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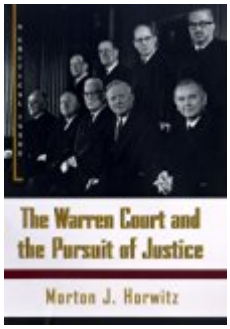

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Historical Preservation For The Warren Court

For over two decades legal historian Morton J. Horwitz has sought to apply the ideas and method of legal realism to the writing of history. Instead of divorcing themselves from questions of legal and political theory that are central to the controversies they study, he urges legal historians to engage those questions with a view toward transforming existing legal consciousness.[1] At the level of theory, Horwitz's project is based on rejection of the law vs. politics distinction. This leads him to criticize the rule of law on the ground that while it creates formal equality, it promotes substantive inequality. Separating legal process from policy outcome, it permits the calculating and wealthy to manipulate legal forms to their own advantage. If the rule of law must be retained for the want of anything better, Horwitz says, it should be transformed to include result-oriented jurisprudence that encourages the pursuit of substantive justice.[2]

The Warren Court and the Pursuit of Justice carries forward Horwitz's project of making history more theoretically self-conscious. Intended to present introductory knowledge of the Supreme Court to the general reader in a nontechnical way, it attempts "to bridge the chasm between legal theory and legal history."[3] To structure his account, Horwitz employs the concept of the living Constitution as a central theoretical principle in historical and constitutional interpretation.

In contextual historical terms Horwitz expresses his purpose thus: "As the Warren Court 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" (p. 112). Conservatives use the Warren Court to condemn judicial activism; liberals claim the Court was not activist as charged, or that the Burger Court was more activist. A significant development that Horwitz fails to mention is recent scholarship which casts doubt on the myth of the Warren Court as countermajoritarian hero, and questions the success of its activist interventions.[4] Nevertheless, his book seems intended to respond to this iconoclastic writing. The Warren Court, we may say, stands in need of historical preservation against the irresistible tide of interpretive revisionism that historicism requires. Horwitz–who is in all previous writing a dedicated historicist–ironically tries to provide it.

I

The author's preservation project rests on two main propositions. He argues, first, that the problem of judicial review in a democracy, which almost all scholars have seen as an issue raised by the Warren Court's decisions, is a false issue. The so-called "countermajoritarian difficulty" is a false issue, contends Horwitz, because there has never been an " 'objective' historical norm or baseline of judicial review" (p. 112). No reliable standard of judicial restraint has ever existed in Supreme Court jurisprudence. Warren Court liberals were therefore free to conceive their own standard of judicial review, as valid and authoritative as any other that could be imagined. The standard was based on an "inspiring vision" of the role of the Constitution and the Supreme Court in American

life, which represented "the spirit of American progressive politics" as it developed in the twentieth century. (p. 113)

Horwitz's second major proposition is that the Warren Court inaugurated "a progressive constitutional revolution that changed the entire landscape of American law and life" (p. xi). Strange as it may seem, few people at the time believed the Supreme Court was "institutionally capable of initiating fundamental constitutional change" (p. xi). Starting with *Brown v. Board of Education*, however, the Warren Court "regularly" transformed constitutional law. It "reconstituted the map of American political theory," transcending old dichotomies of judicial review and democracy and liberty and equality. For the first time in American history, "democracy became the foundational value in American constitutional discourse" (p. xii). By very definition of terms, which are as fluid in Horwitz's account as in the jurisprudence he describes, the Warren Court could not have acted undemocratically.

Horwitz states that "*Brown v. Board of Education* was a nuclear event in American constitutional law that generated multiple tidal waves of reactions that ricocheted back upon the Court" (p. xi). Does he mean to imply that Warren Court liberals, at the height of the Cold War, employed atomic weapons to conduct their constitutional revolution? The idea is unthinkable. Yet use of the nuclear metaphor, which carries with it the image of contaminating fallout, may have an unintended aptness. For Horwitz"s account shows that the revolution in American law and life was not the happy and hopeful affair that Warren Court judges assumed it would be.

Horwitz devotes chapters to the school desegregation cases, the civil rights movement, McCarthyism, the evolving concept of democracy, and democratic culture. Each topic is discussed with reference to the rationale and revolutionary consequences of leading Supreme Court decisions. Although Earl Warren gave his name to this era in Supreme Court history, William J. Brennan is the intellectual and moral hero of this account.

Although he accords it revolutionary significance, the author shows that Brown was fraught with ambiguity. Chief Justice Warren's opinion left unclear whether *Plessy v. Ferguson*'s separate-but-equal rule was categorically overruled, and was indecisive about whether it rested on the idea that the Constitution has a fixed and permanent meaning or the theory of a living Constitution. The Court's gradualist approach to enforcing the decision encouraged violence by giving segregationists time to organize, and within a decade the Warren Court became as divided over the civil rights movement as the country itself.

The legacy of *Brown* proved deeply conflicted, as the civil rights movement did not pan out as its supporters hoped. "More than forty years after Brown," Horwitz dourly concludes, "de facto segregation in housing and schools is still prevalent throughout the country" (p. 49). (He does not discuss the relationship between de jure and de facto segregation.) The example of civil rights success that Horwitz points to is abolition of the ban on interracial marriage in *Loving v. Virginia* (1967). Acceptance of this decision showed the extent to which Brown "shook up deep cultural assumptions about race" (p. 50). Yet since this result followed creation of the right of privacy in *Griswold v. Connecticut* (1965), Horwitz suggests it reflected emerging cultural opposition to government meddling with sex more than elimination of racism.

Horwitz's discussion of McCarthyism–even at this late date–follows the predictable left-wing line. He dismisses the Communist problem and reduces internal security measures to red-baiting and liberal-bashing. After several years of waffling, the Court finally achieved success and by the mid-1960s scattered the forces of repression. To justify this result there occurred in constitutional law a reconceptualization of First Amendment jurisprudence authored by Justice Brennan.

In the mid-1950s a stalemate in constitutional law existed, with Justices Black and Douglas advocating the "preferred freedoms" reading of the First Amendment and Justice Frankfurter insisting on the balancing test. Horwitz states that Justice Brennan transcended this intellectual impasse by developing a new First Amendment jurisprudence based on four simple, familiar, and easy-to-understand ideas. These were the doctrines of chilling effects, void for vagueness, overbreadth, and facial challenge.

Statutes that were vague about what they prohibited, covered constitutionally protected as well as unprotected conduct, and had the chilling effect of deterring people from exercising their constitutional rights, could be challenged on their face as unconstitutional. This approach permitted the Court to shift the focus of judicial review from the actual effect of a statute on individual defendants, to its putative effect on people not involved in the case. Laws could be struck down without waiting to see how they would be applied and the effect they would produce. Although Horwitz does not make the connection, this reformulation of First Amendment issues stood the pre-1919 bad tendency test on its head. Instead of strik-

ing down measures that tended to undermine established authority, the chilling effects test struck down measures that tended to preserve security and order. Concerning the role of the Supreme Court, Horwitz approvingly describes what other scholars have criticized as the transformation of judicial review from interpretation into legislation.

Horwitz uses living Constitution theory to explain Justice Brennan's creative jurisprudence. He employs this theory most prominently in the chapters on democracy and democratic culture, where it permits him to insinuate legal-realist values into the account. This part of the story begins with the republican framers of the Constitution, who took a dim view of government based on the unmediated expression of popular opinion. Early twentieth-century Progressives made direct democracy a positive ideal of good government. However, New Deal liberals fell into dispute over whether democracy should be conceived in procedural political or substantive socioeconomic terms. This was a political question for the legislative and executive branches to decide; it did not concern the judiciary, especially if liberals maintained their opposition to activist judicial review that was a key corollary of progressive democracy. But why should liberals give up the power of judicial review when it could be used for progressive ends? There was no need for this. Accordingly, in the famous *Carolene Products* (1938) footnote 4, Justice Harlan Fiske Stone proposed a new standard of judicial review that would keep judges actively involved in government, while promoting democracy. In essence, the courts would give religious, racial and national minority groups the representation they needed in American politics, but that was denied them by prejudiced legislative majorities.

Most scholarly accounts view the concept of representation in the new judicial review, as conceived by Justice Stone and applied by the Warren Court, as political-procedural in nature. Horwitz argues in contrast that in Warren Court jurisprudence representation went beyond procedure. In the view of Warren Court liberals,"truly effective representation required that all people be guaranteed dignity and worth" (p. 79). The standard of democracy was equality of treatment in respect of substantive values, including social and economic equality, without which "real political equality" could not exist (p. 81). Horwitz finds this redefinition of democracy in the Warren Court's reapportionment and welfare rights decisions. Democracy traditionally meant government by the political branches under the sanction of majority rule. In Warren Court jurisprudence, according to Horwitz, it meant protection of minority rights by judicial legislation aimed at establishing substantive social equality, also known as "positive liberty."

The book concludes with a discussion of Warren Court decisions that recognized what Horwitz sees as the cultural values on which democracy depends. The core value is "individual self-realization" (p. 106). Implicated in substantive-democracy decisions (e.g. *Shapiro v. Thompson* [1969] and *Goldberg v. Kelly* [1970]), this value was preeminently established in obscenity and right of privacy cases. Horwitz concedes that the constitutional law created in decisions such as *Roth v. United States* (1957) and *Griswold v. Connecticut* (1965) aroused strong public opposition and produced an incoherent body of jurisprudence. Nevertheless, the practical and theoretical impact of these decisions was revolutionary. No longer, Horwitz observes, could any serious thinker hold that democracy was primarily political in nature, or that a constitutional distinction existed between political speech and cultural-artistic expression.

II

The Warren Court's approval of "uninhibited, robust, and wide-open debate" on public issues was impressive. But what was "still more amazing," says Horwitz, is that the Court understood so deeply the values needed to sustain democratic culture (p. 99). Many scholars will conclude that if Horwitz is right, the Warren Court was worse than its critics have thought. But is Horwitz being quite fair to the Warren Court liberals? Is this a historically accurate account, or does its theoretical reach exceed its empirical grasp?

Part of the problem lies in a certain degree of rhetorical excess and imprecision in Horwitz's writing. Matters that are introduced as revolutionary achievements on closer analysis turn out to be unsuccessful, incomplete, contradictory, or at best tentative first steps toward elaborating a progressive vision. Perhaps that is the nature of judicially sponsored revolutions. Horwitz does not say. He has a hard time, however, finding in Supreme Court opinions compelling and persuasive evidence to support arguments and conclusions which, according to his professed methodology, have a normative theoretical purpose.

Consider the meaning of positive liberty in the welfare-state. In Horwitz's theory of justice it has a substantive meaning defined in socioeconomic terms, and the reader is assured that the Warren Court shared this vision. Yet in constitutional law the vision was expressed

in due-process terms. To illustrate its meaning Horwitz chooses a later speech in which Justice Brennan said: "Due process asks whether government has treated someone fairly, whether individual dignity has been honored, whether the worth of an individual has been acknowledged. If due process values are to be preserved in the bureaucratic state of the late twentieth century, It is essential that officials possess passion ... that understands the pulse of life beneath the official version of events" (p. 90). Of course scholars will understand that Justice Brennan is demonstrating the subtleties of substantive due process, but will the general reader? On the face of it, the excerpt from Brennan's speech could be a libertarian text. Of similar import are decisions used to illustrate the evolving concept of substantive democracy which actually dealt with equal access to the judicial system.

Horwitz hails "the importance and wisdom" of Justice Brennan's opinion in *Roth v. United States* (1957), offering the most permissive definition of obscenity ever proposed by a court. The test was whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." This cultural democratic breakthrough unexpectedly culminates, however, in Justice Brennan's repudiation of the *Roth* standard and his confession that it is impossible to define obscenity. Horwitz nevertheless insists that it would be wrong to say the Warren Court's attempt to revolutionize constitutional law was a failure. It's just that the Court was not prepared for the sexual revolution that occurred in the 1960s, as though its decisions had nothing to do with that revolution.

Questions arise at the empirical level as well. For example, Horwitz states that within three years of the *Brown* decision "a deadly cycle of violence and disobedience to court orders had become widespread throughout the South" (p. 30). Apparently to support this statement, he says "Impeach Earl Warren" signs appeared throughout the South, and legislation was almost passed by southern congressmen limiting the jurisdiction of the Supreme Court. The Southern Manifesto signed by members of Congress condemning the school desegregation decision as unconstitutional is also mentioned. Is it semantic quibbling to suggest that these were peaceful acts of political protest rather than deadly acts of violence?

In discussing McCarthyism Horwitz denies the existence of a Communist problem in the Cold War period. He records that although Alger Hiss was convicted of perjury, there "were virtually [sic] no other proven examples of disloyalty at Hiss's level, and Hiss himself always maintained that he was framed" (p. 55). Ideological impatience with anti-Communism colors the account of constitutional law, as when Horwitz writes: "Chief Justice Warren's opinion in *Watkins v. United States* marked the first time that the Supreme Court had interfered with the witch-hunting powers of a congressional committee" (p. 61). Is this supposed to mean (1) that the Supreme Court had never decided a case adverse to the exercise of congressional investigative powers, which is not true; (2) that Congress has the power to hunt witches and no Court had ever interfered with it; or (3) the Court had not previously restricted congressional investigation into Communist political activity, which is as imaginary as witches' activity.

Horwitz's strong point is his grasp of theory. He is an expert on the theory of the living Constitution, which he says guided the Warren Court's approach to constitutional interpretation. It is therefore fair to evaluate his treatment of this issue in particular. In a sense of course living Constitution theory does not need history. That is part of its utility and appeal: focusing on politics, ideology, and social and cultural forces, it obviates the hard historical facts about the written Constitution that have commanded the attention of orthodox constitutional lawyers, and that in recent years have assumed theoretical significance in the jurisprudence of original intent. Horwitz does not want to leave it at that, however. Instead he wants to show that living Constitution theory is a historically rooted principle that bears the mark of constitutional legitimacy–more so than the written constitutionalism of original intent jurisprudence, which he criticizes as philosophically incoherent and inadequate for adjudicating twentieth-century constitutional issues.

Like other theoretician-apologists of judicial activism, Horwitz claims John Marshall as an exponent of living Constitution theory. He attributes to Marshall the view that "constitutional meaning changes with changing circumstances," and "legal principles ... evolve over time depending on changing circumstances or changing moral and legal ideas"(pp. 28-29). As evidence for this Horwitz quotes Marshall's statement in *McCulloch v. Maryland* (1819) that the Constitution is intended "to be adapted to the various crises of human affairs" (p. 28). So much for Marshall's words. Expounding further, Horwitz writes: "We should recognize ... that constitutional principles, like all legal principles, are inevitably created by judges in accordance with their conceptions of moral

values and social needs" (p. 29).

Horwitz's interpretation of Marshall is erroneous. As Walter Berns and others have shown, Marshall, in the passage cited, was concerned with the execution of congressional power to adopt appropriate means to fulfill the ends of the Constitution. The question in *McCulloch* was whether a construction of the Constitution by the legislative branch was valid. Marshall denied that new powers could be created by the legislative branch–and surely not by the judiciary–for purposes or objects not contemplated by the Constitution. In other opinions Marshall made clear his belief that the principles of the Constitution are fundamental, permanent, and unchangeable, except through formal amendment.[5]

Chief Justice Warren's opinion in *Brown* was theoretically ambiguous, expressing both the living Constitution concept and the idea that the Constitution has a fixed and permanent meaning. By the early 1960s the living Constitution idea prevailed. In Horwitz's view the reapportionment cases are the clearest demonstration of this fact. In *Reynolds v. Sims* (1964) the Court held that representation in both houses of a state legislature had to be based on equal population districts. Horwitz says the assertion of this rule was "a dramatic rejection of the original constitutional understanding," according to which the upper house in an American legislature was designed to emulate the aristocratic British House of Lords. It was a radical break in the political tradition that could only be justified on the assumption of an evolution of the meaning and significance of democracy, in the minds of the Warren Court judges, as "the foundational constitutional ideal." The Court's revision of democratic theory in turn "presupposed a 'living Constitution" ' that changed and evolved over time (p. 85).

Horwitz's interpretation is historically flawed. In the federal system consideration of differing interests and local community representation was a corollary of the population principle, and formed the basis for county or other political subdivision representation. Systems of representation existed in a tradition of republican government that emphasized consensus rather than simple majoritarianism.[6] Moreover if living Constitution theory was the basis of *Reynolds v. Sims*, one would expect to find it expressed in the Court's opinion. Far from relying on an evolutionary concept, however, Chief Justice Warren appealed to the idea of fixed constitutional meaning. Quoting an earlier opinion of Justice Douglas, he declared: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing–one person, one vote." Warren observed that the framers of the Constitution did not intend to permit vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants.

Horwitz's use of the living Constitution idea can also be questioned from the standpoint of coherence and consistency as requirements of sound legal reasoning. Judging from this account, living Constitution theory applies only to progressive judges. When conservative judges write opinions that creatively develop a constitutional principle, as in Chief Justice Vinson's analysis of the clear and present danger standard in *Dennis v. United States* (1950), it is viewed as constitutional error, rather than an evolution in constitutional meaning under the living Constitution idea. Vinson refused to recognize the force of a fixed and objective legal principle. Sometimes liberal judges write opinions based on the idea that the Constitution has a fixed meaning. Commenting on Justice Brennan's interpretation of the First Amendment in *New York Times v. Sullivan* (1964), Horwitz says that in the context of the civil rights movement, "it was much easier to appreciate the deepest meaning of the constitutional guarantees of freedom of speech and association which through most of its history the Court had managed to ignore" (p. 37). This statement refers to the discovery of constitutional meaning, not its creation by a judge.

Horwitz's inconsistency in the use of living Constitution theory can perhaps be explained. When the law vs. politics distinction is abolished, a structural limitation is removed that encourages, if it does not require, intellectual consistency in legal reasoning. The living Constitution idea does not necessarily abolish logic, but it eliminates a fundamental distinction in western political thought that has been essential to limited government. The living Constitution is a protean concept that can refer to anything–past, present and future–including the written Constitution when an appeal to the text may be politically expedient.

This book aims to establish living Constitution theory as the doctrinal orthodoxy in American constitutional law and history. To do this, Horwitz needs to make it benign, familiar, and reassuring. It is necessary for him to argue that although living Constitution theory, as he is pleased to acknowledge, is informed and inspired by legal realism, that does not mean it denies the existence of legal principles. Horwitz's legal realism, however, is an improved and sanitized thing, not the teaching of skepti-

cism, relativism and nihilism that most scholars have understood it to be. Indeed Horwitz says that Justice Brennan, the mind and conscience of the Warren Court, was a legal realist, and his jurisprudence was based on principles. Reflecting the legal realist vision of law that was incorporated into New Deal legal consciousness, Justice Brennan captured the essence of living constitutionalism when he wrote: "The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs" (p. 114).

The notion of adapting constitutional principles sounds reassuring, as though it means nothing more than the requirement of practical reason that principles always need to be applied in contingent and changing circumstances. But this is not what Horwitz–and Brennan if Horwitz's interpretation of him is correct–means. In living Constitution theory, as in legal realism, legal principles have no intrinsic or real meaning. They mean whatever the times, or the culture, or the political ideology and will of judges and other government officials want them to mean.

Horwitz confirms this view of the matter. He says Warren Court liberals understood that "it is impossible not to Incorporate one's deepest values into constitutional interpretation" (p. 115). Liberal judges accepted social reformers' "conception of law as a malleable instrument of social policy" (p. 114). In living Constitution theory, the socially expedient nature of law" Horwitz asserts, "because it is the vehicle for the most central values of American society-, but those values necessarily evolve as society changes" (p. 87). The law-politics distinction can thus be abolished (or its nonexistence recognized). That is not a cause of concern, however, so long as progressive judges are at the helm.

Horwitz says the historical significance of the Warren Court was "to leave a lasting legacy of progressive interpretations of the Constitution" (p. xii). Even if overturned by conservative judges, progressive constitutional interpretations can "continue to inspire future generations of judges, lawyers, and students" (p. xii). The epistemology of this book is a little obscure, so it's not clear whether the Warren Court's progressive interpretations will retain their meaning. The important point, and the purpose of Horwitz's historical preservation project, Is to make sure that progressive identity–meaningless though it may be–is established as the highest value in American government and politics, and is equated with the pursuit of justice–expedient and instrumental though it is in the theory of the living Constitution.

Notes:

[1]. Morton J. Horwitz, "History and Theory," *Yale Law Journal*, vol. 96 (1987), p. 1835.

[2]. Morton J. Horwitz, "The Rule of Law- An Unqualified Human Good? " *Yale Law Journal*, vol.86 (1977), p.566.

[3]. Morton J. Horwitz, "History and Theory," *Yale Law Journal*, vol. 96 (1987), p.1835.

[4]. Michael J. Klarman, "Brown, Originalism, and Constitutional Theory- A Response to Professor McConnell,"Virginia Law Review, vol.81 (1995), pp. 1931-34; Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (Chicago: University of Chicago Press, 1991).

[5]. Walter Berns, Taking the Constitution Seriously (Lanham, Md.: Madison Books, 1987), p.207.

[6]. Robert G. Dixon, Democratic Representation: Reapportionment in Law and Politics (New York- Oxford University Press, 1968), pp.82, 224.

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