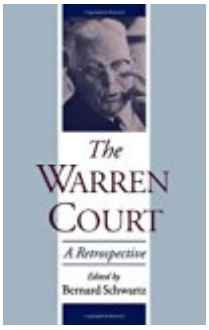
H-Net Reviews
in the Humanities & Social Sciences

Bernard Schwartz, ed. *The Warren Court: A Retrospective.* New York: Oxford University Press, 1996. x + 406 pp. $49.95 (cloth), ISBN 978-0-19-510439-4.



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Published on H-USA (May, 1998)

The Court that Earl Warren Built

The "Warren Court" has been called a continuing constitutional convention, the greatest Supreme Court since the one presided over by John Marshall, and the bright light of justice, fairness, and impassioned activism in a climate of stubborn political resistance and institutional paralysis. Alternatively, it has been labeled the usurper of the Constitution; a cabal of bleeding hearts intoxicated with the belief that the world can be changed with the stroke of a pen; and the final, exhausted thrashings of a reformist legal liberalism rapidly losing its intellectual foundations. This book grapples with these various reputations and in so doing helps us all see clearly again what the passage of time and the accretion of received wisdom has obscured.

This book is a compilation of the proceedings of a conference commemorating the Warren Court, its members, its jurisprudence, and its wider impact on the United States and the international community. Earl Warren is something of an icon for many Americans of a reformist liberal political cast, and some of the contributions to this book are fawning, even gushing. He is variously called the "Super Chief" (p. 10), a "hero" (p. 277), and "one of the two greatest Chief Justices" (p. 256). The accolades extend to the Court as a whole. But this is more than a "love-fest" (p. 377); it is also a collection of some thoughtful remembrances, analyses, and critiques of the Warren Court and the era it helped shape.

The twenty-five essays in this collection vary as much in length (from four to forty-four pages) as they do in style and depth. Some of the pieces are personal reminiscences authored by a fellow justice (William Brennan) and former clerks. Other essays are more academic reviews of the decision making of the Warren Court in particular areas such as race, criminal law, takings, freedom of speech, and religious freedom. Others examine the Court more broadly, for example from the perspective of legal theory. Still others are notable as much for their authorship as for their particular subject matter. Prominent professors of law, jurists active and retired, and others associated with the law are included in the list of contributors.

Given this diversity, perhaps the best way to proceed is to identify a number of recurrent themes. Throughout, certain decisions receive sustained attention. In racial equality it is, unquestionably and unsurprisingly, Brown v. Board of Education that is probably most responsible for the esteem in which the Warren Court is held. In apportionment and the enunciation of the principle of strict voter equality it is Baker v. Carr. In criminal law, Mapp v. Ohio and Miranda v. Arizona stand out. In the emergent constitutional right to privacy, it is Griswold v. Connecticut. In free speech, it is New York Times v. Sullivan. The decisions are cited again and again and subjected to different kinds of analysis from essay to essay. The student of any of these cases can fairly glean a good sense of the arguments for and against each one by working through many of the essays.

The first theme is the that of decline. Several contributors lament the passing of an era of seemingly boundless extension of rights and of judicial courage in the face of

intransigent majorities in the political halls as well as in the country as a whole. Anthony Lewis compares the Warren Court to the Rehnquist Court: one acts like a "second constitutional convention" and other like a salon de refus (p. 398). David Halberstam in his essay sees a descent from the high-mindedness of the Warren Court to a more prosaic meanness of spirit in the Rehnquist Court.

The second theme informing many essays is what can be called the political default theory of judicial review, for which the Warren Court became the touchstone. Taking account of the institutional rigidities and political incentives inherent in a strong system of checks and balances, and the implacable prejudices against blacks and criminals in the political culture, progressive reform could not be expected from the executive and legislative branches of government. If the Court did not act, no one would. The Court merely stepped into a political breach, goes the theory (See the Schwartz essay on Warren, pp. 264-69). It boldly went where others feared to tread, several argue, much to the betterment of the American polity. In a twist on the political default theory, Richard Neely argues that the Supreme Court is the only central institution able to set uniform legal rules of product liability for the country as a whole, the effect of which would be to put a damper on the costly awarding of liability claims against firms from out of state. He wants the contemporary Supreme Court to do for product liability law what the Warren Court did for standardizing criminal procedure.

The third theme concerns the jurisprudential cast of the Warren Court, and here contributors are almost unanimous in claiming that it was simple faith in the rightness and justice of its decision that drove the Court, not any sophisticated theory of constitutional interpretation. Earl Warren especially was a "pragmatic instrumentalist," arriving at the right decision on the facts and then coming up with the reasons for doing so. Such a realist instrumentalism drove Felix Frankfurter to no end of dismay, and he must have been doubly annoyed when Warren would receive praise for the simplicity and clarity of his opinions. They were opinions, Frankfurter can be imagined saying, but they were not careful, reasoned judicial opinions. In the most probing and academically rigorous contribution to this volume, Stephen M. Feldman places the Warren Court at the last, fleeting stage of modernist jurisprudence, arguing that the Court had to rely on widespread agreement on the basic rightness of its decisions, not on the uncontestable jurisprudential way of arriving at them, in order to secure its legitimacy. Since then, Feldman argues, the law has slid into a postmodernism in which one can no longer assume that there are stable conceptual foundations for law, legal reasoning, and the practice of judicial review.

The fourth theme concerns the consequences of the Warren Court for American constitutional law and society. Again, several contributors suggest that the bright light of the Warren Court shines to this day, illuminating state constitutional law and even British legal reform; at the very least, the Warren period remains the standard against which successive courts are to be judged. A couple of contributors are not so sanguine. While he agrees with the result in Brown, federal Court of Appeals Judge Alex Kozinski, for example, claims that it was unfortunate, in a sense, that Brown came so soon in Warren's tenure. It gave the Court an overweening confidence in its own power and mission. He takes aim, among other things, at the apportionment cases, arguing that it is simply not self-evident that strict voter equality is the best constitutional policy. "There is something to be said," he argues, "for the view that voters should not be able to take their political power with them quite as easily as they root up their possessions, leaving those who stay behind–those on the farm, those in the inner city–with a decaying infrastructure and no political base to sustain it" (p. 381). While several authors praise the Court for what it did, they criticize it for its omissions, noting that the Court was too selective in its reformism. The Warren Court all but neglected economic aspects of the Constitution.

Other themes emerge in the essays, including internal Court politics. As several contributions make clear, one cannot assume all the justices thought as one on matters of substantive law or constitutional interpretation. In the end the reader has a satisfying panorama of the Warren Court years.

It is hard to imagine an undergraduate politics or history course for which this would be assigned a required text. The essays are uneven in purpose, length, and depth. They are collected together by their preoccupation with a brief period of U.S. constitutional history.

But what a historical period. The Warren Court's activism has cast a long shadow over subsequent constitutional law and politics in the United States. And as a student of the Canadian constitution, I can assuredly say that this Court has exercised a tremendous influence over Canadian politicians and interest groups who successfully sought an entrenched Charter of Rights that would invite the Canadian judiciary to embark on a constitutional program of legal and social reform in the manner

of the Warren Court.

This, then, is a book for every library and for every advanced student of the constitution in America and abroad.

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Citation: Thomas M. J. Bateman. Review of Schwartz, Bernard, ed., *The Warren Court: A Retrospective.* H-USA, H-Net Reviews. May, 1998.

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