



Chief Justice Earl Warren
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The Warren Court

During Earl Warren's 16 years as chief justice (1953–1969), the Supreme Court had a profound impact on politics and government in America. The Warren Court was an extraordinarily activist, innovative tribunal that wrought far-reaching change in the meaning of the Constitution.

Among its major decisions, the Warren Court outlawed official racial segregation in public schools, set strict national standards to protect the rights of criminal defendants, required the equal apportionment of state legislatures and the House of Representatives, and ruled that prayers and Bible reading in the public schools were unconstitutional. And it handed down other dramatic decisions that won it both high praise and sharp criticism—and engulfed it in great controversy.

Riding the crest of the tidal wave of social change that swept through America in the 1950s and 1960s, the Court became a natural target of those who felt it was moving too fast and too far. The political reaction to its bold decisions was symbolized by automobile bumper stickers and roadside billboards that read "Impeach Earl Warren."

Before he retired as chief justice in 1969, Warren was asked to name the most important decisions of the Warren Court.²⁰ He singled out those dealing with reapportionment, school desegregation, and the right to counsel, in that order.²¹ Each of these cases symbolized one of three broad fields in which the Warren Court brought about far-reaching changes in America: the political process itself, civil rights, and the rights of the accused.

In its reapportionment decisions, the Warren Court required that each citizen's vote count as much as another's. If the quality of a democracy can be gauged, certainly the individual's vote is a basic unit of meas-

urement. Until the reapportionment revolution of the Warren Court, voters were often powerless to correct basic distortions in the system of representation itself.

The Warren Court's *Brown* decision has not eliminated racial segregation in American schools or American society. But by striking down the officially enforced dual school system in the South, the Court implied that "all racial discrimination sponsored, supported, or encouraged by government is unconstitutional."²² Thus the decision foreshadowed a social upheaval. The civil rights movement, the civil rights legislation of the 1960s, and the continuing controversy over the busing of public school children all followed in the Supreme Court's wake.

By the 1980s, the goal of "integration" appeared to be less important to many African Americans than freedom, dignity, and a full share of the economic opportunities of American society. Nevertheless, the *Brown* decision remains a judicial milestone; by its action at a time when much of white America was complacent and satisfied with the existing social order, the Supreme Court provided moral as well as political leadership—it reminded the nation that the Constitution applies to all Americans.

The third broad area of decision by the Warren Court—the protection of the rights of criminal defendants—was discussed in Chapter 4. In a series of controversial decisions, including *Miranda*, *Escobedo*, *Gideon*, and *Mapp*, the Court, bit by bit, threw the mantle of the Bill of Rights around persons accused by state authorities of crimes. In so doing, the Court collided directly with the electorate's rising fear of crime; it was accused of "coddling criminals" and "handcuffing the police." Under the Burger Court the pendulum swung back substantially, in favor of the police and prosecutors.

The Warren Court moved aggressively in several other areas as well—banning prayers in the public schools, curbing the anti-Communist legislation of the 1950s, and easing the laws dealing with obscenity. All this activity provided ample ammunition to the Warren Court's conservative critics: The Court, they charged, had tinkered with legislative apportionment, forced school integration, overprotected the rights of criminals, banished prayer from the classroom, tolerated Communists, and encouraged pornography. Moreover, as many of the Court's critics frequently pointed out, it decided many important cases by a one-vote margin. The Burger Court and the Rehnquist Court moved more cautiously in the 1970s and thereafter and narrowed the sweep of some of the Warren Court's decisions, particularly in the areas of criminal justice and pornography. The Supreme Court might do so even more dramatically in the future. Yet one leading scholar predicted that

the doctrines of equality, freedom, and respect for human dignity laid down in the numerous decisions of the Warren Court cannot be warped back to their original dimensions. . . . Generations hence it may well appear that what is supposedly the most



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conservative of American political institutions, the Supreme Court, was the institution that did the most to help the nation adjust to the needs and demands of a free society.²³

The Burger Court

During the 1968 presidential campaign, Richard M. Nixon promised to appoint to the Supreme Court “strict constructionists who saw their duty as interpreting law and not making law. They would see themselves as caretakers of the Constitution and servants of the people, not super-legislators with a free hand to impose their social and political viewpoints upon the American people.”²⁴

Nixon’s comments clearly reflected one side of the historical argument over the “proper” role of the Supreme Court. Although the argument was as old as the republic itself, it had, by 1968, taken on new political meaning; the Warren Court had become linked in the minds of many voters with black militancy, urban riots, rising crime, and the volatile issue of “law and order” and justice. By contrast, others viewed the Warren Court as a humanitarian force that had revitalized American democracy.

Then in 1969, Chief Justice Earl Warren, a liberal, retired, and Nixon named Warren E. Burger to succeed him. In Chief Justice Burger, Nixon made it clear, he believed he had found a “strict constructionist” who would fit his political and philosophical requirements. Over the next three years, Nixon appointed three more justices to the Court, and in 1975 President Gerald Ford chose one justice. Thus by 1976 a majority of the nine-member Court had been appointed since Earl Warren’s retirement.

The more conservative trend represented a sea change from the Warren Court era. For example, the Burger Court handed down a number of decisions more

favorable to police than to defendants. It narrowed the reach of the Fourth Amendment’s protections against unreasonable search and seizure, making it easier for state and local prosecutors to use illegally seized evidence to convict defendants. (See Chapter 4.) And the Burger Court restored the death penalty.

The Court’s decisions in these cases were hailed by conservatives, who argued that police should be given latitude in dealing with crime. In addition, the Court ruled that journalists had no First Amendment privilege to protect confidential sources and that journalists must answer questions about what they were thinking when they prepared reports resulting in libel suits. (See Chapter 8.)

After appointing Burger, Nixon sought to change the political balance on the Court further by nominating a conservative as an associate justice. Twice, Nixon’s nominees were rejected by the Senate. Finally, Nixon nominated Harry A. Blackmun, a Minnesota Republican and federal appeals court judge. Blackmun, a moderate, was confirmed. Over time, Blackmun often voted with the Court’s liberal bloc; he was the chief architect of the Court’s 1973 decision in *Roe v. Wade*, legalizing abortion.

In 1971 Nixon nominated two more Supreme Court justices said to share his “conservative” philosophy. They were Lewis F. Powell, Jr., a prominent Richmond, Virginia, attorney, and William Rehnquist, then an assistant United States attorney general. Both were confirmed, giving President Nixon four appointees on the highest court. Because Byron R. White, a Kennedy appointee, and Potter Stewart, an Eisenhower appointee, voted in a number of important cases with the four new justices, from that point forward, in some decisions, Nixon had an effective majority in the highest tribunal. Later, however, Powell emerged as the important swing vote on the Supreme Court, sometimes siding with

conservatives, sometimes with liberals. In a number of important cases, Powell's vote was decisive.

And in some policy areas such as desegregation and privacy, the Burger Court gave little comfort to conservatives and even broadened the decisions of the Warren Court. For example, the Burger Court legalized abortion, declined to stop the publication of the Pentagon Papers, extended the right to counsel to poor defendants even in misdemeanor cases, outlawed wiretapping of domestic groups without a court warrant, limited the power of local communities to ban pornography, and ruled that even the president must yield evidence to the courts. In the field of civil rights, the Burger Court banned racial discrimination in private schools and upheld affirmative action in education, jobs, and in federal contracts. And it held that all-male groups can be compelled to admit women—a ruling that the Rehnquist Court extended to include private clubs.²⁵

In 1975 Justice William O. Douglas, an outspoken champion of individual liberties, retired after more than 36 years on the Court. President Ford named a moderate, John Paul Stevens, to replace him. In 1981, President Reagan named the first woman to serve on the Supreme Court, Judge Sandra Day O'Connor of the Arizona Court of Appeals. With the O'Connor appointment, the associate justices of the Supreme Court found it necessary to drop the traditional title of "Mr. Justice." From then on, their title became "Justice."

As a member of the Supreme Court, O'Connor at first generally allied herself with the Court's conservative wing, often voting with Chief Justice Burger, Justice Rehnquist, and Justice Powell. Even as the Supreme Court shifted to the right, many of its decisions still protected individual liberties and minority groups. But, clearly, the Burger Court had developed its own philosophy as it carried out its task of interpreting the Constitution. And this became even more apparent in the Rehnquist era.

The Rehnquist Court

After Warren Burger retired in 1986, President Reagan elevated William Rehnquist to chief justice and appointed Antonin Scalia, another conservative, to the Supreme Court. The appointment of Anthony Kennedy in 1987, and President Bush's appointments of Justices David Souter in 1990 and Clarence Thomas in 1991, meant that for a time, eight of the nine members of the Court had been appointed by Republican presidents. In the space of a relatively few years, the members and political philosophy of one of the three branches of the federal government had changed measurably.

When William Rehnquist was sworn in as chief justice of the United States in September 1986, many political observers expected that his appointment would usher in an era of conservative decisions by the highest court. In time the Court did become more conservative,

Chief Justice William H. Rehnquist, wearing a special robe with gold stripes, presided over the Senate impeachment trial and acquittal of President Clinton in 1999.

APTN/Wide World



but that was not the case initially. During the Rehnquist Court's first term, the liberals won all but two of the major cases and the conservatives prevailed only in the area of criminal law. A moderate-liberal coalition, led by Justice William J. Brennan, Jr., decided cases on affirmative action, teaching creationism in the public schools, protection for pregnant workers, and political asylum for illegal aliens.

Moreover, the Court, by a vote of 8-0, threw out the Reverend Jerry Falwell's suit against *Hustler* magazine.²⁶ In so doing, the Court declined to curb criticism of public figures.

But by 1988 the Rehnquist Court shifted in a more conservative direction, giving public school officials the right to censor school newspapers and plays, for example.²⁷ And after the appointment of Justice Anthony Kennedy, the Court in several decisions made it more difficult for workers to sue employers for discrimination.²⁸ The Court's action alarmed liberals and led to speculation that a conservative majority had finally emerged. In May 1988, in another decision that to some analysts seemed to reflect a more conservative trend, the Court ruled 6-2 that police may, without a warrant, search through trash that people leave outside their home to be collected.²⁸

But, as always, the decisions varied; the Court in 1990 struck down the federal law that sought to ban flag-burning.²⁹ And in 1991, it invalidated New York's "Son of Sam" law, which had barred criminals from earning money from books about their crimes; the Court said the state law violated the First Amendment's provisions of free press and free speech.³⁰

As these opinions demonstrated, the decisions of the Supreme Court are often unpredictable, and the Court's direction not always easily categorized. Although by the year 2000 the Court's conservative bloc was often a dominant force, it did not always prevail.

²⁵Among the cases were *Patterson v. McLean Credit Union*, 491 U.S. 164 (1988), and *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1988). The series of decisions was overturned by the civil rights bill passed by Congress in 1991.