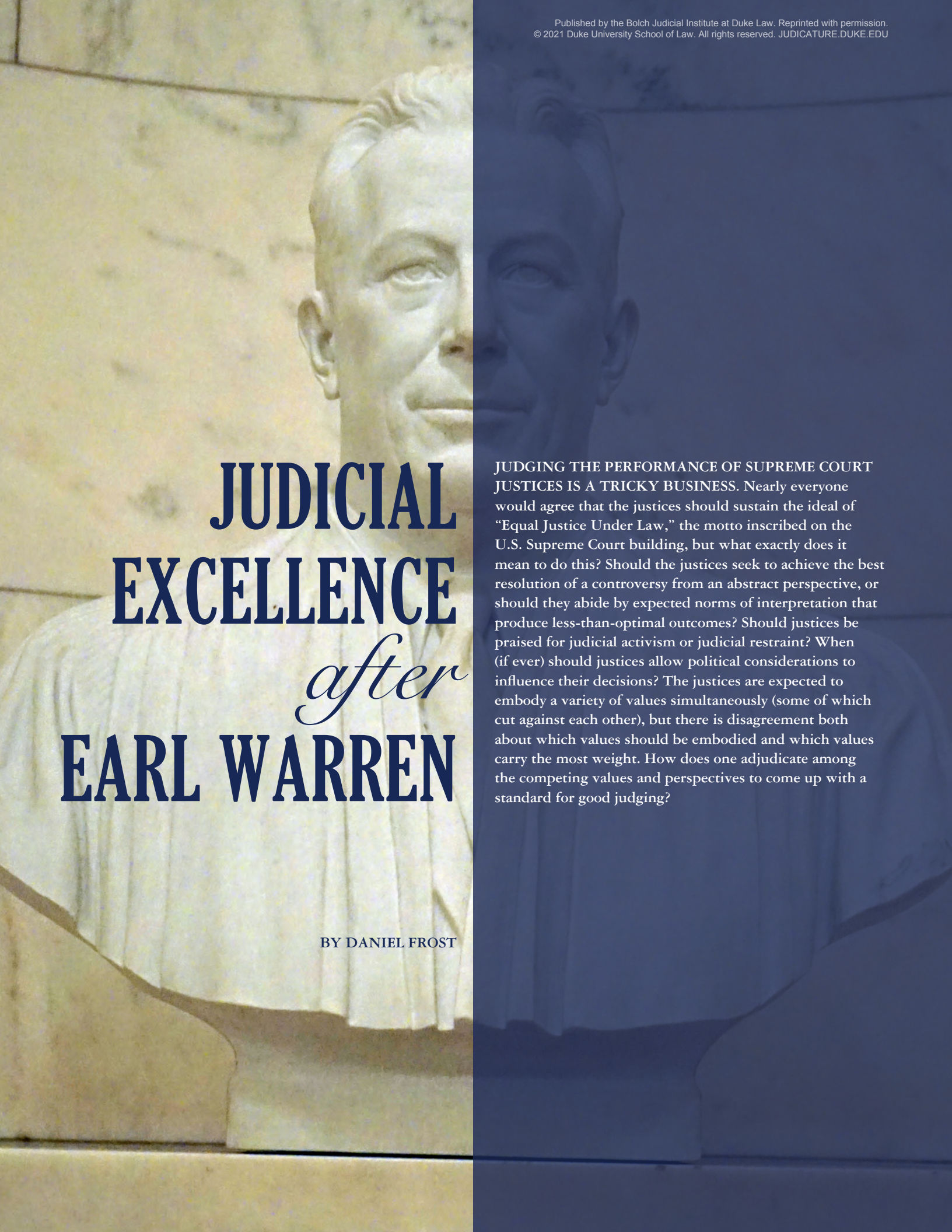

JUDICIAL EXCELLENCE *after* EARL WARREN

JUDGING THE PERFORMANCE OF SUPREME COURT JUSTICES IS A TRICKY BUSINESS. Nearly everyone would agree that the justices should sustain the ideal of "Equal Justice Under Law," the motto inscribed on the U.S. Supreme Court building, but what exactly does it mean to do this? Should the justices seek to achieve the best resolution of a controversy from an abstract perspective, or should they abide by expected norms of interpretation that produce less-than-optimal outcomes? Should justices be praised for judicial activism or judicial restraint? When (if ever) should justices allow political considerations to influence their decisions? The justices are expected to embody a variety of values simultaneously (some of which cut against each other), but there is disagreement both about which values should be embodied and which values carry the most weight. How does one adjudicate among the competing values and perspectives to come up with a standard for good judging?

BY DANIEL FROST

The difficulty of quantifying judicial excellence has not stopped observers of the U.S. Supreme Court from trying. Various lists of all-star Supreme Court justices have been compiled and debated.[1] Such lists provide more than idle entertainment. Highlighting particular justices as exemplars serves aspirational and pedagogical functions within the legal community by reminding lawyers, judges, and academics of our highest ideals and how a particular judge, at a particular moment in history, actualized those ideals. No justice is perfect, of course, but canonizing certain justices can provide a useful standard against which we can evaluate other justices.

This article argues that the canonization of Chief Justice Earl Warren changed the standards by which judicial excellence is gauged. Warren has been both praised and vilified since the day he announced a unanimous decision in *Brown v. Board of Education*,[2] but in polls of experts he consistently ranks among the top Supreme Court justices in history.[3] Warren is esteemed for his leadership, his statesmanship, and, most of all, for the results he achieved. However, Warren and the Warren Court[4] were unconventional in many respects. I argue that Warren's performance changed the standards we use to evaluate judicial excellence in many ways. His bold defense of individual liberties led to a recalibration in the values that Supreme Court justices are expected to embody. Because of him, judicial craftsmanship and reliance on precedent, history, and doctrine were deemphasized as criteria for excellence on the Court, while the pursuit of ethical ideals, informed by a certain reading of the text, became a more central concern of judicial performance. Further, Warren's judging, combined with a strong conservative backlash, gave rise to the contemporary categories that dominate discussions about constitutional interpretation — namely, living constitutionalism and originalism — and led to a heightened sense of concern about judicial activism.[5] This change in vocabulary, as well as a change in standards used to evaluate Supreme Court justices, is an enduring legacy of Warren and the Warren Court.

> Maybe we do not come to regard a justice as great because he or she conforms to some list of pre-established standards, but rather we recognize certain standards as relevant and important because of the way a particular justice *embodies* them.

JUDICIAL EXCELLENCE

The problem in evaluating judicial performance is not that we have too few standards, but that we have too many. Reflecting on a survey of legal experts conducted in 1970, William D. Bader and Roy M. Mersky give the following list of judicial desiderata: "scholarship; legal learning and analytical powers; craftsmanship and technique; wide general knowledge and learning; character, moral integrity, and impartiality; diligence and industry; clear, logical, and compelling communication skills; openness to change; courage to take unpopular positions; dedication to the Court as an institution and to the office of Supreme Court justice; ability to carry a proportionate share of the Court's responsibility in opinion writing; and statesmanship."[6] Another list based on survey data included "judicial restraint, judicial activism, enhancement of the Court's power, protection of individual rights, length of service, impact on the law, impact on society . . . protection of societal rights, dissent behavior, and personal attributes"[7] as bearing on the determination of judicial excellence.[8] More recently, empirical scholars have sought out more objective criteria to quantify judicial acumen. Steven Choi and Mitu Gulati suggest measuring variables such as citation rates (by other judges and by academics), inclusion of opinions in casebooks, speed and disposition of cases, willingness to disagree with other judges nominated by the same party, and so on, in a hypothetical "tournament of judges" to determine the best candidate for a judicial position.[9]

With so many criteria to be applied, it is a wonder that we think highly of any justice at all. But perhaps focusing on criteria is a backward approach. Maybe we do not come to regard a justice as great because he or she conforms to some list of pre-established standards, but rather we recognize certain standards as relevant and important because of the way a particular justice embodies them. It may simply be easier to point to the great justices of the past than it is to think in the abstract about what would make a justice great. Observers generally agree on which justices are truly great.[10] John Marshall — "the great Chief Justice"[11] — is almost universally acknowledged as an excellent justice for his role in defining the contours of the national government and strengthening the prestige and power of the Court, and for his nearly unmatched judicial intellect.[12] Louis D. Brandeis and Oliver Wendell Holmes, Jr.[13] also generally rank high in surveys of legal academics and practitioners.[14] Perhaps judicial excellence is something one knows when one sees it.

Earl Warren tends to come out well in surveys of judicial excellence. In 1970 Albert P. Blaustein and Roy M. Mersky asked 65 law school deans and professors to rate all Supreme Court justices up to 1969 as "great," "near great," "average," "below average," or "failure." The respondents were given no criteria by which to judge the justices. Earl Warren, having just retired, was classified as "great," as were 11 other justices.[15] In 1993 Mersky and Blaustein conducted a similar survey in which Warren placed fifth overall, behind only Marshall, Holmes, Brandeis, and Joseph Story.[16] In 1989 Robert C. Bradley asked scholars, judges, attorneys, and students to "list and rank order ten Supreme Court justices who you consider as great." Similar to Blaustein and Mersky, Bradley did not supply the respondents with any criteria to evaluate justices. Overall, Warren came in as the third greatest justice in history (behind Marshall and Holmes), though his standing varied according to the various groups surveyed. Scholars ranked him third, judges fifth, attorneys sixth, and students fifth.[17]

Clearly, there is a general recognition among observers in general and members of the academy in particular that Warren was among the very greatest justices in Supreme Court history. How does Warren's presence in the Parthenon of Supreme Court Greats affect the standards used to evaluate justices? What did he bring to the list of greats that was not already there? In addressing this question we need to recognize that the *relative weights* of the values we expect justices to embody can change over time. The example of a particular justice can alter our expectations about what is truly important and what is merely peripheral in judicial service.

Consider an analogy: in a discussion of how standards within a social practice change over time, Jeffrey Stout references soccer great Franz Beckenbauer to show how "great ones" change the standards we use to evaluate greatness: "One thing that counts in favor of Beckenbauer's greatness is the way in which his play as a defender transformed the standards by which defenders have subsequently been judged. The standards changed in response to specific features of Beckenbauer's play — his skill as a passer, his ability to join the attack without weakening the team's defensive configuration, and so forth."[18] Beckenbauer did not simply fit into a preexisting mold of what a defender should do, but rather showed the soccer world a new way of playing the game.

The same can be said of particularly influential justices, such as Earl Warren. Warren showed a generation of lawyers, academics, and judges what the Supreme Court could do in the name of equality and civil rights. Against the backdrop of Warren's example, criteria for evaluating the quality of Supreme Court justices could never be the same. The brilliant-but-reserved judging style of a justice such as Felix Frankfurter simply did not have the same appeal when compared to Warren's bold pursuit of civil liberties. Could a justice, after Warren, be content to simply follow the case law and avoid constitutional controversies where possible? Are the "passive virtues"[19] really virtues at all, given the great strides toward justice that the Warren Court achieved? Why would a justice after Warren settle for anything less than *justice?* Warren's influence on judicial evaluation, then, lies not only in the traits for which he is admired but also in the way that certain values came to be seen as more important through his example.

THE CASE FOR WARREN'S GREATNESS

To his admirers, Warren embodies at least three qualities that set him apart as one of the greatest justices of all time: charismatic leadership, statesmanship, and the will to bring about just results. Warren's leadership on the Court, particularly in *Brown v. Board of Education* and other desegregation cases, was incredible. Legal historian Michael Klarman writes that prior to Warren's arrival on the Court the very outcome in *Brown* was in question. Klarman estimates that only four members of the pre-Warren Court — Hugo Black, William O. Douglas, Harold Burton, and Sherman Minton — were strongly inclined to strike down racial segregation in public schools as unconstitutional.[20] A unanimous decision to desegregate public schools was unthinkable.

After Warren arrived in 1953, he relentlessly sought to persuade his colleagues to join a unanimous decision against school segregation. With Warren's arrival the outcome of the case was no longer in question, but a divided Court could make it easier for Southern states to resist the Court's orders. In conference with the other justices, Warren framed the question as one of attributing racial inferiority to blacks. He eventually won over the justices who thought the decision might be interpreted as a political move. In the end Warren achieved unanimity and authored the most celebrated decision of the 20th century. Warren maintained this unity in the string of desegregation cases that followed, and for this (as well as other accomplishments) he is rightly regarded as one of the greatest leaders the Court has ever had.[21]

Second, Warren is believed to be one of the greatest statesmen in the history of the Court, second only perhaps to John Marshall. Bernard Schwartz writes that on the Supreme Court, "the judge must be even more the statesman than the lawyer,"[22] and argues that Warren clearly met this standard. A judicial statesman takes a broad view of history and politics and has a keen appreciation for how the decisions of the Court will be received in both law and in society. A judicial statesman not only keeps pace with social change but seeks to influence its direction. A judicial statesman perceives the institutional possibilities for using the power, and deftly pursues those possibilities in the name of justice and the common good.

Warren's statesmanship is manifest in his Court's decisions, which have become monuments of principle for American identity. Decisions such as *Brown v. Board of Education* and *Miranda v. Arizona* are so well-known and celebrated that they have become a permanent part of America's collective memory. Though their promise was not immediately fulfilled (indeed, Southern "massive resistance" delayed racial integration in public schools for more than a decade),[23] these decisions were important episodes in the development of civil rights. Warren marshaled the prestige and power of the Court to combat the injustices he saw, and history has borne out the weight of many of his contributions.[24]

> Warren's influence on judicial evaluation lies not only in the traits for which he is admired but also in the way that certain values came to be seen as more important through his *example.*

Lastly, and most importantly, Warren is judged to be great because he made the United States more just.[25] Titles about Warren and the Warren Court such as *Justice for All: Earl Warren and the Nation He Made*,[26] *The Warren Court and the Pursuit of Justice*,[27] and *Earl Warren: Justice for All*,[28] give a sense of how Warren is viewed by many of his admirers. Morton Horowitz gives a typical summary of the accomplishments of the Warren Court, many of which would have been unlikely or impossible without the justice's leadership: "The range of the Warren Court's influence has been enormous. The Court initiated a ▸

revolution in race relations; expanded the constitutional guarantee of 'equal protection of the laws'; dramatically expanded the freedom of speech and press; overturned unequally apportioned legislative districts; accorded defendants in criminal cases massively expanded constitutional protections; and recognized for the first time a constitutional right to privacy."[29] Norman W. Provizer and Joseph D. Vigil claim that "Earl Warren possessed an enduring passion for justice. He believed in equal opportunity for the disadvantaged in society so they could become part of the expanding economic scene."[30] They also argue that Warren was willing "to err on the side of too much justice rather than too little."[31] Whatever Warren's faults, his defenders claim that his accomplishments in achieving justice vastly outweigh anything that can be said against him.

> After Warren's tenure the possibilities for judicial activity would appear differently. Warren's contributions were judged by many to be so right, so self-evidently true, that their source or justification within the constitutional text seemed of merely secondary interest. Warren had to be right, because he had come to the *right* conclusions.

THE UNCONVENTIONAL SIDE OF WARREN'S GREATNESS

Those impressed with Warren point to the results of his Court's decisions as proof that the United States was a more just and equitable place in 1969 than it was in 1953, and they are not without justification. But many of Warren's defenders concede, implicitly or explicitly, that Warren's judicial style was unconventional. Warren disregarded many of the aspects of good judging that people in his time took to be important. The elevation of certain aspects of judging, such as arriving at the right answers, brought with it a corresponding demotion of other aspects, such as craftsmanship, adherence to precedent, and reliance on history and text.

Scholars generally agree that Warren did not have a consistent theory of constitutional interpretation. In a 1969 article predicting that Warren "will go down as one of the outstanding figures in the history of the Supreme Court,"[32] Anthony Lewis writes that "[f]ar more than most other members of the Court, [Warren] evidently felt unconfined by precedent or by a particular view of the judicial function." As an example, Lewis cites *Trop v. Dulles*,[33] an opinion authored by Warren in 1958. At issue was a statute that made it possible for soldiers who desert in wartime to be stripped of their citizenship. Lewis writes: "In one vague paragraph the opinion, gliding past much contrary legal history, found that deprivation of citizenship was technically 'punishment.' Then, although conceding that the death penalty would not have been 'cruel,' the opinion concluded that expatriation was so because it brought about 'total destruction of the individual's status in organized society' and cost him, with the loss of citizenship, 'the right to have rights.'"[34] In dissent, Justice Frankfurter wrote, "[i]s constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"

The view that Warren's opinions, as well as many opinions that have been identified in retrospect as "Warren Court" opinions, are lacking in craftsmanship and legal reasoning is shared by Warren's critics and defenders alike. Alexander Bickel, arguably the Warren Court's most trenchant contemporary critic, wrote in 1957: "The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree."[35] Many of Warren's admirers seem to concede the point. After surveying the civil rights cases of the 1960–61 term, Robert G. McCloskey lamented the lack of a systematic approach to this area of law: "Why has it done so little to develop a reasoned, connected set of doctrines in the field of civil rights? Partly no doubt because this is easier said than done . . . . But though this might account for some inadequacy in doctrinal structure, it does not fully explain the failure to develop any such structure at all."[36] In an approving passage describing Warren's support for an anti-flag burning statute, biographer Ed Cray wrote that "Warren had not a legal theory to sustain his opinion; that he would leave to the clerks. He was voting instinctively, not intellectually."[37]

Warren is described by many of his defenders as not caring much for legal technicalities. He would look at the controversy in the case, decide what would be fair, and then ask his clerks to fill in the reasons.[38] Bernard Schwartz — who with a judicial biography of Warren entitled *Super Chief* cannot be mistaken for a critic — writes that "[t]he justices who sat with him have all stressed that Warren may not have been an intellectual like Frankfurter, but then, as Justice Potter Stewart puts it, 'he never pretended to be one.' . . . [A]ccording to Stewart, Warren 'didn't lead by his intellect and didn't appeal to others' intellects; that wasn't his style.'"[39] Schwartz also writes that "Warren never pretended to be a scholar interested in research and legal minutiae. These he left to his clerks." Schwartz then relates that on one occasion Warren's clerks got a good laugh out of a "learned law review article" that put great importance on the way Warren cited precedent. "The clerks knew that was utterly foolish, because nobody (and certainly not the Chief) had paid any attention to it," Schwartz relays.[40] Former Warren clerk Gerald Gunther — who would later become a top scholar of constitutional law — relates that Warren realized that Justice Frankfurter could get virtually any outcome he wanted on the basis of some alleged legal technicality. This "turned the Chief into a great skeptic, if not a cynic, about the alleged binding nature of jurisdictional rules." According to Gunther, Warren learned from

Frankfurter that a judge could do whatever he liked, and that "it didn't turn much on whether he had a legal basis for it."[41]

Warren and the Warren Court have been called "antihistorical" and "antidoctrinal" for the way they disregarded history and precedent to achieve ethical aims. David J. Garrow, another scholar sympathetic to the Warren Court, argues one of the most important lessons of *Brown v. Board of Education* "is the clear and indeed almost explicit manner in which *Brown* signifies and symbolizes the post-1954 Court's repudiation of historical intent and meaningful evidence of historical intent in its reading and application of the reach and meaning of the Fourteenth Amendment."[42] Garrow argues that the lesson of *Bolling v. Sharp, Brown's* companion case, is that "the traditions and niceties of doctrine *do not matter* — or at the very most, matter relatively little — when and where the Court becomes convinced that a fundamental, moral holding needs to be made."[43] Moral concerns become central, while doctrinal and historical concerns recede to the periphery of importance. According to Garrow, this approach is continued in "the Warren Court's two other landmark antihistorical rulings — *Baker v. Carr* and *Griswold v. Connecticut* (and to their even better-known progeny, *Reynolds v. Sims* and *Roe v. Wade*)."[44]

This language may sound extreme, but it is not unique to Garrow. G. Edward White, another Warren acolyte, shares Garrow's view and gives an elaborate defense of Warren's "antidoctrinal"[45] reasoning. From the outset, White concedes that Warren did not follow the established conventions of legal reasoning of his time: "There is no gainsaying Warren's indifference to the approved analytical reasoning of his time. . . . In an age still dominated by process theory, in which judges are expected to engage in 'reasoned elaboration,' duly acknowledging their sources and demonstrating their capacity at analytical reasoning, Warren's style of opinion writing was offensive; many called it inept."[46] White argues that it was not inept, only unconventional. The conventions of the time placed high value on skillfully navigating the twisted jungle of case law, citing authority for every step in the reasoning, and generally deferring to precedent and history. White thinks (and it is plausible to grant) that most judicial decisions start from the conclusion and work toward the premises. Warren was unique in that he wasn't particularly concerned with obscuring his attachment to results: "Technical proficiency therefore seems to reassure us not so much about judicial motivation but about judges' willingness to track the conventional reasoning patterns and professional sources of their time. Warren seemed singularly uninterested in carrying out this tracking."[47]

If Warren wasn't guided by precedent, history, or technical proficiency, what did guide his decision making? White's answer: Warren's sense of moral truth. Warren felt bound to follow the moral imperatives that he found written in the Constitution. He once characterized law as "float[ing] in a sea of Ethics" and said that there is a "Law beyond the Law."[48] White sums up Warren's felt obligation to the text as follows: "The ethical imperatives that Warren read in the Constitution were so clear to him, and his duty to implement them so apparent, that matters of doctrinal interpretation were made simple and matters of institutional power became nearly irrelevant."[49]

In short, White concedes that Warren may have reasoned "poorly" according to the prevailing standards of legal reasoning in the 1950s. But why should those standards have any special claim on us? White writes that "[b]ecause Warren's justifications for a result were often conclusory statements of what he perceived to be ethical imperatives, his reasoning as a jurist was regularly opaque. But opaque or unconventional reasoning is not the same as no reasoning. It merely invites one to analyze Warren's jurisprudence at a different level."[50] The level at which White would have us analyze Warren's jurisprudence is the level of *just results*. The result was what mattered, not the road by which one got there. Warren made results-driven judging respectable (and controversial) in a way that it had not been previously.[51]

JUDGING AFTER WARREN

In this article I have argued that Warren changed the standards by which judicial greatness is measured. What would count as evidence for this claim? One kind of evidence, which I have tried to provide, is the way that Warren's style led to a change in the relative weights assigned to different aspects of judicial performance by observers of the Supreme Court. As White puts it, "Warren's elevation of practical politics and morality to major components in the Court's decision making downgraded the significance of technical reasoning in the process of reaching decisions."[52] Prior to Warren, practical politics and morality played some role in the decision-making of Supreme Court justices, but Warren made these concerns more central to the way judicial performance is evaluated.

Another kind of evidence is the way that Warren's example changed the terms and categories that people use to describe and evaluate the activity of the justices. Richard Posner argues that "the test of greatness for the substance of judicial decisions, therefore, should be, as in the case of science, the contribution that the decisions make to the development of legal rules and principles rather than whether the decision is a 'classic' having the permanence and perfection of a work of art."[53] Warren clearly qualifies as great on this standard, due to the influence he and his Court had on so many areas of the law. But Warren's example also redefined the categories people use to make sense of constitutional interpretation and the role of the justices. The warring interpretive schools of living constitutionalism and originalism grew directly out of the Warren Court years, as well as a general concern with judicial activism. Though this framing of the judicial and interpretive options has come to seem natural to many observers of constitutional law, it was not always so. Prior to the Warren Court, one could draw on sources other than the constitutional text and history without being thought a living constitutionalist or an activist.

Consider the judicial approach of some of the justices who sat with Warren. Justice Felix Frankfurter, for example, does not fit easily into either camp. He was clearly not an originalist since, among other things, he was willing to use the Due Process clause of the Fourteenth Amendment to strike down police procedures that "shock[] the conscience."[54] Justice John M. Harlan II, too, was neither a living constitutionalist nor an originalist. Like Frankfurter, he was ▸

generally inclined toward restraint, but not on the basis of the text alone.[55] Harlan believed that judges could use a broad understanding of some guarantees of the Constitution to combat manifestly irrational legislation, but he was much more committed to tradition and history than many of his brethren on the Court. Harlan was no doctrinaire originalist, but he found plenty to disagree with when it came to some of the Warren Court's most memorable contributions. Between 1962 and 1968 (the heyday of the Warren Court) he wrote an average of 31.1 dissents per term, far more than any other justice on the Court.[56]

After Warren's tenure the possibilities for judicial activity would appear differently. Warren's contributions were judged by many to be so right, so self-evidently true, that their source or justification within the constitutional text seemed of merely secondary interest. Warren *had* to be right, because he had come to the right conclusions.

Warren's critics, on the other hand, countered by seeking to define the duty of justices in a way that would emphasize Warren's alleged activism. Frankfurter and Harlan's approaches were useful in some respects, but their judicial philosophy didn't seem tied to anything objective. Therefore, their theories of judicial restraint did not serve the purpose of highlighting the unconstrained nature of Warren's style. Moving forward, theorists and judges who defined themselves against the example and record of the Warren Court would justify their jurisprudence on the basis of the text, history, and, to some extent, the traditions of constitutional law and practice. Text and history seemed like firm, objective, and uncontroversial sources that could provide external reference points for holding a judge accountable. Justice William H. Rehnquist, who joined the Court just two years after Warren stepped down, spent much of his career developing this critique.[57] Justice Antonin Scalia took it further.[58] But it is worth remembering that the interpretive options need not appear in such sharp contrast. Prior to Warren, one did not have to choose between an unconstrained approach in favor of moral rights and an approach that was wholly beholden to text and history. Only in response to a particular confluence of political and legal factors has such a choice appeared unavoidable.

And herein lies the strange legacy of Chief Justice Earl Warren. He is remembered primarily for extending rights to the weak, the disenfranchised, and the oppressed, but even his admirers are not entirely certain the Constitution authorized him to do so. After Warren, the justices were still expected to give reasons, but the reasoning took on a new character: Results-driven jurisprudence became both respectable and reprehensible in a way that it had not been previously. Speaking for those who admire Warren, Schwartz says it best: "Perhaps the *Brown* opinion did not articulate in as erudite a manner as it should have the juristic bases of its decision. But the Warren opinion in that case is so plainly right in its conclusion that segregation denies equality, that one wonders whether learned labor in spelling out the obvious was really necessary."[59] The *necessity* of giving good legal and constitutional reasons seemed to decline when the results were manifestly just. The Warren Court's decisions and approach are largely responsible for the divide between living constitutionalism and originalism that structure the interpretive debate today.

CONCLUSION

Warren, of course, was not solely responsible for actions of the Court that bears his name, nor for those of the supporters and critics he inspires. However, it is generally agreed that the accomplishments of the Warren Court could not have occurred without Warren. In response to a question about whether Justice Black was the intellectual leader of the Warren Court, Justice Potter Stewart responded that "if Black was the intellectual leader, Warren was the *leader* leader."[60] Warren was the once-in-a-century justice who had the courage, confidence, and conviction to instigate a genuine revolution within a branch of government. Warren did not set the standard by which all justices are measured, but he did create a new genre of greatness. Call it "rights-protecting egalitarianism." Those who follow Warren may revere or despise him, but none can ignore him. After Earl Warren, the judicial function, constitutional interpretation, and the evaluation of judicial performance would never be the same.

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[1] George R. Currie, *A Judicial All-Star Nine,* 1964 Wis. L. Rev. 3 (1964); James E. Hambleton, *The All-Time All-Star All-Era Supreme Court,* 69 A.B.A. J. 462 (1983). More recently, *see* Cass Sunstein, *Home Run Hitters of the Supreme Court*, Bloomberg View, (April 1, 2014) http://www.bloombergview.com/articles/2014-04-01/home-run-hitters-of-the-supreme-court.

[2] 347 U.S. 483 (1954).

[3] *See infra* notes 6-9.

[4] For the purposes of this article I use "Warren Court" to denote the decisions and style of judging which are generally associated with Warren's leadership on the Court. Warren does not bear all the responsibility for the actions of the "Warren Court," but most observers, sympathetic and critical, associate Warren with the general turn toward individual civil rights, as well as a relatively "unconstrained" style of judging that occurred during Warren's tenure.

[5] Howard Gillman argues that something like modern originalism was the dominant interpretive approach in U.S. constitutional law until 1937. *See* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of a 'Living Constitution' in the Course of American State-Building*, 11 Studs. in Am. Political Dev. 191 (1997). I generally agree with Gillman's history, but it remains true that interpretive categories of "originalism" and "living constitutionalism" become legally salient in a new and powerful way with the rise of the Warren Court. As I explain, justices prior to (and even during) the Warren Court did not define themselves in these terms and felt free to use originalist and non-originalist justifications for their decisions. The Warren Court made the choice between these interpretive approaches seem unavoidable.

[6] William D. Bader & Roy M. Mersky, The First One Hundred Eight Justices 31–32 (2004).

[7] *See* William G. Ross, *The Ratings Game: Factors that Influence Judicial Reputation*, 79 Marq. Law Review 401, 403 (1996).

[8] *See also* Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. Pa. L. Rev. 781, 784 (1957).

[9] Steven Choi & Mitu Gulati, *A Tournament of Judges?* 92 Cal. L. Rev. 299 (2004).

[10] *See* Henry J. Abraham, Justices, Presidents, and Senators 1–8 (2008).

[11] *See* Charles F. Hobson, The Great Chief Justice: John Marshall and the Rule of Law (1996).

[12] For a summary of Marshall's accomplishments, *see* Jean Edward Smith, John Marshall: Definer of a Nation 1–5 (1996).

[13] Bader & Mersky, *supra* note 6, at 30, refer to Marshall, Brandeis, and Holmes as "the three greatest justices."

[14] The esteem accorded to the justices came suddenly but has remained strong for nearly three quarters of a century. *See* White, *supra* note 2.

[15] Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1183, 1183 (1972). The results were listed chronologically, so it is hard to tell exactly where Warren fell within this list of twelve. However, from comments that the authors make it is clear that Warren came in behind Marshall, Holmes, and Brandeis.

[16] *See* Ross, *supra* note 6, at App. 1.

[17] Leaders of the Pack: Polls and Case Studies of Great Supreme Court Justices ch. 1 (William D. Pederson & Norman W. Provizer eds., 2003).

[18] Jeffrey Stout, Democracy and Tradition 274 (2004).

[19] Alexander M. Bickel, The Least Dangerous Branch 111–198 (1962).

[20] Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 298 (2004). *See generally id*. at 292–312.

[21] For an excellent history of Warren's involvement in *Brown* and other desegregation cases, *see* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1954*, 68 Geo. L.J. 1 (1979).

[22] Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 4 S. Ill. Univ. L.J. 406, 436 (1979).

[23] *See generally* Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 39–172 (2008).

[24] Bickel seems to have gotten it wrong when he wrote, "[T]he Warren Court's noblest enterprise — school desegregation — and its most popular enterprise — reapportionment — not to speak of school-prayer cases and those concerning aid to parochial schools, are heading toward obsolescence, and in large measure abandonment." Alexander M. Bickel, The Supreme Court and the Idea of Progress 173 (1978). Though Warren's decisions would be narrowed and constrained in the coming decades, there never was an anti-Warren revolution on the Court.

[25] Norman W. Provizer & Joseph D. Vigil, *Earl Warren: Justice as Fairness*, *in* Leaders of the Pack: Polls and Case Studies of Great Supreme Court Justices 200 (William D. Pederson & Norman W. Provizer eds., 2003).

[26] Jim Newton, Justice for All: Earl Warren and the Nation He Made (2006).

[27] Morton J. Horowitz, The Warren Court and the Pursuit of Justice (1998).

[28] Christine L. Compston, Earl Warren: Justice for All (2001).

[29] Horowitz, *supra* note 26, at 3. For a similar summary, *see* Anthony Lewis, *Earl Warren*, in The Warren Court: A Critical Analysis 1 (Richard H. Sayler, Barry B. Boyer, and Robert E. Gooding, Jr. eds., 1969).

[30] Provizer & Vigil, *supra* note 24, at 201.

[31] *Id*. at 210.

[32] *Id*. at 3.

[33] 356 U.S. 86 (1958).

[34] Lewis, *supra* note 28, at 5.

[35] Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1, 3 (1957).

[36] Robert McCloskey, *Deeds Without Doctrines: Civil Rights in the 1960 Term of the Supreme Court*, 56 Am. Pol. Sci. Rev. 71, 88 (1962).

[37] Ed Cray, Chief Justice: A Biography of Earl Warren 492 (1997).

[38] Bernard Schwartz, Super Chief: Earl Warren and His Supreme Court: A Judicial Biography 68–69 (1983). *See also* Cray, *supra* note 37, at 310.

[39] Schwartz, *supra* note 38, at 31.

[40] *Id*. at 68.

[41] Cray, *supra* note 37, at 310.

[42] David J. Garrow, *From* Brown *to* Casey*: The U.S. Supreme Court and the Burdens of History*, *in* Race, Law, and Culture: Reflections on *Brown v. Board of Education* 74 (Austin Sarat ed., 1997).

[43] *Id*. at 78 (emphasis in original).

[44] *Id*. at 75.

[45] G. Edward White, *Earl Warren's Influence on the Warren Court*, *in* The Warren Court in Historical and Political Perspective 44 (Mark Tushnet ed., 1993).

[46] *Id.* at 39.

[47] *Id.*, at 40.

[48] G. Edwin White, *Earl Warren as Jurist*, 67 Va. L. Rev. 461, 472 (1981).

[49] *Id*. at 462.

[50] *Id*. at 477.

[51] I hasten to add that much, probably most, of legal reasoning prior to Warren and the Warren Court was also results-driven. A certain degree of results-driven reasoning is unavoidable when a justice must persuade at least four other justices to join his or her opinion. The opinion that is eventually handed down by the Court often only has the virtue of being what a sufficient number of justices are willing to sign on to.

[52] White, *supra* note 45, at 44.

[53] Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 Yale L.J. 511, 523 (1994) (reviewing Gerald Gunther, Learned Hand: The Man and the Judge (1994)).

[54] *Rochin v. California*, 342 U.S. 165 (1952).

[55] In *Poe v. Ulman*, 367 U.S. 497 (1961), a precursor to *Griswold v. Connecticut*, Harlan voted to strike down a contraceptives ban on the basis of a broad reading of the Due Process clause of the 14th Amendment.

[56] *See* Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism 70 (2004). The second most dissenting justice was Stewart, with an average of 24.1. Black came in third with 21.

[57] *See id*. at 123–33.

[58] *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997).

[59] Schwartz, *supra* note 21, at 438.

[60] Schwartz, *supra* note 38, at 31.