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WASHINGTON LAW REVIEW

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The Unfinished Business of the Warren Court
Charles L. Black, Jr. 3

The question we should ask of the Warren Court is not whether it succeeded, but whether we want to make it succeed. With the issue thus defined, Professor Black examines the work of the Warren Court, the foundation it has laid in substance and methodology, and the direction future advocacy must take to secure and enlarge upon those foundations.

Professor Black compares the Warren Court favorably to the Marshall Court, noting that where the Marshall Court's unique contribution was defining nationhood, the Warren Court's unique contribution was defining citizenship. He urges strong and continuing advocacy to fulfill the Warren Court's vision of citizenship in order that it not be clouded by the type of retrenchment that followed the Marshall Court.

Borrowing from the Civil Law, Professor Black suggests the use of analogy in interpreting the Constitution in those instances when the results sought by textual interpretation can only be reached by transcending all feasible lexicographic operations. Such a methodology sees in the Constitution certain positive commands and values which do not for their validity depend upon a particular phrase in the Constitution.

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Transfer of Decedent's Basis at Death: The Allocated Carry-over Approach 121

Congressional dissatisfaction with the effects of IRC 1014(a) which, although death is not treated as a taxable event for income tax purposes, grants a stepped-up basis in inherited property resulting in gains tax forgiveness on appreciated property held at death, has prompted suggested legislation aimed at the at-death taxation as capital gains of all appreciation on property held at death. This comment urges, instead, that the decedent's tax basis in non-cash assets should be carried over to his successors and allocated on the basis of the market value of the transferred assets. The required legislation and mechanics for implementation of the proposed alternative are also presented. This proposal would avoid the overwhelming liquidity and valuation problems inherent in at-death taxation while ending complete tax forgiveness.

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Address all correspondence to: Washington Law Review
306 Condon Hall
University of Washington
Seattle, Washington 98105