewed the Warren Court sympathetically and one who offered a more cynical evaluation:

"The Court is the most progressive institution we've got," says one law professor. But others insist it is too doctrinaire, too eager to right what it takes to be wrong, too much concerned with grand abstractions of liberty at the expense of the orderly growth and continuity of the law. "When you're trying to carve out new ground in an institution that is nominally committed to the past, you have to cut corners," a defender insists. But a critic contends: "The Court's been making law wholesale rather than retail."⁶

Like *Life*, *Newsweek* also emphasized that, even as commentators were united in deeming the Warren Court a significant force in American society, they offered sharply divergent assessments of the institution's legitimacy. "Friends call it progressive, foes call it arrogant—or worse," *Newsweek* reported. "Both sides agree that it has established itself, with or without portfolio, as conscience to the nation."⁷

Nearly five decades have elapsed since these articles surveyed law professors' attitudes regarding the Warren Court. Read today, the most striking feature of these remarks is how little academic assessments of the Warren Court have changed. Now as then, liberal law professors overwhelmingly sing the Warren Court's praises; conservative law professors, conversely, sing only the blues.

In the modern era of legal academia, this stark left-right dichotomy regarding the Warren Court is vividly illustrated by the dueling appraisals of Morton Horwitz and Robert Bork. Both the left-leaning Harvard Law School professor and the conservative former Yale Law School professor (and failed Supreme Court nominee) agree that the Warren Court is "unique." But beyond that, any area of agreement is exceedingly difficult to discern. The opening paragraph in the first chapter of Horwitz's *The Warren Court and the Pursuit of Justice* embodies liberal reverence. "[T]he Warren Court is increasingly recognized as having initiated a unique and revolutionary chapter in American constitutional history," Horwitz wrote. "Beginning with its first major decision declaring racial segregation unconstitutional in *Brown v. Board of Education*

4. 347 U.S. 483 (1954).

5. *The Warren Court: Fateful Decade*, NEWSWEEK, May 11, 1964, at 24, 25, 33.

6. *Id.* at 33.

7. *Id.* at 24.

(1954), the Court regularly handed down opinions that have transformed American constitutional doctrine and, in turn, profoundly affected American society.”⁸ In *The Tempting of America*, Bork’s chapter on the Warren Court encapsulates conservative scorn. “The Court headed by Chief Justice Earl Warren from 1953 to 1969 occupies a unique place in American law,” Bork wrote. “It stands first and alone as a legislator of policy, whether the document it purported to apply was the Constitution or a statute. Other Courts had certainly made policy that was not theirs to make, but the Warren Court so far surpassed the others as to be different in kind.”⁹

In recent years, these two dominant approaches toward the Warren Court have witnessed the emergence of a third: the liberal concession. Rather than feeling compelled to defend all of the Warren Court’s landmark liberal opinions, some left-leaning scholars have begun allowing that the Court occasionally overstepped proper judicial bounds. As Cass Sunstein, the leading academic expositor of this view, contended in 2005: “Many people continue to defend the Warren Court . . . ; they believe that the (liberal) perfectionism of that particular Court served the nation well. But I have many doubts about the Warren Court.”¹⁰ Chief among these doubts is the concern that the Warren Court victories during the 1950s and 1960s led liberals to focus too much energy on the judicial sphere and too little on the democratic sphere.¹¹ Although this third approach adds a new wrinkle to the Warren Court debate, it does not much alter the debate’s fundamental terms.

The contours of this scholarly debate have become so familiar that some prominent academics have asserted it is no longer profitable to continue discussing the Warren Court. “The legacy of the Warren Court—the positions

8. MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 3 (1998).

9. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 69 (1990). When he was a professor, Bork helped to foment the intellectual opposition against the Warren Court. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 1 (1971) (suggesting that he would consider the question of judicial legitimacy “in the context of the Warren Court and its works simply because the Warren Court posed the issue in acute form”); Robert H. Bork, *The Supreme Court Needs a New Philosophy*, *FORTUNE*, Dec. 1968, at 138 (“The Warren Court . . . challenges us to think again whether there is or can be any substance to the distinction between law and politics.”). After his failed Supreme Court bid, Bork blamed the event that transformed his surname into a verb on his academic excoriations of the Warren Court. “[A]fter the most minute scrutiny of my personal life and professional record, all that was available to the opposition was ideological attack, and so politics came fully into the open,” Bork stated. “I had criticized the Warren Court, and this was the revenge of the Warren Court.” BORK, *supra*, at 348–49.

10. CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 35 (2005) (parentheses in original).

11. See Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 *CONN. L. REV.* 205–07 (1991) (contending that the Warren Court debate has distracted liberals from imagining a new constitutional order that does not depend on judges); see also BARACK OBAMA, *THE AUDACITY OF HOPE* 83 (2006) (“Still, I wondered if, in our reliance on the courts to vindicate not only our rights but also our values, progressives had lost too much faith in democracy.”). For an argument contending that Professor Sunstein influenced President Obama’s views toward the judiciary, see Justin Driver, *Obama’s Law*, *NEW REPUBLIC*, June 9, 2011, at 10–14.

laid out by its defenders and detractors—is increasingly unhelpful,” Sunstein has written.¹² Three years ago, Jack Balkin and Reva Siegel framed *The Constitution in 2020*—a collection of writings from liberal professors proposing various constitutional reforms—as a project designed in large part to end the Warren Court discussion. As Balkin and Siegel explained, “[T]he key to the future is not a return to the battles of the past. . . . The country has changed, and its needs are different. Americans today need not seek a restoration of the glory days of the Warren Court.”¹³

While the frustration of these scholars is understandable, it is also lamentable. It is understandable because none of the three postures toward the Warren Court—conservative attack, liberal defense, and liberal concession—appear poised to advance our understanding of that institution or the document that it was charged with interpreting. But their frustration is lamentable because these now well-rehearsed positions hardly exhaust the full range of viable approaches to understanding the Warren Court. Examining that institution’s legacy through an alternate lens may prove useful in helping to revive the dormant judicial tradition of liberal constitutional interpretation.

This Article offers a new liberal perspective on the Warren Court, criticizing that institution not for going too far but instead for venturing insufficiently far in its constitutional conceptions. In providing a historically grounded critique of the Warren Court’s jurisprudence, this Article identifies particular judicial decisions where progressive decisions were plausible, but in which the Warren Court nevertheless issued conservative constitutional rulings. The scholarly attention lavished upon liberal achievements has regrettably obscured how constitutional conservatism significantly shaped the Warren Court era. Examining those underappreciated instances where liberal victories were attainable, but the Court declined to deliver, should bring the Warren Court into a sharper historical focus.

In this Article, the term “constitutional conservatism” is used in a historical fashion. During the Warren Court era, to be a constitutional conservative meant embracing a few closely related concepts: venerating precedent; resisting sharp breaks with the past; conceiving of the judicial role as modest; and adopting a skeptical view of constitutional interpretations designed to produce a more egalitarian society.¹⁴ Constitutional conservatives,

12. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 2 (1993).

13. Jack M. Balkin & Reva B. Siegel, *Introduction* to *THE CONSTITUTION IN 2020*, at 6 (Jack M. Balkin & Reva B. Siegel eds., 2009).

14. When the Warren Court was at its apex from 1962 to 1969, Justice John Marshall Harlan II most consistently espoused this judicial philosophy. See Norman Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U. L. REV. 249, 250, 257 (1969) (identifying Justice Harlan as a “restraining force during a period of rapid change,” stating he was “distrustful of abrupt change, comfortable with accustomed rules and practices, and therefore reluctant to revise the judgments of predecessors,” and identifying the hallmarks of Harlan’s jurisprudence as “a profound respect for precedent and a limited view of the Supreme Court’s role in a federal system”). It is not for

thus, sought to *conserve* the prevailing legal regime.¹⁵ This historically rooted usage of “constitutional conservatism” stands in almost direct opposition to the way that term is sometimes invoked today.¹⁶

Liberal scholars during the modern era generally neglect the Warren Court’s constitutional conservatism, as that term would have been understood at the time. They insist the Warren Court made history, not mistakes. But this Article contends that it is profoundly mistaken to deny the Warren Court’s constitutional conservatism a significant place in its jurisprudential legacy. The few scholars who mention even in passing Warren Court decisions that seem to clash with egalitarian ideals typically assert that progressive decisions in these areas would have been inconceivable during the 1950s and 1960s. But a detailed examination of the historical record belies such assertions. Indeed, the Warren Court frequently issued decisions that collided not just with today’s liberal sensibilities, but also with the liberal sensibilities of that time. The following critique attempts to recreate the liberal constitutional possibilities as they were understood contemporaneously. I contend, in sum, that the Warren Court’s glory days should have been more glorious still.

The balance of this Article proceeds as follows. Part I sets the stage by briefly chronicling how the fundamental terms of the academic debate regarding the Warren Court emerged in the wake of *Brown v. Board of Education*.¹⁷ In response to conservative attacks on *Brown* that originated in politics and eventually migrated into academia, liberal law professors sought to defend the Warren Court’s legitimacy. Throughout the Warren Court era, prominent liberal academics continually played this role, challenging conservative opposition to the Warren Court rather than challenging the Court itself. This Part also analyzes the leading modern historical accounts of the

nothing, then, that a biography of Justice Harlan is subtitled “Great Dissenter of the Warren Court.” See TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENER OF THE WARREN COURT (1992). Perhaps Justice Harlan’s most spirited declaration of his constitutional conservatism came in his dissenting opinion in *Reynolds v. Sims*, where he poured cold water on the idea “that every major social ill in this country can find its cure in some constitutional ‘principle’ and that this court should ‘take the lead’ in promoting reform when other branches of government fail to act.” 377 U.S. 533, 624 (1964) (Harlan, J., dissenting). When the Warren Court unleashed its inner Justice Harlan, it can often be understood as practicing constitutional conservatism.

15. Cf. JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS, 1933–1939, at viii (1967) (defining conservatives during the New Deal as politicians who “sought to ‘conserve’ an America which they believed to have existed before 1933”).

16. See Ed Kilgore, *The Hidden Meaning Behind Michele Bachmann’s ‘Constitutional Conservatism,’* NEW REPUBLIC, July 5, 2011, available at <http://www.tnr.com/article/the-permanent-campaign/91205/michele-bachmann-president-constitution> (revealing that Congresswoman Bachmann uses the term to indicate, *inter alia*, a desire to invalidate President Obama’s health care plan). Relying upon the judiciary to resolve issues arising from the political sphere would have been seen as close to the antithesis of constitutional conservatism during the Warren Court era.

17. 347 U.S. 483 (1954).

Warren Court, contending that none of them adequately emphasizes the Court's constitutional conservatism in the face of plausible liberal alternatives.

Part II identifies and explores five significant areas where the Warren Court issued conservative constitutional opinions in cases where it would have been quite conceivable for the Court to issue liberal decisions. First, the Court in *Hoyt v. Florida* validated a statute that required women—but not men—to volunteer for jury service.¹⁸ Although law professors have previously suggested that prevailing attitudes made the decision virtually inevitable, they have ignored the evidence suggesting that considerable space existed for the Warren Court to issue more progressive gender decisions. Second, the Court in *Braunfeld v. Brown* found that the State did not violate the Free Exercise Clause when it forced Orthodox Jewish storeowners to adhere to Sunday Closing Laws.¹⁹ Even setting aside that most states with Sunday Closing Laws granted religious exemptions, the statutes had long been subjected to widespread condemnation and even judicial invalidation. Third, regarding the question of racial equality with which the Warren Court is so readily identified, the Court in *Swain v. Alabama* refused to provide oversight for the exercise of peremptory strikes.²⁰ As many scornful law review commentators immediately noted, *Swain* articulated an impossibly high standard and thus prolonged the existence of the southern all-white jury. Fourth, the Court in *Powell v. Texas* found that convicting chronic alcoholics of public intoxication did not violate the Eighth Amendment's prohibition on cruel and unusual punishment.²¹ While that decision may sound perfectly predictable today, *Powell* shocked contemporary observers, including the numerous federal judges who had already invalidated the application of such laws. Finally, the Court in *McDonald v. Board of Election Commissioners* found that registered voters in jail awaiting trial did not have a right to vote by absentee ballot.²² Many commentators observed that the Court reached that result only by applying an extremely relaxed level of scrutiny, abandoning its own recent precedents, and engaging in elaborate fantasies regarding how the state may not have actually deprived jailed inmates of their voting rights. These five cases, of course, provide merely an illustrative, not an exhaustive, account of the Warren Court's conservatism.

Part III steps back to examine the consequences of including constitutional conservatism as a significant part of the Warren Court's legacy. First, emphasizing the Warren Court's conservative decisions helps to illustrate the broad range of latitude that judges often have in deciding cases, a concept that two leading schools of legal history have unduly minimized. The Justices

18. 368 U.S. 57 (1961).

19. 366 U.S. 599 (1961).

20. 380 U.S. 202 (1965).

21. 392 U.S. 514 (1968).

22. 394 U.S. 802 (1969).

were not the mere products of either their times or political coalitions; to view them as such not only incorrectly deprives them of the acclaim they deserve when they issued honorable decisions, but it also incorrectly exonerates them for issuing dishonorable decisions. Second, seeing the Warren Court's past limitations clearly may help to revive the tradition of progressive judicial interpretation, as these decisions underscore the mutability of constitutional law. In highlighting how even the vaunted Warren Court sometimes maintained the prevailing constitutional understandings for no better reason than that they had prevailed for a long time, modern liberals should redouble their efforts to offer critical examination of preexisting law's normative power. Third, appreciating instances when the Warren Court failed to issue liberal decisions more accurately depicts historical reality, and complicates the oft-repeated idea that the Court oversaw a "revolution." Identifying the Warren Court Justices as "revolutionaries" risks perpetuating the mistaken impression that progressive constitutional interpretation can no longer thrive. Finally, the Article posits an explanation for why liberals have thus far dedicated scant attention to criticizing the Warren Court for its shortcomings. Because liberals who praise the Warren Court consistently extol the institution for its exquisitely developed moral compass, many scholars may be reluctant to emphasize instances where that compass faltered. A brief conclusion follows.

The common thread uniting these Parts is a concern that uncritical adoration of the Warren Court has dulled modern liberals to the possibilities held in progressive judicial interpretation. Too often, liberal legal scholars depict the Warren Court as a halcyon age of constitutional interpretation—a magical moment when the judicial and political stars aligned—that simply never will be approximated again. Recapturing the past in all its rich complexity and appreciating the Warren Court's failures alongside its successes help to demythologize that age and in the process demonstrate that liberal constitutional interpretation can flourish once more. Recovering merely a few of the many squandered judicial opportunities of the Warren Court era not only sharpens our constitutional history; it may also shape our constitutional future.

I.

TERMS OF DEBATE

A. Brown and Beyond

The intellectual dynamic that thrust liberals into the role of defending the Warren Court from conservative attacks can be traced back to *Brown v. Board of Education*,²³ the opinion that literally earned the Warren Court its name.²⁴

23. 347 U.S. 483 (1954).

24. See EARL WARREN, THE MEMOIRS OF EARL WARREN 4 (1977) (noting that "the phrase 'The Warren Court' . . . was coined not as a symbol of achievement or endearment, but as an indication of scorn by those who resented [*Brown*]").

After the Court invalidated segregated schooling on May 17, 1954, it did not take long for many people to denounce the decision.²⁵ The most important denunciation of all, however, arrived in March 1956, when the overwhelming majority of southern senators and congressmen signed what they formally titled the “Declaration of Constitutional Principles,” but quickly became known as the “Southern Manifesto.”²⁶ That document asserted that, in issuing *Brown*, the Supreme Court Justices operated “with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land.”²⁷

Professor Charles Fairman of Harvard quickly responded with a piece entitled “The Attack on the Segregation Cases.”²⁸ A more fitting title, perhaps, would have been “An Attack on the Attack on the Segregation Cases.” Fairman began by announcing that “[e]vents have dictated” his article, which consisted solely of a point-by-point rebuttal of the seven central objections to *Brown* that southern opponents had advanced.²⁹ Fairman’s piece adopted a remarkably emotional tone, both in its repudiation of the attackers and its celebration of the Justices. “The Supreme Court has run into a storm of protest, as severe as it has ever encountered,” Fairman wrote. “If the protests are unjust, then the protestants, however sincere, are doing enormous public harm. I believe that the attacks are unjust, that on the controverted matters the Court has been right, that it has acted with courage, and that it merits our confidence and support.”³⁰

The scholarly debate that emerged during the following years and decades largely replicated the dynamic of the immediate post-*Brown* era. Rather than liberal scholars offering broadly critical analyses of the Warren Court’s progressive agenda, they generally directed their efforts toward defending the

25. See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY*, at xviii–xx (2001) (describing southern denunciations of *Brown*).

26. 102 CONG. REC. H3948, 4004 (daily ed. Mar. 12, 1956).

27. *Id.* at 4516.

28. Charles Fairman, *The Supreme Court, 1955 Term—Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83 (1956).

29. See *id.* at 83–94. In challenging what was perhaps the South’s most oft-repeated attack, Fairman conceded that the Constitution mentions neither education nor schools: “Neither does it say anything about laundries. But when, long ago, San Francisco’s supervisors exercised their discretion in such a way that white applicants were granted, but all Chinese denied, permits to conduct laundries, the Court struck down the practice as a denial of equal protection.” *Id.* at 86 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

30. *Id.* at 83. As Fairman’s article closed, he again invoked emotionally charged language. See *id.* at 94 (“Once the Court’s judgment is everywhere in the course of execution, difficult though that objective now appears, this country will gain the much-needed calm that comes from doing right, and the hurtful attack upon the Court will cease.”). Fairman’s systematic effort to refute the Southern Manifesto’s analytical force built upon work that Alexander Bickel—then a staunch *Brown* defender—began in the popular press. After the Manifesto appeared, Bickel wrote an article for the *New Republic* that sharply contested the document’s constitutional interpretations. See Alexander M. Bickel, *Ninety-Six Congressmen Versus the Nine Justices*, NEW REPUBLIC, Apr. 23, 1956, at 11, 13 (“Of course the Constitution does not mention education. Nor does it mention an Air Force, but the President’s title to the commander-in-chief in the air as well as on land is not consequently the less.”).

Court's actions from conservative critiques within the academy. The intellectual melees surrounding two sets of Holmes Lectures delivered at Harvard Law School, separated by one decade, provide representative snapshots of scholarly discourse during the Warren Court era. In April 1959, Professor Herbert Wechsler extolled the importance of "Neutral Principles" in constitutional adjudication.³¹ In the course of making his argument, Wechsler asserted that—though he personally disapproved of segregated schools—he could not articulate a neutral constitutional principle that justified the Court's decision in *Brown*.³² Wechsler's doubts regarding the legitimacy of the Court's signature achievement generated a torrent of responses from liberal scholars.³³ As one of the many early academic responders suggested, unlike the criticism from southern politicians, Wechsler's "criticisms and demands [were] of a different order; academic attention to such comment is not only appropriate, it is compelled."³⁴ This statement does not contain much hyperbole, as legal academics during that era repeatedly challenged constitutional conservatism in their own ranks. With almost no exceptions, liberals did not feel free to chide the Court for moving with insufficient alacrity on the school desegregation front.³⁵ To do so would have risked drawing the Court into a two-front war.

In October 1969, shortly after Earl Warren yielded the stage to Warren Burger, Alexander Bickel criticized the Warren Court in his Holmes Lectures that would be published the following year as *The Supreme Court and the Idea of Progress*.³⁶ Examining its most important opinions, Bickel suggested that the Warren Court's jurisprudence had outpaced what American citizens actually desired and, accordingly, seemed likely to prove ephemeral: "[T]he upshot is that the Warren Court's noblest enterprise—school desegregation—and its most popular enterprise—reapportionment—not to speak of school-prayer cases and those concerning aid to parochial schools, are heading toward obsolescence, and in large measure abandonment."³⁷

31. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

32. *Id.* at 34.

33. See, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Richard A. Givens, *The Impartial Constitutional Principles Supporting Brown v. Board of Education*, 6 HOW. L.J. 179 (1960); Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Benjamin F. Wright, *The Supreme Court Cannot Be Neutral*, 40 TEX. L. REV. 599 (1962).

34. Addison Mueller & Murray L. Schwartz, *The Principle of Neutral Principles*, 7 UCLA L. REV. 571, 571 (1960).

35. After the Court issued the "all deliberate speed" decree in *Brown v. Board of Education II*, 349 U.S. 294, 301 (1955), only one article in a prominent law review criticized the Court for moving too slowly. See Robert Braucher, *The Supreme Court, 1954 Term—Foreword*, 69 HARV. L. REV. 120, 123 (1955) (criticizing the Court's *Brown* decisions for disentangling right from remedy). And, tellingly, that article predated the Southern Manifesto's appearance.

36. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS*, at xi (1970).

37. *Id.* at 173.

Like the reaction to Wechsler, the pages of law reviews teemed with liberal responses defending the Warren Court from Bickel's critique.³⁸ Writing in the *Harvard Law Review*, Judge J. Skelly Wright of the D.C. Circuit suggested that Professor Bickel's qualms about the Warren Court's understanding of the judicial role represented the last gasps of a dying era in legal academia.³⁹ Law school students of that time, Wright asserted, had "seen that affairs can be ordered in conformance to constitutional ideals and that injustice—to which they are prepared to give powerful meaning—can be routed. They have seen that it can be done: the Warren Court did it and the heavens did not fall."⁴⁰

Whatever the effects of the Warren Court on law students, Judge Wright's prediction for the future of legal scholarship proved to fall wide of the mark. Well after Warren completed his tenure as Chief Justice, conservative law professors continued to express profound reservations about the Warren Court's legitimacy.⁴¹ Liberal law professors responded, in kind, by expressing profound reservations about those reservations.⁴² And there the debate remained.

B. Modern Academia

During the last few decades, academic debate regarding the Warren Court has become considerably less freighted. The contours of that debate, however, have remained largely unaltered. For their part, law professors espousing a conservative understanding of judicial authority continue to disparage what they regard as the Warren Court's arrogation of power.⁴³ The substance of these critiques has not changed much, even if the individuals advocating these positions today have little in common with their intellectual forbearers. Although modern debate among Warren Court scholars on the left requires a bit more parsing, it too demonstrates remarkable continuity with earlier eras.

38. See, e.g., Jerome A. Barron, *The Ambiguity of Judicial Review: A Response to Professor Bickel*, 1970 DUKE L.J. 591, 604 (criticizing Bickel's approach); Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 21 (1970) (contending, contra Bickel, that "[t]he Warren Court's outlawing of segregation by law has to a very considerable extent worked out in practice").

39. J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 805 (1971).

40. *Id.* (emphasis omitted).

41. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 408 (1977) (contending that the Warren Court's constitutional interpretation violated originalism); BORK, *supra* note 9, at 69 (same).

42. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (repudiating the originalist claims of Berger and Bork).

43. See, e.g., Lino A. Graglia, *The Myth of a Conservative Supreme Court: The October 2000 Term*, 26 HARV. J.L. & PUB. POL'Y 281, 286 (2003) (criticizing the Warren Court for demonstrating insufficient fealty to the Constitution and being excessively liberal).

Three distinguished left-leaning law professors have written major works grappling with the Warren Court's historical legacy during the last twenty years: Morton Horwitz's *The Warren Court and the Pursuit of Justice*; Lucas A. Powe, Jr.'s *The Warren Court and American Politics*; and Mark Tushnet's "The Warren Court as History: An Interpretation."⁴⁴ These authors, and many other liberal academics besides, have offered stimulating accounts of the most significant judicial body in twentieth-century America.⁴⁵ But while left-wing law professors have viewed the Warren Court from many different vantage points, none of those perspectives has included sustained historical analysis demonstrating how the Court failed to deliver liberal opinions when it could have realistically done so. Consequently, the Warren Court's constitutional conservatism has gone severely underappreciated.

Of the three extended historical assessments, Professor Horwitz's volume offers the most celebratory account of the Warren Court's achievements. He consistently bathes the Warren Court in warm, almost heroic light and suggests that the reach of the Court's liberal victories was virtually limitless. "When Earl Warren became Chief Justice in 1953," Horwitz writes, "few would have predicted that when he retired sixteen years later the Warren Court would be remembered for inaugurating a progressive constitutional revolution that changed the entire landscape of American law and life."⁴⁶ The book disregards areas of conservative continuity, instead seeing almost exclusively revolutionary change. Horwitz occasionally acknowledges that the Warren Court stumbled in its liberal march, as occurred when it retreated in cases involving Communists in the immediate aftermath of Red Monday.⁴⁷ But Horwitz generally concedes early missteps in order to praise the Court for subsequently righting its conservative wrongs.⁴⁸ The aroma of adulation emanating from Horwitz's narrative is so pungent that Sanford Levinson and Jack Balkin have commented: "The tone of the book is scarcely that of a detached historian."⁴⁹

Professor Powe's book adopts a more measured—if still fundamentally admiring—tone in assessing the Warren Court's legacy. Although Powe demonstrates greater willingness to criticize the Warren Court Justices than does Horwitz, he does not generally frame those criticisms in a historically

44. HORWITZ, *supra* note 8; LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); Mark Tushnet, *The Warren Court as History: An Interpretation*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* (Mark Tushnet ed., 1993).

45. See, e.g., Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459 (1997); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845 (2007).

46. HORWITZ, *supra* note 8, at xi.

47. *Id.* at 59–65.

48. *Id.* at 65–67.

49. Sanford Levinson & Jack M. Balkin, *Morton Horwitz Wrestles with the Rule of Law*, at 483, 489, in *TRANSFORMATIONS IN AMERICAN HISTORY: LAW, IDEOLOGY, POLITICS, AND METHOD* (Daniel W. Hamilton & Alfred L. Brophy eds., 2010).

grounded manner to suggest that a greater number of liberal outcomes were realistically available. As his title suggests, Professor Powe portrays the Warren Court not in utter isolation, but as one of three coequal branches of government.⁵⁰ “[T]he Court was a functioning part of the Kennedy-Johnson liberalism of the mid and late 1960s,” Powe writes. “Indeed, a prime reason that liberals were and remain captivated by the Warren Court is that it represents the purest strain of Kennedy-Johnson liberalism. The Warren Court seemed to combine Kennedy’s rhetoric with Johnson’s ability to do the deal.”⁵¹ If the Warren Court failed to issue a liberal opinion, Powe suggests, a liberal opinion must not have been there for the taking.⁵²

Professor Tushnet views the Warren Court through a strikingly similar prism to the government-centered perspective used by Powe.⁵³ “The Supreme Court, in short, is unlikely to be an aberrational institution in the United States political system. And, indeed, the Supreme Court under Earl Warren was not aberrational, either in its broad ideology or in its particular positions,” Tushnet writes.⁵⁴ “The Warren Court was a liberal Court. After 1962 it was one institution in a unified government dominated by both Congress and presidency by liberal Democrats.”⁵⁵ Though both professors view the Warren Court as inextricably linked to the 1960s Democratic Party, their normative assessments of that linkage are quite distinct. Whereas Powe fully embraces the tenets of 1960s Democratic liberalism, Tushnet has long disparaged that worldview for being insufficiently radical.⁵⁶ Thus, while Tushnet briefly criticizes a few of the Warren Court’s decisions from the far left, he incorrectly attributes those opinions to the frailties of liberalism.⁵⁷ Tushnet’s radical critique insufficiently emphasizes that the Warren Court repeatedly issued conservative constitutional decisions—even according to contemporaneous legal liberal sensibilities.

50. See POWE, *supra* note 44, at xv (framing his book as seeking “to eschew the law professor’s traditional Court-centered focus and instead place the Court where it belongs as one of the three co-equal branches of government, influencing and influenced by American politics and its cultural and intellectual currents”).

51. *Id.* at 494.

52. See *infra* text accompanying notes 378–379.

53. See Tushnet, *supra* note 44, at 12–13.

54. *Id.* at 3.

55. *Id.* at 12–13. Professor Tushnet continues to conceive of the Warren Court in Dahlian terms. See MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* 97 (2010) (identifying the Warren Court as “an instrument of the New Deal/Great Society political regime,” and referring to Powe’s book as “the most astute detailed analysis of the way the Warren Court meshed with that political regime”).

56. See Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 709 (1980) (criticizing “[t]he politics of liberalism” because it “assume[s] that contemporary American society approximates a just society” and it “den[ies] the need for massive and therefore probably violent changes in the structure of society”); Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981) (revealing that if he were a judge he would interpret the Constitution in a manner “likely to advance the cause of socialism”).

57. See Tushnet, *supra* note 44, at 26 (“From the beginning to the end, the Warren Court found itself torn between a liberal idealism that saw the Court as an engine for progressive social reform and a liberal realism that saw severe limits on the Court’s ability to accomplish progressive reforms.”).

Permitting Tushnet's critique alone to articulate the entire left's disgruntlement with the Warren Court may lead to the mistaken impression that one must be a radical in order to find fault with the Court.

In sum, none of the three leading historical assessments of the Warren Court provides a sustained argument contending that the body issued constitutionally conservative decisions when liberal alternatives were plausibly available. This scholarly disregard distorts the conception of the Warren Court because, as the following history reveals, liberals at the time periodically voiced substantial disappointment with particular conservative decisions. But those expressions of liberal discontent protesting the outcomes in isolated cases went uncollected; consequently, they were not understood even at the time as forming an important basis for understanding the Warren Court era. Over time, those voices of liberal criticism have grown so faint as to become inaudible. It is essential to recover the Warren Court's conservative decisions, alongside the liberal critiques that they inspired, and to appreciate them for the significant and complex part of the Warren Court's legacy that they comprise.

II.

THE WARREN COURT'S CONSERVATISM

A. Engendering Juries

An all-male jury in Hillsborough County, Florida, tried and convicted Gwendolyn Hoyt for second-degree murder after she whacked her husband in the head with a baseball bat.⁵⁸ Leading up to that fatal encounter, Hoyt had strong reasons to suspect that her husband had been carrying on an extramarital affair for several months.⁵⁹ Hoyt was nevertheless committed to salvaging the marriage.⁶⁰ But when she sought to discuss the marital difficulties with her husband and made a sexual overture, her husband made it clear that he had no interest in reconciliation.⁶¹ Hoyt asserted that this final rejection sent her into a blind rage in which she beat her husband with a bat that their son had recently brought into the house from the yard.⁶²

In the Supreme Court, Hoyt contended Florida's requirement that women, but not men, must affirmatively volunteer in order to become eligible for jury service violated the Equal Protection Clause on both facial and as-applied grounds.⁶³ Hoyt further suggested that the effect of Florida's statute—which amounted to a virtual exclusion of women from jury service—was particularly

58. See *Hoyt v. State*, 119 So. 2d 691, 696 (Fla. 1959) (Hobson, J., concurring in part and dissenting in part).

59. *Id.* at 697.

60. *Id.*

61. *Id.*

62. *Id.*

63. Brief of Appellant at 9, 21, *Hoyt v. State*, 119 So. 2d 691 (Fla. 1950) (No. 31), 1961 WL 102289.

pernicious in her case, where male and female jurors could be expected to react in very different ways to her defense of temporary insanity.⁶⁴ Justice Harlan, writing for a unanimous Court in 1961, rejected Hoyt's challenges to Florida's law. Applying rational basis scrutiny, Justice Harlan found that it was reasonable to treat male and female jurors differently. "[W]oman is still regarded as the center of home and family life," Harlan reasoned. "We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."⁶⁵ Although the ten thousand names on the annually compiled jury list from which Hoyt's venire was selected included only 10 women (from 220 volunteers), Justice Harlan declined to find that Florida had arbitrarily sought to prevent women from serving as jurors.⁶⁶ Chief Justice Warren, joined by Justice Black and Justice Douglas, wrote a two-sentence concurrence finding it impossible to conclude "that Florida is not making a good faith effort to have women perform jury duty without discrimination on the ground of sex."⁶⁷

Traditionally, legal scholarship examining the Warren Court has ignored that institution's approach to gender equality.⁶⁸ But with the increased cultural salience of such matters during recent decades, Warren Court scholars have begun to address the issue. Regrettably, however, they have tended to do so cursorily, often omitting analysis of even a single Warren Court opinion. Instead, Warren Court scholars typically raise the issue of gender in the course of emphasizing legal developments that unfolded only following Chief Justice Warren's departure. In this vein, Professor Tushnet writes: "[A]fter Warren left the Court, the reconstitution of the Great Society coalition to include the organized women's movement had its counterpart on the Supreme Court, which for the first time in 1971 held a statute unconstitutional because it discriminated against women and then in 1973 redefined the nation's abortion laws."⁶⁹ Professor Horwitz adopts a similar line, but he additionally credits the Warren Court for the decisions vindicating gender equality during Chief Justice Burger's tenure. "[T]he first case extending the Constitution to bar gender

64. *Id.* at 20.

65. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

66. *Id.* at 65, 69. In finding that no impermissible exclusion had occurred in the compilation of the jury list, Justice Harlan expressly noted that "[t]he representative of the circuit court clerk's office, a woman, . . . actually made up the list." *Id.* at 65 (emphasis added). Justice Harlan may have mentioned the clerk's gender in order to suggest that a woman would not have aided in the intentional exclusion of female jurors. *Cf.* Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404 (2012) (critiquing the practice of judicial opinions that note the race of actors in order to suggest an absence of racial discrimination).

67. *Hoyt*, 368 U.S. at 69 (Warren, C.J., concurring).

68. To take only one of many possible examples, Alexander Bickel—despite voluminous writings about the Warren Court—never analyzed that body's relationship to gender equality.

69. Tushnet, *supra* note 44, at 19.

discrimination, *Reed v. Reed* (1971), was decided only after the Warren Court had passed into history,” Horwitz writes. “Yet the path had been prepared by Warren Court decisions expanding the scope of the Equal Protection Clause of the Fourteenth Amendment.”⁷⁰ The Court under Earl Warren’s leadership did not play a significant role in adjudicating gender equality, Horwitz suggests, because those issues had not yet come to the fore.⁷¹ The conventional story of the Warren Court’s jurisprudence regarding women has been, in sum, that there is simply not much of a story to tell.

That tidy narrative elides great complexity. As *Hoyt v. Florida* demonstrates, cases involving gender equality were not wholly missing in action during the Warren Court era.⁷² But that decision has been almost completely erased from the Warren Court’s legacy; neither the Warren Court volume edited by Tushnet nor the one written by Horwitz—to take only two prominent examples—even mentions *Hoyt*.⁷³ Even Powe, one of the few prominent Warren Court scholars who analyzes *Hoyt*,⁷⁴ does not deviate significantly from the fundamental view advanced by Tushnet and Horwitz. All three scholars are united in contending that the gender attitudes of the Warren Court era made it implausible that the Court could have issued legal opinions advancing the cause of gender equality. For Powe, this contention means declaring that the Court’s decision in *Hoyt* was virtually inevitable given society’s views of women during the early 1960s. “It would be another decade, and therefore beyond Warren’s tenure, before the next gender discrimination case appeared on the docket,” Powe concludes. “*Hoyt* is thus a useful reminder that the Court does not create social movements; it responds to them. It took Betty Friedan and the sexism of the civil rights movement to create the modern women’s movement.”⁷⁵

A detailed historical examination of *Hoyt* reveals, however, that the Warren Court enjoyed considerably more latitude to issue decisions vindicating gender equality than leading scholars have previously appreciated. Two of the strongest indications that the Warren Court enjoyed greater freedom to advance

70. HORWITZ, *supra* note 8, at 4. Oddly, Professor Horwitz has at times even appeared to suggest that the Warren Court repeatedly issued momentous decisions advancing the cause of gender equality. See Morton J. Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 456 (1988) (contending that “many of the most important decisions of the Warren Court can be understood as a rediscovery of the inseparable connection between political culture and political equality,” including its “recognition of the claims of women”).

71. See HORWITZ, *supra* note 8, at 103 (suggesting that the pornography debate shifted because of “the emergence of the feminist movement soon after the Warren Court had come to a close”).

72. *Hoyt v. Florida*, 368 U.S. 57 (1961).

73. See HORWITZ, *supra* note 8; THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE (Mark Tushnet ed., 1993).

74. Powe dedicates several paragraphs to analyzing the decision, and scolds the Court for its insensitivity to gender oppression in comparison to its concern about racial oppression. See POWE, *supra* note 44, at 180.

75. *Id.*

gender equality in *Hoyt* than is commonly understood can be found in a not-especially-mysterious location: Justice Harlan's opinion for the Court. First, Justice Harlan's opinion makes clear that Florida's treatment of female jurors represented the position taken in only a minority of states.⁷⁶ Along with Florida, seventeen other states permitted women (through various mechanisms) to claim exemption from jury service solely on account of sex.⁷⁷ Three states—Alabama, Mississippi, and South Carolina—prohibited women from jury service altogether.⁷⁸ In contrast to conservative laws in twenty-one states, twenty-nine state laws called women for jury service in the same manner that they called men.⁷⁹ Given that many scholars contend that the Warren Court did not generally act in a countermajoritarian fashion but instead typically brought Southern outliers into line with national values,⁸⁰ it seems worth noting that Southern states almost exclusively featured the conservative approach to female jury service.⁸¹

Second, it is important to appreciate that when the Court considered *Hoyt*, the Florida statute provided for a less equitable approach to female jury service than was permissible under federal law.⁸² Until 1957, the eligibility of women to serve on federal juries depended upon the law of the state where the relevant federal court was located.⁸³ Where state law permitted women to serve on juries, women were likewise entitled to serve on federal juries; where state law prohibited women from serving, they were also excluded from serving in federal court.⁸⁴ But the Civil Rights Act of 1957 upended that state-driven system for determining federal juror eligibility and replaced it with language declaring that “[a]ny citizens of the United States” were eligible to serve.⁸⁵

76. *Hoyt*, 368 U.S. at 62–63.

77. *Id.* at 62.

78. *Id.* at 62 n.5.

79. *Id.* at 62 n.6, 63 n.8 (listing state statutes). Eight of the twenty-nine states made express provisions for women to be excused from jury service if familial duties would make service a hardship. *Id.* at 62 n.8.

80. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 286 (2009) (describing the “Warren Court reforms” as tackling southern “outlier[s]”); POWE, *supra* note 44, at 490 (“[T]he dominant motif of the Warren Court is an assault on the South as a unique legal and cultural region.”).

81. Apart from the three southern states that absolutely barred women from serving, the following southern and border states featured approaches similar to Florida's: Arkansas, Georgia, Kansas, Louisiana, Missouri, Tennessee, and Virginia. See *Hoyt*, 368 U.S. at 62 n.6.

82. *Id.* at 60.

83. *Id.* at 60 n.2.

84. See 28 U.S.C.A. § 1861 (West 1957) (forbidding “service as a grand or petit juror if a person was incompetent to serve as a grand or petit juror by the law of the State in which the district court is held”).

85. *Id.* In *United States v. Wilson*, Judge Johnson provided an early judicial interpretation of this statutory change: “This Court is assuming, of course (and there can be no doubt about it), that the words as used in [the statute], ‘Any citizen of the United States . . .’ includes a female citizen of the United States.” 158 F. Supp. 442, 449 (1958). Judge Johnson's assumption, of course, stands in some

Although that legislation was primarily aimed at remedying exclusion on the basis of race, as Justice Harlan observed in a footnote: “The effect of that statute was to make women eligible for federal jury service even though ineligible under state law.”⁸⁶

In a similar vein, concern about gender equality also arose at the federal level in the early 1960s. Indeed, only one month after the Court decided *Hoyt*, President Kennedy established the Commission on the Status of Women. In the Executive Order announcing the Commission, Kennedy acknowledged that “prejudices and outmoded customs act as barriers to the full realization of women’s basic rights which should be respected and fostered as part of our Nation’s commitment to human dignity, freedom, and democracy.”⁸⁷ Accordingly, he mandated that the Commission examine the “[d]ifferences in legal treatment of men and women in regard to political and civil rights.”⁸⁸

In addition, a judge on the Florida Supreme Court endorsed gender equality more heartily than did any Supreme Court Justice. In his dissent from the Florida Supreme Court’s denial of rehearing, Judge Hobson stated his position in unequivocal terms: “No valid reason exists for limiting jury service to women who volunteer.”⁸⁹ “[S]ince the advent of woman suffrage and the entry, in this era of modernity, of untold numbers of American women into all fields of business and professional life,” Judge Hobson wrote further, “the reason given for excluding them from jury service no longer exists, nor does that or any other reasonable basis which I can envisage exist to justify the provision.”⁹⁰

Examining *United States v. Dege* bolsters the notion that the Warren Court Justices were meaningfully aware of changing gender roles when they decided *Hoyt*.⁹¹ *Dege*, decided only one year before *Hoyt*, demonstrated remarkably enlightened gender attitudes in the context of construing a criminal conspiracy statute.⁹² Regrettably, however, modern scholarship has almost completely overlooked *Dege* in analyzing either the Warren Court or the quest for gender equality. Indeed, during the last twenty-five years, no scholar in

tension with a notorious decision on gender equality concluding that the terms “citizen” and “voter” were not coextensive. See *Minor v. Happersett*, 88 U.S. 162, 178 (1875).

86. *Hoyt*, 368 U.S. at 60 n.2 (internal citations omitted). It is true that Justice Harlan proceeded to note that nothing indicates that the 1957 Civil Rights Act “was impelled by constitutional considerations.” *Id.* But this formulation suggests a sharper break between statutory considerations and constitutional considerations than often exists in reality. Cf. Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 26–28 (2003).

87. See Exec. Order No. 10980, 26 Fed. Reg. 12059 (Dec. 14, 1961).

88. *Id.*

89. *Hoyt v. State*, 119 So. 2d 691, 700–01 (Fla. 1960) (Hobson, J., dissenting from a denial of rehearing).

90. *Id.*

91. 364 U.S. 51 (1960).

92. *Id.* at 52.

either of those two areas has seriously undertaken sustained analysis of the decision.⁹³ The paucity of analysis is regrettable because omitting *Dege* from the picture makes it extremely difficult to comprehend the progressive gender paths that were available to the Warren Court.

In *Dege*, the Supreme Court agreed to resolve a seemingly simple question that had divided the circuit courts: Are a husband and wife legally capable of entering into a criminal conspiracy with each other?⁹⁴ The traditional approach, which the Ninth Circuit embraced below in *Dege*, answered that question in the negative because wives were understood as possessing no independent ability to resist their husbands' decisions.⁹⁵ The modern approach, as articulated by the D.C. Circuit and the Fifth Circuit, found that spouses could in fact conspire, as changing gender roles had undermined the basis for believing that spouses should necessarily be exempt from conspiracy charges.⁹⁶

Justice Frankfurter's opinion for the Court in *Dege* embraced the modern approach, finding that spouses could be charged with conspiracy. Ruling otherwise, Justice Frankfurter wrote, would perpetuate "medieval views regarding the legal status of woman and the common law's reflection of them."⁹⁷ To the extent that the traditional approach stemmed from the idea that "a wife must be presumed to act under the coercive influence of her husband and, therefore, cannot be a willing [coconspirator]," Justice Frankfurter declared that the idea "implies a view of American womanhood offensive to the ethos of our society."⁹⁸ Clinging to the traditional conspiracy approach, Frankfurter reasoned further, "would require us to disregard the vast changes in the status of woman—the extension of her rights and correlative duties—whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country."⁹⁹ Even if Justice Frankfurter's depiction of the state of marriage in 1961 America was excessively sanguine,¹⁰⁰ it is nevertheless noteworthy that

93. Warren Court scholars have utterly neglected *Dege*. A very small number of scholars exploring gender equality have cited the case, but they have invariably done so in passing, typically in footnotes. See, e.g., Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 28 n.139 (1994) (briefly mentioning *Dege*). Scholarship exploring the concept of conspiracy has, not surprisingly, kept a closer eye on *Dege*. See, e.g., Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 449–50 (1998) (analyzing *Dege*).

94. See *Dege*, 364 U.S. at 51–52.

95. See *id.*

96. See *id.*

97. *Id.* at 52.

98. *Id.* at 53.

99. *Id.* at 54.

100. In another overly rosy assessment, Justice Frankfurter's opinion elsewhere suggested that many American women had long ago broken free from the shackles of gender oppression. See *id.* (contending that the English "common-law disabilities" of women "were extensively swept away in our different state of society, both by legislation and adjudication, long before the originating conspiracy Act of 1867 was passed"). For a more nuanced depiction of ideas surrounding American

Frankfurter held up independent womanhood as an ideal, and that he understood how laws theoretically designed to benefit women often served to diminish them.¹⁰¹

Chief Justice Warren, joined by Justice Black and Justice Whittaker, dissented in *Dege*.¹⁰² But the dissent, revealingly, did not attempt a mere resurrection of the traditional approach to conspiracy. Rather than asserting that wives were necessarily beneath their husbands, Warren's dissent instead sought to elevate marriage. "It is not a medieval mental quirk," Warren insisted, to believe that "the concept of the 'oneness' of a married couple may reflect an abiding belief that the communion between husband and wife is such that their actions are not always to be regarded in the criminal law as if there were no marriage."¹⁰³ The Court's decision in *Dege*, thus, complicates the flat assertion put forward by no less an authority on gender equality than then-Judge Ruth Bader Ginsburg that "[e]vening up the rights, responsibilities, and opportunities of men and women was not on the agenda of the Warren Court."¹⁰⁴

As early as the 1940s, the Supreme Court had issued a significant decision vindicating the right of women to serve on juries—provided that they were eligible under the applicable state law. In *Ballard v. United States*, a case decided fifteen years before *Hoyt*, the Court vacated two criminal convictions because, in contravention of California law, the Southern District of California

womanhood than the one advanced by Justice Frankfurter, see generally Reva B. Seigel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (depicting the persistence of sex discrimination in American law and society well after 1867).

101. Justice Frankfurter dismissed as "self-deluding romanticism" Blackstone's statement that "even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England." *Dege*, 364 U.S. at 54 (quoting BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 433 (1765)). *Dege*, thus, anticipates Justice Brennan's much ballyhooed statement from *Frontiero v. Richardson*: "[O]ur Nation has had a long and unfortunate history of sex discrimination . . . rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." 411 U.S. 677, 684 (1973).

102. *Dege*, 364 U.S. at 55 (Warren, C.J., dissenting).

103. *Id.* at 58. Law review articles overwhelmingly applauded *Dege*. See, e.g., Robert J. Bray, Jr., *Criminal Law—Conspiracy—Husband and Wife Are Legally Capable of Conspiracy Against the United States*, 6 VILL. L. REV. 97, 99 (1960); Joseph F. English, *Married Women and Property Rights: A Comparative View*, 10 CATH. U. L. REV. 75, 83 n.66 (1961).

104. Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 132 (Vincent Blasi ed., 1983). Intriguingly, Ginsburg demonstrated familiarity with *Dege* when she was an advocate before the Supreme Court. Indeed, the brief that Justice Ginsburg filed in *Reed v. Reed* repeatedly identified *Dege* as an early instance where the Court departed from its standard mistreatment of women. See Brief for Appellant at 13, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133596 ("Fortunately, the Court already has acknowledged a new direction, see *United States v. Dege* . . ."); *id.* at 50 (asserting that *Hoyt* "harks back to the stereotyped view of women rejected in *United States v. Dege*"). Unlike Ginsburg's legal advocacy, though, her law review writings have avoided referencing *Dege*. For valuable insight into the theoretical underpinnings of Ginsburg's legal advocacy, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

had systematically excluded women from grand and petit juries.¹⁰⁵ Justice Douglas's opinion for the Court made clear that the decision was principally motivated by the then-controlling statute, which required federal courts to employ the same juror qualification procedures as those used by state courts in the relevant jurisdiction.¹⁰⁶ Nevertheless, the reasoning that Justice Douglas relied upon in *Ballard* could easily be understood as extending well beyond that relatively discrete setting. "The systematic and intentional exclusion of women, like the exclusion of a racial group, or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society," Justice Douglas wrote. "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."¹⁰⁷

On the heels of *Ballard*, lower courts also invalidated some female juror exclusion provisions that clashed with state laws. In a 1947 case, which aptly originated in Seneca County, New York, a state court judge dismissed a criminal indictment because women had been excluded from service on grand juries.¹⁰⁸ Although the New York legislature made women eligible to serve on grand juries in 1938, no woman in Seneca County had been summoned for grand jury service during the intervening nine years.¹⁰⁹ Citing *Ballard*, Judge Huff wrote: "I find that persons of the female sex have been systematically excluded from service as grand jurors in Seneca County and particularly from

105. 329 U.S. 187 (1946).

106. *Id.* at 190–91.

107. *Id.* at 195 (internal citations omitted). Legal commentators greeted *Ballard* favorably. See William J. Hickey, *Federal Legislation: Improvement on the Jury in Federal Courts*, GEO. L.J. 500, 511–12 (1947) (calling the exclusion of women jurors a pressing problem). The hopes that *Ballard*'s sweeping language would soon lead to a broad Supreme Court opinion prohibiting all gender classifications in jury service were, however, extinguished the following year. In *Fay v. New York*, Justice Jackson's opinion for the Court left no doubt that *Ballard*'s holding in support of female jurors would not immediately be extended to the constitutional context: "The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment." 332 U.S. 261, 290 (1947). *Fay* may superficially seem to damage the central argument of this section, but it is essential to remember that the case was decided by the narrowest of margins, with Justice Murphy writing a strong dissent for himself and three other Justices. See *id.* at 296 (Murphy, J., dissenting). In addition, it bears remembering that fourteen years elapsed between *Fay* and *Hoyt*. Those fourteen years witnessed American women make major strides in a host of different arenas.

108. *People v. Cosad*, 73 N.Y.S.2d 890, 940 (Seneca Cnty. Ct. 1947). Nearly one century before *Cosad*, of course, Seneca County hosted a significant gathering dedicated to advancing gender equality. See VIRGINIA BERNHARD & ELIZABETH FOX-GENOVESE, *THE BIRTH OF AMERICAN FEMINISM: THE SENECA FALLS WOMAN'S CONVENTION OF 1848* (1995).

109. *Cosad*, 73 N.Y.S.2d at 939–40.

the Grand Jury which indicted this defendant. Such systematic exclusion is a violation of this defendant's constitutional rights."¹¹⁰

Somewhat surprisingly, *Hoyt* did not generate much scrutiny in contemporaneous legal literature. The few commentators who responded, however, did not generally embrace the decision. A student note in the *Tulane Law Review*, for instance, criticized *Hoyt's* formalist reasoning, noting that "as a practical matter, automatic exemption equals automatic exclusion."¹¹¹

In contrast to the paucity of commentary in law reviews, *Hoyt* received extensive criticism in the pages of the nation's leading newspapers. Even before the Court heard oral argument, the *Washington Post* ran an editorial supporting *Hoyt's* position: "There seems to be a good deal of substance to [the] contention that the all-male jury which sat in this case was not a true cross section of her peers and she was in consequence deprived of the equal protection of the laws guaranteed her by the Fourteenth Amendment to the Constitution."¹¹² The editorial further suggested that "[t]here may be special force to" the claim in cases like *Hoyt's* that arose from facts potentially yielding sharply different reactions from male and female jurors.¹¹³

Not surprisingly, the *Washington Post* editorial page failed to see matters in an appreciably different light after having the benefit of reading *Hoyt*. The newspaper's editorial on the case predicted (accurately, as it turned out) that *Hoyt* "is not likely to be [the Court's] last word on the subject of women serving on juries."¹¹⁴ The editorial further suggested that states dragging their heels on the issue of juror equality should remedy the matter legislatively before the Court had occasion to revisit the issue. "The most enlightened jurisdictions now make women as welcome in the jury box as they are in the voting booth," the editorial noted. "The few states that are still holding out against feminine jurors would do well to correct this deficiency in their emancipation statutes before the Supreme Court finds it necessary to reconsider."¹¹⁵

110. *Id.* at 890. In 1948, the Arizona Supreme Court relied upon a procedural technicality to invalidate a measure that permitted women to cite their gender as a legitimate reason for exempting them from jury service. *See State v. Pelosi*, 68 Ariz. 51, 66 (1948).

111. Diane F. Yockey, Note, *Courts—Women Jurors—Automatic Exemption*, 36 TUL. L. REV. 858, 861 (1962). For another student note that criticizes the exclusion of female jurors in general and the Florida statute that the Court ultimately reviewed in *Hoyt*, see Grace Elizabeth Woodall Taylor, Note, *Jury Service for Women*, 12 U. FLA. L. REV. 224 (1959).

112. *Female of the Species*, WASH. POST, Sept. 4, 1961, at A18 (internal quotation marks omitted).

113. *Id.*

114. *Women on the Jury*, WASH. POST, Nov. 26, 1961, at E4. *See Taylor v. Louisiana*, 419 U.S. 522 (1975) (overruling *Hoyt*).

115. *Women on the Jury*, *supra* note 114. The extensive newspaper coverage of *Hoyt* stands in stark contrast to the lack of attention that greeted the Court's decision in *Plessy v. Ferguson*. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 23 (2004) (observing that the *New York Times* did not mention *Plessy*, even though the newspaper covered other cases decided on the same day, in order to contend

Hoyt also elicited frowns from the *New York Times*. Following the decision, the paper's summary of major national events derisively commented: "There is still a constitutional difference between men and women. At least that is what the Supreme Court implied in a ruling that found nothing unconstitutional in a Florida law making jury duty voluntary for women but compulsory for men."¹¹⁶ The treatment of *Hoyt* in the *Times* also suggests that Justice Harlan's contention that "woman is still regarded as the center of home and family life" did not embody elite views of gender roles in 1961.¹¹⁷ Had Harlan reduced a mere commonplace to writing, it would seem unlikely that the newspaper would have seized upon the comment as its "Quotation of the Day," a development that inspired an old friend of Harlan's to compose some doggerel tweaking the Justice's gender views.¹¹⁸ Harlan's statement, then, may have been less an expression of the zeitgeist than an anachronism.

Nor did condemnation of *Hoyt* disappear from newspapers in the decision's immediate aftermath. Several months after the Court's decision, the *New York Times Magazine* ran an extended piece by attorney Louis Nizer, who made an impassioned plea for eliminating barriers to women serving as jurors.¹¹⁹ Using *Hoyt* as a point of departure, Nizer drew upon his trial experiences to explore issues relating to jury selection and the differences that gender-integrated juries may have made to deliberations.¹²⁰ Although the modern feminist movement would surely regard some of his analysis as retrograde,¹²¹ Nizer nevertheless powerfully concluded that excluding women from juries constituted an affront to the democratic process. "Democracy functions best when it is permitted to synthesize the variegated view of the greatest number," Nizer wrote. "A jury system that does not reflect the opinions of women, or any other segment of the population, can no more be truly

that the case was consistent with prevailing attitudes). Legal history might be enhanced by consistently surveying newspaper coverage in an effort to chronicle instances where the judiciary may well have been able to issue decisions protecting marginalized groups, but declined to do so.

116. *The Major Events of the Day*, N.Y. TIMES, Nov. 21, 1961, at 41.

117. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

118. *Quotation of the Day*, N.Y. TIMES, Nov. 21, 1961, at 41. The poem ran: "While never really a misogynist, / You thought that women should not be kissed . . . / Now as Judge in the highest Court, / Woman's been put right where she ought, / Not with jurors 'midst scenes of strife / But 'the center of home and family life.'" George A. Trowbridge to Justice Harlan, Nov. 25, 1961 (quoted in LINDA K. KERBER, *NO CONSTITUTIONAL RIGHTS TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 183 (1998)).

119. Louis Nizer, *Verdict on Women as Jurors*, N.Y. TIMES MAG., Mar. 11, 1962, § 6, at 11. Six months after Nizer's piece ran, the *New York Times Magazine* featured another piece making the case for gender equality at a slightly higher level of generality. See Lee Graham, *Who's in Charge Here?—Not Women!*, N.Y. TIMES MAG., Sept. 2, 1962, § 6, at 8 ("[I]n the area of legal rights, the American woman has yet to achieve full equality.").

120. See Nizer, *supra* note 119, at 8. For a thoughtful exploration of the thorny questions that often arise regarding identity-based inclusions and exclusions, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

121. See Nizer, *supra* note 119, at 80 ("[M]y own experience leads me to suspect that in many instances a woman's thought processes derive more from the emotions than a man's.").

representative of the community than an election held with restricted voting.”¹²²

B. Closing Religion

Abraham Braunfeld would, by most appearances, seem to make an unlikely outlaw. The owner and operator of a modest business that sold children’s clothing in Philadelphia, Pennsylvania, Braunfeld opened his store each weekday morning and closed it nearly every weekday evening.¹²³ The sole exception occurred on Fridays, when Braunfeld locked up at mid-afternoon so that as an Orthodox Jew he could observe the Sabbath, which forbids working from nightfall on Friday until nightfall on Saturday.¹²⁴ In the late 1950s (no more so than today), Braunfeld hardly fit the standard depiction of a hardened criminal. Yet each Sunday morning, this deeply religious small-business owner woke up and proceeded knowingly to break the law.

Braunfeld’s crime of choice involved nothing more sinister than opening his store for business. In doing so, however, he violated Pennsylvania’s Sunday Closing Law, which required stores to remain shuttered on what—in Christian circles at least—was the Lord’s Day.¹²⁵ The lineage of Sunday Closing Laws, alternately known as Blue Laws,¹²⁶ can be traced all the way back to thirteenth-century England; they were imported to America during the colonial era.¹²⁷ Braunfeld contended that the Blue Laws violated his First Amendment rights under the Free Exercise Clause.¹²⁸ Forcing him to observe the laws meant that his store would remain closed the entire weekend—from mid-afternoon on Friday until Monday morning—when most shopping occurred. The financial hardship on Braunfeld was sufficiently severe that his store could not remain both financially viable and closed on Sundays.¹²⁹ A three-judge district court rejected Braunfeld’s Free Exercise claim.¹³⁰

In 1961, the Warren Court weighed in on the dispute in *Braunfeld v. Brown*, one in a set of four cases that involved various challenges to the

122. *Id.* at 85.

123. See Theodore R. Mann & Marvin Garfinkel, *The Sunday Closing Laws Decisions—A Critique*, 37 NOTRE DAME L. REV. 323, 323 (1962). Mann and Garfinkel served as Braunfeld’s lawyers. See Brief for Appellant at 1, *Braunfeld v. Brown*, 366 U.S. 599 (1961) (No. 67), 1960 WL 98689.

124. Mann & Garfinkel, *supra* note 123, at 323.

125. See 18 PA. STAT. ANN. §4699.10 (West 1960).

126. Scholars dispute the origins of the term “Blue Laws.” One understanding of the term traces it to the color of the paper on which the New Haven colony printed the code of laws. Another understanding suggests that it was an offshoot of “true blue,” a term of reproach sometimes applied to those deemed excessively religious. See DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, *BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS* 8 (1987).

127. *Id.* at 10–37.

128. See *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961).

129. Brief of Appellant, *supra* note 123, at 6.

130. *Braunfeld v. Gibbons*, 184 F. Supp. 352, 352–53 (E.D. Pa. 1959).

constitutionality of Sunday Closing Laws.¹³¹ The Court addressed the broadest challenge to the laws, under the Establishment Clause, in *McGowan v. Maryland*.¹³² There, although Chief Justice Warren's opinion for the Court acknowledged the religious origins of Blue Laws, he concluded that during the modern era the statutes had become secular. "The present purpose and effect of most [Sunday Closing Laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals," Chief Justice Warren explained.¹³³ "People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like."¹³⁴

Having determined that states did not generally violate the Establishment Clause by passing Blue Laws, the Court could turn its attention to the narrower question raised in *Braunfeld*: Did states violate the Free Exercise Clause by refusing to exempt individuals whose religious Sabbath fell on a day other than Sunday? Chief Justice Warren, announcing the Court's judgment, answered that question in the negative.¹³⁵ Emphasizing that Pennsylvania's Blue Law did not expressly render any tenets of Orthodox Judaism illegal, Chief Justice Warren characterized the law as imposing merely an "indirect burden" on Braunfeld's religious observation.¹³⁶ "[T]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive," Chief Justice Warren wrote.¹³⁷ "Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday."¹³⁸ One consequence of granting an exemption to Orthodox Jews and other individuals who did not recognize Sunday as the Sabbath, Chief Justice Warren cautioned, was that it could provoke Christians to feel persecuted. "To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage

131. In addition to *Braunfeld*, the other three Sunday Closing cases were: *McGowan v. Maryland*, 366 U.S. 420 (1961); *Gallagher v. Crown Koshher Super Markets*, 366 U.S. 617 (1961); and *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

132. 366 U.S. at 430.

133. *Id.* at 445.

134. *Id.* at 451–52.

135. *Braunfeld v. Brown*, 366 U.S. 599, 600 (1961). Although Chief Justice Warren technically spoke for a plurality of Justices and announced merely the Court's *judgment* rather than its *opinion*, his writing in *Braunfeld* has been broadly accepted as providing the Court's authoritative voice. See, e.g., POWE, *supra* note 44, at 184 (writing of *Braunfeld*, "Warren, for the Court, was unimpressed").

136. *Braunfeld*, 366 U.S. at 607.

137. *Id.* at 605.

138. *Id.*

over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against.”¹³⁹ Exemptions may even inspire some storeowners to undergo phony religious conversions so that they, too, could gain a “competitive advantage” that “compel[led] them to close their businesses on what had formerly been their least profitable day.”¹⁴⁰ Those risks, in the Court’s view, simply were not worth running.

The Court’s decision in *Braunfeld* drew three separate dissenting opinions. Justice Brennan chided the Court for “conjur[ing] up several difficulties” with Blue Law exemptions which he contended were “more fanciful than real.”¹⁴¹ Whatever minor difficulties might actually ensue from granting exemptions, Justice Brennan pointed out that, in the laboratories of democracy, Pennsylvania’s hardline approach was a distinctly minority position. “It is true, I suppose, that the granting of such an exemption would make Sundays a little noisier, and the task of police and prosecutor a little more difficult,” Justice Brennan reasoned.¹⁴² “It is also true that a majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania’s.”¹⁴³

Justice Stewart’s dissent eschewed empiricism for straightforward morality. “Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival,” Justice Stewart wrote. “That is a cruel choice.”¹⁴⁴ The Court’s rationale, according to Justice Stewart, impermissibly imposed unity where there was diversity: “For me, this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness.”¹⁴⁵

Justice Douglas alone thought that the Blue Laws violated the Establishment Clause as well as the Free Exercise Clause.¹⁴⁶ But Douglas also acknowledged that “[w]hen these laws are applied to Orthodox Jews . . . their vice is accentuated.”¹⁴⁷

Warren Court scholars have generally ignored *Braunfeld* and its companion cases involving Sunday closing laws.¹⁴⁸ Neither the book written by

139. *Id.* at 608–09.

140. *Id.* at 609.

141. *Id.* at 615 (Brennan, J., concurring and dissenting).

142. *Id.* at 614.

143. *Id.* at 614–15. Father Robert Drinan similarly noted that in the states permitting religious exemptions to the Blue Laws “[o]ne never hears of problems.” ROBERT F. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 216 (1963).

144. *Braunfeld*, 366 U.S. at 616 (Stewart, J., dissenting).

145. *Id.*

146. *See McGowan v. Maryland*, 366 U.S. 420, 576 (1961) (Douglas, J., dissenting).

147. *Id.* at 577.

148. A major reason that scholars have underplayed *Braunfeld* is that the Supreme Court issued a decision far more favorable to Free Exercise claimants two years later in *Sherbert v. Verner*.

Professor Horwitz nor the one edited by Professor Tushnet addresses the cases. Professor Powe, for his part, does briefly mention the cases in contending that increased secularization would earmark the laws for history's dustbin regardless of what the Supreme Court actually held.¹⁴⁹ Professor Powe does not, however, acknowledge that even at the time the Supreme Court issued the opinions they were widely condemned as anachronistic.

The dominant reaction to the Court's set of decisions affirming the Sunday Closing Laws was dissension. Chief Justice Warren's conclusion that the laws had somehow magically morphed from religious to secular evoked particular incredulity. As John Donaldson commented, "It is difficult to reconcile this conclusion with the obvious fact that these laws are well received by the Christians who constitute a majority in most political subdivisions, and to whom the legislatures are principally answerable."¹⁵⁰ In sharp contrast, Justice Douglas's wholesale condemnation of the Blue Laws garnered him praise. Professor Peter Donnici declared that Justice Douglas "alone pierced the secular façade of the Blue Laws."¹⁵¹

374 U.S. 398 (1963). Writing in 1968, Professor Paul Kauper contended "*Braunfeld* was sharply restricted, if not devalitized, by the later holding in *Sherbert*." Paul G. Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269, 275 (1968). But this assessment may understate *Braunfeld's* grip on the Court's Free Exercise jurisprudence in the modern era. See, e.g., Karl Bade, *Scylla, Charybdis, and Adam Smith: An Economic Analysis of the Religion Clauses*, 39 DEPAUL L. REV. 1235, 1249–50 (1990) (tracing *Braunfeld's* continuing legacy). Professor Kauper's underestimation of *Braunfeld's* continuing vitality may partially help to explain his otherwise confounding contention that "[o]n the whole there can be no serious quarrel with the results reached by the Warren Court in the cases arising under the religion clauses of the first amendment." Kauper, *supra*, at 287.

149. See POWE, *supra* note 44, at 185.

150. John E. Donaldson, *Freedom of Religion and the Recent Sunday Closing Laws Cases*, 3 WM. & MARY L. REV. 384, 386 (1962). See Ralph F. Bischoff, *Constitutional Law and Civil Rights*, 1961 ANN. SURV. AM. L. 55, 75 (observing that "[t]he Supreme Court is not handling itself well in this area"); Edmond Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U. L. REV. 1274, 1278 (1961) (criticizing the Court's decisions upholding Blue Laws); J.W.F., Note, *Constitutionality of Sunday Closing Laws Upheld by Supreme Court*, 7 UTAH L. REV. 537, 542 (1962) (noting that "[a]lthough the Court found no direct religious purpose in the closing laws, their obvious effect is to protect the quiet of the majority's Sabbath, while the same protection is not afforded groups who recognize another day than Sunday as their holy day"); Kenneth H. Hopp, *Sunday Laws—The McGowan Decision*, 13 BAYLOR L. REV. 225, 242 (1961) (criticizing the Court for rejecting "the chance to advance the field of constitutional law by throwing up barriers for the protection of minorities"); Henry M. Schmerer, Comment, *Constitutional Law—Establishment of Religion—Sunday Closing Laws*, 16 MIAMI L. REV. 337, 344 (1961) (criticizing the Court's decisions upholding Blue Laws); Estil A. Vance, Jr., *Constitutional Law—Police Power—Religion—Sunday Closing Laws Are a Reasonable Exercise of Police Power to Promote a Day of Rest*, 40 TEX. L. REV. 702, 707 (1962) (same).

151. Peter J. Donnici, *Government Encouragement of Religious Ideology: A Study of the Current Conscientious Objector Exemption from Military Service*, 13 J. PUB. L. 16, 19 (1964). See David W. Louisell, *The Man and the Mountain: Douglas on Religious Freedom*, 73 YALE L.J. 975, 986 (1964) (praising Justice Douglas's dissent in the Blue Law cases). The Blue Law decisions were widely, not universally, reviled. For a prominent author who voiced support for the Court's general rationale, see Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 83–94 (1961). The *Harvard Law Review* also published a student note defending the constitutionality of Blue Laws, sketching some of the arguments that the Court ultimately embraced shortly before the

Although some commentators expressed disagreement with the entire set of Blue Law decisions, the Court's refusal to grant an exemption under the Free Exercise Clause in *Braunfeld* elicited particularly widespread and particularly hostile sentiments. Burton Greenspan rejected Chief Justice Warren's contention that Blue Laws could be viewed as "indirectly" burdening religious observation. "It has been said that the Sunday laws do not make any religious practice unlawful, but that they simply regulate a secular activity. Such reasoning is fallacious and short sighted," Greenspan wrote. "The Sunday law operates to make the religious practices of the Sabbatarian more expensive and burdensome, and, in that respect, prohibits the free exercise of religion."¹⁵² Several writers echoed Justice Stewart's objection regarding the cruelty of the choice that the Court placed before *Braunfeld*. "The injustice of the majority's thinking in upholding statutes demanding 'enforced Sunday togetherness' is best illustrated by *Braunfeld v. Brown*," wrote Ronald Coffey. "To make a man choose between his business and religion is certainly a most restrictive prohibition of one's free exercise of religion as guaranteed by the First Amendment."¹⁵³ Writing in the *Harvard Law Review*, Professor Jerome Barron broadened the point:

It is the enforced homage to that religious Sunday of history that constitutes enforced abandonment of one of the precepts of the Sabbatarian's religion: the belief that only the Sabbath is a day of rest proclaimed by God. It is this homage that constitutes a burden on the free exercise of his religion.¹⁵⁴

Well before the Supreme Court resolved the issue, moreover, legal commentators overwhelmingly treated Blue Laws with skepticism. "The Sunday blue laws are unfair and seem to serve no useful function in our society today," contended Eugene Chell in 1958.¹⁵⁵ Writing six years earlier in the *Yale Law Journal*, Edgar Czarra claimed Sunday closing laws "[c]learly" had no place "in a modern community," because "while society has undergone great changes since their enactment, the statutes remain in their puritanical form."¹⁵⁶ Nor was such skepticism a new phenomenon in the 1950s. Going back to the

Court confronted the issue. See Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 HARV. L. REV. 729, 743 (1960) ("[I]t seems that Sunday statutes are genuinely necessary for the completely effective achievement of the legitimate social policies underlying them, and that therefore the application of such a statute to a particular individual cannot be dismissed summarily as a pointless restriction of religious liberty.").

152. Burton A. Greenspan, *Sunday Closing Laws: Free Exercise of Religion and a Uniform Day of Rest—A Dissent*, 35 CONN. B.J. 523, 528 (1961).

153. Ronald J. Coffey, *Interpretation of Exemptions Under the New Ohio Sales Tax*, 30 U. CIN. L. REV. 457, 470 (1961). See Elizabeth Heazlett, Comment, 23 U. PITT. L. REV. 216, 227 (1961) ("[T]he ultimate effect is to force a Jew to choose between his business and his religion.").

154. Jerome A. Barron, *Sunday in North America*, 79 HARV. L. REV. 42, 53 (1965).

155. Eugene P. Chell, Editorial Note, *Sunday Blue Laws: An Analysis of Their Position in Our Society*, 12 RUTGERS L. REV. 505, 520 (1958).

156. Edgar F. Czarra, Jr., *Sunday Statutes in a Modern Community*, 61 YALE L.J. 427, 427, 433 (1952).

Great Depression, Dean Alvin Johnson argued in 1934 that the laws clashed with the enlightened nation's values. "The many cases on this subject speak in unmistakable clearness that the ultimate and sole object in the minds of Sunday law originators was to promote the interest and influence of the church by constraining men to attend to her ordinances," Johnson wrote. "In this day of enlightenment we ought not to be forced to take up work begun in the past. We live when men ought to have, by reason of experience and principles laid down by our forefathers, a better understanding and conception of truth and religious freedom."¹⁵⁷

In response to the Court's decisions, the editorial pages of prominent national newspapers condemned the continued existence of Blue Laws. A *Washington Post* editorial stated that "[w]e thoroughly share the perplexity expressed by Justice Douglas," and closed by suggesting, "Perhaps if—as we fear—Monday's decisions spawn a spate of such 'blue laws,' the religious motivation will become so clear that the Court will no longer be able to ignore it."¹⁵⁸ Using even stronger language, the *Detroit Free Press* dismissed as "ridiculous" the Court's contention that Blue Laws had become secular and confessed, "[How] the justices can pretend [otherwise] is beyond our comprehension."¹⁵⁹ Noting that Michigan law provided religious exemptions for otherwise required Sunday closings, the newspaper observed the laws still "can interfere with the right of a minority to a different belief. As of this week, they may be considered constitutional, but that does not mean they are reasonable. The Court has ruled for the majority and totally ignored the religious rights of minorities."¹⁶⁰ The *Los Angeles Times* embraced the notion that the laws impinged upon both economic and religious liberties: "Sunday selling is a matter of competitive practice and individual conscience. There is no showing the public health and morals are adversely affected."¹⁶¹

Magazines did not receive the Court's decisions any more favorably. *Time* ridiculed Chief Justice Warren's contention that, because individuals enjoy a wide range of leisure activities on Sunday, the religious origin of Blue Laws had effectively been laundered: "Seldom has an issue of liberty been argued on flabbier grounds."¹⁶² Ralph Nader, in a magazine article called "Blue-Law Blues," contended: "The stands by most Protestant and Catholic bodies [supporting the Blue Laws], however well intentioned, indicate a deeply rooted

157. Alvin W. Johnson, *Sunday Legislation*, 23 KY. L.J. 131, 166 (1934).

158. Editorial, *The Lord's Day*, WASH. POST, May 31, 1961, at A14.

159. Editorial, *As We See It*, DETROIT FREE PRESS, June 2, 1961, at 12.

160. *Id.*

161. Editorial, *The 'Moral' Issue of Sunday Selling*, L.A. TIMES, Mar. 6, 1963, at A4. A *Washington Post* column also highlighted how the decisions eroded liberty: "The Supreme Court has held the blue laws constitutional and therefore any state that favors controlling the life of the individual, from the cradle to the grave, may do so." George E. Sokolsky, *Blue Laws*, WASH. POST, July 12, 1961, at A17.

162. See *Blue Sunday*, TIME, Oct. 25, 1963, at 56.

antagonism toward the Constitutional framework for church and state within which our nation has developed. . . . The fundamental objection to Sunday legislation is that it offends both religion and liberty.”¹⁶³

The wide latitude available to the Warren Court in these cases to adopt a liberal position may be best understood by noting that, even before the beginning of the Civil War, at least one judicial body invalidated a Blue Law in light of its religious content. In 1858, the California Supreme Court found its own state Blue Law unconstitutional, concluding in *Ex parte Newman*:

The whole scope of the act is expressive of an intention on the part of the Legislature to require a periodical cessation from ordinary pursuits, not as a civil duty, necessary for the repression of any existing evil, but in furtherance of the interests, and in aid of the devotions of those who profess the Christian religion.¹⁶⁴

In response to the state’s claim that closing laws simply encouraged health and restoration, *Ex parte Newman* further found that this secular garb could not effectively cloak the law’s sectarian motivation. “The truth is, however much it may be disguised, that this one day of rest is a purely religious idea,” the court wrote.¹⁶⁵ Admittedly, just three years later, the California Supreme Court reversed course when it upheld a revised Blue Law.¹⁶⁶ Nevertheless, that judges not only conceptualized but also actually articulated constitutional objections to a Blue Law more than a century before *McGowan* and *Braunfeld* highlights the conservatism animating some of the Warren Court’s decisions.

C. Excluding Race

In 1962, a grand jury in Talladega County, Alabama, indicted a nineteen-year-old black man named Robert Swain for raping a seventeen-year-old white woman.¹⁶⁷ An all-white jury subsequently convicted Swain of the offense and sentenced him to death.¹⁶⁸ Swain contended on appeal that the jury that convicted him had been selected in violation of the Fourteenth Amendment’s Equal Protection Clause. During voir dire, the prosecution used six of its peremptory strikes to exclude all six black citizens on the venire from becoming empaneled jurors charged with trying the case. Swain contended that this usage of peremptory challenges offered only a recent instance of a longstanding practice in Talladega County, where no black person had been

163. Ralph Nader, *Blue-Law Blues*, NATION, June 10, 1961, at 499, 500.

164. 9 Cal. 502, 505 (1858).

165. *Id.* at 509.

166. *See Ex parte Andrews*, 18 Cal. 678 (1861).

167. *Swain v. Alabama*, 380 U.S. 202, 231 (1965) (Goldberg, J., dissenting).

168. Brief for Petitioner at 3, *Swain v. Alabama*, 380 U.S. 202 (1965) (No. 64), 1964 WL 81288.

permitted to serve as a juror in any case within living memory.¹⁶⁹ The Alabama Supreme Court rejected Swain's claim.¹⁷⁰

These arresting details would seem to make *Swain v. Alabama* a prime candidate for the Warren Court's intervention to invalidate the conviction. Most significantly, the case involved a glaring question of racial inequality—an issue with which the Warren Court had been closely identified since *Brown*. In addition, the exclusion of blacks from juries in Talladega County was absolute, making it appear to fit comfortably in a long line of cases beginning with the Supreme Court's nineteenth-century decision in *Strauder v. West Virginia*¹⁷¹ and stretching through the Warren Court's own opinion in *Hernandez v. Texas*.¹⁷² Furthermore, that *Swain* was a capital case stemming from interracial rape allegations recalled celebrated cases where the Supreme Court had confronted similar factual scenarios in Alabama.¹⁷³ With the benefit of retrospect, even the matter of timing seems to have cut in Swain's favor: the Court decided the case in March 1965, during what would turn out to be the height of Warren Court liberalism.¹⁷⁴

Despite all of these factors militating in favor of a reversal, the Warren Court affirmed Swain's conviction in the course of issuing an extraordinarily conservative decision. At its core, Justice White's opinion for the Court amounted to a defense of the peremptory strike's legitimacy as a vital part of the adjudicative process. "The peremptory challenge has very old credentials," Justice White observed in tracing the practice back several centuries.¹⁷⁵ According to Justice White, what made peremptory strikes special was that—unlike removals for cause—lawyers need not offer any explanation for deploying them.¹⁷⁶ Respecting the peremptory challenge meant understanding that it "provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or

169. See *Swain*, 380 U.S. at 231 (Goldberg, J., dissenting).

170. *Swain v. State*, 156 So. 2d 368, 375 (Ala. 1963) ("The fact that the prosecution peremptorily strikes every Negro from the jury panel in a case where the defendant is a Negro does not constitute a violation of the defendant's constitutional rights.").

171. 100 U.S. 303 (1879) (invalidating a state statute that expressly barred nonwhites from jury service).

172. 347 U.S. 475, 482 (1954) ("[I]t taxes our credulity to say that mere chance resulted in their [*sic*] being no [Mexican-Americans] among the over six thousand jurors called in the past 25 years.").

173. See *Norris v. Alabama*, 294 U.S. 587 (1935); *Powell v. Alabama*, 287 U.S. 45 (1932); JAMES GOODMAN, *STORIES OF SCOTTSBORO* (1995) (analyzing various accounts of the Scottsboro cases and placing them in context of Alabama during the 1930s).

174. This date has the virtue of coming after Justice Goldberg replaced Justice Frankfurter in 1962 and before the Watts riots occurred in August 1965. See POWE, *supra* note 44, at 209 (contending that the Warren Court history remembers began in 1962); HORWITZ, *supra* note 8, at 45 (proposing that the Watts riots motivated the Court to issue conservative decisions in cases involving civil rights).

175. *Swain v. Alabama*, 380 U.S. 202, 212–13 (1965).

176. *Id.* at 219–20.

those with blue eyes.”¹⁷⁷ Regarding the prosecution’s removal of all six black members of the venire in *Swain*, the opinion established a presumption that, within the confines of a single case, the prosecutor’s reasons for exercising peremptory strikes may not be probed—no matter how egregious the racial pattern of challenges. “[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws,” Justice White wrote. “To subject the prosecutor’s challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge.”¹⁷⁸

Turning from the particular facts of *Swain*’s case to the broader question of juror exclusion in Talladega County, the Court found no conduct that required invalidating the conviction. Although Justice White conceded that black citizens had not in fact served on juries in the county, he noted that Alabama—like all states—allocated peremptory strikes both to prosecutors and defense attorneys. This dual allocation meant that the absence of blacks from juries may not be wholly attributable to state action.¹⁷⁹ Given the uncertainty regarding the extent to which defense attorneys used peremptory challenges against blacks in Talladega County, the Court determined that the record would not support reversing the Alabama Supreme Court. Still, Justice White declined to declare that the state’s exercise of peremptory strikes was altogether immune from constitutional scrutiny. The threshold test that Justice White spelled out in *Swain*, however, would not prove easy to meet:

[W]hen the prosecutor in a county, in case after case . . . is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that *no* Negroes *ever* serve on petit juries, the Fourteenth Amendment takes on added significance. . . . If the State has not seen fit to leave *a single* Negro on *any* jury in a criminal case, the presumption protecting the prosecutor *may* well be overcome.¹⁸⁰

If a party could overcome those obstacles, Justice White held out the possibility that “[s]uch proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity” to serve on juries as whites.¹⁸¹

Justice Goldberg, joined by Chief Justice Warren and Justice Douglas, wrote the dissent in *Swain*. Although Justice Goldberg invoked some strong language toward the opinion’s close,¹⁸² the dissent adopted a generally

177. *Id.* at 212.

178. *Id.* at 221–22.

179. *Id.* at 225–26.

180. *Id.* at 223–24 (emphasis added).

181. *Id.* at 224.

182. *Id.* at 246 (Goldberg, J., dissenting) (“I deplore the Court’s departure from its holdings in *Strauder* and *Norris*.”).

measured tone. The lack of vitriol must be attributable in large part to the broad agreement that united the dissenters with the majority. The dissenters in no way disagreed with the Court's holding that parties must look beyond the four corners of their particular cases in order to challenge how peremptory strikes are exercised. Like the Justices in the majority, the dissenters also thought that parties successfully contesting peremptory challenges must demonstrate that blacks had been systematically excluded from jury service. Justice Goldberg's dissenting opinion parted company with the Court on the narrower point of whether Swain had successfully demonstrated that the state caused the "total exclusion" of blacks from serving as jurors in Talladega County.¹⁸³ With a demonstration of total exclusion, the dissenters would have shifted the burden to the state in order to have it explain the absence of black jurors.¹⁸⁴

In the twenty years that *Swain* governed peremptory strikes, no federal court ever found a violation of the Warren Court's test.¹⁸⁵ This development came as no surprise to many of *Swain*'s numerous vehement critics. When the Court decided the case in 1965, several law review commentators immediately foresaw that the standard articulated in *Swain* would effectively turn out to be no standard at all. A student note denouncing the decision in the *Harvard Law Review* was the first piece among many to deem *Swain*'s threshold nearly unattainable: "Under the holding in *Swain*, it may prove virtually impossible for a defendant to make the required showing of discrimination even if the prosecution has in fact consistently abused its right of peremptory challenge."¹⁸⁶ Indeed, the test Justice White articulated in *Swain* was so severe—requiring that "*no Negroes ever serve on petit juries*" in order to come

183. *Id.* at 240.

184. *Id.* Many prominent Warren Court scholars wholly disregard *Swain*. See, e.g., BICKEL, *supra* note 36 (ignoring *Swain*); HORWITZ, *supra* note 8 (same); G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE (1987) (same). Consequently, *Swain* has been largely disembodied from the Warren Court. To their credit, both Powe and Tushnet address the case. Regrettably, Tushnet chalks up *Swain* as yet another instance of liberalism's failures. See Tushnet, *supra* note 44, at 25 (attributing *Swain* to liberalism's penchant for permitting realism to trump idealism). Yet *Swain* is more properly conceived not as evincing liberalism, but as betraying it. For his part, Powe aptly terms the decision "surprising." POWE, *supra* note 44, at 289. But Powe does not endeavor to demonstrate that the decision surprised even contemporaneous observers, nor does he understand *Swain* as part of a larger pattern of conservative decisions issued by the Warren Court.

185. See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 134 (2000).

186. *Use of Peremptory Strikes to Exclude Negroes from Trial Jury*, 79 HARV. L. REV. 135, 137 (1965) [hereinafter *Peremptory Strikes*]. See Gary L. Geeslin, Note, 39 MISS. L.J. 157, 163 (1967) ("The single greatest problem a petitioner will have in establishing his course of conduct is the nearly insurmountable burden of proof."); Paul Snyder, Comment, 38 U. COLO. L. REV. 279, 280–81 (1966) (stating that *Swain* saddles defendants "with a difficult, if not impossible, task"); *Fair Jury Selection Procedures*, 75 YALE L.J. 322, 326 (1965) (contending that *Swain* forces defendants to shoulder "almost impossible burdens"); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1160 (1966) [hereinafter *Constitutional Blueprint*] (calling *Swain*'s burden "impossible for any single individual to carry"); *id.* at 1163 (calling the burden "an unjustifiable and virtually insuperable obstacle").

into play¹⁸⁷—that one writer simply “assum[ed] the Court used these words figuratively.”¹⁸⁸

Commentators repeatedly condemned *Swain*'s standard because they believed that it stemmed from a perhaps willful naïveté regarding the realities of Southern justice.¹⁸⁹ As an article in the *Virginia Law Review* suggested, “There seems to be no rational basis for the Court’s insistence on blinding itself to the continuing total white control of the processes of justice in most of the South, or to the central role which this particular form of discrimination plays in the larger framework of equal protection.”¹⁹⁰ Some of *Swain*'s opponents noted that neither courts nor prosecutors generally maintained extensive records regarding anything so ephemeral as the exercise of a peremptory strike.¹⁹¹ The absence of such recordkeeping required black defendants who wished to bring a *Swain* challenge to depend on the assistance of individuals who seemed distinctly disinclined to provide it. “The only other likely sources of such information,” one critic noted, “are white lawyers and courthouse personnel, none of whom can be expected to exert his memory to help a Negro defendant secure reversal of an otherwise valid conviction.”¹⁹²

Scholars were particularly critical of *Swain*, moreover, because whatever the vintage of peremptory challenges’ “credentials,” they could not be found in the Constitution. Indeed, the Supreme Court had made it clear more than thirty years before *Swain* that the peremptory challenge was not constitutionally required.¹⁹³ As Professor Laughlin McDonald memorably put the point in the *Stanford Law Review*: “[T]he peremptory challenge is not constitutionally protected whereas the right to a racially nonexclusive jury is. If the two conflict with each other, the peremptory challenge should give way.”¹⁹⁴

187. *Swain*, 380 U.S. at 223 (emphasis added).

188. Geeslin, *supra* note 186, at 162.

189. Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 375–76 (1966) (“[T]he mathematical case appears overwhelming, and it leads to a conclusion contrary to that reached by the Court.”); Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 293 (1968) (contending “the *Swain* Court was remarkably blind to realities”); John Andrew Martin, *The Fifth Circuit and Jury Selection Case: The Negro Defendant and His Peerless Jury*, 4 HOUS. L. REV. 448, 451–52 (1966) (“[I]n *Swain v. Alabama* the method used by the Supreme Court to reach its decision and the Court’s opinion could be found lacking and even naive when compared with the performance of the Fifth Circuit.”); Jennie Rhine, Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1417, 1431 (1968) (criticizing “[t]he Court’s naïveté about racial attitudes” evinced in *Swain*).

190. *Constitutional Blueprint*, *supra* note 186, at 1159.

191. See, e.g., *Peremptory Strikes*, *supra* note 186, at 137.

192. *Id.*

193. See *Stilson v. United States*, 250 U.S. 583, 586 (1919) (“There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges.”).

194. M. Laughlin McDonald, *In Pursuit of the “Least Racist” Juror*, 23 STAN. L. REV. 367, 372 (1971) (reviewing *MINIMIZING RACISM IN JURY TRIALS* (Ann Fagan Ginger ed., 1969)). See Rhine, *supra* note 189, at 1431 (contending in the context of *Swain* that “[w]here a constitutional claim conflicts with a nonconstitutional claim, the latter must yield”); Norman Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553, 1590

Justice White's opinion for the Court understandably received most of the venom from *Swain*'s initial detractors. But even in 1965 some observers found Justice Goldberg's "total exclusion" standard too demanding. "A determined prosecutor would still be able to use the peremptory challenge as a tool of discrimination by permitting a few Negroes to sit on juries in relatively inconsequential cases," noted a piece in the *Virginia Law Review*. "As long as he was sophisticated enough to avoid obvious tokenism, he would be free to strike Negroes in any important case."¹⁹⁵ Similarly, a comment in the *Yale Law Journal* criticized Justice Goldberg's standard as unworkable, "since it could not be applied when more than a token number of Negroes had served and could not be used to judge the prosecutor's actions in a single case."¹⁹⁶

Even before *Swain* appeared on the Court's radar, the national media noted that peremptory strikes were integral to perpetuating all-white juries. In January 1962, Claude Sitton wrote in the *New York Times Magazine* that the "systematic exclusion from jury panels . . . is perhaps the greatest wrong suffered by the minority race in the legal process."¹⁹⁷ Sitton's article even drew particular attention to Alabama's usage of peremptory strikes to prevent blacks from serving on juries.¹⁹⁸ After the Court decided *Swain*, the *New York Times* seemed to have difficulty fully grasping the fact that the Warren Court had issued such a conservative decision in the case. In an article deceptively headlined "High Court Limits White-Jury Rule," the newspaper described *Swain* as follows: "In an opinion by Justice Byron R. White, the Court's opinion said that although a Negro is not entitled to a jury containing members of his race, a state's purposeful or deliberate exclusion of Negroes on account of race from service as jurors is unconstitutional."¹⁹⁹ That description more strongly resembles what the *Times* may have wished *Swain* held than what it

(1969) ("[T]radition furnishes no adequate basis for determining the constitutionality of racial classifications.").

195. See *Constitutional Blueprint*, *supra* note 186, at 1173.

196. See *Fair Jury Selection Procedures*, *supra* note 186, at 324.

197. See Claude Sitton, *When a Southern Negro Goes to Court*, N.Y. TIMES MAG., Jan. 7, 1962, at 80.

198. See *id.*

199. *High Court Limits White-Jury Rule*, N.Y. TIMES, Mar. 9, 1965, at 22. Misapprehension of *Swain* as a decision that vindicated civil rights extended even into the 1990s. See James B. O'Hara, *Introduction*, in *THE WARREN COURT: A RETROSPECTIVE 4* (Bernard Schwartz ed., 1996) (describing *Swain* as "forbidding peremptory challenges based on race in selecting juries," and listing the case alongside *Brown* and *Loving v. Virginia* as the Warren Court's "major milestones" of equal protection). As Professor Randall Kennedy correctly observed, "Many people misunderstand the Court's ruling in *Swain*." RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 196 (1997).

The coverage of *Swain* in the *Washington Post* also mangled the decision's holding. "The Supreme Court held yesterday that a criminal defendant is not entitled by the Constitution to demand that the racial makeup of the community be mirrored in the jury that tries him or in the roll from which the trial jurors are drawn," the article began. *Rape Conviction by All-White Jury Upheld*, WASH. POST, Mar. 9, 1965, at A5. *Swain*, of course, never advanced a claim proposing proportional representation. The media's profound difficulty grasping *Swain*'s actual holding may help to explain why the decision seems to have eluded the attention of editorial writers at the nation's leading newspapers.

actually held. But when journalists better understood *Swain* following the first wave of coverage, national news publications ran multiple articles disparaging the decision.²⁰⁰

Apart from the Supreme Court's many precedents invalidating race-based juror exclusions,²⁰¹ judicial opinions from lower courts also suggest that the Court could have plausibly issued a more progressive decision in *Swain*. Although peremptory strikes had infrequently been challenged before 1965,²⁰² at least one prominently placed judge was prepared to invalidate glaring racial disparities in their implementation well before Chief Justice Earl Warren joined the Court. In 1948—almost two decades before the Court decided *Swain*—Judge Henry Edgerton of the D.C. Circuit wrote a vigorous dissent attacking the prosecution's apparently race-based usage of peremptory strikes in *Hall v. United States*.²⁰³ The defendants in *Hall* contended that the government violated their constitutional rights by using nineteen of its twenty peremptory strikes to exclude all nineteen black members of the venire from the jury. The majority opinion rejected this contention, claiming that the inclusion of blacks in the venire demonstrated that no impermissible exclusion had transpired.²⁰⁴ In

200. See Haywood Burns, *Can a Black Man Get a Fair Trial in This Country?*, N.Y. TIMES MAG., July 12, 1970, at 5 (criticizing *Swain*); Lewis M. Steel, *A Critic's View of the Warren Court—Nine Men in Black Who Think White*, N.Y. TIMES MAG., Oct. 13, 1968, at 56 (same); *Bias in the Jury Box*, TIME, Apr. 6, 1970, at 61 (same).

Although the *New York Times* pitched Steel's article as a "critic's view of the Warren Court," a close reading of the piece reveals that Steel made a much broader historical claim contending that the Supreme Court throughout its history had acted as "the Supreme Court of white America." Steel argued that judicial victories for black citizens were merely window dressing: "Only where racial barriers were overtly obnoxious—and, therefore, openly contradictory to the American creed of equality—has the Court deigned to move." Steel, *supra*. This statement anticipated an intellectual move that Professor Derrick Bell would subsequently make in law review articles. See Derrick Bell, *The Supreme Court: 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 32 (1985) (referring to ostensible victories for racial equality as "'contradiction closing' cases" because, although "they narrow the gap between white and black rights that the framers wrote in the Constitution," "they bring about no real change in the status of blacks"). For a critique of this line of reasoning, see Justin Driver, *Rethinking the Interest—Convergence Thesis*, 105 NW. U. L. REV. 149, 182–85 (2011).

201. See *supra* cases cited in note 173.

202. In 1959, Jack Greenberg noted that the issue of peremptory strikes had been "treated in but few decisions." JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 326 (1959). Greenberg and Constance Baker Motley, two lawyers for the NAACP Legal Defense and Education Fund, eventually spearheaded *Swain*. Writing even many years after the decision, both lawyers would look back on *Swain* as a particularly bitter loss. See JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 460 (1994) ("I left LDF before I could take part in overruling one of our most deeply felt jury case losses, *Swain v. Alabama* (1965), . . ."); CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW 201 (1998) (stating that the LDF attorneys "were appalled to learn that we had lost Justice Brennan, Black, and Clark").

203. 168 F.2d 161, 165 (D.C. Cir. 1948) (Edgerton, J., dissenting).

204. See *id.* at 164 ("If the [defendants'] theory were correct and were carried to its ultimate logical result, it would be a violation of the Constitution for any prosecuting attorney peremptorily to challenge a Negro jurymen if the defendant happened to be a Negro."). In *Hall*, the Court supported its

dissent, Judge Edgerton warned that the prosecution's conduct strikes "at the very heart of the jury system," and "open[s] the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."²⁰⁵ Drawing on the Supreme Court's lengthy history of condemning the exclusion of black jurors from jury lists and panels, Judge Edgerton wrote: "[T]he spirit and purpose as well as the letter of those cases forbid systematic exclusion of Negroes from a jury that tries Negroes. The rule excluding Negroes from the panel has no value if all who get on the panel may be systematically kept off the jury."²⁰⁶

It is also helpful to contemplate how a judicial body more thoroughly committed to challenging the persistence of all-white juries than was the Warren Court may have approached *Swain*. During the 1950s and 1960s, the Fifth Circuit addressed the issue of single-race juries far more fervently than the Supreme Court. In *United States ex rel. Goldsby v. Harpole*, for instance, the Fifth Circuit in 1956 drew upon its understanding of Southern racial realities in order to permit a black criminal defendant to raise the issue of juror exclusion during habeas proceedings, even though he had failed to do so at trial.²⁰⁷ Typically, a defendant's failure to raise that issue at trial would mean that the issue had been waived. Both the Mississippi Supreme Court and the federal district court accordingly deemed the issue untimely raised.

But the Fifth Circuit refused to follow suit, rejecting the argument advanced by Mississippi's then-Attorney General Ross Barnett.²⁰⁸ The court observed that no official appeared able to recall a black person's name ever appearing on a jury list in Carroll County, Mississippi, even though blacks made up approximately half of the population. Writing for the court, Judge Rives explained:

We have called the figures startling, but we do not feign surprise because we have long known that there are counties not only in Mississippi, but in the writer's home State of Alabama, in which Negroes constitute the majority of the residents but take no part in government either as voters or as jurors. Familiarity with such a condition thus prevents shock, but it all the more increases our concern over its existence.²⁰⁹

Despite the widespread absence of blacks serving on juries, Judge Rives emphasized that Southern lawyers very infrequently raised the issue: "As

reasoning by drawing upon the Michigan Supreme Court's decision in *People v. Roxborough*. See 12 N.W.2d 466, 473 (Mich. 1943).

205. *Hall*, 168 F.2d at 165.

206. *Id.* at 166.

207. 263 F.2d 71 (5th Cir. 1959).

208. *Id.*; Barnett would, of course, go on to infamy as the Mississippi Governor who vehemently opposed James Meredith's integration of Ole Miss. See JOHN DITTMER, LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI 139-41 (1995).

209. *Goldsby*, 263 F.2d at 78-79.

Judges of a Circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries.”²¹⁰ Given the unwillingness of many lawyers to raise the juror exclusion issue and Goldsby’s apparent early desire to raise it, the Fifth Circuit refused to find the matter waived and ordered a new trial.²¹¹

Seven years after *Goldsby*, the Fifth Circuit went even further in an en banc ruling in *Brooks v. Beto* when it upheld the systematic *inclusion* of black jurors.²¹² The constitutional guarantee that jurors come from a representative cross section of the community, according to *Brooks*, legitimated the decision of jury commissioners to consider race in compiling jury lists.²¹³ “The cases—the long, long line of cases borne of a century’s struggle against this evil of race discrimination—make quite clear that this duty is not one to be exercised in the abstract,” Judge Brown wrote in *Brooks*. “On the contrary, it is the reality of the world, indeed, at times the segregated world, which must be kept in mind.”²¹⁴ Compiling juror lists in a colorblind manner simply would not discharge the state of its responsibility. “Although there is an apparent appeal to the ostensibly logical symmetry of a declaration forbidding race consideration in both exclusion and inclusion, it is both theoretically and actually unrealistic,” Judge Brown explained. “Adhering to a formula which in words forbids conscious awareness of race in inclusion postpones, not advances, the day when this terrible blight of racial discrimination is exterminated. The challenge is to assure constitutional equality now. . . . That evil of racial exclusion cannot be ignored.”²¹⁵ But one year earlier, of course, the Warren Court chose to ignore that very evil in *Swain*.

A few months after the Supreme Court decided *Swain*, national political figures found occasion to repudiate the stubborn persistence of the all-white jury. The event that brought the issue to the fore was a jury’s failure in Lowndes County, Alabama, to convict a Ku Klux Klansman charged with

210. *Id.* at 82.

211. The Fifth Circuit ascertained Goldsby’s desire to raise the juror exclusion issue because his first lawyer, who was black, had drafted a motion to quash the indictment on that ground. Goldsby subsequently retained a white lawyer, who refused to defend him alongside a black lawyer. Goldsby’s initial lawyer then dropped out of the case, and the juror exclusion motion went unfiled. The race of the attorneys mattered to the Fifth Circuit because it suggested that the costs associated with white lawyers raising the juror exclusion issue were greater than those for black attorneys. There may have been some truth in this assessment, as it was Goldsby’s initial lawyer who raised the juror exclusion issue after rejoining the case during habeas proceedings. *Id.* at 82–83.

212. 366 F.2d 1, 4, 24 (5th Cir. 1966) (en banc).

213. *Id.* Cf. *The Case for Black Juries*, 79 YALE L.J. 531, 538 (1970) (“There is a fundamental problem with this approach. The black litigant and the black community are protected equally not when there is equal *opportunity* for blacks to serve, but when blacks *do* serve on juries.”).

214. *Brooks*, 366 F.2d at 12.

215. *Id.* at 24.

murdering Viola Liuzzo, a civil rights worker from Michigan.²¹⁶ “Selection of Southern juries is a matter in which we should be and intend to be more active,” Attorney General Katzenbach stated in October 1965.²¹⁷ Katzenbach instructed the Department of Justice to intervene in a lawsuit to support five black citizens who alleged that they had systematically been excluded from serving on juries in Lowndes County, Alabama.²¹⁸ One month later, President Johnson also weighed in when he urged Congress to pass legislation designed to prevent “injustice to Negroes at the hand of all-white juries.”²¹⁹ Calling the jury the “cornerstone of our system of justice,” President Johnson declared: “If its composition is a sham, its judgment is a sham. And when that happens, justice itself is a fraud, casting off the blindfold and tipping the scales one way for whites and another way for Negroes.”²²⁰

Perhaps the strongest indication that legal observers considered *Swain* a judicial relic is the existence of commentary predicting and hoping that the rule articulated in the opinion was not long for this world. On the aspirational front, a note in the *Virginia Law Review* concluded: “The Court in *Swain* . . . in effect handed the states a blank check for discrimination. It is to be hoped that the Court will swiftly reconsider.”²²¹ On the prognostic front, commentary in the *Mississippi Law Journal* stated: “The Court is not likely to allow an unworkable standard like that announced in *Swain v. Alabama* to stand for very long.”²²² The Court would not, however, revisit *Swain* for more than two decades. Finally, in 1986, the Burger Court in *Batson v. Kentucky* at least partly redressed the Warren Court’s error by lowering the burden for proving that prosecutors had used peremptory strikes in a racially impermissible manner.²²³

D. Punishing Addiction

In December 1966, Leroy Powell, a 65-year-old shoe-shiner living in Austin, Texas, was arrested and convicted for the crime of public

216. See Roy Reed, *Klansman Freed in Liuzzo Killing*, N.Y. TIMES, Oct. 22, 1965, at 1 (indicating that when the not-guilty verdict in this second trial in the Liuzzo killing was announced “[s]everal spectators in the courtroom, which was filled with white people, burst into applause”).

217. Jean M. White, *U.S. May Intervene for Fairer Dixie Jury Choice*, WASH. POST, Oct. 22, 1965, at A7.

218. See *U.S. Aids Negroes Fighting Jury Bar*, N.Y. TIMES, Oct. 25, 1965, at 28. In explaining its decision to intervene, the Justice Department stated: “For the past 50 years, it has been the practice, custom and usage in Lowndes County to exclude Negroes by reason of their race or color from serving on grand and petit juries in the county.” *Id.*

219. See Robert E. Baker, *LBJ Seeks Law to End Sham Trials*, WASH. POST, Nov. 17, 1965, at A1.

220. *Id.* Although the ensuing legislation—the Jury Selection and Service Act of 1968—did not explicitly address peremptory strikes, it did forbid exclusion on grounds of “race, color, religion, sex, national origin, or economic status.” Pub. L. No. 90-274, 82 Stat. 53 (1968).

221. *Constitutional Blueprint*, *supra* note 186, at 1175.

222. Geeslin, *supra* note 186, at 164–65.

223. 476 U.S. 79 (1986).

intoxication.²²⁴ It was hardly his first such encounter. By Powell's own count, he had amassed approximately one hundred convictions for the offense since 1949.²²⁵ Despite this lengthy record, Powell nonetheless deemed himself "pretty lucky" in avoiding arrest.²²⁶ Seeing as how he often drank wine until he passed out and not infrequently slept on the sidewalk rather than in his home, Powell may well have had reason to believe that fortune had smiled upon him.²²⁷

On the evening in question, just as with his prior arrests, Powell had not been accused of yelling, accosting anyone, or otherwise creating a disturbance—only staggering, speaking incoherently, and reeking of booze.²²⁸ Powell filed a lawsuit claiming that his drinking problem rendered his conviction for public drunkenness a violation of the Eighth Amendment's ban on cruel and unusual punishment.²²⁹ Chronic alcoholism was a disease, Powell contended, and it should be impermissible to punish someone for suffering from what was, after all, an illness. Powell's supported his contentions at trial by offering the testimony of Dr. David Wade, a psychiatrist who explained that a chronic alcoholic is someone who drinks because of an uncontrollable compulsion rather than an affirmative choice. Dr. Wade further testified that a personal examination led him to conclude that Powell was, in fact, a chronic alcoholic and that jailing Powell would not diminish his desire to drink.²³⁰ The trial court agreed with Dr. Wade's testimony and entered findings of fact to that effect.²³¹ As a matter of law, however, the trial court nevertheless held that chronic alcoholism was not a valid defense to a charge of public intoxication.²³²

When the case made its way to the Supreme Court in 1968, the Court rejected Powell's claim that convicting him for public drunkenness violated the Eighth Amendment.²³³ Justice Marshall's plurality opinion indicated that ruling for Powell would amount to a perversion of the Cruel and Unusual Punishment Clause: "The primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed."²³⁴ In Marshall's view, accepting Powell's claim threatened to remove the legal pillar of moral accountability. And the consequences of eliminating that pillar were

224. Brief of American Civil Liberties Union et al. at 5, *Powell v. Texas*, 392 U.S. 514 (1968) (No. 405), 1967 WL 113843.

225. *Powell*, 392 U.S. at 555 (Fortas, J., dissenting).

226. Brief of Appellant, *supra* note 224, at 6.

227. *Id.* at 3–4.

228. *Powell*, 392 U.S. at 555 (Fortas, J., dissenting).

229. *Id.* at 517.

230. *Id.* at 518.

231. *Id.* at 517.

232. *Id.*

233. *Id.* at 537.

234. *Id.* at 531–32.

nothing less than breathtaking. “If Leroy Powell cannot be convicted of public intoxication,” Marshall wrote, “it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a ‘compulsion’ to kill.”²³⁵

Given that current judicial interpretations find the Eighth Amendment to have precious little applicability beyond the capital punishment context,²³⁶ the outcome in *Powell* now comes as no great surprise.²³⁷ Indeed, if the Supreme Court issued a decision vindicating the underlying claim in *Powell* today, many observers would view it as a bolt from the blue. But when the Supreme Court decided *Powell* in 1968, commentators consistently characterized the decision as “surprising.” Immediately after the decision, *Time* declared: “[T]he court surprised just about everyone last week when it upheld . . . the conviction of Leroy Powell.”²³⁸ In the coming months and years, a great deal of law review commentary would echo *Time*’s appraisal, including Professor Isidore Silver’s article from the *New York University Law Review*: “In *Powell v. Texas* . . . the Supreme Court surprisingly refused to hold that chronic alcoholism was a defense to [public drunkenness].”²³⁹

235. *Id.* at 534.

236. For a thoughtful treatment of this idea, see Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155 (2008).

237. Even two Warren Court scholars who have recently addressed *Powell* seem either not to appreciate that the Court could have realistically issued a progressive decision in the case or do not believe that it would have been desirable to do so. Professor Tushnet portrays *Powell* as an instance where the Warren Court permitted liberal realism to trump liberal idealism. See Tushnet, *supra* note 44, at 24–25 (contending *Powell* presents a “division within the Warren Court over idealism and realism,” and that “at [*Powell*’s] center was a practical point”). But, as the contemporaneous responses to *Powell* demonstrate, no flights of idealistic fancy were required to believe that Powell’s conviction should be invalidated; indeed, many doctrinally grounded commentators thought that an evenhanded reading of the governing Supreme Court doctrine required that result. Professor Powe, taking a page out of Justice Marshall’s book, contends that had the Court vindicated Powell’s claim, the doctrinal implications would have been devastating. See POWE, *supra* note 44, at 441 (contending that “[i]t does not take a long time to discover the hole [in Powell’s position] as well as the sweep of its logic”); *id.* at 442 (suggesting that accepting Powell’s argument may have made it difficult to prosecute drunk drivers for killing people). This claim, however, seems dramatically overstated.

238. *The Law: Public Drunkenness Is a Crime*, TIME, June 28, 1968, at 34.

239. Isidore Silver, *The President’s Crime Commission Revisited*, 43 N.Y.U. L. REV. 916, 958 n.170 (1968) (italics added). See, e.g., George F. Bason, Jr., *Chronic Alcoholism and Public Drunkenness—Quo Vadimus Post Powell*, 19 AM. U. L. REV. 48, 49 (1970) (stating that *Powell* “confounded the experts”); J. Walter McKenna, *Criminal Law and Procedure*, 20 SYRACUSE L. REV. 219, 234 (1968) (calling *Powell* “surprising”); Richard A. Merrill, *Drunkenness and Reform of the Criminal Law*, 54 VA. L. REV. 1135, 1135 (1968) (same); Lynd K. Mische, *Recent Cases: Constitutional Law—Chronic Alcoholism as a Defense to a Charge of Public Intoxication*, 34 MO. L. REV. 597 (1969) (same).

The expectation that Powell would prevail was not something that arose only in retrospect. Scholarly commentary written before the Court decided the case also repeatedly suggested that Powell’s victory seemed assured. See Daniel R. Coburn, *Driver to Easter to Powell: Recognition of the Defense of Involuntary Intoxication*, 22 RUTGERS L. REV. 103, 134 (1968) (“Considering the generally recognized futility of punishing alcoholics . . . it would appear almost inane to predict that the Court would by its decision ratify the anachronistic presumption underlying public intoxication

That a decision capable of eliciting such widespread astonishment in the late 1960s would elicit mere yawns if it were decided today casts a harsh light on the stunted development of jurisprudential understandings of what constitutes “cruel and unusual punishment.”²⁴⁰ Retracing the steps that prompted contemporaneous observers to find *Powell* surprising not only demonstrates that the Warren Court issued a conservative decision in *Powell* when the legal world anticipated a liberal outcome, but also may help to illuminate the path toward a revived Eighth Amendment jurisprudence.

Perhaps the most important basis for predictions that the Court would decide in *Powell*’s favor was the Supreme Court’s decision six years earlier in *Robinson v. California*,²⁴¹ where the Court invalidated a statute that made it illegal “to be addicted to the use of narcotics.”²⁴² Relying on the Eighth Amendment, the Court in an opinion written by Justice Stewart invalidated the California statute because it was tantamount to a state attempting “to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with venereal disease.”²⁴³ Drug addiction was “apparently an illness which may be contracted innocently or involuntarily,” according to *Robinson*, and states may not treat “a person thus afflicted as a criminal.”²⁴⁴ Although the Court conceded that the California statute’s ninety-day sentence fell well short of what courts would typically deem cruel and unusual punishment, it insisted that the duration of imprisonment was irrelevant when dealing with an illness: “Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”²⁴⁵

Among the early responses to *Robinson*, many analysts predicted that the judiciary would extend the decision’s logic to the context of alcoholism.²⁴⁶ Indeed, some analysts thought that the extension had effectively already occurred. “Alcoholism is no different than drug addiction, assuming that the

statutes”); Walter W. Steele, Jr., *The Status of Status Crime*, 52 JUDICATURE 18, 19 (1968) (stating “[t]here can be little doubt” that *Powell* will prevail).

240. U.S. CONST. amend. VIII.

241. 370 U.S. 660 (1962).

242. CAL. HEALTH & SAFETY CODE § 11721 (1961).

243. *Robinson v. California*, 370 U.S. 660, 666 (1962).

244. *Id.* at 667.

245. *Id.*

246. See Michael R. Asimow, *Constitutional Law: Punishment for Narcotic Addiction Held Cruel and Unusual—Robinson v. California (U.S. 1962)*, 51 CALIF. L. REV. 219, 227 (1963) (“The wind from *Robinson* could topple statutes in the area of alcoholism, which, considered as a disease, presents problems analogous to those of addiction.”) (internal citations omitted). Professor Asimow’s analysis presciently identified the very line that the Court would ultimately draw to distinguish *Robinson* from *Powell*. See *id.* (“Where a statute appears to punish alcoholism per se, the *Robinson* theory would be relevant. However, drunkenness convictions ordinarily arise from ‘drunk in a public place’ statutes, which seem comparable to ‘under the influence’ narcotic statutes. Consequently, their constitutionality when applied to alcoholics is open to question.”) (internal citations omitted).

person is no longer in control of himself,” wrote Professor Dale Broeder.²⁴⁷ “In other words, habitual drunkenness will many times now be a complete defense to a drunkenness charge.”²⁴⁸ Similarly, the *Washington Post* ran an editorial contending: “Certainly the time has come for a good look at criminal prosecution of chronic alcoholics in light of [*Robinson*’s] principle.”²⁴⁹

As these commentaries predicted, lower courts did not take long to rely upon *Robinson* in invalidating public intoxication statutes as applied to chronic alcoholics. In 1966, the Fourth Circuit—seldom seen as being in the vanguard of progressive legal interpretation—held that applying North Carolina’s public drunkenness statute to Joe B. Driver violated the Eighth Amendment.²⁵⁰ With a criminal record that accomplished the seemingly impossible feat of making Powell seem like a modest drinker, Driver had been convicted of public intoxication more than 200 times.²⁵¹ As a result of these infractions, Driver had spent nearly two-thirds of his life behind bars.²⁵² “This addiction—chronic alcoholism—is now almost universally accepted medically as a disease,” Judge Bryan wrote for the court in *Driver v. Hinnant*.²⁵³ To convict Driver of public drunkenness “would affront the Eighth Amendment, as cruel and unusual punishment in branding him a criminal.”²⁵⁴ Judge Bryan further reasoned that the Court’s decision in *Robinson* “sustains, if not commands,” the Fourth Circuit’s decision: “The California statute criminally punished a ‘status’—drug addiction—involuntarily assumed; the North Carolina Act criminally punishes an involuntary symptom of a status—public intoxication.”²⁵⁵

Two months after the Fourth Circuit’s decision, the D.C. Circuit’s en banc ruling in *Easter v. District of Columbia* unanimously invalidated a public intoxication statute as applied to chronic alcoholics.²⁵⁶ The D.C. Circuit’s controlling opinion in *Easter* relied upon a congressional statute permitting District of Columbia courts to account for chronic alcoholism in determining liability in public intoxication cases.²⁵⁷ But that opinion also contained

247. Dale W. Broeder & Robert Wade Merson, *Robinson v. California: An Abbreviated Study*, 3 AM. CRIM. L.Q. 203, 205 (1965).

248. *Id.* See also Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 650–51 (1966) (suggesting that one understanding of *Robinson*’s implications would “[a]t a minimum . . . apply to a law that punishes alcoholism”).

249. Editorial, *Prosecution of Alcoholics*, WASH. POST, July 19, 1964, at E6.

250. *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966). Apart from our shared surname, I have no reason to believe that I can claim Joe as a relative.

251. *Id.* at 763.

252. *Id.*

253. *Id.* at 764.

254. *Id.*

255. *Id.* at 764–65.

256. 361 F.2d 50, 51 (D.C. Cir. 1966). According to the D.C. Circuit, DeWitt Easter had been “arrested for intoxication or associated conduct 70 times [since 1937], 12 times in 1963 alone.” *Id.* at 55.

257. See D.C. CODE § 24-501 (1961). Congress passed this statute, entitled “Rehabilitation of Alcoholics,” in 1947.

extremely sympathetic language describing the futility of treating alcoholics as criminals: "Jail is not the answer to their trouble. We think they are sick people and need scientific and technical attention of psychiatrists and medical personnel."²⁵⁸ Even then-Judge Warren Burger, who would soon wage a high-profile campaign in the national press inveighing against courts' supposed coddling of criminals,²⁵⁹ voted to invalidate Easter's conviction on the statutory ground.²⁶⁰ In addition to the statutory holding, moreover, four D.C. Circuit judges—David Bazelon, Charles Fahy, Harold Leventhal, and J. Skelly Wright—were prepared to decide *Easter* on a constitutional basis. Drawing upon *Robinson* and *Driver*, those judges found that "the public intoxication of a chronic alcoholic lacks the essential element of criminality; and to convict such a person of that crime would also offend the Eighth Amendment."²⁶¹

Apart from the judiciary, the other two branches of government also evinced skepticism about the utility of public intoxication laws during the 1960s. Partially in response to the D.C. Circuit's decision in *Easter*, the United States Congress repealed the crime of public intoxication in the District of Columbia and provided resources for rehabilitating alcoholics.²⁶² In the executive branch, President Johnson formed a commission to study the administration of criminal justice in July 1965.²⁶³ As is generally true with such

258. *Easter*, 361 F.2d at 52.

259. See Warren E. Burger, *What to Do About Crime in U.S.: A Federal Judge Speaks*, U.S. NEWS & WORLD REP., Aug. 7, 1967, at 70 ("No nation on earth goes to such lengths or takes such pains to provide safeguards as we do, once an accused person is called before the bar of justice and until his case is completed.")

260. Then-Judge Burger, along with Judge Tamm, joined Judge Danaher's opinion concurring in the judgment. See *Easter*, 361 F.2d at 61.

261. *Id.* at 55. *Easter*'s four-judge plurality opinion regarding the constitutional question also drew support from a recent Seventh Circuit decision. *Id.* at 55 n.9 (citing *Sweeney v. United States*, 353 F.2d 10 (7th Cir. 1965)). In *Sweeney*, the Seventh Circuit, building upon *Robinson*, invalidated a probation condition for a chronic alcoholic that forbade him from using alcohol. See *Sweeney*, 353 F.2d at 11.

Numerous state courts followed the federal courts' lead in deeming it impermissible to convict chronic alcoholics for public intoxication. See *Dunlap v. City of Atlanta*, No. B-29126 (Ga. Super. Ct. Fulton County July 17, 1967); *State v. Ricketts*, No. 8787 (Md. Crim. Cir. Ct. Montgomery County Oct. 25, 1967); *Lee v. Hendricks*, No. H.C.-0075 (Pa. Ct. C.P. Philadelphia Aug. 31, 1967). Even after *Powell*, moreover, the Minnesota Supreme Court refused to uphold a public drunkenness conviction where it found the "defendant was no more able to make a free choice as to when or how much he would drink than a person would be who is forced to drink under threat of physical violence." *State v. Fearon*, 166 N.W.2d 720, 724 (Minn. 1969). In a similar vein, the Idaho Supreme Court remanded a case to the trial court to determine whether the defendant was a chronic alcoholic. See *State v. Oyler*, 436 P.2d 709 (Idaho 1968). Requiring an alcoholic to forgo drinking as a condition of probation, the court reasoned, "would be patently as vindictive as demanding a lame person run for his freedom." *Id.* at 712.

262. See Bason, *supra* note 239, at 61. Congress's decision to repeal D.C.'s public intoxication statute also would have been motivated by the recommendation of a presidential commission that examined crime in Washington. See REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 490-91 (1966).

263. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

entities, this nineteen-member Commission consisted not of longhaired radicals but pillars of the Establishment. Attorney General Nicholas Katzenbach headed the group that included Yale President Kingman Brewster, American Bar Association President Lewis F. Powell, Jr., and Columbia Law School Professor Herbert Wechsler, among others.²⁶⁴ But even so stolid a group espoused a progressive approach to the issue of public intoxication in its 1967 report.²⁶⁵ Noting that fully one-third of the arrests in the nation were for the crime of public intoxication during 1965, the Commission recommended that states abandon treating public intoxication as a crime. According to the Commission, such charges overwhelmed police officers and judges, and the statutes had proven generally ineffective and even counterproductive.²⁶⁶ The Commission further recommended that, instead of processing alcoholics through the criminal justice system, states administer comprehensive treatment programs and shift the emphasis away from law and toward public health.²⁶⁷

At least one politician who held White House aspirations in 1968 criticized the application of legal sanctions to alcoholics. Two months before he would announce his presidential candidacy in March 1968, Senator Robert Kennedy declared in a public address that greater attention should focus on “effective alternatives to criminal treatment of sick men, such as drug addicts, alcoholics, and the mentally ill. Far too much of our police work is spent combating ills which the police cannot effectively fight.”²⁶⁸

With this widespread understanding that punishing chronic alcoholics for public intoxication was unlawful (in the eyes of judges) and unwise (in the eyes of policy makers) during the late 1960s, it is now possible to appreciate fully the deep conservatism that permeated Justice Marshall’s opinion in *Powell*. That opinion—in the face of Powell’s lengthy arrest record, the testimony from Dr. Wade, the trial court’s findings of fact, and the overwhelming force of scientific opinion—appears to employ the strategy of ignoring the issue in the hopes that it will simply go away. “We know very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell’s drinking problem, or indeed about alcoholism itself,” Marshall wrote.²⁶⁹ Even in 1968, it required an act of willfulness to question whether Powell suffered from alcoholism and whether his addiction to alcohol

264. See *President Forms Panel to Study Crime Problems*, N.Y. TIMES, July 26, 1965, at 1 (identifying Commission members).

265. See TASK FORCE REPORT: DRUNKENNESS: ANNOTATIONS, CONSULTANTS’ PAPERS, AND RELATED MATERIALS 1 (1967). For an overview of the Commission’s approach to public drunkenness, see Peter Barton Hutt, *Perspectives on the Report of the President’s Crime Commission—The Problem of Drunkenness*, 43 NOTRE DAME LAW. 857 (1968).

266. *Id.*

267. *Id.*

268. See Richard Witkin, *Kennedy Offers Anticrime Plan: Asks Community-Police Tie and Treatment of ‘Sick’*, N.Y. TIMES, Jan. 19, 1968, at 15.

269. *Powell v. Texas*, 392 U.S. 514, 521–22 (1968).

played a large role in his many, many arrests. At times, though, Marshall seemed to go further still and contend that the concept of alcoholism was, well, incoherent. With a telling usage of scare quotation marks, Justice Marshall wrote: “[T]he inescapable fact is that there is no agreement among members of the medical profession about what it means to say that ‘alcoholism’ is a ‘disease.’”²⁷⁰ In a decision that the D.C. Circuit issued only months before the Court decided *Powell*, Judge J. Skelly Wright demonstrated how a more liberal jurist might handle the issue of scientific disagreement regarding alcoholism. “[T]hat there is no clear definition of alcoholism and no complete agreement as to its causes is not a ground for denying it disease status,” Wright conceded. “The same might be said of cancer or epilepsy.”²⁷¹

The balance of Justice Marshall’s opinion makes it clear that he believed criminal law could, in fact, provide some assistance in combating the wages of overconsumption. “Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect,” Justice Marshall wrote, “and the existence of criminal sanctions may serve to reinforce this cultural taboo, just as we presume it serves to reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct.”²⁷² According to Marshall, permitting the state to prosecute people like Powell for public intoxication could even be understood as benefiting them: “It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides.”²⁷³ For a Supreme Court Justice who would eventually pride himself on the ability to impress upon his colleagues the real-world consequences of their decisions for marginal members of society,²⁷⁴ Justice Marshall’s failure to contemplate the negative repercussions stemming from arrests and convictions is nothing less than startling.

Justice Marshall’s opinion in *Powell* distinguished the Court’s holding in *Robinson* by retroactively filtering *Robinson* of the passages that characterize drug addiction as an illness. The central problem with the California statute in *Robinson*, according to Justice Marshall, was that it punished a status (i.e., being a drug addict) rather than conduct.²⁷⁵ Texas sought to do no such thing with its public intoxication statute, as Powell “was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular

270. *Id.* at 522.

271. *Salzman v. United States*, 405 F.2d 358, 367 (D.C. Cir. 1968) (Wright, J., dissenting).

272. *Powell*, 392 U.S. at 531.

273. *Id.* at 528.

274. Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1218 (1992) (noting Justice Marshall would frequently tell his colleagues anecdotes from his lawyering days to advance his judicial positions).

275. *Powell*, 392 U.S. at 532.

occasion.²⁷⁶ The federal circuit courts that decided *Driver* and *Easter* had entertained this potential distinction between public intoxication laws and the statute at issue in *Robinson*. And those courts, like the many legal analysts who applauded those decisions, rejected the distinction as unpersuasive.²⁷⁷ Justice Fortas's dissenting opinion in *Powell* on behalf of three other Justices also found that the statutes could not be meaningfully distinguished. "[T]he essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid," Justice Fortas wrote.²⁷⁸ According to the dissenters, the trial court's findings of fact indicated that Powell "was powerless to avoid drinking; that having taken his first drink, he had an uncontrollable compulsion to drink to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places."²⁷⁹

But even accepting that the statute at issue in *Robinson* was meaningfully distinct from the one at issue in *Powell*, that distinction nevertheless succeeds in revealing another aspect of the Warren Court's conservatism. If the statutory requirement of being found in public made drunkenness laws different from *Robinson*, then some nontrivial percentage of people who were arrested for public intoxication would still have no real option to consume alcohol in private: homeless people effectively faced the choice of consuming alcohol in public or not at all. Yet Justice Marshall's opinion did not so much as hold out the possibility that prosecuting individuals for public intoxication who lacked housing would be unconstitutional. It took a separate opinion from Justice White concurring in the judgment to raise this rather significant objection.²⁸⁰

276. *Id.*

277. Appearing in public may be conceived as but a symptom of chronic alcoholism. See *Driver v. Hinnant*, 356 F.2d 761, 764–65 (4th Cir. 1966) ("The alcoholic's presence in public is not his act, for he did not will it. It may be likened to the movements of an imbecile or a person in a delirium of a fever [M]any of the diseased have no homes or friends, family or means to keep them indoors. *Driver* examples this pitiable predicament, for he is apparently without money or restraining care."); *Easter v. District of Columbia*, 361 F.2d 50, 53–55 (D.C. Cir. 1966) (embracing criminal element analysis provided in *Driver*).

For only some of the many law review writings praising the appeals courts for invalidating public intoxication statutes as applied to chronic alcoholics, see John A. Lowe, *The Criminal Responsibility of Chronic Alcoholics*, 52 CORNELL L.Q. 470 (1967); Laurence J. Hoffman, *Constitutional Law—Cruel and Unusual Punishment—Criminal Prosecution of Chronic Alcoholic for Public Intoxication Prohibited*, 46 B.U. L. REV. 409 (1966); Thomas Sidney Smith, *Constitutional Law—Cruel and Unusual Punishment—Chronic Alcoholism*, 44 N.C. L. REV. 818 (1966); *Constitutional Law: Criminal Punishment of Alcoholic for Public Drunkenness Held to Be Cruel and Unusual Punishment Under Eighth and Fourteenth Amendments*, 1966 DUKE L.J. 545; *Constitutional Law—Criminal Law—Chronic Alcoholism—Criminal Conviction for Compulsive Conduct Symptomatic of Chronic Alcoholism Is Cruel and Unusual Punishment*, 54 GEO. L.J. 1422 (1966).

278. *Powell*, 392 U.S. at 567–68 (Fortas, J., dissenting).

279. *Id.* at 568 (internal quotation marks omitted).

280. See *id.* at 551 (White, J., concurring) ("Although many chronics have homes, many others do not.").

Justice White, of course, was not generally understood to support lax enforcement of the criminal laws.²⁸¹

The social dynamics swirling around public intoxication during the late 1960s make it predictable that law reviews would roundly disparage *Powell*. Professors Michael Katz and John Burchard, for instance, called *Powell* “a reflection of society’s distressing inability to deal with the effects of alcoholism on the human personality.”²⁸² In a fifteen-page article written entirely in verse that appeared in the *UCLA Law Review*, Professor Gary Dubin lambasted the Court’s decision, concluding:

A final toast to valiant Leroy!
In our cause he did not fail.
Chug-a-lug for our poor Leroy.
*It’s sad he’s still in jail.*²⁸³

In the popular press, too, *Powell* received rough treatment. The *Time* article covering *Powell* began: “Doctors, lawyers and enlightened laymen have long agreed that alcoholism is a disease, not a crime. And they have taken for granted that when the right case came along, a liberal and enlightened Supreme Court would strike down the practice of punishing drunks merely for being intoxicated in a public place.”²⁸⁴ History has been kind to the “enlightened laymen” of the 1960s—at least regarding their view of alcoholism.²⁸⁵ But as cases like *Powell* demonstrate, the unqualified assessment of the Warren Court as “liberal and enlightened” is sorely in need of revision.

E. Confining Democracy

Commentators often hail the Warren Court for affording judicial protection to democracy. Many distinguished scholars have contended that this aspect of the Warren Court’s constitutional legacy may well be its defining feature. Professor Horwitz wrote: “One of the most important changes in Supreme Court jurisprudence during the Warren Era was the new central role of democracy. As constitutional law scholar John Hart Ely has suggested, in the

281. See DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 445 (1998) (contending that Justice White being “tough on crime” was consistent with John Kennedy’s brand of liberalism).

282. Michael Katz & John D. Burchard, *Psychology and the Legal Enterprise*, 19 U. KAN. L. REV. 197, 204 (1971).

283. Gary V. Dubin, *The Ballad of Leroy Powell*, 16 UCLA L. REV. 139, 154 (1968). See Bason, *supra* note 239, at 62 (criticizing *Powell*); Joel S. Lee, *American Law: The Case for Radical Reform*, 16 N.Y.L.F. 978, 983 n.38 (1970) (book review) (calling *Powell* a “backward looking decision”); Walter W. Steele, Jr., *The Status of Status Crime*, 52 JUDICATURE 18, 19 (1968) (criticizing *Powell*); *Supreme Court, 1967 Term*, 82 HARV. L. REV. 95, 105–06 (1968) (same).

284. *Warren: Out of the Storm Center*, TIME, June 28, 1968, at 34.

285. As relentlessly chronicled in the television show *Mad Men*, enlightened laymen during the 1960s understood alcoholism a good deal better than they understood many of that era’s other ills. See MAD MEN (AMC television broadcast 2007–present).

Warren Era democracy became the fundamental ideal that gave meaning to the spirit of the Constitution.”²⁸⁶ As Horwitz explains, Professor Ely’s extremely influential theory of judicial review portrayed the Warren Court as consistently articulating the notions set forth in footnote 4 of *United States v. Carolene Products Co.*,²⁸⁷ and thus elevating concern for the unfettered functioning of the “democratic process.”²⁸⁸ Although Horwitz and Ely praise the Warren Court for its broad conception of what democracy entailed, both scholars have also emphasized that the Court viewed voting equality as paramount.²⁸⁹

There is certainly ample cause for praising many of the Warren Court decisions within the democratic arena. Among other significant decisions, the Court determined that reapportionment did not pose a political question in *Baker v. Carr*,²⁹⁰ announced the “one person, one vote” principle in *Reynolds v. Sims*,²⁹¹ and invalidated the poll tax in *Harper v. Virginia Board of Elections*.²⁹² That those decisions altered the nation’s political landscape cannot be gainsaid. But for all of the Warren Court’s justly admired opinions that expanded democratic ideals, scholars have minimized or altogether ignored the Warren Court’s opinions that constrained those ideals. The Warren Court’s role in permitting impingement upon the right to vote in the face of compelling arguments advanced by disenfranchised citizens is long overdue for examination.

The Warren Court’s refusal to issue progressive opinions found at least a few outlets in the democratic sphere, including its often overlooked decision validating literacy tests in *Lassiter v. Northampton County Board of Elections*.²⁹³ Examining North Carolina’s literacy test with a minimal level of scrutiny, the Court found that literacy and intelligence were not coextensive.²⁹⁴ Nevertheless, Justice Douglas explained: “[I]n our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.”²⁹⁵

286. HORWITZ, *supra* note 8, at 74.

287. 304 U.S. 144, 153 n.4 (1938).

288. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–75 (1980).

289. See *id.* at 74; HORWITZ, *supra* note 8, at 99.

290. 369 U.S. 186 (1962).

291. 377 U.S. 533 (1964).

292. 383 U.S. 663 (1966).

293. 360 U.S. 45 (1959).

294. *Id.*

295. *Id.* at 52. In the years leading up to *Lassiter*, the national news media ran articles condemning laws that made the right to vote contingent upon literacy. See, e.g., Henry Steele Commager, *Why Almost Half of Us Don’t Vote*, N.Y. TIMES, Oct. 28, 1956, at 14 (“Whatever may have been the value of literary tests originally, there is not much point in them now. They have not perceptibly improved the quality of voting anywhere, and they lend themselves readily to abuse of the most pernicious character.”); *Southern Negroes & the Vote: The Blot Is Shrinking, But It Is Still Ugly*, TIME, July 29, 1957, at 12 (“In the Deep South and in many other Southern rural areas, the decisions

Perhaps no voting rights opinion more starkly illustrates the Warren Court's constitutional conservatism than *McDonald v. Board of Election Commissioners*, a case decided at the tail end of Earl Warren's time as Chief Justice that involved the seemingly mundane issue of absentee ballots.²⁹⁶ *McDonald's* ostensibly unremarkable subject matter may explain why Warren Court scholars have not cited—let alone analyzed—the case, and why even scholars who are dedicated to the election law field have also disregarded it.²⁹⁷ The widespread neglect of *McDonald* is regrettable because the decision casts important and unflattering light upon the Warren Court's implementation of rational basis scrutiny, its treatment of impoverished citizens, and its treatment of individuals ensnared by the criminal justice system.

On March 29, 1967, Andrew Byrd and Sam McDonald, both registered voters, filed timely applications seeking absentee ballots for Chicago's rapidly approaching city council elections. Byrd and McDonald could not vote in person at their local polling places because they were incarcerated awaiting trial in the Cook County Jail. Byrd could not pay the \$5000 in bail money associated with his robbery charge; McDonald stood accused of murder, a charge deemed altogether ineligible for bail.²⁹⁸ Chicago's Board of Election Commissioners rejected the inmates' requests for absentee ballots because, it reasoned, the inmates did not fall into any of the categories of individuals eligible to vote absentee.²⁹⁹ Although Illinois law allowed registered voters who were away from their home county for any reason whatsoever on Election Day to cast absentee ballots, Byrd and McDonald (for these purposes at least) had the misfortune of residing in Cook County.³⁰⁰ Nor, the Board reasoned, should the inmates be construed as "physically incapacitated," within the meaning of the Illinois statute, from voting in person.³⁰¹

The brief filed on behalf of Byrd and McDonald in the Supreme Court challenged the Board's decision as violating the Constitution on two different grounds. First, the brief contended that Illinois had violated the Equal Protection Clause by providing no compelling interest for drawing the lines as

on passing or flunking [a literacy exam] rest in the hands of white registrars . . . who use the power of office in devious ways to prevent qualified Negroes (and sometimes qualified poor whites) from registering.").

296. 394 U.S. 802 (1969).

297. The volumes produced by Horwitz, Powe, and Tushnet all neglect *McDonald*. The leading election law casebook also omits the case. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (3d ed. 2007).

298. Brief of Petitioner at 4–5, *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969) (No. 68), 1968 WL 112648.

299. See *McDonald*, 394 U.S. at 803–05.

300. *Id.*; see 46 ILL. REV. STAT. § 19-1 (1967).

301. *McDonald*, 394 U.S. at 804–05; 46 ILL. REV. STAT. § 19-1. The other two provisions for absentee eligibility—involving exceptions for poll watchers monitoring foreign precincts, and religious observers—were irrelevant to the inmates' claim. *Id.*

it did.³⁰² Although the Constitution did not require states to provide absentee ballots, once they had done so they could not arbitrarily limit the fundamental right to vote.³⁰³ Even if rational basis scrutiny were appropriate, however, Illinois had failed to provide a reasonable justification for its voting restriction: Why, for instance, did the state prohibit inmates awaiting trial from receiving absentee ballots if they were jailed in their home counties, but permit them to receive absentee ballots if they were jailed in counties other than where they resided?³⁰⁴ Second, with respect to Byrd's financial inability to make bail while awaiting trial, the brief asserted that the Board's actions amounted to a denial of the right to vote based upon poverty.³⁰⁵ According to this theory, prohibiting Byrd from voting in light of his financial condition violated the Supreme Court's decision in *Harper*, which invalidated the poll tax because it disenfranchised poor voters.³⁰⁶

When the Supreme Court decided *McDonald* in April 1969, Chief Justice Warren, writing on behalf of a unanimous Court, validated the Board's denial of the inmates' attempt to vote by absentee ballot.³⁰⁷ Warren began the opinion by considering which level of scrutiny should apply to the Illinois scheme, noting that the Court had often strictly scrutinized voting restrictions in the past. "[W]e have held that because of the overriding importance of voting rights, classifications which might invade or restrain them must be closely scrutinized and carefully confined where those rights are asserted under the Equal Protection Clause," Warren wrote.³⁰⁸ "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."³⁰⁹ But in a move that was crucial to the opinion's outcome, Warren quickly dispelled the notion that "[s]uch an exacting approach" would be required here.³¹⁰ Whatever hopes had been raised by the suggestion that lines drawn on the basis of wealth would be subjected to strict scrutiny, Warren dashed them by concluding: "[T]he distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race."³¹¹ In addition, Warren puzzlingly concluded that the inmates' voting rights were not even necessarily at stake: "[T]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the

302. See Brief of Petitioner, *supra* note 298, at 10.

303. See *id.* at 7–8.

304. See *id.* at 6.

305. See *id.* at 12.

306. See *id.* at 13.

307. See *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 810–11 (1969).

308. *Id.* at 807 (internal quotation marks omitted).

309. *Id.* (internal citations omitted).

310. *Id.*

311. *Id.*

right to vote that is at stake here but a claimed right to receive absentee ballots.”³¹²

This Court’s other justification for rational basis scrutiny signaled its intention simply to assume the inmates’ claims into oblivion. After all, denying people who are incarcerated the ability to obtain an absentee ballot is effectively indistinguishable from outright disenfranchisement. Even as assessed by the notoriously forgiving standards of rational basis scrutiny, Chief Justice Warren’s opinion formulated a test that may as well have abdicated judicial review altogether. “The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside . . . only if based on reasons totally unrelated to the pursuit of that goal. . . . [S]tatutory classifications will be set aside only if no grounds can be conceived to justify them,” he wrote.³¹³ Demonstrating an unusually fertile judicial imagination, Warren concocted baroque fantasies about how Illinois may have in fact gone to elaborate lengths to enable jailed inmates to exercise the right to vote. “Appellants agree that the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day,” Warren hypothesized, “or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own.”³¹⁴

Chief Justice Warren further disagreed with the claim that preventing jailed inmates from receiving absentee ballots in their residential counties smacked of unreasonable line drawing. Referring to people who could not vote in person because of physical incapacitation, Warren observed that these voters must present a doctor’s affidavit attesting to their incapacity in order to receive an absentee ballot.³¹⁵ Regarding the different treatment for inmates depending on whether they were incarcerated in their resident counties, Chief Justice Warren reasoned that the policy may reflect the state’s belief that, absent the voting booth’s protection, “local officials might be too tempted to try to influence the local vote of in-county inmates. Such a temptation with its attendant risks to prison discipline would, of course, be much less urgent with prisoners incarcerated out of state or outside their resident counties.”³¹⁶

Chief Justice Warren consigned to a footnote the Court’s treatment of the *Harper*-inspired claim that Illinois effectively prohibited poor citizens charged with bail-eligible offenses from voting in a way that did not inhibit their

312. *Id.*

313. *Id.* at 809.

314. *Id.* at 808 n.6.

315. *Id.* at 809. Chief Justice Warren declined to explain why the similar affidavits that Byrd and McDonald obtained from the Warden of Cook County Jail did not discharge their statutory obligation. See *McDonald v. Bd. of Election Comm’rs*, 277 F. Supp. 14, 16 (N.D. Ill. 1967) (describing Byrd’s and McDonald’s inclusion of the warden’s affidavit).

316. See *McDonald*, 394 U.S. at 810.

wealthier counterparts.³¹⁷ Here, too, *McDonald* assumed away a legal question that was far from trivial: If a person of means could pay bail and vote but an indigent person could not in light of their incarcerated status, did the poll tax analogy not contain at least some force? Chief Justice Warren eluded this potentially thorny legal question by retreating to the contention that “there is nothing in the record to show that appellants are in fact absolutely prohibited from voting by the State.”³¹⁸

One need not possess the formidable imagination that Chief Justice Warren displayed in *McDonald* to envision the Court deciding the case in another way. Indeed, given that the district court judge who heard an earlier version of the claim brought by Sam McDonald also invalidated the Board’s limitation on absentee ballots,³¹⁹ no imaginative leaps are required at all. In vindicating McDonald’s claim, Judge Lynch stressed that Illinois law expressly provided that individuals charged with crimes must be both convicted and sentenced in order to be disenfranchised.³²⁰ This statutory regime, Judge Lynch contended, rendered it obvious that the Illinois legislature had not intended to remove McDonald’s right to vote. Drawing upon the Supreme Court’s decision requiring “one person, one vote,” Judge Lynch quoted Chief Justice Warren’s opinion in *Reynolds*: “A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm.”³²¹ The same principle applied here, according to Judge Lynch: “It seems clear to this Court that petitioner McDonald, a citizen, a qualified voter, is no more nor no less so whether his physical incapacity to be present at the polls stems from organic illness or from physical confinement on charges of which he is presumed innocent until proven otherwise.”³²²

A Warren Court decision arriving on the heels of *McDonald*, moreover, revealed considerable tension with the Court’s approach in that case. In *Kramer v. Union Free School District No. 15*, a case decided fewer than two months after *McDonald*, the Supreme Court reverted to its typical strict scrutiny method in reviewing a voting restriction.³²³ *Kramer* involved a challenge to a New York law that restricted voting eligibility in school district elections to individuals who either were the parents of children attending local public schools or were the owners and renters of taxable real property within the

317. *Id.* at 808 n.7.

318. *Id.*

319. *McDonald v. Bd. of Election Comm’rs*, 265 F. Supp. 816, 817 (N.D. Ill. 1967).

320. *Id.* at 818–19; 46 ILL. REV. STAT. §§ 3–5 (1967).

321. *McDonald*, 265 F. Supp. at 818 (quoting *Reynolds v. Sims*, 377 U.S. 533, 568 (1964)).

322. *Id.* at 817–18. When a three-judge district court panel heard the challenge brought by Byrd and McDonald that was ultimately appealed to the Supreme Court, however, it upheld the State’s rationale for absentee ballots. *See McDonald v. Bd. of Election Comm’rs*, 277 F. Supp. 14 (N.D. Ill. 1967).

323. 395 U.S. 621 (1969).

district.³²⁴ Morris Kramer, whom the Court described as “a 31-year-old college-educated stockbroker who lives in his parents’ home,” fell into neither category and challenged the law as violating his constitutional rights.³²⁵ In Chief Justice Warren’s opinion invalidating the voting restriction, he applied strict scrutiny, stating: “[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.”³²⁶ Without intending to denigrate the plight of Morris Kramer, one might be forgiven for doubting whether it rose to the same level as those of Andrew Byrd and Sam McDonald. That the Warren Court used its most searching level of scrutiny in *Kramer* and its least searching level in *McDonald* seriously damages the claim that the institution was the eternally vigilant guardian of the dispossessed.

Although newspapers did not extensively cover *McDonald*,³²⁷ law reviews leveled broadsides against it. Normative evaluation of the decision was overwhelmingly, if not universally, unfavorable. In particular, the Court’s selection of rational basis scrutiny attracted widespread scorn. By 1969, after all, the Supreme Court had been stating that voting was a fundamental right stretching back more than eight decades.³²⁸ The Warren Court itself had repeatedly employed strict scrutiny to examine infringements on the franchise.³²⁹ Thus, many observers noted that *McDonald* was extremely unusual for “refus[ing] to apply a strict standard of review to classifications by means of which a state has effectively denied the vote to some of its citizens.”³³⁰

324. *Id.* at 622.

325. *Id.* at 624.

326. *Id.* at 627.

327. *See Convicts Are Denied an Absentee Ballot*, N.Y. TIMES, Apr. 29, 1969, at 34; Glen Elsasser, *Illinois Vote Law Is Upheld by High Court*, CHI. TRIB., Apr. 29, 1969, at B6.

328. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (stating that voting is fundamental because it is “preservative of all rights”).

329. *See, e.g., Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (“We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).

330. *The Submerged Constitutional Right to an Absentee Ballot*, 72 MICH. L. REV. 157, 167 (1973). *Id.* at 162 (“The Court’s disposition of *McDonald* was largely dictated by its selection of a standard of review to test the validity of the state’s classification under the equal protection clause.”). *See also California’s Debt Restriction: An Unconstitutional Super Majority Voting Requirement?*, 43 S. CAL. L. REV. 455, 459 n.26 (1970) (identifying tension between *McDonald*’s low level of scrutiny and other voting rights cases); Arnold I. Menchel, *Election Laws: The Purge for Failure to Vote*, 7 CONN. L. REV. 372, 380 (1975) (same); Gregg Darrow Thomas, *Equal Protection of the Laws: Sex Is Not a Suspect Classification*, 27 U. FLA. L. REV. 288, 289 n.16 (1974) (same); *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 948 n.55 (1970) (same); *Election Laws as Legal Roadblocks to Voting*, 55 IOWA L. REV. 616, 650 (1970) (same); Harvey C. Jewett, *The College Voter and Residency Requirements*, 17 S.D. L. REV. 131, 138 (1972) (noting that *McDonald*’s opting against the compelling interest test “seem[s] out of step with the general trend of voting rights cases”).

Even more strongly condemned than the Court's decision to use rational basis in *McDonald*, though, was the anemic fashion in which the Court implemented it.³³¹ Not surprisingly, commentators seized upon the Court's strained effort to separate an inmate's right to vote from an inmate's right to receive an absentee ballot. "In spite of *McDonald*, it seems factually absurd to say that a person's right to vote is not denied because he cannot vote by absentee ballot," stated one author.³³² The *Harvard Law Review* student note assessing *McDonald* termed it "surprising" and "perplexing" that the Court would make dubious assumptions on behalf of the Illinois law in light of the Court's previous sensitivity to impeding fundamental rights.³³³ "Just how lenient [*McDonald*'s rationality test] was is shown by the Court's effort to find reasons supporting the state classification," the note stated. "The Court simply asserted that the physically infirm were sufficiently different from prisoners to be treated separately."³³⁴ Regarding the absence of anything in the trial record demonstrating that Illinois did not in fact shuttle inmates to the polls, Arnold Menchel acidly remarked: "There was also nothing in the record to show that the tooth fairy might not leave bail money under the prisoner's pillow, but the Court failed to mention that possibility."³³⁵

III.

IMPLICATIONS AND EXPLANATIONS

A. Reclaiming Judicial Latitude

Recovering instances of the Warren Court's forgotten constitutional conservatism highlights the wide-ranging judicial latitude that Supreme Court Justices often enjoy. Evidence of this latitude from the Warren Court era challenges some of the central claims advanced by two influential schools of legal history. The first school minimizes judicial latitude by suggesting that judges merely interpret the Constitution in a manner that articulates the consensus views of the American people at that time.³³⁶ The second school—

331. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 36 (1972) (describing the new "bite" of the Burger Court's equal protection analysis).

332. *Election Laws as Legal Roadblocks to Voting*, *supra* note 350, at 650.

333. *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 82–83 (1969).

334. *Id.* at 83.

335. Menchel, *supra* note 330, at 380 n.50.

336. See, e.g., FRIEDMAN, *supra* note 80, at 381 ("Consensus was a long time developing, but when it did, the justices' interpretation of the Constitution gave way to popular will."); KLARMAN, *supra* note 115, at 453 ("Most of the Court's race decisions considered in this book imposed a national consensus on a handful of southern outliers."); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 200* (2006) ("[J]udges often serve a more constructive role when they try to preserve a constitutional consensus that has become contested but has not yet been repudiated by a majority of the country."); CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 142* (2009) ("[T]he Court is much more tightly connected to public consensus than we often acknowledge.").

although offering more subtlety than the first—minimizes judicial latitude by contending that judges decide cases by espousing the dominant ideology associated with the political coalition that placed them on the bench.³³⁷ Despite the significant differences that separate the two schools, they are united by a general insistence that Justices should neither be praised nor condemned for particular decisions because those decisions are driven by larger forces. But as the preceding five historical recreations of the possibilities arrayed before the Warren Court demonstrate, these two schools of legal history provide an excessively detached approach to assessing judicial performance.

Professor Michael Klarman is among the most prominent advocates of the first school of legal history, a group of scholars whom I have previously termed “consensus constitutionalists.”³³⁸ Because Klarman believes Supreme Court decisions almost invariably articulate popular opinion, he cautions legal scholars against either celebrating Justices for decisions that society has embraced or excoriating them for decisions that society has repudiated.³³⁹ When scholars applaud the Court for its decision in *Brown* or denounce the Court for its decision in *Korematsu*, Klarman and his fellow consensus constitutionalists believe that they fundamentally err by failing to acknowledge that the decisions were merely products of their times.³⁴⁰ “One implication of this perspective on constitutional interpretation is that the justices are unlikely to be either heroes or villains,” Klarman has written.³⁴¹ Disputing this claim, I have previously argued that racial egalitarianism was a sufficiently contested ideal during the 1950s and 1960s that nothing about the decisions in cases like *Brown* and *Loving v. Virginia* was inevitable.³⁴² In so doing, I defended the legitimacy of scholars who praise the Supreme Court for issuing decisions that required some measure of judicial courage for affording constitutional protection to marginalized groups.³⁴³

This Article has examined the opposite, far less familiar side of that same coin: if it is advisable to pat the Warren Court on the back for its decisions expanding egalitarianism in *Brown* and *Loving*, it is also advisable to rap the

337. See, e.g., MARK V. TUSHNET, *WHY THE CONSTITUTION MATTERS* (2010).

338. See Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 757 (2011).

339. See KLARMAN, *supra* note 115, at 449 (declining to discuss “[w]hether social and political context *should* play such a large role in constitutional interpretation”).

340. See *id.* at 468 (“The justices are too much products of their time and place to launch social revolutions.”).

341. *Id.* at 6. This statement so perfectly encapsulates Klarman’s theory that he seriously contemplated entitling his book *Neither Hero Nor Villain*, rather than *From Jim Crow to Civil Rights*. See Michael Klarman, *Neither Hero Nor Villain: The Supreme Court, Race, and the Constitution in the Twentieth Century* (Univ. of Va. Sch. of Law, Legal Studies, Working Paper No. 99-3a, 1999), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=169262.

342. See Driver, *supra* note 338, at 820.

343. See *id.* at 794; see also Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345 (contending that opinions affording constitutional protections to marginalized groups have often required judicial courage).

Warren Court on its knuckles for its decisions constraining egalitarianism. Consider the Court's denial of gender equality in *Hoyt* and its rejection of the Free Exercise claim in *Braunfeld*. Had those cases yielded a progressive holding—with the Court invalidating the statute requiring women to volunteer for jury service in *Hoyt* and requiring religious-based exemptions for Blue Laws in *Braunfeld*—consensus constitutionalists would likely attribute those decisions to part of an “emerging national consensus.”³⁴⁴ Examining the practices that existed at the state level, consensus constitutionalists could note that a majority of states did not require women to volunteer for jury service and that a majority of states with Sunday Closing Laws granted religious-based exemptions.³⁴⁵ But such an approach would improperly deny the Warren Court praise that it would deserve for issuing decisions that expanded conceptions of equality. Conversely, to treat the Supreme Court's conservative opinions in *Hoyt* and *Braunfeld* as being inevitable improperly exonerates the Warren Court for the regrettable decisions that it actually issued in those cases. Contrary to the assertions of consensus constitutionalists, the Warren Court sometimes did in fact play the hero, issuing opinions that expanded conceptions of equality. But it is important to realize that, even as assessed by contemporaneous constitutional understandings, the Warren Court at least periodically played the goat.

The second school of legal history, whose intellectual origins can be traced back to the work of Robert Dahl,³⁴⁶ offers a dominant understanding of the Warren Court's legacy. True to his training as a political scientist, Dahl insisted that the judiciary be examined in conjunction with the other two branches of government. Dahl further contended that Supreme Court Justices—who were, after all, members of the “political elite”—rarely issued opinions that clashed with the views of “lawmaking majorities,” a term that he invoked to indicate “a majority of those voting in the House and Senate, together with the president.”³⁴⁷ The scholarly treatments of the Warren Court offered by both Professor Powe and Professor Tushnet, as discussed above, can usefully be understood as offering a neo-Dahlian perspective.³⁴⁸

This neo-Dahlian perspective helpfully illuminates many of the Warren Court's most lasting achievements. For all its considerable insight, though, focusing on the Warren Court's constitutional conservatism succeeds in revealing some of the theory's severely underappreciated vulnerabilities. Examining the Warren Court's conservatism raises fundamental questions

344. KLARMAN, *supra* note 115, at 310.

345. *See supra* text accompanying notes 136–138, 310.

346. *See generally* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

347. *Id.* at 284.

348. *See supra* text accompanying notes 50–57.

regarding why the judicial wing of Kennedy-Johnson liberalism sometimes deviated so substantially from the views advanced by its elected counterparts.

Why, for instance, did the Warren Court in *Powell* refuse to acknowledge that alcoholism was an illness when so many political elites had already done so? By 1969, Congress had passed a law for Washington, D.C., acknowledging this point, a presidential commission had recommended abandoning public intoxication statutes altogether, and a serious presidential contender had even spoken out against using the criminal law to address what was, for chronic alcoholics at least, a medical problem.³⁴⁹ Similarly, why did the Warren Court in *McDonald* decline to invalidate the Illinois statute that amounted to disenfranchisement for jailed citizens who lacked the financial wherewithal to make bail? By the time the Court decided *McDonald* in 1969, it is important to remember that it had been five years since President Lyndon Johnson declared war on poverty and Congress passed the Economic Opportunity Act.³⁵⁰ Perhaps most conspicuously, why did the Warren Court in *Swain* refuse to rein in peremptory strikes, a device that was proving increasingly essential to the maintenance of all-white juries? Not only had the Court itself long been engaged with addressing the systematic exclusion of black jurors, but elected officials had also joined the fight with the 1957 Civil Rights Act and frequently used strong language to condemn all-white juries during the mid-1960s as the topic attained great salience. Scholars writing in the tradition of Dahl would do well to explore the reasons that judges sometimes refuse to endorse the ideological commitments advanced by elected officials with whom they are generally aligned.

B. Actuality's Normativity

Emphasizing the conservative strain that inflected the Warren Court's constitutional decisions may also, somewhat counterintuitively, help reawaken the liberal legal community to the potential held in progressive judicial interpretation. Recovering from historical obscurity cases where the Warren Court declined to issue a liberal holding underscores the wide range of possible constitutional understandings that exist at any particular moment. This lesson in constitutional contingency may encourage modern liberals to contemplate how the current legal order could be more egalitarian than it is today. And it should inspire them to attempt to close the wide gap between the real and the ideal with renewed fervor.

Much of modern legal liberalism suffers from a debilitating sense of what Professor Paul Mishkin long ago referred to as "the normative power of the

349. See *supra* text accompanying notes 94–100.

350. See JAMES T. PATTERSON, AMERICA'S STRUGGLE AGAINST POVERTY IN THE TWENTIETH CENTURY 122–37 (2000) (analyzing the War on Poverty).

actual.”³⁵¹ By this term, Mishkin meant: “[T]hat which is law tends by its very existence to generate a sense of being also that which ought to be the law.”³⁵² Perhaps no more vivid example of this phenomenon exists than Professor Powe’s animated defense of the Supreme Court’s decision in *Powell v. Texas*. Rejecting the notion that Justice Fortas’s opinion—which would have deemed it unconstitutional to convict Powell for public drunkenness—demonstrated his commitment to marginalized citizens, Professor Powe writes:

Fortas is better characterized not by sympathy to the outsider, but by hubris and faith. . . . It is no wonder Fortas is not the patron saint of Mothers Against Drunk Drivers. The same “irresistible impulse” that put Powell on Austin streets places other alcoholics behind the wheel of their cars. They certainly do not want to kill anyone while driving. It is, they claim, their condition, not their actions. To be sure, Fortas could state that being drunk on a sidewalk was a condition, while being drunk behind the wheel of a car was conduct that may be prohibited. Arbitrary lines are a fact of life in the law. But why draw it when a more sound line is already available? Being a chronic alcoholic is a condition; being drunk in public is conduct that may be prohibited.³⁵³

But a Supreme Court opinion that deemed it impermissible to convict chronic alcoholics of public intoxication would hardly imperil prosecutions for drunk drivers who committed homicide. Whereas the harms of public intoxication are overwhelmingly confined to the intoxicator, the same does not hold true for manslaughter. Self-inflicted wounds and wounds inflicted upon others seem readily distinguishable.

A decision vindicating Powell’s claim, contrary to the assertions of Justice Marshall and Professor Powe,³⁵⁴ need not have required completely reconceptualizing the foundations of criminal responsibility. That slope does not seem especially slippery. Embracing Justice Fortas’s opinion in *Powell* may, however, have had the benefit of prompting society to reevaluate the desirability of using the crude instrument that is criminal law to combat behavior relating to addiction. Given that American incarceration rates have increased dramatically since the 1970s, and that too many of today’s imprisoned population were convicted of crimes associated with the War on Drugs,³⁵⁵ such a reevaluation remains among society’s most urgently needed conversations.

351. Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 71 (1965) (internal quotation marks omitted). Mishkin credited Felix Cohen with coining the phrase. *Id.*

352. *Id.*

353. POWE, *supra* note 44, at 442–43.

354. *Powell v. Texas*, 392 U.S. 514, 535–36 (1968); POWE, *supra* note 44, at 441.

355. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6 (2010). For a compelling critique of Alexander’s work, see James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012).

Suggesting that *Powell* could have realistically been decided the other way and contending that the judiciary may have a larger role to play in confounding the nation's draconian drug sentencing laws may sound like radical notions to modern lawyers. But that radical ring is largely attributable to the hegemonic influence of legal actuality's normative power. If the judiciary were to issue decisions recognizing such legal principles, there is reason to believe that law's normative force would soon make those decisions seem workaday and obvious.³⁵⁶ Shortly before the Warren Court drew to a close, Kenneth Karst and Harold Horowitz made this point in writing about a recently decided case that then seemed to fit uneasily into the modern legal doctrine:

In retrospect, it is interesting to see how many close questions of yesterday now seem obvious of solution. So it will be, we think, with *Reitman v. Mulkey*, as it is already with *Reynolds v. Sims*. History—not the “original understanding,” but tomorrow's history—will validate the decision as no satisfying doctrinal discourse could.³⁵⁷

The Warren Court repeatedly demonstrated that legal ideas that once seemed fundamental and indispensable could in fact be discarded without inviting the calamitous results that dissenting voices predicted.³⁵⁸ Sometimes, as in *Reynolds's* announcement of “one person, one vote,”³⁵⁹ the new rule itself quickly came to be viewed as fundamental and indispensable. Regrettably, however, far too many legal liberals seem to have forgotten that today's heresy can become tomorrow's orthodoxy.

The “normative power of the actual” has not, of course, proven so seductive that it has forestalled all progress in the field of constitutional interpretation since Earl Warren departed the Court. Such a claim would be silly. To the contrary, the Supreme Court has made undeniable strides in extending the egalitarian ideal. To appreciate this doctrinal dynamism, one need consider only some of the instances of Warren Court conservatism that were explored in Part II. In contrast with those Warren Court decisions, the Burger Court issued opinions that allowed a criminal defendant to challenge the prosecutorial exercise of peremptory strikes in an individual case;³⁶⁰ ensured that registered voters who were in jail awaiting trial could actually exercise the

356. Cf. Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1444–46 (2001) (observing that arguments the legal profession deems “off the wall” and “on the wall” are far from fixed).

357. Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 79. See *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating a state constitutional provision because it effectively facilitated housing discrimination).

358. See, e.g., Margaret K. Rosenheim, *Shapiro v. Thompson: “The Beggars Are Coming To Town,”* 1969 SUP. CT. REV. 303, 304 (“If any aspect of the American public aid scene had seemed to be permanent, it was the durational residence requirement. Like the means test, this feature derived from the Elizabethan Poor Law. It had been part of the states' poor relief laws from the beginning.”).

359. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

360. *Batson v. Kentucky*, 476 U.S. 79 (1986).

right to vote,³⁶¹ and interpreted the Free Exercise Clause to require states to provide a compelling justification for denying exemptions to laws that even incidentally burdened religious practices.³⁶² The Burger Court, in other words, remedied some of the areas in which the Warren Court had misguidedly embraced constitutional conservatism.

But at this point actuality's normative power once again enters the picture. It merits wondering why current legal liberals evince such seeming complacency with these relatively modest doctrinal developments—advances that were, after all, squarely on the table more than four decades ago. It seems difficult to believe that liberal ideals for legal reform could remain so stagnant for so long. Rather than attempting to fine-tune *Batson's* method for preemptory strikes, liberals should consider pressing for the end of preemptory strikes altogether, relying only upon juror strikes for cause. Rather than resting content with protecting the absentee voting rights of jailed inmates, more liberals should prioritize reenfranchising citizens who have lost their voting rights because of criminal convictions. In addition to attempting to reinvigorate the Free Exercise Clause, moreover, liberals should also contemplate rededicating themselves to realizing the full promise of the Establishment Clause.

These issues, of course, in no way represent anything approaching a complete catalogue of legal liberals' modern constitutional agenda. Nevertheless, they helpfully illustrate how the vanguard of left-liberal constitutional thought should have by now traveled a much greater distance from the doctrinal innovations of the Burger Court.

C. Revolution?

Few words have been invoked more frequently to characterize the Warren Court era than “revolutionary.” As with many notions that would become conventional wisdom regarding the Warren Court's legacy, Anthony Lewis was among the first to advance this proposition. “A revolution made by judges,” Lewis wrote in 1968. “It is an implausible idea, temperamentally and historically. But there is not much exaggeration in using such terms, so fundamental were the changes it made or initiated in American law and politics and social arrangements.”³⁶³ Portraying the Warren Court's decisions as a

361. *O'Brien v. Skinner*, 414 U.S. 524 (1974) (deeming unconstitutional the state court's denial of absentee ballots to certain incarcerated citizens).

362. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (raising the government's burden of justification for rejecting religious exemptions that the Warren Court imposed in *Sherbert v. Verner*, 374 U.S. 398 (1963)). The Burger Court also, of course, required gender classifications to be examined with a heightened level of scrutiny. *See Reed v. Reed*, 404 U.S. 71 (1971) (determining that administrators of estates may not be appointed in a sexually discriminatory way).

363. Anthony Lewis, *Earl Warren, in* 4 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS* 2721, 2721 (Leon Friedman & Fred L. Israel eds., 1969).

“revolution” may appear to stem from the tendency of newspaper reporters to overstate the import of contemporary events. But the practice extends well beyond mere journalistic hype. Indeed, at least one of the Warren Court Justices explicitly embraced this notion. In 1972, Abe Fortas declared, “The social revolution which the Warren Court triggered has operated at all levels of our life.”³⁶⁴ This concept has also infiltrated academia, where it has proved surprisingly durable. On the very first page of Professor Horwitz’s book about the Warren Court, some version of the word “revolution” appears three times in fewer than six sentences.³⁶⁵ Although Horwitz’s usage may be unusually promiscuous, he is far from the only law professor to so label the institution.³⁶⁶

The Warren Court certainly issued important decisions involving a host of different doctrinal areas that helped to bring about meaningful changes in American society. Yet the claim that the Warren Court initiated a full-fledged revolution has become tenable in part by disregarding the Court’s episodes of constitutional conservatism. Far from storming the barricades, the Warren Court sometimes played the more traditional role as defender of the status quo. This traditional role was particularly apparent in its opinions upholding Sunday Closing Laws and refusing to provide meaningful oversight for preemptory strikes, as the Court placed great emphasis on the lengthy lineages of those two institutions. It seems safe to assume that, whatever its origins, the Warren Court’s veneration of timeworn practices did not come from the Che Guevara handbook.

The absurdity conjured by that mental image raises essential questions about the utility of invoking the word “revolutionary” to describe the Warren Court’s legacy. This severely overworked term should perhaps be permitted to retire, especially when it is applied broadly rather than to discrete doctrinal areas. But even ignoring the Warren Court’s conservatism and paying attention only to the liberal victories for which it is justly hailed, the term “revolutionary” risks exaggerating the radicalism contained in those decisions. To take a well-known example, the Warren Court’s decision in *Brown* did not

364. Abe Fortas, *A Revolution of Rights*, N.Y. TIMES, Nov. 26, 1972, at E9. Fortas continued in this vein throughout: “It is not surprising . . . that the basis of the social revolution was constitutional principle because, basically, this is a constitutional revolution. It is a revolution founded on the principle of entitlement, not grace or charity. It is a revolution based on the principle of human rights.” *Id.*

365. See HORWITZ, *supra* note 8, at 3 (“[T]he Warren Court is increasingly recognized as having initiated a unique and revolutionary chapter in American constitutional history.”); *id.* (“The [Warren] Court initiated a revolution”); *id.* (“Before we can understand the Warren Court revolution”).

366. See, e.g., POWE, *supra* note 44, at 485 (“A revolutionary body is necessarily one that is engaged in making a sharp break from the past, and constitutional doctrine in 1953 (or even 1962) bore few relationships to constitutional doctrine in 1969.”); SUNSTEIN, *supra* note 12, at 1 (suggesting that the Warren Court’s decisions “amounted to a constitutional revolution”); Bernard Schwartz, *Preface, in THE WARREN COURT: A RETROSPECTIVE*, *supra* note 199, at v (contending the Warren Court sparked “[a] judge-made revolution”).

materialize from thin air. When Governor Earl Warren's aspirations were still principally concentrated on Article II rather than Article III,³⁶⁷ the Vinson Court had already issued significant decisions undermining Jim Crow.³⁶⁸ Thus, while the Court's opinion in *Brown* required considerable judicial courage, it was not wholly unprecedented as that decision is sometimes portrayed.

Casting the Warren Court Justices as revolutionaries may also further the mistaken impression that the judiciary is fundamentally incapable of once again playing a significant role in offering protection to marginalized members of society. Among the left-liberal intelligentsia, it has become something of an article of faith that the Warren Court was a golden judicial age, the likes of which may never be glimpsed again.³⁶⁹ If having revolutionaries win confirmation from today's United States Senate is viewed as a prerequisite to progressive interpretation, it is no wonder that liberal hopes for the possibilities of judicial reform have become so glum. But the Warren Court Justices—even at their considerable heights—often acted less as revolutionaries than reformers. Appreciating the Warren Court's actual role rather than the mythical one that has been thrust upon it may help to make progressive constitutional interpretation once again seem a realistically attainable goal.

D. Explaining the Absence of Liberal Criticism

During the last four decades, legal academia has not been principally known for its exclusion of left-liberal perspectives. Given that scholars accrue professional laurels by advancing novel arguments, many liberals on law school faculties have had ample incentives to advance the counterintuitive claim that the Warren Court repeatedly issued conservative decisions in a wide array of doctrinal areas. Before closing, then, it seems appropriate to contemplate what factors may explain the dearth of sustained critical examination of the Warren Court's constitutional conservatism.

One substantial part of the explanation for the absence of such criticism likely stems from the peculiar type of liberal praise that has been heaped upon

367. For a perceptive examination of Warren's career (including his presidential aspirations), see WHITE, *supra* note 184.

368. See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950).

369. See, e.g., Anthony Lewis, *The Legacy of the Warren Court*, in THE WARREN COURT: A RETROSPECTIVE, *supra* note 199, at 406 ("I sometimes long for a new era of judicial leadership. We cannot expect that from our more cautious contemporary Justices. The age of judicial heroism is past."); WHITE, *supra* note 184, at 344 (contending that the Warren Court can be understood "as the culmination, and perhaps the end, of a twentieth-century liberal sensibility"). Liberals who contend that the Warren Court era was marred by judicial overreach nevertheless agree that a future Supreme Court seems unlikely to adopt the Warren Court's mission as its own. See Cass R. Sunstein, *The Spirit of the Laws*, NEW REPUBLIC, Mar. 11, 1991, at 32 ("[T]he Warren Court is long gone. From the standpoint of the 1990s, the Court increasingly appears to be a historical anomaly, indeed an unprecedented exception to American political traditions; it was an adjudicative body willing to use the Constitution as an engine of social reform in the interest of civil rights and civil liberties.").

the Warren Court. When liberals identify virtues of the Warren Court's jurisprudence, they do not generally dwell upon its mastery of legal craft.³⁷⁰ Instead, liberals tout the Warren Court for its unusually fine-tuned moral sense. Although an early generation of scholars mocked Chief Justice Warren for his questions during oral argument asking whether a particular measure was "fair" or "just,"³⁷¹ liberal academics subsequently began to portray the moral clarity contained in such questions as not only acceptable, but as affirmatively honorable. Warren's signature question provided a fitting mantra for the Court to which he gave his name. As Professor Tushnet writes, "Warren and his core liberal colleagues . . . were unconcerned with general matters of constitutional theory."³⁷² Instead, the Warren Court was primarily concerned with "questions of basic fairness," "achieving just outcomes," and doing "what they believed right."³⁷³

Intriguingly, this notion was not something that scholars grafted onto Warren after the fact. Rather, from an extremely early point during his time on the Court, Warren depicted himself in precisely this light. In November 1955, in a magazine article that has been all but forgotten, Warren suggested that his legal views were animated by the ubiquitous childhood utterance: *That isn't fair*. "A legal system is simply a mature and sophisticated attempt, never perfected, to institutionalize this sense of injustice and to free men from the terror and unpredictability of arbitrary force," Warren wrote.³⁷⁴ Thus, when liberal scholars praise the Warren Court for its moral vision, they are in an important sense embracing a conception that Chief Justice Warren himself initially articulated.

This close identification of decisions with the Justices' own conceptions of what was morally just, however, has made liberal criticism of the Warren Court a highly freighted proposition. If the Warren Court's great strength is its morality, liberals finding fault with the Court would be required to draw attention to instances when its moral compass faltered. To phrase the matter more pointedly, for liberals, finding Warren Court decisions wanting from a

370. For an exception to this rule, see Strauss, *supra* note 45, at 850 ("[T]he Warren Court was lawyerly in a deep and important sense.").

371. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 120–21 (1975) ("The Warren Court took the greatest pride in cutting through legal technicalities, in piercing through procedure to substance. But legal technicalities are the stuff of law, and piercing through a particular substance to get to procedures suitable to many substances is in fact what the task of law most often is."); Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 11 (1993) (noting that at Harvard Law School in the 1960s "it was common to mock Warren for often asking from the bench whether a particular legal position was 'just.' Sophisticated legal scholars did not speak that way").

372. Tushnet, *supra* note 44, at 16.

373. *Id.* at 17. See G. Edward White, *Earl Warren's Influence on the Warren Court*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 37, 44 (Mark Tushnet ed., 1993) (suggesting that the Warren Court elevated "elemental fairness" above traditional concerns like "textual literalism and institutional deference").

374. Earl Warren, *The Law and the Future*, FORTUNE, Nov. 1955, at 106, 229.

historically contextualized perspective means finding the Justices themselves who issued the opinions to be morally deficient. Accordingly, offering a liberal scholarly critique of the Warren Court may feel nearly indistinguishable from launching an ad hominem attack. And whatever their conservative indiscretions, many liberal scholars surely believe that the Justices who delivered *Brown v. Board of Education*, *Gideon v. Wainwright*, and *Reynolds v. Sims* deserve better than a square kick in the teeth.

A second reason—closely related to the first—that the Warren Court has not previously been subjected to much historically grounded criticism from liberals is attributable to the considerable difficulties that arise when authors attempt to write history that occurred during their own lifetimes. The liberal legal scholars who have sought to place the Warren Court in historical context thus far have been examining their own eras. In many instances, moreover, the scholars are attempting to write about the not-so-distant past in which they served as law clerks to their protagonists.³⁷⁵ Such historical inquiries necessarily contain an extraordinarily high degree of difficulty, something that Warren Court scholars themselves have repeatedly recognized.³⁷⁶

Gaining sufficient perspective on the Warren Court to view the institution clearly is made more difficult still by the fact that liberal scholars found the Warren Court's jurisprudence professionally inspirational—not only to themselves, but to an entire legal generation. This notion that the Warren Court inspired an era of liberal lawyers repeatedly cropped up in the Court's immediate aftermath, and it has reappeared relentlessly ever since. Writing one year after Chief Justice Warren's departure, Professor Vincent Blasi contended: “[I]f the Warren Court is destined to have any lasting impact on American life, it will be in this generation of young lawyers it spawned.”³⁷⁷ Three decades later, Professor Powe wrote that “[t]he Warren Court definitely did inspire a generation of lawyers . . . who worshipped it,” and included himself among

375. Lucas Powe served as a law clerk to Justice Douglas. Mark Tushnet served as a law clerk to Justice Marshall. G. Edward White served as a law clerk to Chief Justice Warren. Owen Fiss served as a law clerk to Justice Brennan.

376. See HORWITZ, *supra* note 8, at 112 (“As the Warren Court gradually fades from collective memory and becomes ‘history,’ it is all the more important to see it in historical perspective, free, as much as possible, of the slogans and abstractions of contemporary constitutional debate.”); Tushnet, *supra* note 44, at 6 (“Perhaps the Warren Court remains too close for historical analysis, and perhaps the most we can hope for is a scorecard toting up decisions the analyst likes and dislikes.”).

377. Vince Blasi, *A Requiem for the Warren Court*, 48 TEX. L. REV. 608, 623 (1970). See Wright, *supra* note 39, at 804 (“I speak of an identifiable new generation of lawyers because I believe that one of the greatest legacies of the Warren Court has been its revolutionary influence on the thinking of law students.”).

their number.³⁷⁸ Powe was far from the only esteemed liberal academic to so confess.³⁷⁹

For liberal academics who attended law school around the period when Earl Warren served as Chief Justice, the passage of time appears to have little diminished the Warren Court's inspirational luster. It is perfectly understandable that liberal scholars of that generation viewed the Warren Court Justices with admiration for helping to improve American society in significant ways. Contrary to the claims of some revisionist scholars who portray the Supreme Court as merely an incidental entity during the nation's liberal ascent, the Warren Court Justices deserve that admiration. The accuracy of history, however, requires acknowledging that the Justices did not invariably cover themselves in glory. Along with liberal admiration, the Warren Court Justices also deserve at least some measure of liberal condemnation. Legal scholars near the beginning of their scholarly careers may be particularly well positioned to take the full measure of the Warren Court, contemplating its missed opportunities as well as its achievements. As is typically true of historical inquiry, assessing the Warren Court within the rich and varied context of its own times, thus, may require the attention of scholars from subsequent times.

CONCLUSION

On July 5, 1968, not long after Earl Warren announced his intention to resign as Chief Justice, he presided over one of the very few press conferences ever held inside the Supreme Court.³⁸⁰ With approximately fifty reporters in attendance, the event must have taken Warren back to his days of elective office. Whatever its evocations, the experience does not seem to have been an unpleasant one as Warren spent nearly an hour answering reporters' questions about his judicial legacy. Shortly before the session wrapped up, a journalist posed a seemingly inevitable question: "Mr. Chief Justice, in retrospect, do you have any reservations about any of the decisions you made?" If the question was formulaic, Warren's response did little to elevate it. "We are all human, and make mistakes," he said.³⁸¹

Conservative scholars have long gleefully identified what they regard as the innumerable mistakes that the Supreme Court made during Chief Justice

378. POWE, *supra* note 44, at 501. Professor Powe insists that enough time has passed that the Warren Court's inspirational effects have diminished, if not disappeared. *See id.* at xiv-xv ("I freely admit that I was once a partisan, celebrating liberal victories and despairing retrenchment. Years in academia, however, have given me a different perspective.")

379. *See, e.g.*, Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1129 (1991) (stating that even during the 1960s "it was understood that [the] Harvard [faculty's criticisms] did not speak for the profession as a whole, and even less so for the young, who looked to the [Warren] Court as an inspiration, the very reason to enter the profession").

380. *Earl Warren Talks About the "Warren Court,"* U.S. NEWS & WORLD REP., July 15, 1968, at 62.

381. *Id.*

Warren's tenure. More recently, liberal scholars, too, have begun to argue that the Warren Court erred in overstepping its bounds. Most liberal scholars, of course, continue simply to celebrate the Warren Court's achievements, leaving the misimpression that—from a liberal's perspective—the institution represented jurisprudential nirvana. Absent from the scholarly debate about the Warren Court thus far, however, is a sustained liberal argument contending that it made significant mistakes—not for going too far, but for not going far enough in its judicial reforms. This Article provides that missing perspective and, in so doing, aims to initiate a long overdue conversation.

The conspicuous absence of this perspective on the twentieth century's most intensely examined judicial body has profoundly constrained academic understandings. Failing to emphasize the obtainable liberal victories that the Warren Court left on the table prevents scholars from gaining an accurate historical assessment of that defining period in American legal history. Expanding the historical canvass to include the Warren Court's missteps as a significant part of its judicial legacy allows for a richer appreciation of the nation's constitutional heritage. But the perspective also helps to begin reenvisioning the shape of constitutional interpretation to come. Illuminating the contingencies exemplified by the Warren Court's constitutional conservatism may rekindle the liberal imagination to the considerable possibilities contained in judicial interpretation. That the Warren Court failed to do something, after all, hardly means that it cannot be done.

