

*THE WARREN COURT AND AMERICAN  
POLITICS: AN IMPRESSIONISTIC  
APPRECIATION*

**THE WARREN COURT AND AMERICAN POLITICS.**  
By Lucas A. (Scot) Powe, Jr.<sup>1</sup> Harvard University Press.  
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Scot Powe has written a marvelous book—every page challenging, provocative, stimulating, and just a pleasure to read. Its great strength is that it works from bedrock—the Court’s opinions, the approximately 1750 the Warren Court handed down over sixteen years. But this is far more than a tour of the Court’s leading cases or ‘best hits.’<sup>3</sup> “My job,” Powe writes, “is neither to cheer nor boo; it is to understand and explain . . . not whether the[se] changes [the Warren Court] wrought were good or bad, but how they came to be, how far they reached, and how they eventually encountered limits.” (p. xv) He has two related goals:

The first is to help revive a valuable tradition of discussing the Supreme Court in the context of American politics. The second seeks to replace stereotypes with information by syn-

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1. Anne Green Regents Chair, The University of Texas School of Law.

2. Research Scholar, New York University School of Law. I wish to thank Norman Dorsen, Sandy Levinson, Scot Powe and the late, deeply lamented John P. Frank for careful readings of a draft, and Don Dripps for his editorial midwifery. This is not the place to say more about John Frank except that for sixty years the Supreme Court had no more devoted friend. I also thank Scot Powe for many discussions about this book and its memorable personalities, and the graciousness with which he took (occasionally) concurring opinions. All interviews unless otherwise noted are on file with the author. I have used the phrase “Warren Court” throughout for clarity.

3. Powe considers other than constitutional cases—business, labor and anti-trust as well as FELA cases—although he omits “several major areas—from tax to administrative law generally.” (p. 533) “The essence of the Great Society is antitrust,” Earl Warren said in 1966. “Without small business you have no Great Society.” Drew Pearson diary, February 5, [1966], Pearson papers, Lyndon Baines Johnson Library, which also noted: “I asked him [Warren] how Thurgood Marshall was getting along as Solicitor General, and he was a little hesitant to comment. He indicated that Marshall was quite weak on antitrust cases, and that the Justice Department generally was weak.”

thesizing the numerous books and articles on the Supreme Court, its decisions, and its justices during Warren's tenure. . . . The approach I have taken has rarely been seen in over a quarter century. (pp. xi, xiv)

It is the method of Princeton's successive McCormick Professors of Jurisprudence—Edward S. Corwin, Alpheus T. Mason and Walter F. Murphy—of Harvard's Robert G. McCloskey and, although Powe does not mention it, also in so many ways of Professor Felix Frankfurter—an eminently cultivated, historically-based tradition of scholarship that is nearly moribund today. Serving as an inspiration to Powe were the work of McCloskey and Murphy, especially the former's *The American Supreme Court*<sup>4</sup> and the latter's *Elements of Judicial Strategy*. "This is what scholarship is all about," Powe recalls feeling when he read them three decades ago. (p. xvi) This book, like the best of those he emulated, will last. Not the least of those reasons is Powe's refreshing, if occasionally sardonic, prose. (Who says a book can't reflect its author?)

Powe has an enviable knack of shifting smoothly between the Court and the political environment in which it works. This is a history of an institution—a mix of narrative history and doctrinal analysis with biographical snippets interspersed, all well-conceived, sensitive to the interplay of myriad cross-currents and, considering the mass of material available which Powe has deftly synthesized, blessedly concise. More has likely been written about the Warren Court than about any other "Court"; the volume happily shows no sign of abating. For some people there can never be too much of a good thing. "The history of the Victorian Age will never be written: we know too much about it," wrote Lytton Strachey.<sup>5</sup> Powe has put the lie to this about the Warren Court. He includes everything of importance down to mid-level details, but no more. I may have a quibble here and a question there over Powe's interpretations, but to an extent this is, as it always has been and likely will always be, a matter of reading tea leaves. Choices in emphasis and interpretation are inherent in writing about the Court, and Powe's choices

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4. Justice Frankfurter wrote McCloskey upon publication of his book that "in the plethora of writing that we have had during the last few decades on the Supreme Court, yours belongs to the very, very few that bring the disinterested enlightenment that scholarship should furnish. I hope it will be widely read and carefully pondered over by your colleagues . . . I congratulate you." Felix Frankfurter to Robert G. McCloskey (Nov. 1, 1960), Frankfurter papers, Harvard Law School Library.

5. Lytton Strachey, *Eminent Victorians* v (G.P. Putnam's Sons, 1918).

throughout are eminently reasonable. All in all, it is difficult to escape the conclusion that this is far and away the best book on the Supreme Court during one of the most turbulent eras in its history.

Doctrinal lines are rarely tidy. Neither can be the recounting of doctrine or the portrayal of the people who created it. The evolution of doctrine is only one part of a book like Powe's. But even such expert doctrinal explication will get one only so far in understanding the Warren Court, or indeed any court. Smooth history is incomplete history. Too much is happening at too many different levels for it to be otherwise. The narrator must, like the events he is relating, peek down winding paths of personality while taking into account twisting turns of doctrine created in a political atmosphere that ultimately controls. He must consider the Court's organizational "methods and practices," as Brandeis told Frankfurter,<sup>6</sup> who changed this into "business,"<sup>7</sup> and also the styles and techniques of individual justices. It is a difficult, decidedly non-linear task and one that Powe splendidly achieves.

### I. DREAMS AND REALITY

They were heady times when Scot Powe first read his intellectual forbears:

Those were the days my friends,  
We'd thought they'd never end  
We'd sing and dance for-ever and a day  
We'd live the life we choose,  
We'd fight and never lose.  
For we were young and sure to have our way.

...

Those were the days, oh yes, those were the days.  
Then the busy years when rushing by us.  
We lost our starry notions on the way.

...

For in our hearts the dreams are still the same.<sup>8</sup>

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6. Louis D. Brandeis to Felix Frankfurter, June 5, 1927, in Melvin I. Urofsky and David W. Levy, eds., *Half Brother, Half Son: The Letters of Louis D. Brandeis to Felix Frankfurter* 297 (U. of Oklahoma Press, 1991).

7. Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (Macmillan, 1928).

8. "Those Were the Days" (1800).

“The Court has only a few big issues to decide,” Justice William J. Brennan, Jr., said typically optimistically in early 1968. “The Bill of Rights will be pretty well solidified.”<sup>9</sup>

How different it was ten years earlier. In 1958, after two terms on the Court, Brennan was “comfortable in his relationships with the other justices, but he was feeling his way on his views. He was a little uncertain about them.”<sup>10</sup> (Later, he admitted that it took him five years to feel confident about them.)<sup>11</sup> Only the year before, he had written *Roth v. United States*.<sup>12</sup> It was an impressive work of craftsmanship by a freshman justice. In the words of one study Brennan “fashioned a rationale for the suppression of ‘obscenity’ that also accorded freedom to ideas about sex”<sup>13</sup> despite, as Powe notes, being “hopelessly confused about obscenity.” (p. 117)

*Roth* provided an early example of Brennan’s approach: “He always acknowledged the legitimacy of the government’s interest; therefore, unlike Hugo L. Black and William O. Douglas, he never took the government head on,” Powe writes. “But having recognized the legitimacy of what the government

9. Pearson interview with Brennan, Pearson papers (cited in note 3). “What’s coming up?” Rodell asked Justice White in 1965. “Quantitatively,” Rodell wrote, recording the essence of what White said, “still reapportionment, *Escobedo* (etc.), Negro stuff, especially murder 3 [capital punishment]. Also plenty [of] censorship cases. [White] agreed Brennan formula [in *Roth*] was unclear . . . and that the Supreme Court could not forever remain censor.” When Rodell asked Warren the same question, noting the Court’s success in the fields he mentioned to White, Warren “agreed—nothing so imp[ortant] ahead—good thing for Court to lie low a while, comparatively, and consolidate, limit, define [*Escobedo*, etc.]” Fred Rodell, “Interviews with Supreme Court Justices in 10/65 for Warren Court book,” private possession (“*Rodell Supreme Court interviews*”). [*Escobedo*, etc.] is in the original.

10. Peter Fishbein interview. Different justices take differing lengths of time to feel fully at home on the Court. By no later than the start of their third terms, it seems from their drafts and circulations, Black and Frankfurter felt at home on the Court. “At first,” Douglas recalled in 1961,

I found the Court very, a very unhappy experience. . . . I found it was an experience that was, for a year or two, very dreary. A case seemed to be very slow, the work quite uninteresting. And it took about two or three years to get caught up in the enthusiasm of the broad group of ideas that the Court dealt with. And from that time on, from about 1941, 1941 or 1942, I was quite happy there.

Conversations between Justice William O. Douglas and Professor Walter F. Murphy, taped during 1961-1963, Seeley G. Mudd Manuscript Library (December 20, 1961 conversation), Princeton University (“*Douglas-Murphy conversations*”). “After you’ve been here 10 years,” Douglas said in 1960, “everything that comes around, has come around twice and you know what you think.” John French interview.

11. Edmond Cahn to Russell Niles (March 8, 1962), Cahn papers, New York University School of Law Library.

12. 354 U.S. 476 (1957).

13. Edward deGrazia and Roger K. Newman, *Banned Films: Movies, Censors and the First Amendment* 96 (R.R. Bowker Co., 1982).

wanted to do, Brennan then would shift to conclude that government had not done it appropriately in the case at bar.”<sup>14</sup> (p. 117) On the other end of the scale was Justice John Marshall Harlan’s “normal First Amendment stance”: “Interests must be balanced with a heavy hand placed on the state’s side.” (p. 219) “Lawyer-like reasoning”<sup>15</sup> (p. 95) could support either Brennan’s or Harlan’s result.

Widely varying from this traditional methodology was Black’s and Douglas’s approach to the First Amendment. The fact that they almost always reached the same outcome obscured differing perspectives: Black’s came from a deep immersion in history against an unchanging view of human nature and human needs; Douglas viewed personal fulfillment as central to the human condition. The Bill of Rights, Edmond Cahn wrote—his title, “The Firstness of the First Amendment,” summarizing his argument as well as that of both justices—“is directed toward the values that lie beyond . . . as a people’s charter of edification.”<sup>16</sup> The ethereal and the heavenly are not easily susceptible of analysis.<sup>17</sup> They do not readily lend themselves to teaching, dissection and explication in the way Brennan’s and Harlan’s opinions do.<sup>18</sup> If I am correct in this, it could be one reason for what I perceive as Powe’s slight unease with Black’s (before 1965 largely) and Douglas’s methods but, emphatically, not their (and especially Douglas’s) results. Brennan’s resolution—“[s]trict scrutiny, compelling interests, the chilling effect, and the need for breathing space constituted the vocabulary of unconstitutionality in Brennan’s jurisprudence,” as Powe writes (p. 303)—seems to be the one he endorses. (p. 303)

Part of Brennan’s doctrinal arsenal originated with Felix Frankfurter, who soon dropped his share of it. In December

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14. Once Frankfurter saw Brennan’s direction in *Roth*, he discarded his thought of writing separately and gave the research his clerk had done to Brennan, who used it. Jerome Cohen interview.

15. See *Yates v. U.S.*, 354 U.S. 298 (1957) (Harlan, J.); *Speiser v. Randall*, 357 U.S. 513 (1958) (Brennan, J.).

16. Edmond Cahn, *The Firstness of the First Amendment*, 65 *Yale L.J.* 464, 481 (1956).

17. Justice Byron White reflected this attitude when he refused to say about *Buckley v. Valeo*, “The First Amendment therefore!” and hold the statute unconstitutional. Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* 447 (Free Press, 1998).

18. When William H. Rehnquist was appointed to the Court, Alexander Bickel thought that he would write opinions “which it will be a pleasure to teach and a challenge to contend with.” Bickel to Hans A. Linde (Oct. 28, 1971), Bickel papers, Yale University.

1958 he suffered a heart attack and his personality changed. It was more than a rigidity in conference. "I cannot find something amusing at Conference without being suspect," he told Brennan. "It is sad but it's true. . . ."<sup>19</sup> For several months at least, his conversation had "less frolic and more form" and deliberation.<sup>20</sup> "Afterwards," recalled one of his clerks, "he didn't look like himself at all."<sup>21</sup> Soon, Frankfurter "started to mull over who would write his biography. It was to him a matter of great concern and interest."<sup>22</sup>

If Frankfurter now more than ever accepted the zeitgeist as a major source of decision, his comrade in restraintist arms, Harlan, lived somewhat in fear of the poltergeist.<sup>23</sup> "Harlan lacks fiber," claimed Grenville Clark, the founder of his old law firm, who thought this had also been the case in his law practice.<sup>24</sup> He was a practitioner of the jurisprudence of the steady hand. Harlan's "main concern, his lodestar," observed Norman Dorsen, who clerked for him, "was to keep things on an 'even keel.' He used that phrase many times. . . . The thing that people from Wall Street, from that world, care about most is national security. That's at the core of their senses. They don't want to rock the boat."<sup>25</sup> Financial markets and corporate clients such as Harlan represented abhor uncertainty. Jurisprudentially, this translated into a deep respect for tradition and precedent. As Harlan wrote in his *Gideon v. Wainwright*, concurrence, "I agree that *Betts v. Brady* should be overruled,

19. Felix Frankfurter to William J. Brennan, Jr. (March 8, 1960), Frankfurter papers (cited in note 4).

20. Max Isenbergh, *Reminiscences of FF as a Friend* 51 Virginia L. Rev. 564, 573 (1965).

21. Howard Kalodner interview.

22. John French interview.

23. In retrospect the process of Harlan's appointment seems a relic. "I wanted a trial lawyer for the next Court appointment," noted Herbert Brownell, Eisenhower's Attorney General, "because the opinions under Vinson lacked utility to the bar. They were weak in applying high flowing principles to the lower courts and the bar that could be understood. I had long thought John should be on the Court. I told this to Ike and he agreed." Brownell interview. As Harlan's biographer writes, "Harlan was Brownell's first, and only, choice." Tinsley E. Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court* 87 (Oxford, 1992); see also *id.* at 80. "We were so, so simpatico," Brownell said. "Did you ever know someone you didn't have to ask how he felt about something because you felt the same way? That's how it was with John and me." Do you recall ever disagreeing? I asked. "Not on anything of any importance. We were like this," and Brownell held up two fingers next to each other. "He was my first boss," from 1927 to 1929. Brownell paused to contain his emotions. Herbert Brownell interview.

24. Grenville Clark to Louis Lusky, (Oct. 17, 1960), Clark papers, Dartmouth College.

25. Yarbrough, *Harlan* at 341 (cited in note 23); see also Norman Dorsen, *Harlan, Civil Liberties, and the Warren Court*, 36 N.Y.L. Sch. L. Rev. 81, 100-07 (1991).

but consider it entitled to a more respectful burial than has been accorded. . . .”<sup>26</sup>

But as the McCarthyite witch hunt slowly lessened and other First Amendment issues came to the fore, as Harlan’s eyesight increasingly deteriorated during the 1960s, and with Frankfurter, who, as Harlan’s biographer noted, “closely monitored the tenor of Harlan’s opinions,”<sup>27</sup> no longer on the Court, what slowly came through to Harlan was an increasing appreciation of the ambit of the First Amendment. I do not wish to overstate this but it seems to me that something changed his thinking in this area during the decade. His perspective was obviously far from that of, say, Hugo Black, his distant cousin whom even in his first term he called “a great gentleman”<sup>28</sup> (and who certainly never tired of telling Harlan how wrong he was).<sup>29</sup> Harlan remained the soul of courtesy and correctness as he was always the exemplar of “[d]isembodied, impersonal justice”<sup>30</sup>—even if, as he liked to say, a tough case would “succumb to a little bourbon.”<sup>31</sup> But his perspective, culminating in *Cohen v. California* in 1971, was notably different from what it had been in the mid-1950s, even frequently against the backdrop of a changing Court which remained unprecedented in almost every way.

## II. A NEW “COURT”

Powe varies the standard version of Frankfurter’s retirement in 1962 dramatically changing and liberalizing the Warren years<sup>32</sup> by adding a third “court” that brought into being “History’s Warren Court.” After the 1957 domestic-security decisions through the 1961 term, he writes, the Court “varie[d] between stalemate and retreat for . . . almost five years,” (p. 497)

26. *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963).

27. Yarbrough, *Harlan* at 124 (cited in note 23).

28. William Lifland interview.

29. In the late 1960s, recalled one of his clerks, Black’s “great friendship was with Harlan. Harlan would invariably stop by to pick Black up going to court and conference and they’d walk down the hall together, with Harlan having his arm around the Judge [as his clerks called Black], this tall guy with his arm around this little guy. Black would try with great animation to convince Harlan to go the other way.” Joseph Price interview.

30. John P. Frank, quoted in Yarbrough, *Harlan* at 344 (cited in note 23).

31. Yarbrough, *Harlan* at 143 (cited in note 23).

32. Civil liberties lost, five to four  
With old Felix there, blocking the door;  
But with Goldberg, ne Arthur,  
Who rings freedom farther,  
They win by the very same score.

Fred Rodell, *Fred Rodell’s Limericks: Nine-A-Court*, Monocle 56 (Nov., 1964).

keeping the NAACP alive in southern states by extending and shifting analyses previously applied in the domestic-security area. And in doing so, the Court's approach set the stage for the later break.

The reason “[m]ost constitutional law scholars have not appreciated this initial break,” Powe writes, is “probably because the domestic-security retreat does not fit well with a story about unfolding progress after the ill-starred *Dennis v. United States* decision.” (p 497-98) What this new division helps to show is the utility of the analytic techniques the Court used in cases about both race and reds. A superb chapter entitled “Little Rock and Civil Rights” details the South's attack on the NAACP.<sup>33</sup> The Court's first true recognition of freedom of association came in *NAACP v. Alabama* in 1958.<sup>34</sup> Disclosure of membership, Justice Harlan wrote for the Court, might well “induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs. . . .”<sup>35</sup> This language is very similar to the language used the year before in *Watkins v. United States*: “The critical element” in determining whether a witness can be compelled to testify “is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures. . . .”<sup>36</sup> These cases came shortly after *Pennsylvania v. Nelson*<sup>37</sup> and *Slochower v. Board of Higher Education of New York City*<sup>38</sup> which, Powe notes, were “a godsend to southerners” and made national security conservatives “allies against the Court.” (p. 85) Except for *Brown*, “progress” after *Dennis* was uneven until Frankfurter's retirement in 1962. His departure that summer remains the pivot of the era. The new majority had a very different philosophy.

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33. “I have every reason to believe,” said Earl Warren, “that Simon Sobeloff was promised an appointment to the Supreme Court but rendered too many decisions for integration.” Drew Pearson diary (Feb. 5, 1966), Pearson papers. The seat went instead to Stewart in 1958. See David L. Bazelon, *Tribute to Simon Sobeloff*, 34 Maryland L. Rev. 486, 487-88 (1974).

34. *NAACP v. Alabama*, 357 U.S. 449 (1958).

35. *Id.* at 463.

36. *Watkins v. U.S.*, 354 U.S. 178, 198 (1957).

37. 350 U.S. 497 (1956).

38. 350 U.S. 551 (1956).

## III. POWE'S HEROES

Although Powe writes that “it no longer matters to me whether the *Reapportionment Cases* or *Miranda v. Arizona* was rightly decided,” but that *Brown v. Board of Education* “is different because it does matter,” (p. xv) he has his heroes—liberals and liberalism—and his villains, especially Felix Frankfurter. Justice Douglas, with whom Powe “benefited (immensely)” (p. xiii) from a clerkship in the 1970 term, called Frankfurter “a sneaky little bastard. If I have to go to heaven,” he said after his retirement, “I wish Felix would go to hell. I wouldn’t want to go to heaven if I knew he were there.”<sup>39</sup> But even Powe’s heroes have foibles: Brennan in *Ginzburg v. United States* simply “lied, implying that [certain items] might be obscene. . . . This shameful travesty of constitutional analysis” consigned Ralph Ginzburg to jail.<sup>40</sup> (p. 345) Warren in his opinion for the Court in *O’Brien v. United States*, “engaged in a type of individualized decisionmaking, applicable to one person alone, that has no place in a judicial system that professes any desire for justice and consistency in decisionmaking. . . . It was one of the most shameful moments of the Warren Court.”<sup>41</sup> (p. 327-28)

Nor do the two senior liberal heroes escape Powe’s cavil. He is frequently harsh on Hugo Black (to whom I admit to, shall I say, a certain prejudice), especially after Black “changed” in his later years. By 1964 “Black was on the downslide in his career,” Powe writes, “and his reputation would match reality if he had left the Court with Frankfurter, the indispensable foil who brought out the best in him.”<sup>42</sup> (p. 303) And by then Douglas “no longer had the interest to . . . articulate[ ] a jurisprudence based on evolving tradition,” or anything else for that matter.

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39. Virginia Durr interview.

40. This author questions Powe’s remark that “Censorship boards vanished overnight without even the benefit of a tepid eulogy.” (p. 339) On their disappearance—the last boards went out of business in the early 1980s—see deGrazia and Newman, *Banned Films* at 100-51 (cited in note 13). As one New York City police lieutenant told me when I was working on this book, “we have murders every day. We’re going to worry about a movie?”

41. “In *O’Brien* I got mistaken instructions from the Chief as to what its rationale was to be,” noted his clerk Larry Simon. “I wrote the draft on the grounds that burning a draft card was not speech. Black, of course, joined immediately since it was a straight speech-conduct distinction case, and only Black did. It sat for weeks. Then Warren said, ‘repair this. We don’t want to do any balancing,’ and he made some snide remark about Frankfurter. I said, ‘how about using compelling state interest,’ and he said, ‘that’s OK.’” Simon interview.

42. This statement in my opinion would have been true if Black retired from the Court in the summer of 1964.

(p. 304) He progressively lost interest in the Court, and his opinions became increasingly short<sup>43</sup> and slapdash as he often traveled to deliver speeches or to gather material for a new book. Fred Rodell wrote:

It's the credo of William O.D.  
That his life, like his law, must be free.  
So he'll fidget in Court  
Just as long as he ourt  
And then turn up in Teh'ran for tea.<sup>44</sup>

“The reason Bill writes so many books is that he has to pay alimony,” Black said.<sup>45</sup> Douglas hoped to be Secretary of State in the Kennedy administration, Powe writes,<sup>46</sup> (p. 209) the first time this has been in print, and, as journalist Drew Pearson noted, Douglas was “bitter when he didn’t get it.”<sup>47</sup> Kennedy wanted him for the post, Douglas claimed, and Joseph Kennedy offered it to him, but “I said no because Jack didn’t call me.”<sup>48</sup> In his thinking about foreign policy, especially its connection to economic policy, Douglas, to an unusual extent, combined theory and practice.

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43. “[I]n my view the Holmes type of opinion is the most serviceable and the most enduring. We should aim for brevity, not for professorial dissertations.” Douglas, Memorandum to Conference (Oct. 23, 1961), Hugo L. Black papers, Library of Congress. In October 1965 Justice Byron White called Douglas “incredible and genius. Always did his (home)work. Incredibly fast. ‘Ablest on Court.’” *Rodell Supreme Court interviews* (cited in note 9) (emphasis in original). Douglas was conscientious in his own way; see, among many examples, his memorandum re nos. 237 and 290 (Feb. 14, 1959); and Douglas to Black, (June 5, 1959) (re *U.S. v. Atlantic Refining Co.*), both in Black papers. He also had more intellectual modesty, doubts and skepticism than he let on publicly but which his close friends knew. This letter to Abe Fortas, after reading Fortas’s tribute honoring Douglas’s twenty-five years on the Court, *Mr. Justice Douglas*, 73 *Yale L.J.* 917 (1964), gives a hint:

I received your piece for the Yale Law Journal over the weekend and I have been trying to pen a few words to you ever since. It’s almost impossible for what you said moved me very deeply  
— because you said it  
— because I only wish it were wholly true  
— because only I know the great failures.

Douglas to Fortas (March 31, 1964), Douglas papers, Library of Congress.

44. Rodell, *Limericks* (cited in note 32).

45. John McNulty interview.

46. Powe apparently was told this by Douglas who also told it to other clerks increasingly during the 1960s; Jared Carter, Carl Seneker II interviews.

47. Drew Pearson diary, August 23 [1966], Pearson papers.

48. Carl Seneker II interview.

## IV. HEROES AND THEORY

The “majority justices were not constitutional theorists,” Powe writes, but rather “men of action, ready and willing to act. . . . Even though they coalesced as a majority, they had differing preferences and perceptions.” (p. 216) “None . . . seemed to care about theory during this era.” (p. 303) This seems to me much too strong and not quite correct: the publications, speeches and correspondence of Black, Douglas and Brennan make the point: Black’s James Madison lecture in 1960;<sup>49</sup> Douglas with his numerous books and articles, some of which, such as *We the Judges*<sup>50</sup> and *The Right of the People*,<sup>51</sup> in which he advanced a full-blown theory of the right of privacy, are genuine contributions; and Brennan who in published lectures discussed federal-state relations<sup>52</sup> and proffered the outlines at least of a form of secular natural law.<sup>53</sup> Indeed on the same page as the last quotation Powe writes of “Black’s well-developed constitutional theories, based on his good versus evil law-office history, [which] were too idiosyncratic to convince anyone else.” (p. 303) Yet he speaks of Black and Douglas “with their absolutist position on speech” (p. 115) and notes, “No one else, including Douglas, could take absolutism seriously.” (p. 144)

In *New York Times v. Sullivan*,<sup>54</sup> Powe asserts, “Black restated his view that the First Amendment was absolute and therefore the whole law of defamation was unconstitutional.” (p. 309) It is true that, as Warren noted, “If Hugo has his way, [the First Amendment] would abolish libel laws and slander” (Douglas disagreed with this)<sup>55</sup> and that Black had earlier said,

49. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960).

50. William O. Douglas, *We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukherjea* (Doubleday & Co., 1956). And to think that the current vogue in comparative constitutional law is new!

51. William O. Douglas, *The Right of the People* 87-165 (Doubleday & Co., 1958).

52. See William J. Brennan, Jr., *Some Aspects of Federalism*, 39 N.Y.U. L. Rev. 780 (1964).

53. “Perhaps some of you may detect, as I think I do, a return to the philosophy of St. Thomas Aquinas in the new jurisprudence [in an American Bar Association report]. Call it a resurgence if you will of concepts of natural law—but no matter.” William J. Brennan, Jr., *The Role of The Court—The Challenge of the Future* (1965), in Stephen J. Friedman, ed., *An Affair with Freedom: William J. Brennan, Jr.* 321-22 (Atheneum, 1967).

54. 376 U.S. 254 (1964).

55. Drew Pearson diary, August 5 [, 1966], Pearson papers, which also noted: “Douglas agrees on obscenity, but not otherwise.” “I don’t think that Congress has the power to enact a law that penalizes speech,” Douglas said in 1962.

However, that may be a different question as presented concerning the application of the due process [clause] of the Fourteenth Amendment and the re-

and in the privacy of his chambers would continue to say, that “it would not bother [him] if there were no libel or slander laws” because “they infringe on free speech.”<sup>56</sup> But he never, so far as I am aware, wrote or stated this publicly. Black was never as “absolute”—a word which to my knowledge he never used in any opinion—or as doctrinaire as ‘conventional wisdom’ would have it. He wanted results above all. “I’m not going to let any wild-eyed hypothetical interfere with my theory,” he said,<sup>57</sup> and he balanced in the First Amendment area or explicitly applied the vague contours of the Fourteenth Amendment’s due process clause more than is often realized—in *Martin v. City of Struthers* in the 1940s,<sup>58</sup> in *Konigsberg v. State Bar of California* in the 1950s,<sup>59</sup> in *Gideon* in the 1960s. In *Konigsberg*, his dissent in *Adamson v. California*<sup>60</sup> having made the revival of substantive due process not possible for him, Black “talked out the problem, trying out theory after theory,” recalled William Cohen. “Finally he shot them all down and said, ‘guess I’ll have to use due process.’”<sup>61</sup> When he wrote in the frustrating luxury of dissent, Black was more strident. But when he wrote for the Court in First Amendment cases—which was relatively uncommon—his

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straint that it places on the states. This is a question that has never been presented in the citing of a libel or slander suit. Whether a state law would be unconstitutional because of the incorporation of the First Amendment in the Fourteenth Amendment, that’s never been presented for a decision. It may never be. I wouldn’t want to prejudge it. It would, however, require considerable persuasion to indicate that the adoption of the Fourteenth Amendment deprives the states of something that was as historical as libel and slander. Because they have been in existence from the very beginning.

Douglas-Murphy conversations (December 17, 1962).

Douglas joined both Black’s concurring opinion in *Sullivan* and Goldberg’s opinion which concurred in the result. Although the thrust of both opinions was essentially the same—the full protection of speech about “public” or “official” business, conduct or affairs—differences ensued after that crucial step. “An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment,” Black concluded. I do not find in the opinion any comment—one single word, dot or comma, as he might put it—stating what might be more than that “minimum guarantee.” He just leads one to think that there should be more when he closes: “I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.” 376 U.S. at 297. Goldberg on the other hand states: “The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.” *Id.* at 301-02.

56. George L. Saunders, Jr., interview.

57. Jesse Choper interview.

58. 319 U.S. 141 (1943).

59. 353 U.S. 252 (1957).

60. 332 U.S. 46, 69 (1947).

61. William Cohen interview.

analysis was necessarily more generalized and diffused, but never enough to obscure the forcefulness of his personality.<sup>62</sup>

## V. PERSONALITY AND JUDGING

The Supreme Court is a marriage without divorce. In 1986 Justice Brennan repeated what had been obvious to everyone since at least the Greeks: “In an institution this small, personalities play an important role. It’s inevitable when you have just nine people. How those people get along, how they relate, what ideas they have, how flexible or intractable they are, are all of enormous importance.”<sup>63</sup> Although Powe has written “an external rather than an internal history of the Court,” (p. 534) I wish he had placed more influence on personality. The Court operates at the intersection of politics, personality and principle, a crossing as difficult in historical reconstruction as it is dangerous in the making. We are all prisoners of our pasts to some extent, and it is inevitably present in the institutional making.

“You must remember one thing,” Chief Justice Hughes told Justice Douglas. “At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.”<sup>64</sup> As Douglas often observed when a deportation case came before the Court in the 1950s, with Frankfurter, who came to the United States from Austria in 1894, invariably voting in favor of the petitioner, “Felix is saying to himself, ‘There but for the grace of God go I.’”<sup>65</sup> Black admitted, “I may be slightly influenced by the fact that I do not think Congress *should* make any law with respect to these subjects [covered by the First Amendment].”<sup>66</sup> Both he<sup>67</sup> and Warren reversed themselves on the re-

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62. See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971). None of Black’s First Amendment opinions for the Court can fairly be called major, although *Adderley v. Florida*, 385 U.S. 39 (1966), perhaps rises to mid-level importance.

63. Jeffrey Leeds, *A Life on the Court*, N.Y. Times Magazine (Oct. 5, 1986). “Every time someone new joins the Court, it’s a different instrument,” Byron White often said. Hutchinson, *Man Who Was White* at 340 (cited in note 17).

64. William O. Douglas, *The Court Years 1939-1975: The Autobiography of William O. Douglas* 8 (Random House, 1980).

65. Several Douglas clerks told me this. It is instructive to note that both the “chilling effect” and “compelling state interests” test which Frankfurter originated for the Court came in the educational setting, one which was near his heart and experience—the personal factor again.

66. Edmond Cahn, *Justice Black and First Amendment ‘Absolutes’: A Public Interview*, 37 N.Y.U. L. Rev. 549, 553 (1962) (originally emphasized). Cahn added the emphasis when he edited the transcript of the interview with Black for publication; Cahn

apportionment issue. “In California the federal system worked all right for us,” Warren later said. “I endorsed it. But when I got here and saw the unfair position of other states, I had no alternative but to reverse myself.”<sup>68</sup>

Warren reluctantly dissented in the 1961 movie censorship case, *Times Film Corporation v. Chicago*.<sup>69</sup> “I really hate doing it for these people. I really don’t like them or this business,” he told his clerks. “But it’s the right thing. Censorship is wrong.”<sup>70</sup> Behind this remark were enmities starting during the 1934 gubernatorial campaign in California when Warren was Republican state chairman and Metro-Goldwyn-Mayer chairman Louis B. Mayer was vice-chairman and that likely continued through Warren’s governorship from 1942 to 1953. What Laura Kalman found while working with the justices’ papers for her biography of Abe Fortas holds for all researchers: that “the language of personal preferences pervades the papers of most Warren Court Justices”<sup>71</sup>—or anyone else.

Warren “remembered railroad accidents, saw guys killed or lose a limb,” Rodell noted, and this led to his views on Federal Employers Liability Act cases. “City-bred judges can’t envision” this, he said, and “of course” it affects a justice’s views.<sup>72</sup> John Harlan epitomized a city-bred judge. He “dealt at arm’s length with Warren,” said Herbert Brownell who knew Harlan intimately and Warren very well. “Their backgrounds were so different. Warren was a politician, an emotional fellow, with strong feelings emotionally one way or the other. He put people into two classes, either he liked them or he didn’t. Harlan was different. He admired intellectual ability. His mind didn’t work in a political way. It was easy to see the difference between them.”<sup>73</sup>

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papers (cited in note 11).

67. Roger K. Newman, *Hugo Black: A Biography* 129, 569-70 (Pantheon Press, 1994).

68. Pearson interview with Warren, August 28 [1963], Pearson papers. “There was no constitutional question raised [in California],” Warren said; “it was purely a political question. [When] the constitutional question was raised [in the Supreme Court], . . . I saw it as a different question. . . .” Earl Warren interview, 216-17 in Earl Warren Oral History Program, Regional Oral History Office, University of California, Berkeley.

69. 365 U.S. 43 (1961).

70. Jesse Choper interview. Yet Warren had a not uncommon prosecutor-turned-politician’s attitude toward the press and later said that he would have voted against it and joined the Court’s opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972); Norman Redlich interview.

71. Laura Kalman, *The Wonder of the Warren Court*, 70 N.Y.U. L. Rev. 780, 782 (1995).

72. Rodell *Supreme Court interviews* (cited in note 9).

73. Herbert Brownell interview. See Yarbrough, *Harlan* at 135-36 (cited in note

Thus Warren in 1966: “John Harlan now comes on as if he were doing Felix’s bidding, only he goes much further than Felix would have gone.”<sup>74</sup> Fred Rodell:

John M. Harlan would valiantly save  
A high court which he sees misbehave;  
Unrestrained is his plaint:  
“We must use self-restraint”—  
While his grandfather turns in his  
grave.<sup>75</sup>

While Douglas thought Harlan was “ok,”<sup>76</sup> that is, he did his work efficiently and without personal aspersions, Douglas in the early 1960s frequently got piqued with Warren. “Earl Warren in his personal relations is a very petty man,” Douglas wrote in 1961, “but he has at the professional level stood up extremely well.”<sup>77</sup> Douglas was “not wild” about Warren,” Rodell noted in 1965. He “granted that Warren was “down-to-earth,” but said that Warren “has *some* delusions at grandeur—limousines, etc.—and on the administrative level acts as boss, not chairman of equals.”<sup>78</sup> In short, they were “feuding,” as Arthur Goldberg told me. One result was that Warren “refused to join Douglas’s opinion” in *Griswold v. Connecticut*.<sup>79</sup> That would have left it only with a plurality, not a majority. Warren joined Goldberg’s concurring opinion which specifically joined the Court’s opinion in order that there would be an opinion of the court.

Shortly after *Griswold* came down in 1965, Warren noted that no voices had been raised in conference for three years.<sup>80</sup> “Since Felix left, everything has been harmonious at the Court,” Brennan said in 1968. “There’s respect although we differ.”<sup>81</sup> No one would call all of the justices at this time paragons of equable temperament, but they recognized, despite strong ideological and personal differences, that they were nine persons who had a job in common and that they had to surmount whatever obstacles there were in order to do it. The only exception

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74. Drew Pearson diary, August 23 [, 1966], Pearson papers.

75. Rodell, *Limericks* (cited in note 32).

76. Peter Westen interview.

77. Douglas to Irving Dilliard, March 27, 1961, Douglas papers.

78. *Rodell Supreme Court interviews* (cited in note 9) (italics in original).

79. Arthur Goldberg interview; 381 U.S. 479 (1965).

80. *Rodell Supreme Court interviews* (cited in note 9). “The only arguments that have occurred in conference have been between FF [Frankfurter] and others,” Warren said in 1966. Drew Pearson diary, August 23 [, 1966], Pearson papers.

81. Pearson interview with Brennan.

was Black's strife with Fortas, which remained in the conference room (although Fortas talked about it with friends as Black did not, so far as I can tell, mention it to anyone at all). Compared to what came before (and after) it was an Era of Good Feelings.

The "only way to handle [Frankfurter] in conference," according to Warren, "is [to] shut him up. I let him go 2-3 times, ignoring him. He would nag and nag. Then you'd put him in his place and he'd be quiet for a while."<sup>82</sup> These were not new traits. "I spent a lot of time with his mother in her last years," recalled his niece Ruth Lehr, "and she complained about how emotional Felix got, how small things upset him so much."<sup>83</sup> In 1957 former Harvard Law School dean Roscoe Pound told Claude Pepper of the time when both were on the faculty and Frankfurter came to his office, "indignant at not getting something done," Pepper wrote, and "shook his fist in Pound's face. Pound said, 'Now sit down, Frankfurter, or I'll throw you out of that window.' Frankfurter sat down."<sup>84</sup>

Justice Douglas was not exactly an impartial observer, but he was correct when he said that Frankfurter "has a missionary zeal about even a stinking little tax case."<sup>85</sup> This was especially true when a Holmes or Brandeis opinion might be construed as controlling on the point at issue.<sup>86</sup> Such a case (which could be in any field) often was not without its own importance but was minor in the scheme of things. Frankfurter nevertheless would make it into a major battle of right, freedom and justice, invoking the rallying cry of "Reason" and implying that his opponents manifestly lacked any semblance of objectivity or rationality. Rarely did he look within and examine his own behavior. "Frankfurter is a friend whom I admire for many rare qualities," noted Jerome Frank. "Surprisingly, however, he is not given,

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82. Drew Pearson diary, August 23 [1966], Pearson papers. His "greatest burden" and "worst experience" at the Court, Warren said after he retired, was "to keep Frankfurter under control." Eugene Gressman interview. Warren "distrusted Frankfurter's methods as well as his motives so much," noted Jerome Cohen, "that halfway through the [1955] term he forbade us clerks from having contact with Frankfurter the rest of the term." Jerome Cohen interview.

83. (Telephone) interview with Ruth Lehr.

84. Pepper diary, August 7, 1957, in Pepper's possession at his office in the House of Representatives when I examined it, now in the Pepper papers, Florida State University.

85. Douglas-Murphy conversations (May 23, 1962 conversation).

86. In 1957 Frankfurter wrote in *A Punny Platonic Dialogue*: "Nor is our Master [Holmes] free from responsibility. The phrase 'clear and present danger,' which I am sure dropped much too easily from his pen, has been as you know the source of much loose thinking and still looser writing." No date (about October 1, 1957), Frankfurter papers, Library of Congress.

overmuch, to self-exploration and self-awareness. Douglas, I should say, has far more of that quality.”<sup>87</sup> (“You know why Frankfurter didn’t have any children? Because Holmes didn’t,” Douglas told a friend.)<sup>88</sup>

Frankfurter supported the government in every constitutional loyalty-security case starting in 1959. If government action was reasonable, then he viewed it as constitutional. All factors must be considered, and all interests balanced even if some are weighed with one hand on the scale. “*Sweezy*”<sup>89</sup> was exactly the same thing as *Barenblatt*,<sup>90</sup> Warren said later, “yet Felix reversed himself. He would never find opposite to Learned Hand or an opinion written by Holmes. Felix changed on Communist cases because he couldn’t take criticism.”<sup>91</sup> The times had changed, but the feeling that Frankfurter expressed at the height of the Court-packing plan in 1937 never totally left him and sometimes inhibited him: “. . . through circumstances, in the making of which I have had no share, I have become a myth, a symbol and promoter not of reason but of passion. I am the symbol of the Jew, the ‘red,’ the ‘alien.’ In that murky and passionate atmosphere anything that I say becomes enveloped.”<sup>92</sup>

Two former major national politicians, Warren and Black, sat on the Warren Court.<sup>93</sup> Warren was a three-time governor of California who had been the 1948 Republican vice-presidential nominee and a candidate for the presidential nomination in 1952; Black had been a powerful senator during the New Deal and planned to run for Senate Majority leader after Alben Barkley stepped down and then for president.<sup>94</sup> Such a background can lead a justice to a sense of effective limits on the Court’s pronouncements (although, of course, frequently it does not and should not) and can limit the political costs to the institution. This is what Sam Rayburn meant after Lyndon Johnson told him at length of the intellect of the Kennedy administration’s cabinet after its first meeting. “Well, Lyndon,” Rayburn

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87. Jerome Frank to Arthur M. Schlesinger, Jr., January 22, 1947, Frank papers, Yale.

88. Eliot Janeway interview.

89. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

90. *Barenblatt v. U.S.*, 360 U.S. 109 (1959).

91. Drew Pearson diary, August 23 [1966], Pearson papers.

92. Frankfurter to Grenville Clark, March 6, 1937, Frankfurter papers, Library of Congress.

93. I omit Sherman Minton and Harold Burton, both of whom served in the United States Senate, Potter Stewart who served one term on the Cincinnati city council, and Arthur Goldberg who later ran for governor of New York.

94. Newman, *Black* at 235 (cited in note 67).

said, “you may be right . . . but I’d feel a whole lot better about them if just one of them had run for sheriff once.”<sup>95</sup>

Warren in the late 1960s spoke appreciatively of protest movements, saying “there’s a lot of value in that,”<sup>96</sup> and within his family he expressed the view that Ronald Reagan was “pretty much of a boob.”<sup>97</sup> At the same time, however, both his morality was conventional enough (in the philosophical sense) and traditional enough (in the practical sense) that he dissented in *Shapiro v. Thompson*, which overturned durational residency requirements for welfare applicants.<sup>98</sup> He was never an unreconstructed liberal and “didn’t want an influx of poor people into New York or California,” noted Larry Simon, then his clerk. “He had an intuition as to what makes sense. He was aware that he and the Court were perceived as liberal, and that there were political costs to that.”<sup>99</sup>

Political considerations led Black in August 1968 to accept suddenly and unexpectedly CBS television’s longstanding offer for an interview. Republican presidential candidate Richard Nixon was unmercifully attacking the Court. “Some of our courts have gone too far in weakening the peace forces as against the criminal forces,” he had been saying for months as he accused the Supreme Court of giving the “green light” to “the criminal element” in the nation, specifically mentioning *Miranda v. Arizona*.<sup>100</sup> Black feared that the “excellent men” on the Court, his son has written, “sometimes carried their sense of right and wrong so far that a reaction might set in. . . .”<sup>101</sup> It already had. The number of people who rated the Supreme Court as “excellent or “good” dropped from 45 per cent in 1967 to 36 in 1968<sup>102</sup> when 63 per cent of respondents in a Gallup Poll thought that the Court was too lenient on crime. (p. 410)

95. David Halberstam, *The Best and the Brightest* 41 (Random House, 1972).

96. Ira Michael Heyman interview.

97. Earl Warren, Jr., interview.

98. 394 U.S. 618 (1969).

99. Larry Simon interview. “I used to have long talks with Warren in the 1950s,” recalled James Roosevelt. “He’d talk about how he was worried he wouldn’t be perceived as a liberal. He was really concerned and I’d have to pump him up, tell him that he’s really a great liberal and that everybody knows that. Sometimes I don’t think he was convinced. That was left over from his days as governor and from the Japanese evacuation effort.” James Roosevelt interview.

100. Quoted in Donald Grier Stephenson, Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* 181 (Columbia U. Press, 1999); *Miranda v. Arizona*, 384 U.S. 436 (1966).

101. Hugo Black, Jr., *My Father: A Remembrance* 243-44 (Random House, 1975).

102. Stephenson, *Campaigns and Court* at 180 (cited in note 100).

Black's interview did not stem the widespread negative feelings toward the justices, but it helped humanize the Court at a time when the institution needed it badly.

## VI. AN ARRESTING INSIGHT

"American policymaking in the 1960s was a heady experience fueled with the confidence that had never tasted failure," Powe writes, virtually from the literal shadow of the Lyndon B. Johnson Library.

The liberal-majority justices . . . were supremely confident in their ability to fashion a better world. The best description of the period is that all three branches of government believed they were working harmoniously to tackle the nation's problems. It was simply a matter of determining which institution was best-suited to handle a specific problem, and each went forward in its own way knowing the others also were seeking complementary results. (p. 214)

The Warren Court "was a functioning part of the Kennedy-Johnson liberalism of the mid and late 1960s . . . represent[ing its] purest strain. . . . The Warren Court demanded national liberal values be adopted in outlying areas of the United States. . . ." (p. 494)

This is an arresting insight. The 1960s was one of those rare moments in American history when the whole federal government marched to essentially the same beat. The pinnacle perhaps came in the 1964 Civil Rights Act. It remains one of the high points of reform in American history. "The justices were seemingly in agreement with each other," Powe writes, "and seemingly the country agreed with them." (p. 238) So it also was in 1961 when Chief Justice Warren honored the memory of House Speaker Sam Rayburn in open court, a rare if not unprecedented occurrence.<sup>103</sup> "You can perform a great service," Johnson told a historian in 1965, "if you say that never before have the three independent branches been so productive."

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103. The Court at this time wishes to take notice of the death today of the Honorable Sam Rayburn, Speaker of the House of Representatives. We, in common with all Americans, I am sure, are saddened by the passing of this great American, who served in the Congress of the United States since 1913 and as Speaker for 17 years, which is longer than the service of any other Speaker in history. We honor his memory, and in recognition of that fact the Court now adjourns.

Supreme Court Journal 99 (Nov. 16, 1961).

Never has the American system worked so effectively in producing quality legislation—and at a time when our system is under attack all over the world. Now why is that? First, there is the quality in each of the branches. I'll put the executive branch last. First, you have to take the pioneering, courageous, compassionate leadership of the Supreme Court. . . . I don't think ever has a court been led by more balanced, judicious temperaments. Here are men who have sat in the Senate, in courts, who have a background of a lot of experiences.<sup>104</sup>

Many of those experiences were in common. Douglas had been close with the Kennedy family since the mid-1930s when he served with Joseph P. Kennedy on the Securities and Exchange Commission.<sup>105</sup> He waited for calls from President Kennedy or Robert Kennedy and jumped when either phoned. “Yes, Jack, it's so good of you to call,” he would say.<sup>106</sup> Goldberg had been a political supporter of Kennedy's, his highly effective Labor Secretary and ambassador to the United Nations under Johnson. The Justices' ties with Johnson were even deeper. Black and Douglas went back to New Deal days with Johnson, sharing mutual political beliefs and numerous friends.<sup>107</sup> Black's sister-in-law Virginia Durr was one of Lady Bird Johnson's oldest friends, and Johnson as Senate minority leader limited a Senate hearing into her husband Clifford after he was preposterously charged with Communist ties just as Brown was before the Court in 1954. An investigator stated that he had been assured that Durr was “a reliable comrade” who would transmit presumed Communist Party information to Black.<sup>108</sup> Douglas wrote speeches for Johnson in 1941.<sup>109</sup> Tom Clark and his family had been both personal and political friends with the Johnsons since 1940.<sup>110</sup> “He loved you and Mary and cherished so many years and miles which we have known together,” Lady Bird wrote after Lyndon's death.<sup>111</sup> “Indeed, there can never be a dearer friendship,” Clark re-

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104. William E. Leuchtenburg, *A Visit With LBJ*, *American Heritage* 52 (May-June 1990).

105. See Douglas, *Court Years* at 301-11 (cited in note 64).

106. Jared Carter interview.

107. See Douglas, *Court Years* at 85, 311-37 (cited in note 64).

108. John A. Salmond, *The Conscience of a Lawyer: Clifford J. Durr and American Civil Liberties, 1899-1975* at 164 (U. of Alabama Press, 1990).

109. Jonathan Daniels, *White House Witness: 1941-1945* at 99 (Doubleday, 1975).

110. Mimi Gronlund Clark conversation; Robert A. Caro, *The Years of Lyndon Johnson: Means of Ascent* 122-23 (Alfred A. Knopf, 1990).

111. Lady Bird Johnson to Tom C. Clark (Feb. 19, 1973), Clark papers, Tarlton Law Library, University of Texas School of Law.

plied.<sup>112</sup> Favours went both ways starting when Clark was working his way up the Justice Department culminating in his being Attorney General from 1945 to 1949. Johnson named Clark's son Ramsey as Attorney General in 1967, necessitating Justice Clark's retirement from the Court. None of this, or indeed any justice's connection with any president ever, compared to Fortas's tie with Johnson: He was both LBJ's best friend and first adviser on nearly everything.

"Sometimes," recalled Justice Brennan, "we'd get into a car and go over to the White House for a drink late in the afternoon. Tom Clark set it up."<sup>113</sup> ("Sounds just like Tom," Lady Bird Johnson noted, adding that in general "drinks took place in a little room off Lyndon's office on a good many evenings, frequently.")<sup>114</sup> Who went? "The Chief, Hugo, Bill Douglas, Tom, Arthur Goldberg or Abe Fortas, and I," said Brennan. Justices Harlan, Stewart and White stayed back at the Court, minding the store (and writing their dissents). How different it was just a few years later when Fortas, the ultimate victim of the ultimate closeness, resigned. "We were crestfallen," said Lady Bird Johnson.<sup>115</sup> "I ruined his life," said Lyndon Johnson.<sup>116</sup>

## VII. A COURT'S CONSTITUENCY

The collective reputation of a court depends, in large part, on the audience at which its opinions are aimed. For the choice of audience affects style. Style may be the dress of thoughts; it is also the clothes of an institution's operations. It may appear amorphous and incapable of definition, but most people "know

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112. Clark to Lady Bird Johnson (March 6, 1973), Clark papers, Tarlton Law Library, University of Texas School of Law. Clark continued: "It was founded and cemented in mutually significant events, such as when Lynda was born, we filled the suspense awaiting her arrival by taking an automobile ride with Lyndon and Tony; our going away party in San Francisco in 1942 as Lyndon took off for the South Pacific was Lieutenant Commander, USN . . . ; my appointment as Assistant Attorney General in 1943 and [Clark's brother] Bill's death soon thereafter when Lyndon went to Tennessee with me to the fallen airliner; our trips to New York with the Gooches and the Jacks-sons. . ." Tony was likely Anthony Buford, a St. Louis businessman and friend of Clark's from St. Louis; the Gooches were Tom C. Gooch, publisher of the Dallas *Daily Times Herald*, and his wife Lula; the Jacks-sons were Dallas friends Albert Jackson and his wife. I thank Mimi Clark Gronlund for her kind assistance in identifying these friends of her father's.

113. William J. Brennan, Jr., interview.

114. Lady Bird Johnson interview.

115. Lady Bird Johnson interview.

116. Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice 1* (William Morrow, 1988).

it when [they] see it.”<sup>117</sup> It includes humor, and the Warren Court had more than its share of humorous members.<sup>118</sup> But, ultimately when it comes to a court, style is literary voice, the manner of expression.

Every justice has his or her literary voice. Douglas’s references were as well traveled as he. (“World-besotted traveler; he served human liberty,” as Yeats wrote of Swift.)<sup>119</sup> “Usually,” noted Walter Murphy, Douglas “wrote for intelligent lay people, never, except on highly technical matters such as Securities Exchange Act, for professors of law, and seldom for his fellow judges.”<sup>120</sup> Black, in keeping with his electoral background, sought directness and simplicity so that “they,” the general citizenry, would understand. Frankfurter pursued the comprehensive<sup>121</sup> which resulted in being both lengthy<sup>122</sup> and not infrequently discursive. Harlan’s opinions were often elaborately structured, similar to briefs. Warren, admitting that he was “not

117. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

118. Two examples: at Heathrow Airport in London an American tourist, not recognizing Justice Brennan, came up to him and asked what he did. “I’m a lawyer,” he said. “What sort of law?” she asked. “General practice,” he replied. Floyd Abrams, *In Memoriam: William J. Brennan, Jr.*, 111 Harv. L. Rev. 18, 23 (1997).

In the late 1950s, with the Court closely divided, one attorney, after arguing his case, joked that he should have moved the lectern in the court down to Justice Stewart and have argued directly to him. When Stewart heard this, he said, “Yes, and he would have ended up losing by a vote of eight to one.” James E. Clayton, *The Making of Justice: The Supreme Court in Action* 216 (E.P. Dutton & Co., 1964).

119. Yeats, *Swift’s Epitaph*.

120. Walter F. Murphy, *The Constitution and the Legacy of Justice William O. Douglas*, in D. Grier Stephenson, Jr., ed., *Essential Safeguard: Essays on the United States Supreme Court and Its Justices* 102-03 (Greenwood Publishing Group, 1991).

121. See, e.g., *Comm’r of Internal Revenue v. Estate of Church*, 335 U.S. 632, 687 (1949) (appendix listing cases in which legislative history had been employed during the last decade); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 524-28 (1952) and appendix, at 533-40 (various definitions of blasphemy and sacrilege); *McGowan v. Maryland*, 366 U.S. 420, 551 (1961) (appendix including all state “blue laws”).

122. Black thought that Anthony Amsterdam, who clerked for Frankfurter in the 1960 term, “co-opted” Frankfurter. Much that Amsterdam wrote for Frankfurter, whose opinions that term were on the whole likely the longest in Supreme Court history, “troubled” Black. His opinion for the Court in *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961), ran 111 pages. “Felix is depending too much on his clerks,” Black said and suggested editorial changes to Felix, telling him that “it would help the opinion if you would tell the reader up front what the case is about,” which Felix frequently had done in the past. But Frankfurter did not change anything. George L. Saunders, Jr., interview. In *Wiener v. U.S.*, 357 U.S. 349 (1958), by comparison, Frankfurter, having been assigned the case early in the term, kept all the papers, not sharing them with his clerks, and near the end of the term circulated “a gem of an opinion that he wrote entirely alone. . . .” Writing it, he said, was like “cooking dinner when your wife is out for the evening.” Norman Dorsen, *Book Review*, 95 Harv. L. Rev. 367, 386 n.104 (1981).

a writer,”<sup>123</sup> leaned to a meat-and-potatoes approach. Conciseness was not his or Brennan’s strength. The often intricate organization of Brennan’s, Harlan’s, Warren’s and Frankfurter’s opinions resulted from their general practice of having their clerks nearly always prepare first drafts. Only two justices—Black and Douglas—in the first instance wrote most of their words themselves (although Stewart wrote more of them than any other justice).

The Warren Court came relatively early in “the modern era of ghostwriting by law clerks,” with its “polite fiction that all judges are the authors of all their opinions. . . .”<sup>124</sup> Chief among the beneficiaries of this practice was Warren. His clerks wrote almost all his opinions. In 1954, noted one clerk, Warren “did some drafts,” as he did occasionally every term, “and tried to get structure, but gave no detailed instructions.”<sup>125</sup> He “didn’t think or care about his intellectual processes,” observed another clerk five years later.<sup>126</sup> “The degree of guidance varied with the case,” said Larry Simon, who clerked in 1967.

He would read the briefs and get the import of former cases from them. Sometimes he read those cases. He understood what was at stake—why and what was important. The rationale of the decision and its consequences were not as important to him as to other justices or law professors. He was not interested in structuring an opinion. He knew what he wanted to do. He was not a man who agonized. He was concerned about the Penn-Central case and asked me to go into it in great depth. I had worked on it the year before when I clerked for Edward Weinfeld, and I gave the Chief a lengthy memo, 6 or 7 pages. He read it and said, “I’m not interested in this as a den of themes on both sides.”<sup>127</sup>

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123. *Rodell Supreme Court interviews* (cited in note 9). “I sometimes write things because I don’t want anyone to say that I don’t have the courage to write them,” Warren told his friend and biographer John Weaver. Weaver (telephone) interview.

124. Richard A. Posner, *Law and Literature* 377 (Harvard U. Press, 1998) (rev. and enlarged ed.).

125. Gerald Gunther conversation.

126. Murray Bring interview. “He told us what he wanted generally without too many specifics.” Peter Low interview (he clerked in 1963.)

127. Larry Simon interview. “Warren had a real grasp of issues,” observed James Roosevelt,

but he was limited. If you ask whether he had a grand theory of any kind, any sense of where the country should go, I would say no. I feel that if he were President, he would have to study awfully hard to understand the situation in Europe or Russia, for example, and I’m not sure he would understand any of the intricacies or finer points. He wasn’t lazy but just not theoretically inclined; he liked things pretty much pat and dry, and to deal with them as they are, not

Starting at least as early as the 1965 term, Warren regularly took a clerk along to supply references when he went to see other justices to discuss cases.<sup>128</sup> When his friend and biographer John Weaver asked if he now had time to reflect and philosophize, Warren replied, “I’m not that kind of guy.”<sup>129</sup>

Procedures in Harlan’s chambers were similar. “Harlan’s was a law office, not an intellectual office,” observed Norman Dorsen who clerked for him in 1957.

He wanted to solve problems and didn’t theorize about them. Clerks drafted about 95% of opinions. He would reedit that and was very attentive at that. He was a significant participant. He had very good law clerks. He was the favored justice at Harvard, especially after Frankfurter retired. He knew how to get the best from people. He was like the senior partner in a law firm, handing out parts of cases to different people. Ten years later, he probably was a better worker than he was in 1957. He was not then on top of the issues intellectually, but he was thorough and open-minded.<sup>130</sup>

(One should compare Harlan to Fortas: “It mattered to Fortas who the parties or the lawyers were,” noted one of his clerks. “If he knew them or cared about them, he would bend arguments to fit the results.”)<sup>131</sup>

Harlan was, like the rest of us, a captive of his background. Dispassionate to a fault—perhaps as a reaction to contentious father; in the hospital near the end of his life, he said, “my life has been only work. I’ve never felt loved”<sup>132</sup>—he rarely betrayed emotion. One notable exception was his passionate dissent in *Poe v. Ullman*.<sup>133</sup> Not only had the Connecticut Planned

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as they might be because of your or others’ actions. I found that disturbing. He was charming, yes; a wonderfully smooth politician who got along with all sorts of different people, yes; but not much of any sort of thinker or someone who liked to ponder with those inevitable problems.

James Roosevelt interview.

128. Douglas Kranwinkle interview.

129. John Weaver (telephone) interview. “The gent is not a reading man.” Frankfurter to Alexander Bickel, no date (about September 1, 1957), Frankfurter papers, HLS. Warren’s good friend, journalist Drew Pearson, wrote while vacationing with him, “[The] CJ [Chief Justice] has read all the debates of the drafters, feels they were referring to political speech, not obscenity.” Pearson diary, August 5, [1966], Pearson papers. I have never seen this claim anywhere else.

130. Norman Dorsen interview; see Yarbrough, *Harlan* at 304 (cited in note 23).

131. Daniel Levitt interview.

132. Nancy Black interview. A psychologist, she was Hugo Black’s daughter-in-law; his wife, Elizabeth, sent her to succor Harlan when both justices were in the hospital across the hall from each other.

133. 367 U.S. 497 (1961).

Parenthood League in the early 1950s considered him to handle a prospective case (which was never brought) to challenge the constitutionality of Connecticut's birth control law,<sup>134</sup> but Harlan had himself contributed money to the group.<sup>135</sup> In conference Harlan called it "the most egregiously unconstitutional act I have seen since being on the Court."<sup>136</sup>

The period from *Poe* in 1961 to *Griswold* four years later was the indispensable disturbance before the storm, both legally and socially. In *Poe* Harlan and Douglas heavily drew on the American Civil Liberties Union's amicus brief. In *Griswold* so much information about social change was coming in daily that the lawyers for Mrs. Griswold and Dr. Buxton had to set a cut-off date for including such information in their brief.<sup>137</sup> Traditionalists such as Paul Freund, Philip Kurland and Alexander Bickel who focused on the Court's role in the polity dueled with civil libertarians such as Edmond Cahn, Fred Rodell and John P. Frank in the public and academic press; Anthony Lewis set the standard for journalistic commentary. The shade of Felix Frankfurter hung over the writings of the former; the presence of Black, Douglas, Warren and Brennan was poised over the civil libertarians. In the process, and with increasing momentum, often under the impetus of cases brought by the ACLU,<sup>138</sup> legal theory changed.

I wish Powe would have devoted some mention to how these changes contributed to results in cases. Charles Reich's article "The New Property" deserves notice: his inscribed copy to Black reads, "For HLB, from whose dissents this article grew,"<sup>139</sup> and its influence on Justices Douglas and Brennan (but not Black) was obvious.<sup>140</sup> Powe was, of course, not writing an intellectual history of the Court but in an "external" history occasional mentions of such matters—and also, in a forerunner of the future, of the reaction in California during Reagan's early gov-

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134. David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 124 (William Morrow, 1994).

135. Miriam Harper Kobrak interview. She was the widow of Yale law professor Fowler V. Harper, who handled *Poe v. Ullman* in the Supreme Court.

136. Garrow, *Liberty and Sexuality* at 184 (cited in note 134)

137. Catherine Roraback interview.

138. See Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 214-81, 299-301, 306-07, 313-14, 320 (Oxford U. Press, 1990).

139. Reich's inscription on a copy of *The New Property*, 73 Yale L.J. 733 (1964), is in Black papers, Library of Congress.

140. See *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (Brennan, J.); *Wyman v. James*, 400 U.S. 309, 326 (1971) (Douglas, J., dissenting); *Thorpe v. Housing Auth.*, 386 U.S. 670, 678 (1967) (per curiam).

ernorship to the “rights revolution” started by *Gideon*, a movement that, under the early intellectual influence of Edmond Cahn,<sup>141</sup> was continued on both the theoretical and policy implementation level by Edgar and Jean Cahn before reaching other areas—<sup>142</sup> would seem to be fitting.

### VIII. WARREN TO THE RESCUE

The “rights revolution” was beyond imagination when Warren became Chief Justice in October 1953. It is difficult to overstate the Supreme Court’s internal predicament, even aside from the school segregation cases and the *Rosenberg* case the previous June.<sup>143</sup> Fred Vinson had been an disaster as Chief Justice—disengaged, out of his element and over his head.<sup>144</sup> Hugo Black said that “there should be no chief justice. The job should rotate among the justices as some state courts do.”<sup>145</sup> Other justices repeated this in Vinson’s presence. Warren quickly heard about such comments, most likely in his many talks with Black at the Court and at dinners at Black’s home before his wife moved to Washington. He brought a new vitality to a very dispirited institution.

Starting in the 1954 term, Warren met with Black to discuss assignment of opinions. Usually, this came after conference (although occasionally it was on Saturday mornings) and generally was at Black’s chambers (although sometimes they consulted by phone).<sup>146</sup> “We all knew that they met,” Justice Brennan said. “There’s not too much around here that’s secret. If anyone complained about it, I didn’t hear it. It was just accepted as a fact of life here.”<sup>147</sup> Whether Black had his choice of what majority opinions he wanted to write or Warren gave him the choice is beside the point. “It seemed almost a formal procedure,” noted one of Black’s clerks. “Before the conference he said, ‘why don’t you boys look at this list and see what you want

141. See, e.g., Edmond Cahn, *Law in the Consumer Perspective*, 112 U. Pa. L. Rev. 1 (1963), reprinted in Lenore L. Cahn, ed., *Confronting Injustice: The Edmond Cahn Reader* 15 (Little Brown, 1966).

142. See, e.g., Edgar S. Cahn and Jean Camper Cahn, *The War on Poverty: A Civilian Perspective*, 73 Yale L.J. 1317 (1964).

143. See Newman, *Black* at 419-24 (cited in note 67).

144. See *id.* at 366, 419.

145. Quoted in Newman, *Black* at 419 (cited in note 67).

146. Elizabeth Black interview.

147. Brennan interview.

to work on.”<sup>148</sup> Black would say, “I’d like to have this and this,” and he picked the opinions. Invariably Warren would agree.<sup>149</sup>

Warren was far more conventional than his critics might ever imagine; were it not for his position, young rebels of the day might have called him a ‘square.’ “As friendly as a traveling salesman,”<sup>150</sup> he made acquaintances easily. “When he threw back his big head and laughed and said, ‘by golly,’ it was hard not to like him,” said Hugo Black’s daughter Josephine.<sup>151</sup> He may have been saying it upon seeing the same thing for the umpteenth time, but he did it with the utmost sincerity; he was exuding the timeless traits of good will and good fellowship. His table talk often concerned current California politics and political personalities. He relished telling stories about Senator Hiram Johnson, who came as close to a political model as anybody. “Let’s talk politics,” he frequently told Merrell (Pop) Small, a gubernatorial aide whom he saw frequently when he returned to California. “I’m a political eunuch in Washington. You’re the only one I can talk to.”<sup>152</sup> “Government” was his hobby, Warren said,<sup>153</sup> and much of his ever-pleasant humor was political. Upon being introduced at a retirement party, he asked the master of ceremonies, “Do I get the Miranda waiver?”<sup>154</sup>

Stolid on the outside but thin-skinned, Warren was a suave politician who could deal with anyone. During his gubernatorial years in California, he built (in the words of his 1950 Democratic opponent James Roosevelt) “a Warren party straight across the board.”<sup>155</sup> He led the loathing toward Richard Nixon (no mean achievement given the competition). In one of the ironies of history Warren gave the presidential oath to Nixon in 1969.

Warren was an unusually effective Chief Justice for the same reasons that accounted for his pre-Court successes. At oral argument “he gave the absolute impression of fairness.”<sup>156</sup> “His questions to counsel are likely to concern moral principle,” Anthony Lewis wrote in 1958. “‘Is that fair?’ he sternly asked a

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148. Stephen Schulhofer interview.

149. Dick Howard interview.

150. *The ‘Chief,’* unpublished manuscript, Pearson papers.

151. Josephine Black Pesaresi interview.

152. Merrell F. (Pop) Small (telephone) interview.

153. *The ‘Chief,’* unpublished manuscript, Pearson papers (cited in note 150).

154. John Weaver (telephone) interview.

155. Quoted in Amelia Roberts Frey, *The Warren Tapes: Oral History and the Supreme Court*, 1982 Sup. Ct. Hist. Soc’y Y.B. 10, 18. See Newman, *Black* at 426 (cited in note 67).

156. Guido Calabresi interview.

government lawyer recently—rather than abstract legal concepts.”<sup>157</sup> In *Cooper v. Aaron* the justices badgered the school board’s lawyer continuously. When his time was up, he started to head back to his seat. Warren said, “counsel, we’ve been rough. Take your time to make your argument. We will not interrupt.”<sup>158</sup> At the Court’s conferences he presented the issues honestly, without cutting corners, and let others have their full say. He exuded good fellowship and nearly all his colleagues simply liked him. Combine this with a transparent sense of the public good and of purpose even if one disagreed with him, along with a continual respect for personal values, and the result is an exceptionally effective leader.

Brennan knew how to get along with an older Chief—he had done so in New Jersey with Arthur T. Vanderbilt. As early as 1960 Warren talked with him before conference about the cases to be discussed.<sup>159</sup> Brennan could also get along with anyone, and he was independent. *In re Groban*<sup>160</sup> came before the Court early in the 1956 term. At issue was an Ohio law permitting the state fire marshal to conduct a “private,” secret investigation into a fire’s causes and to sentence suspects to jail, without the presence of counsel. At conference only Black, Warren and Douglas voted to overturn the law.<sup>161</sup> Douglas’s one page dissent, quickly withdrawn, did not satisfy Black<sup>162</sup> whose dissent went through six drafts of tightly controlled passion. Brennan immediately agreed with Stanley Reed’s first version of his Court opinion.<sup>163</sup> But after reading a later draft, he asked if Reed planned a recirculation. “Frankly,” he wrote, “Hugo has just about convinced me that the analogy to grand jury proceedings is not wholly sound and that unless we strike down this statute we may encourage delegation of similar powers to other law enforcement authorities to interrogate without the presence of counsel.”<sup>164</sup> Brennan decided to stay with the majority and also to join Frankfurter’s concurrence.<sup>165</sup> In that opinion Frankfurter

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157. Anthony Lewis, *Portraits of Nine Men Under Attack*, N.Y. Times Magazine (May 18, 1958).

158. Calabresi interview.

159. Richard Arnold interview.

160. 352 U.S. 330 (1957).

161. Docket book, Stanley F. Reed papers, University of Kentucky.

162. William Cohen interview.

163. Brennan to Reed, December 6, 1956, Reed papers.

164. Brennan to Reed, February 12, 1957, Reed papers.

165. Brennan to Reed, February 19, 1957, Reed papers.

wrote that Black's dissent conjured up "driving a troupe of hobgoblins."<sup>166</sup>

At the time Frankfurter was also berating Brennan, his former student who, although not lacking in self-confidence, was feeling the typical uncertainties of a freshman justice; and he was also treating Brennan as inferior. Brennan came to Black and said, "I've read your and Felix's opinion, and your opinion has gotten to me."<sup>167</sup> He withdrew his vote from Reed's opinion to join Black. To Reed and Frankfurter Brennan explained:

Troubling things often appear in sharpest perspective in the small hours of the night when they won't let me sleep. I have been uneasy about this case all along but thought until last night that Felix had routed the troupe of hobgoblins that bothered me. Last night, however, it became clearer in [my] mind that I should join in the dissent. However slightly or remotely the Court result may encourage the troupe to form, it is better, I now firmly think, positively to discourage even the thought of its organization.<sup>168</sup>

Soon Brennan was joining most of Black's opinions (and when he did not, Black was disappointed).<sup>169</sup> *Groban*, along with *Nilva v. U.S.*,<sup>170</sup> which came down the same day, February 25, 1957, was the first case in which Black, Brennan, Douglas and Warren dissented together as a group. Soon *Time* magazine was to call them "B., B., D. and W.," after the well-known advertising agency Batten, Barton, Durstine and Osborn.<sup>171</sup> As the term progressed Brennan started visiting Black often.<sup>172</sup> "From the

166. *In re Groban*, 352 U.S. at 336.

167. George C. Freeman, Jr., interview.

168. Brennan to Reed and Frankfurter, February 25, 1957, Reed papers.

169. Robert Girard interview.

170. 352 U.S. 385 (1957).

171. *Time*, July 14, 1957.

172. George C. Freeman, Jr., interview. "I like the new justice very much," Black wrote his son when Brennan had been on the Court for only a few weeks.

Maybe he has been a labor lawyer for business but so far his approach to cases does not indicate that such lawyers do not have just as much desire to do justice as lawyers that represent the labor unions. . . . He has a very nice personality, has understood the cases argued, and has expressed himself with references to those cases and a fine and wholesome manner.

Hugo L. Black to Hugo L. Black, Jr., October 23, 1956, Black papers. And shortly after *Groban* came down, Douglas wrote Fred Rodell:

I read your piece on Eisenhower's standard for the selection of the Justices on the Court. ["The Joker of Judicial Experience," *Progressive*, Jan., 1957] I agree that the requirement of prior judicial experience is an unwise one and over the years would have too narrowing an effect. I think it was a splendid point.

I believe, however, that you are dead wrong on Justice Brennan. He is a wonderful person and a grand human being. He has courage and independ-

beginning, more than anybody else who joined the Court,” said Josephine Black Pesaresi who witnessed it, “he looked up to Daddy like a puppy dog.”<sup>173</sup> Brennan never outgrew some of that feeling; it was reinforced by Frankfurter’s occasional jurisprudence of personality (Holmes and Brandeis above all)<sup>174</sup> while Black was focusing on principle. Thirty years later, at a symposium honoring Black’s centennial Brennan talked at length about the *Groban* case.<sup>175</sup>

Frankfurter, frustrated by Brennan’s civil libertarian instincts, started calling Black, Douglas, Warren and Brennan “the framers.” His and Harlan’s law clerks for several years picked it up and used it frequently inside the Court. In an important sense they were right, for these four justices were rewriting the Constitution—making its eighteenth-century, yet ageless, words applicable to the second half of the twentieth century. While the modern idea of what the Constitution means started with the footnote numbered four in that “otherwise obscure case,” *U.S. v. Carolene Products Co.*,<sup>176</sup> and accelerated throughout the 1940s, pausing slightly in the early 1950s as the focus (not to mention the efforts of those involved in the reformulation) shifted to *Brown v. Board of Education*, the whole notion underwent a seismic shift during the Warren years.

## IX. WHOSE COURT IS IT ANYWAY?

Earl Warren gave the Court its central public face, not its public (or private) tone. Hence the appellation “the Warren Court,” which he accepted (what ex-politician would not?), albeit ambivalently. “The Chief didn’t talk about that,” Brennan

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ence. He is imbued with the libertarian philosophy and I would be willing to give odds that he will leave as fine a record on this Court as Holmes, Hughes, Murphy or any of the great.

I hope you can get to know Justice Brennan; and if you and Janet can get down this spring I’ll make certain that you meet him and his lovely wife.

William O. Douglas to Fred Rodell, March 2, 1957, Rodell papers, Haverford College Library. In later years Rodell sometimes stayed with Brennan when he went to Washington. Janet Rodell interview.

173. Josephine Black Pesaresi interview.

174. See *Green v. U.S.*, 356 U.S. 165, 192 (1958) (Frankfurter, J., concurring); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 462 n.34 (1959) (Frankfurter, J., dissenting). For Brennan’s complaints about such practices, see *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 399 n.8 (1959) (Brennan, J., dissenting in part and concurring in part).

175. Comments at University of Alabama Hugo L. Black centennial celebration, March 17, 1986.

176. 304 U.S. 144, 152 n.4 (1938); Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 512 (Viking, 1956).

said. Black did, and Warren “knew what Hugo was saying,” that it was not the Warren Court, “and thought that naming the Court after the Chief was inappropriate.”<sup>177</sup> But as its public face, Warren became the Court’s lightning rod to criticism, hung in effigy more often than anyone could record. (“Impeach Earl Warren” signs were a common sight in many parts of the country. One of Hugo Black’s law clerks, David Vann, who clerked the term of *Brown* and who lived in Birmingham, told Warren, “I see all these signs with your picture. Are you running for office or something?” Warren laughed louder than anyone else.)<sup>178</sup>

The combination of race, reds and religion was, except for the aftermath of *Dred Scott*, the most combustible combination in American history. The “Warren Court” became the lightning rod for the most vituperative criticism ever directed at judges, far greater than that, to pick one example totally at random, aimed at the Supreme Court after the 2000 presidential election case. Both the issues it considered and the appellation, bestowed by journalists who after *Brown v. Board of Education* needed a handy tag more than ever, remain. As Powe writes, “[T]he Warren Court is a window to the present, a touchstone for determining right and wrong today.” (p. xiv)

Influence and persuasion are notoriously difficult to determine. “Criticism,” as Harold Bloom observed, “is the art of knowing the hidden roads that go from poem to poem.”<sup>179</sup> In later years devotees of Warren and Brennan, following the lead of the late Bernard Schwartz (whose major source was Brennan), have tried to construct and propagate a model history of the Court, one that was repeated in the tributes and memorials to Brennan, every one of which his extraordinary career so richly merited, of Warren, the humanitarian and brilliant politician who saved the Court from the morass that it had fallen into when Fred Vinson sat in the center chair, and of Brennan, the “playmaker” and court politician who through charm and force of intellect was responsible for the intellectual breakthroughs that metamorphosed American constitutional law with the others in the majority following his lead. This rewriting of history

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177. William J. Brennan, Jr., interview.

178. David Vann interview.

179. Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* 96 (Oxford U. Press, 2d ed. 1997).

was wrong and misleading, as Brennan repeatedly said, but which so many of his followers refused to hear or believe.<sup>180</sup>

Brennan years later also talked about the “Warren Court.” “You ought to hear him on that subject,” Herbert Brownell said. Did Brennan criticize Warren? I asked. “In effect he does. When he has a couple of drinks, he can get going. He says something like, ‘who wrote those opinions?’ or ‘I gave him a lot of help on those he wrote.’ He’s pretty emphatic about it but he never directly criticizes Warren. He talks about this almost every time I see him. He brings it up.”<sup>181</sup>

In the 1960s Brennan wrote a disproportionate share of important opinions because, as he knew better than anyone, Warren and Black in their discussions after conference wanted to assign them to him.<sup>182</sup> But to say, as Mark Tushnet has, expressing the standard view, that “Brennan was primarily a tactician, devising ways to implement a vision clearly and properly associated with Warren”<sup>183</sup> not only begs the question of why Warren needed a tactician, but it also disserves Brennan. He was no tool of Warren. His constitutional panorama was broader and deeper. “Over time,” Powe writes, “Brennan became that most important justice of the second half of the twentieth century, but that achievement is based on his full thirty-four-year career. . . . The claim that the Warren Court was really ‘the Brennan Court’ seems largely based on reading Brennan’s subsequent career backward or defining a different era (well past Warren’s retirement). . . . No one claimed that it was the Brennan Court while Warren sat. [Brennan] was largely unknown,” a pardonable exaggeration. (p. 500) Brennan’s emphasis on egalitarianism, al-

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180. In one of his first interviews with Justice Brennan for his authorized biography, Stephen J. Wermeil “was caught totally off guard by a stern lecture” from Brennan: “Kill off that silly notion of an amiable Irishman going around cajoling and maybe seducing colleagues—that just doesn’t happen.” Wermeil, *Justice on a Grand Scale: William J. Brennan, 1906-1997*, Newsweek (Aug. 4, 1997).

181. Herbert Brownell interview. Powe writes that Brennan was “Warren’s best friend and ablest lieutenant” (p. 90). “I think probably the closeness was largely judicial,” Brennan noted. Leeds, *Life on the Court* (cited in note 63). My impression is that among Washington residents Warren was more at ease off the Court with more political types such as Tom Clark among the justices and Drew Pearson as well as the Washington lawyer Edward Bennett Williams (even though he was a generation younger). And to say that Brennan was Warren’s “ablest lieutenant” causes one to wonder why any justice should need a lieutenant.

182. This is probably what Brennan meant when he said that Warren knew “how to use men to the Court’s best advantage.” Dennis Lyons interview.

183. Mark Tushnet, *The Warren Court as History: An Interpretation* in Mark Tushnet, ed., *The Warren Court in Historical and Political Perspective* 33 (U. Press of Virginia, 1993)

though begun during the later Warren years, largely post-dated them.

Both Warren and Black sought leadership and competed subtly for it. Warren “did lead in many ways but it is arguable whether or not he was the leader of the Court,” said Justice Stewart. “I mentioned the name of one person who many would argue was the leader of the Court—Justice Black—during those years.”<sup>184</sup> In a large generalization Black represented task leadership and Warren stood for social leadership.<sup>185</sup> They worked exceptionally well together for essentially common results. The good of the Court and the country came first for both. But the Hugo Black of his last five years or so, despite seeing more of his opinions become law than those of any other justice and being more than anyone else the driving force behind the constitutional revolution that transformed the nation, was different from the man of his previous nearly thirty years on the Court.<sup>186</sup> At the same time a new generation of law professors and other commentators, often of a now different mindset, was coming into prominence.

Powe justifies the Court’s identification “with Warren rather than with anyone else” by quoting CBS commentator Eric

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184. Potter Stewart, *Reflections on the Supreme Court*, in Priscilla Anne Schwab, ed., *Appellate Practice Manual* 313 (ABA, 1992).

185. David J. Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court* in Walter F. Murphy and C. Herman Pritchett, eds., *Courts, Judges and Politics* (Random House, 1986) (originally published 1961).

186. “It is ironic,” Powe writes, “that Brennan split with the liberals to create the majority in *Schmerber*, for he explained the increasing post-*Miranda* reluctance to create new liberal rules as resulting from Black’s switch where ‘we lost our fifth vote’” (p. 400), citing Newman, *Black* at 570 (cited in note 67), wherein I quote Justice Brennan, as his source. But Justice Brennan was not referring to any specific time period, just Black’s “change” in general in the mid-1960s, when he told me this; and in any event even if Fortas for Goldberg was close to an even swap for liberals, then Thurgood Marshall for Tom Clark was a good trade. As Powe states: “It is impossible to state with any precision when Black had outstayed his time. It occurred at some point during the mid-1960s. . . .” (p. 261.)

Powe, I believe, also overplays Black’s “heart problems” starting in the summer of 1962. These “problems” were a cardiogram that deviated from earlier ones. His physician told him not to play singles in tennis and while he should “live a normal life,” he should not “press too hard.” Black to George C. Freeman, Jr., August 3, 1962, Black papers, Library of Congress; Black to Sterling F. Black, September 10, 1962, Charlotte Black papers, in private possession. Black wrote substantially fewer opinions than usual in the 1962 Term, indeed his fewest of any term except for the 1955 Term when the Court purposely lay low after *Brown I* and *II*, and needed only two volumes for its entire product. He did this to take it easy to be sure, but also, if only partly, because he spent much time condensing from 142 to 52 pages the memorandum Frankfurter wrote just before the previous term, which by internal understanding would serve as the basis for a prospective Court opinion in *Arizona v. California*, 373 U.S. 546 (1963). See Newman, *Black* at 531-32 (cited in note 67).

Severeid's statement that Warren "possessed that rarest of traits — 'gravitas'" (p. 500)—as if the others on the Court did not also possess that quality in equal amounts. But, as Judge Charles E. Wyzanski, Jr., who knew far more about the Court than Severeid, noted in 1966, Hugo Black was "the greatest influence on twentieth-century American law."<sup>187</sup> Indeed, the first comprehensive posthumous review of Black's work noted that "[a]t first glance [he] seems not merely to be part of the climate of our age but to be largely responsible for bringing it into existence. [He] shaped the major trends in contemporary constitutional law."<sup>188</sup>

Perhaps history is, as Aaron Burr remarked about law, "that which is boldly asserted and plausibly maintained."<sup>189</sup> Black's rhetorical force and personal power wrapped in the smoothest of sheathings combined with what Justice Fortas called "his stone wall of logic."<sup>190</sup> As Byron White, recently-appointed, complained to himself out loud in 1962, "the same issues that were here in 1947 [when he served as a clerk] are still here, and Hugo still runs the Court."<sup>191</sup> Abe Fortas has been justly chastised for his astounding ethical blindness, but no one has ever questioned his acuteness. "He talked about other justices and he had great respect for Brennan's games, how he would stitch together a majority, but not as an original intellect," said Daniel Levitt, Fortas's clerk in 1965 and 1966. "He had no respect for Warren as a lawyer. Fortas greatly admired Black's intellect and intensity,

187. Charles E. Wyzanski, Jr., *Whereas—A Judge's Premises* x (Little, Brown, 1966).

188. Sylvia Snowiss, *The Legacy of Justice Black*, 1973 Sup. Ct. Rev. 187, 187, 250.

189. Walter Nelles and Carol W. King, *Contempt by Publication in the United States: To The Federal Contempt Statute*, 28 Colum. L. Rev. 401, 428 (1928).

190. Abe Fortas, *Chief Justice Warren: The Enigma of Leadership*, 84 Yale L.J. 405, 406 (1975).

191. Hutchinson, *Man Who Was White* at 339 (cited in note 17). Fred Rodell in 1965 found White "reluctant" to talk about the Court or himself, "withdrawn, voice low, occasional big smile,—didn't want interview; begged no mention and no direct quotes." When Rodell noted that in three fields—the Bill of Rights, desegregation and reapportionment—the Court protected minorities against majority rule, White "smiled, half-agreed" and asked, "how do they know the 'right' solution?" "How does anyone?" Rodell replied. "Someone has to carry the ball." "White smiles weakly," Rodell recorded. He "agreed *prejudice* (including his) decided [cases]. Too many [people] too sure they were right," White added. He seemed "cautious, timid, almost scared (of doing wrong thing? of holding great power?)," and was "not strong or inspiring." *Rodell Supreme Court interviews* (cited in note 9). In 1964 Rodell wrote:

Although B. All-American White  
Used to turn either flank with delight,  
now comes a call  
That he carry the ball—  
He's too eager to run to the right.

Rodell, *Limericks*, (cited in note 32).

that he always wanted to win. It frustrated him that Black usually did.”<sup>192</sup> And Warren long admitted privately that he was primarily a disciple of Black’s.<sup>193</sup> And Justice Brennan, after calling Black “the biggest giant of them all, of course” (on “a Court of giants” when he joined it), wrote, “Hugo Black, more than anyone, provided the Warren Court with the early vision that carried it through the 1960s.”<sup>194</sup>

Black’s achievements during the 1960s constitute much of the bedrock of American constitutional law—the incorporation of the Fourteenth Amendment into the Bill of Rights, *Gideon v. Wainwright*, *Engel v. Vitale*,<sup>195</sup> his insistence in precise and passionate rhetorical fusillades that would have made Aristotle proud for the widest conceivable scope for the First Amendment and, to take an issue which reached maturity after his death, the concept of content-neutrality in the First Amendment which, ironically like the first explicit reference to race as a “suspect” classification which must be subject to the “most rigid scrutiny” which he also originated, came in dissent.<sup>196</sup> This is quite a bit for one lifetime.

“Great men, like great ages,” wrote Nietzsche,

are explosives in which a tremendous force is stored up. . . .  
Once the tension in the mass has become too great, then the most accidental stimulus suffices to summon into the world the “genius,” the “deed,” the great destiny. What does the environment matter them, or the age, or the “spirit of the age,” or “public opinion”?

Harold Bloom, quoting this, continues: “The genius is strong, his age is weak. And his strength exhausts, not himself, but those who come in his wake. He floods them.”<sup>197</sup> So it was with

192. Daniel Levitt interview.

193. Washington Post (Sept. 19, 1971).

194. William J. Brennan, Jr., *The Warren Court: A Personal Remembrance*, 15 Sup. Ct. Hist. Soc’y Q. 5, 7 (1994) (no. 4).

195. 370 U.S. 421 (1962).

196. *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (content neutrality); *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944). It is exceedingly unlikely that *Baker v. Carr*, which Warren called “the most important decision perhaps in the last hundred years of government”—*Brown*, he said, “would not have been needed but for long delay on voting rights. . .”—would have come about had not Black raised the issues in his dissent in *Colegrove v. Green*, 328 U.S. 549 (1946). He put them on the table to be used in the future (even if he later said that his colleagues “thought I was crazy” when he circulated his dissent). The quotations are from Pearson diary, February 6, 1966, Pearson papers; *Rodell Supreme Court interviews* (cited in note 9); Anthony Lewis, *Mr. Justice Black*, N.Y. Times (Sept. 20, 1971).

197. Bloom, *Anxiety of Influence*, 50-1 (emphasis in original), quoting Nietzsche,

Black's opinions and public speeches from the mid-1950s through the early 1960s. So it was with Brennan's opinions and speeches especially in the early through mid-1980s.<sup>198</sup>

Into the mid-1960s it was the Hugo Black Court. In 1964 both *Time* and *Newsweek* ran feature stories on the Court written after extensive consultations with leading professors and practitioners and discussions with justices. Black, *Time* noted, "has lived to see the 'Warren Court,' as it is known out of respect for the Chief Justice, more accurately called the 'Black Court' after its chief philosopher."<sup>199</sup> Similarly *Newsweek*: "Black—not Warren—remains the intellectual leader of the libertarian majority today. . . . In terms of its philosophical crucible, the 'Warren Court' might better be called the 'Black Court.' . . . [A] critic contends: . . . 'It's as if Black just pulls a lever marked "libertarian" and out comes a verdict."<sup>200</sup> After this, the battlefield changed. Black, as Powe notes, "increasingly shoehorned new issues into older categories that he had developed in other circumstances. In the process, the robust individualism of his prior years waned." (p. 216) Brennan was a generation younger.

Powe notes that Robert Post, Sanford Levinson and Dennis Hutchinson "have answered in the affirmative" the question, "Wasn't it really the Brennan Court?"<sup>201</sup> (p. 499) The question itself was never raised during the Warren years. Indeed, it was not posed until 1983 and it must be understood against both the background of Brennan's dislike for Warren Burger and the trend of decisions in the interim.<sup>202</sup> "Labeling Courts in an exer-

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*Twilight of the Idols* (cited in note 179).

198. Brennan was a leader of the posthumous cheering for Black. "No Justice in our history had a greater impact on our law or on our constitutional jurisprudence," he said in 1986. *Remarks on the Occasion of the Justice Hugo L. Black Centennial* in Tony Freyer, ed., *Justice Hugo Black and Modern America* 183 (U. of Alabama Press, 1990). Black's "contributions to constitutional jurisprudence," Brennan had earlier written, "particularly in the construction and application of the Bill of Rights, probably were as influential in shaping our freedoms as any." Brennan, *Foreword in Hugo L. and Elizabeth Black, Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black v* (Random House, 1986).

199. *Time* (Oct. 9, 1964). "I was very much pleased with the article, particularly because it had no barbs aimed at the Court or its work. I should think it was good for such an article to come out at this time." Hugo L. Black to John McNulty, October 19, 1964, Black papers, Library of Congress.

200. *The Warren Court: Fateful Decade*, *Newsweek* (May 11, 1964).

201. Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 *Mich. L. Rev.* 922, 923 (1983).

202. Brennan "had something nice to say about everyone except Warren Burger whose personal and intellectual ineffectiveness as Chief Justice propelled [him] into positions he might not have taken otherwise." Roger K. Newman, *Mr. Justice Brennan: His*

cise in cultural analysis. . .,” writes Tushnet.<sup>203</sup> It speaks to our current needs. As the Italian philosopher Benedetto Croce said, “All history is contemporary history.”<sup>204</sup>

What is at work here, I believe, and perhaps appropriately for a book on those turbulent years, is a generation gap. Those who lived professionally through them put their vote in someone senior at that time; those younger vote for their bellwether during their time. (Proteges—did someone say acolytes?—of Frankfurter virtually outdid themselves with encomia of Black near the end of his life and after his death.<sup>205</sup> Could it be because they knew him?) None of this is to take one iota away from Justice Brennan’s greatness—just to say that it flowered at its fullest later.<sup>206</sup> History is large enough for both him and Hugo Black.

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In 1913 the founder of the field of Supreme Court studies wrote that constitutional law is “applied politics . . . in its noble sense.”<sup>207</sup> Felix Frankfurter was referring to social legislation but the observation holds equally on even a larger scale. Constitutional law is indeed politics in the Aristotelian sense as the completion of ethics with the state as the organization for furthering human needs, and it is exercised through judicial review which Edward S. Corwin so aptly called “an attempt by the

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*Imprint Will Endure*, National Law Journal (Aug. 4, 1997).

203. Tushnet, *Warren Court as History*, at 33 (cited in note 183).

204. Arthur M. Schlesinger, Jr., *A Life in the Twentieth Century: Innocent Beginnings, 1917-1950* at 453 (Houghton Mifflin, 2000).

205. Paul Freund: “[Black] is without doubt the most influential of the many strong figures who have sat during the thirty years that have passed in his Justiceship.” *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A. L. Rev. 467, 473, reprinted in *On Law and Justice* 232 (Belknap Press, 1968). Alexander Bickel: “The Warren Court in its heyday was Hugo Black writ large.” *The Morality of Consent* 9 (Yale U. Press, 1975). Philip Kurland: “And so, for the reasons that history has accorded the accolade the ‘Great Chief Justice’ to John Marshall, it may well come to recognize Hugo Black as the ‘Great Justice.’ No other Justices have left such a deep impression on our fundamental document.” *Hugo Lafayette Black: In Memoriam*, 20 J. Pub. L. 359 (1971). Wallace Mendelson: “That Hugo Black is one of the great men of his generation few would deny. That he is a master advocate seems equally clear. Few, perhaps not even Brandeis, can match him in the mounting of an argument.” *Hugo Black and Judicial Discretion*, 85 Pol. Sci. Q. 17 (1970), but “conceived and for the most part written some years ago.” *Id.* at 38. Also Anthony Lewis: “In the lifetime of most Americans, no judge has had an impact on law and society approaching that of Hugo L. Black. In fact, few politicians, even Presidents, have impressed their personality so strongly on their country.” *Mr. Justice Black* (cited in note 196).

206. This reviewer would rate Black as “the most important jurist” for the period 1940-1965 and Brennan for 1965-1985.

207. Archibald MacLeish and E.F. Prichard, Jr., eds., *Law and Politics: Occasional Papers of Felix Frankfurter 1913-1938* at 6 (Harcourt Brace, 1939).

American democracy to cover its bet.”<sup>208</sup> This ensures that, as Frankfurter wrote shortly before he went on the Court, “There is no inevitability in history except as men make it.”<sup>209</sup>

Ending a chapter on the Court’s post-1964 Civil Rights Act cases, Powe writes, “If it wasn’t perfect or wasn’t as much as some wanted, it stands up well compared to any other period.” (p. 302) We cannot realistically ask much more from any group of human beings. Nor can we ask much more from a book. Powe has given lasting treatment of the most significant judicial epoch since John Marshall’s—“an exciting era that time will value both by acceptance and precept,” in Tom Clark’s words.<sup>210</sup> *The Warren Court and American Politics* is, very simply, indispensable for anyone interested in the Supreme Court during those tumultuous and, yes, revolutionary years. On this subject this is the book.

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208. Edward S. Corwin, *Book Review*, 56 Harv. L. Rev. 484, 487 (1942).

209. Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* 9 (Harvard U. Press, 1938).

210. Tom C. Clark, *Book Review*, 36 U. Chi. L. Rev. 239, 246 (1968) (reviewing Archibald Cox, *The Warren Court*).