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BOOK REVIEW

SUPER CHIEF. By *Bernard Schwartz*.¹ New York: New York University Press. 1983. Pp. xiii, 853. \$29.95.

KENNETH STARR*

For a *tour d'horizon* of the landmark decisions of the Supreme Court during the sixteen year tenure of Chief Justice Earl Warren, it would be difficult to match Professor Bernard Schwartz's impressive book. The author has painstakingly set out with great clarity the decisional process leading to the opinions which the Warren Court left as a remarkable—and controversial—constitutional legacy.

It was no accident that a highly popular governor of the nation's then second largest state found himself as President Eisenhower's first appointee to the Supreme Court. As Professor Schwartz recounts, the President-elect telephoned Governor Warren in early December, 1952, only a month after the election, and found the Governor reading in bed. The President-elect had bad news for the nationally prominent politician who was, notwithstanding disclaimers to the contrary, apparently interested in moving from the Governor's mansion in Sacramento to a cabinet post in Washington. There was, General Eisenhower reported, no place for the Governor in the cabinet. While Governor Warren had been seriously considered for Attorney General, that post had gone to Herbert Brownell, an able New York attorney who had managed Eisenhower's campaign. Like Presidents before and after him, General Eisenhower had chosen as his chief law officer an individual with close personal and political ties to the incoming Chief Executive (a tradition that began when George Washington asked his long-time friend and family lawyer, Edmond Randolph of Virginia, to serve as the nation's first attorney general). As a leading early opponent of Eisenhower's candidacy, Governor Warren could scarcely have expected to be brought into the inner circle of the new President's Cabinet.

The news from Washington was not entirely bleak. The President-elect indicated that he intended to offer Warren the first vacancy on the Supreme Court. According to Chief Justice Warren's memoirs, General Eisenhower stated, "That is my personal commitment to you."² This commitment appar-

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1. Edwin D. Webb Professor of Law, New York University.

2. E. WARREN, *THE MEMOIRS OF EARL WARREN* 260 (1977).

ently was not the result of any political obligation or deal. At the 1952 convention, Governor Warren had not been quick to release the California delegation's votes to Eisenhower,³ and President Eisenhower in his memoirs stated flatly: "I owed Governor Warren nothing."⁴

Not surprisingly, a single telephone conversation under the pressing circumstances of a government in formation lacked the specificity of careful contract negotiations. Thus, and significantly for purposes of what was to transpire within the year, the Eisenhower-Warren phone conversation did not focus on whether the "first vacancy" was any vacancy on the Court, including the Chief Justiceship. It was indeed the top judicial post in the land, however, which became vacant on September 8, 1953, just before the convening of the October, 1953 Term, when a seemingly healthy Chief Justice Fred Vinson succumbed to a heart attack.

This turn of events left official Washington in a quandary. Based upon the agreement as to the "first vacancy," Governor Warren had to leave Sacramento for the third-ranking job in the Department of Justice, Solicitor General. In a luncheon meeting in Washington with Attorney General Brownell, Governor Warren had agreed in June, 1953 to accept this important but politically less visible post to build up his legal credentials for appointment to the Court. "It had been some time since Warren had actively practiced law, and Brownell said that the President believed that service as Solicitor General would be valuable prior to membership on the Supreme Court" (p. 2).

If history had taken the intended course and the California prosecutor-politician indeed had served in the crucible of the Solicitor Generalship for a season, Earl Warren would have stepped into the Chief Justiceship with a professional dimension indisputably distinct from that of a public official steeped in state politics and government. The effects of a sojourn as chief Supreme Court advocate for the United States government in the Eisenhower Administration are entirely unknown and unknowable, and it is idle to speculate as to what, if any, consequences would have flowed from Earl Warren's serving as President Eisenhower's advocate in the Supreme Court. After all, Justice Robert Jackson, in a well-remembered observation, indicated that the position he had taken as Attorney General in support of the constitutionality of the Lend-Lease program was simply the position of an advocate and not reflective of his own views.⁵

In being swept from a career in state and national politics to what Professor Schwartz repeatedly refers to as the Marble Palace, Earl Warren had no occasion, other than in avocational thoughts, to develop views as to the role of the courts in a representative democracy. Indeed, the Governor's political phi-

3. G. WHITE, *EARL WARREN: A PUBLIC LIFE* 138 (1982).

4. D. EISENHOWER, *MANDATE FOR CHANGE: THE WHITE HOUSE YEARS* 228 (1963); *see also* J. POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* 152 (1979).

5. J. GUNTHER, *INSIDE USA* 18-20 (1947).

losophy was not entirely clear; in 1947, one well-known non-legal observer remarked about then Governor Warren: "[H]e has the limitations of all Americans of his type with little intellectual background, little genuine depth or coherent political philosophy; a man who has probably never bothered with an abstract thought twice in his life. . . ."⁶ More charitably Professor Schwartz notes: "There was no hint of greatness in the first phase of Warren's career. An honest, hard-working and vigorous law-enforcement officer, there was little to distinguish Warren from his peers. . . . The early Earl Warren was more than most a product of his upbringing and surroundings" (p. 7).

Governor Warren may have come to Washington in the autumn of 1953 with few, if any, jurisprudential or constitutional views. Professor Schwartz does not suggest the contrary. In fact, the author seems to conclude that, with the magisterial exception of *Brown v. Board of Education*,⁷ the early terms showed little of Warren's reformist inclinations or of any particular predilection (p. 127). The politician-turned-judge even deferred to the senior Justice Hugo Black, who in effect presided at the early conferences attended by the new Chief Justice. In the early going, save for the strong leadership displayed in the school desegregation cases, Earl Warren was getting his judicial sea legs.

In the early pages, the author recounts the intellectual ferment stirring the Court at the time of the new Chief's arrival. He describes accurately, but a bit summarily, the cleavage between Justices Black and Frankfurter and the differing views of judicial philosophy underlying their profound disagreement:

To Frankfurter, restraint was the proper posture for a nonrepresentative judiciary, regardless of the nature of the asserted interests in particular cases. In all cases, Frankfurter felt, "Humanity is not the test of constitutionality." On the contrary, as he once wrote Justice Murphy, "a sensitive humanitarian who has taken the oath as a judge . . . does not yield to his compassion, or . . . think his compassion is the measure of law."⁸ [Pp. 42-43.]

Frankfurter felt, the author correctly observes, a close spiritual kinship with Holmes, who in dissent had fought the intrusion of judicial predilections into the process of determining whether legislative enactments passed constitu-

6. It is a matter of lively debate whether as of his appointment in 1953, Earl Warren had a developed judicial philosophy. Professor Schwartz does not say that Warren did, but Professor G. Edward White in his recent study of Earl Warren argues that throughout his public life Chief Justice Warren had "a deep commitment to a general set of principles that were consistent in themselves." G. WHITE, *supra* note 3, at 4. Professor White concluded that as a judge, "Warren developed a theory of judging that combined an ethical gloss on the Constitution with a activist theory of judicial review." *Id.* at 6. This theory came with time, however. Upon ascending the bench, Earl Warren was, at bottom, a man comfortable with the exercise of power and a firm believer in the capacity of government to solve problems. These problems included the achievement of social justice. "His sympathy for persons oppressed by special interests ran deep: he was a Progressive first and a Republican second." *Id.* at 154.

7. 347 U.S. 483 (1954).

8. S. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 86 (1974).

tional muster.⁹ Frankfurter's admiration for Holmes was admittedly almost without bounds. "You have a right to deem my attitude toward Holmes close to idolatry, certainly to reverence" (p. 42).

Justice Black would have none of this. Deference to Congress was, in effect, an abdication of judicial responsibility. Black's avowed activism was simply giving vent, in his view, to the duty of judges to provide their "honest judgment" as to the constitutionality of an act of Congress.

After laying out the intellectual dividing line between Black and Frankfurter, the author enthusiastically embraces Justice Black's constitutional views and dismisses Frankfurter's contribution. Professor Schwartz cannot be accused of masking his own jurisprudential preferences, for he rejects out of hand the Holmes and Frankfurter traditions with the following pronouncement: "In the end, it was Black, not Frankfurter, who best served the Court and the nation. With all his intellect and legal talents, Frankfurter's judicial career remained a lost opportunity" (p. 48).

Why is it, the reader presumes to ask, that Frankfurter's career floundered on the shoals of missed opportunity. Professor Schwartz does not blanch: Justice Black was for individual liberties as against the powers of government.¹⁰ In contrast, "no matter how he tried to clothe his opinions with the Holmes mantle, there was an element of shabbiness in the results reached by Frankfurter in too many cases" (p. 48). The anti-libertarian results of the philosophy of restraint are thus simply too much for Professor Schwartz to bear, regardless of the powerful intellectual justification for a restrained judiciary in a representative democracy, the precise basis of the great Holmes dissents.

The relevance of this dispute between the intellectual titans of the Court is powerfully demonstrated by the author. Chief Justice Warren was feeling his way in the early days, torn between these two competing schools of thought. The uncertainty and vacillation were not to remain for long:

Not until the 1956 term, did Warren finally make the choice. When he did, it was to reject the philosophy of judicial restraint and join hands with Black. From then on, it was Warren who was to lead the Court, with Black as a principal ally, in rewriting so much of the corpus of constitutional law. [pp. 47, 49.]

Thus began the modern constitutional revolution.¹¹

9. *Id.*; see F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 26-29 (1961); F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 192 (1962); THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER 189-90 (S. Konefsky ed. 1949); Frankfurter, *The Early Writings of O.W. Holmes, Jr.*, 44 HARV. L. REV. 717, 723-24 (1931).

10. See G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 424-25 (1977); V. HAMILTON, HUGO BLACK: THE ALABAMA YEARS 301-08 (1968); G. WHITE, THE AMERICAN JUDICIAL TRADITION 331-36 (1976).

11. See R. McCLOSKEY, THE MODERN SUPREME COURT 322-66 (1972); B. SCHWARTZ & S. LESHER, INSIDE THE WARREN COURT 199-213 (1983); G. WHITE, *supra* note 10, at 317-68. See generally P. KURLAND, POLITICS, THE CONSTITUTION,

The new Chief Justice was warmly received by the Brethren in the early days. The Justice destined to be the new Chief's nemesis, Felix Frankfurter, was impressed by the style and manner of the Court's newest member: "I like him as a human being. He is agreeable without being a back-slapper; he is informal but has native dignity" (p. 148). To Justice Robert Jackson, Frankfurter wrote in April, 1954 about the new Chief's handling of a particular matter: "[Warren] . . . showed the understanding that comes from caring for the real responsibility that that problem implies. What a pleasure to do business with him" (p. 148). Indeed, Justice Stewart recalls, according to Professor Schwartz, his understanding "that, when Earl Warren first came to the Court as Chief Justice, Felix was going around Washington saying, 'This is the greatest Chief Justice since John Marshall and maybe greater'" (p. 147).

Justice Frankfurter's benign, avuncular attitude toward the new Chief doubtless was influenced by the fact that in the early days the new Chief was typically in accord with Frankfurter. "[Warren] was assiduously courted by Frankfurter, who sought to win the new Chief to his own judicial philosophy" (p. 146). The prolific Frankfurter "bombarded Warren with notes, memoranda, articles and even texts intended to inculcate the Frankfurter view" (p. 149). Frankfurter, who along with Jackson was already hopelessly at odds with Justice Black, found to his great satisfaction that the new Chief in his first term disagreed with Black in twenty-two cases (p. 151).

The new sense of good feeling on a Court plagued with stormy relationships, such as the bitter public feud between Black and Jackson, was most dramatically evidenced in *Brown*. Warren, we are informed, had little trouble in coming to a decision on the merits in *Brown*. *Plessy v. Ferguson*,¹² the 1896 case holding over the first Justice Harlan's magnificent dissent that the principle of separate-but-equal comported fully with the equal protection guarantee of the fourteenth amendment, was plainly wrong. The new Chief's views or inclinations were not evident, however, at the time of oral argument in *Brown* in December, 1953; the Chief Justice asked very few questions, leaving the field to more active questioners such as Justices Frankfurter and Jackson. The Chief's reticence, however, ended when the conference room doors were closed:

Until [the conference], his Brethren had found a bluff, convivial colleague, who disarmed them with his friendliness and lack of pretension. Now they were to learn that he was a born leader, whose political talents were to prove as useful in the Judicial Palace as they had been in the State House. [p. 84.]

Before Chief Justice Warren's ascension, the Court had been badly fragmented on the fourteenth amendment issues in the school desegregation cases. The Court was divided four to three to two in its internal councils: Justices Black, Douglas, Burton and Minton favored overruling *Plessy*; Chief Justice

AND THE WARREN COURT (1970); L. LEVY, THE SUPREME COURT UNDER EARL WARREN (1972); C. LYTLE, THE WARREN COURT AND ITS CRITICS (1968); R. MASLOW, "CODDLING CRIMINALS" UNDER THE WARREN COURT (1969).

12. 163 U.S. 537 (1896).

Vinson, Justice Clark and Justice Reed favored *Plessy's* retention; Justices Frankfurter and Jackson were troubled by state-imposed segregation but *dubitant* as to the jurisprudential basis for overruling the long-standing precedent.¹³ Under prodding from Justice Frankfurter, the Court had put the school desegregation cases over until the 1953 Term for reargument in order for the deeply divided Court to consider the issues at greater leisure. As Professor White has observed in his book on Chief Justice Warren:¹⁴

The major purpose of the reargument was to give the Justices more time to congeal their positions on the segregation cases. Frankfurter and Jackson, especially, were fearful that an opinion that invalidated segregation but did so in a strident or unreasoned fashion would do greater harm than the continuance of the practice.¹⁵

Time had radically altered the judicial landscape. At this juncture after Chief Justice Vinson's death, the incumbent Chief Justice embraced the views already espoused in conference during the prior term by four other members of the Court. But, as is now well-known, the monumental achievement of the new Chief Justice was not the amassing of five votes to overrule *Plessy*. It was, rather, the skillful "forging of a unanimous majority for the *Brown* decision" which established what Professor White refers to as Warren's "presence" on the Court.¹⁶ Here in *Brown* was the use of power to achieve laudable social ends. It was, in a way, like being Governor all over again:

[*Brown*] involved convincing others of the necessity for an arm of government to act decisively and affirmatively where a moral issue was at stake. The elimination of segregation, in [Warren's] mind, was comparable to the establishment of compulsory health insurance [in California]. Both were responses to an injustice; both sought to prevent humans from being disadvantaged through no fault of their own.¹⁷

Justice Frankfurter was, of course, in accord with the Chief's proposed result in *Brown*. The rationale, however, was quite a different matter. Perhaps to secure unanimity among the Brethren, the Chief Justice had argued in conference that state-mandated segregation carried with it the mark or badge of inferiority; thus, anyone defending the principle of separate-but-equal would find himself very much on the defensive. It was a useful device, and apparently forcefully presented by Warren in conference. As Professor White has observed: "Without labeling defenders of the *Plessy* decisions white supremacists, he conveyed that association. This was a familiar Warren technique, the argument to induce shame."¹⁸

13. G. WHITE, *supra* note 3, at 162; *see generally* R. KLUGER, *SIMPLE JUSTICE* (1976).

14. *See* Kurland, Book Review, 96 HARV. L. REV. 331-39 (1982) (reviewing G. WHITE, *supra* note 3).

15. G. WHITE, *supra* note 3, at 163.

16. *Id.*

17. *Id.*

18. *Id.* at 165.

Schwartz's book ably chronicles the process by which the new Chief Justice persuaded and cajoled his Brethren that the need for unanimity was paramount for the sake of the Court and the nation. As is now well known through such sources as Richard Kluger's *Simple Justice*,¹⁹ Warren secured the Justices' agreement at the initial conference to discuss the cases informally without taking votes. Thus, the Chief avoided the eight Justices' freezing themselves into varying positions by even tentatively voting. The former Governor had dealt long enough with legislators to have learned well the lesson of urging one's prospective but uncertain allies to keep their options open so the desired votes could eventually be secured without forcing an embarrassing *volte-face*. Professor Schwartz quotes the comments of Warren himself in this regard a year after the *Brown* decision: "The fact that we did not polarize ourselves at the beginning gave us more of an opportunity to come out unanimously on it than if we had done otherwise" (pp. 84-85).

In the meantime, Justice Frankfurter was providing the Court with an abundant fare of constitutional food for thought. The Justice circulated a lengthy memorandum, reflecting apparently in large measure the laborious effort of Frankfurter's law clerk, Alexander Bickel,²⁰ analyzing the intent of the framers of the post-Civil War fourteenth amendment. That lengthy voyage back in time, involving "months of plowing through the musty, near century-old folio volumes of the *Congressional Globe*" resulted in the conclusion that the legislative history of the Amendment was "inconclusive" (p. 85). That conclusion was helpful to the anti-*Plessy* abolitionists, for Chief Justice Warren's late predecessor had argued in conference only a year earlier in December, 1952 that the fourteenth amendment's framers had *not* intended to abolish segregation.

With the Court thus not swimming against a tide of adverse legislative history, the Chief Justice urged the conference to abolish state-mandated segregation on moral grounds, namely that *Plessy* improperly and unfairly placed a badge of inherent inferiority upon blacks. Professor Schwartz superbly captures the spirit of *Brown* and much of the jurisprudence that was to follow during the era of the Warren Court:

Warren's words [at the conference] went straight to the ultimate human values involved. In the face of such an approach, traditional legal arguments seemed inappropriate, almost pettifoggery. To quote [Justice] Fortas . . . , "opposition based on the hemstitching and embroidery of the law appeared petty in terms of Warren's basic value approach." [P. 87.]

The new Chief Justice evinced in the Court's consideration and decision of *Brown* two traits that were to become hallmarks of his tenure as the Na-

19. (1976).

20. Works by Alexander Bickel include *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); *THE MORALITY OF CONSENT* (1975); *POLITICS AND THE WARREN COURT* (1965); *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

tion's highest judicial official: first, extraordinary political and interpersonal skills of leadership and persuasion; and second, a willingness to lay down far-reaching rules wrapped in the mantle of the Constitution, with a minimum of concern for the "embroidery and hemstitching" of the law. The first attribute can scarcely be gainsaid, and its value to a Chief Justice presiding over the Court in the stormy years from Korea to the first year of the presidency of Richard Nixon can hardly be underestimated. This characteristic would set the new Chief Justice apart from predecessors such as Fred Vinson, whose conference presentations were deemed by the Brethren to be shallow, and Harlan Fiske Stone, whose abilities were unquestioned but who turned the Justices' conferences into combative debates by always insisting upon having the last word.

The second attribute reflected by *Brown* and much that was to follow in the Warren era is what makes Earl Warren an object of such abiding interest and debate. He was, quite simply, not a lawyer's lawyer, nor did he become a judge's judge. He was a law giver, a reshaper and reformer of society, a zealous protector of individual interests (with certain exceptions, such as cases involving obscenity). He was the promulgator of a moral code; a man who "raised ethics to a high judicial art."²¹ His former law clerk, Professor White, readily concedes that the Chief Justice took his own ethical judgments as a more reliable standard than the text of the Constitution.²² He was the Nation's Platonic Guardian, guided by conscience and a humanitarian zeal to help the disadvantaged. As such, he was skeptical of modern representative government with its uncertainties and compromises. Professor White said it well: "Warren's progressivism had led him to believe that legislatures were neither 'democratic' nor 'representative'. . . . Warren had . . . been inclined [as Governor] . . . to prefer his own solutions to social problems over those of legislators. . . ."²³

To abide always by the representative process was to blink at injustice. Legislatures, captured by special interests and oblivious to the needs of the disadvantaged, were not forums where fairness could reign. In contrast, the judge, above all a politically effective Chief Justice, could root out injustice and eliminate unfairness by opening wide the courthouse doors throughout the nation to provide sanctuary for society's forgotten and oppressed.

Brown was in retrospect the signal event in the judicial education of Earl Warren. It was his judicial trip on the road to Damascus, for after *Brown*, "Warren became a champion of activism. . . . He had resumed the familiar stance of progressive champion of the public interest" (pp. 170-202). He could be, if you will, a Super Governor with the legislature never in session, so long as he had four other votes to support his view. Judicial power could be employed for noble, disinterested ends, carrying out a sense of personal fairness

21. G. WHITE, *supra* note 3, at 367.

22. *Id.* at 362.

23. *Id.* at 353.

developed over years of rich experience in the world of practical affairs. This was no arid intellectual exercise, devoid of human sensibilities, reliant upon the process of reason and guided by restraint born of humility. It was American self-confidence writ large, wrapped in judicial attire, a secular priesthood of enlightened, humane concern for the downtrodden. This was, to be sure, heady stuff; the Governor had become overnight the Platonic Guardian for the entire Nation, motivated only by devotion to the public good. Anthony Lewis, who covered the Court for the *New York Times*, has aptly conveyed the results of the Chief's journey toward activism: "Earl Warren was the closest thing the United States has had to a Platonic Guardian, dispensing law from a throne without any sensed limits of power except what was seen as the good of society."²⁴

This was too much for Felix Frankfurter to bear. The disciple of Holmes and Brandeis, Frankfurter was irretrievably bound to the modern theory of judicial review, namely that the courts, as a non-democratic branch, should use their extraordinary power with utmost care and caution. It is no surprise that Earl Warren's embrace of Progressive activism through the use of judicial power led to a deep and abiding rupture of relations with Frankfurter. The barrage of notes and memoranda gradually abated and died, leaving in its stead a body of embittered correspondence between Justice Frankfurter and Learned Hand, the country's most distinguished appellate judge of the day, on the subject of Earl Warren.²⁵ The letters are slashing vituperative. Judge Hand, the paragon of judicial temperament, wrote disparagingly to Frankfurter as follows:

The more I get of your present Chief, the less I admire him. It is all very well to have a man at the top who is keenly aware of the dominant trends; but isn't it desirable to add a pinch or two to the dish of what we used to call "law."
[p. 276.]

Judge Hand referred to the Chief Justice in correspondence as "that Dumb Swede," the "Pontifex Maximus" or "Judex Maximus" (p. 276-77).

To his credit, Professor Schwartz, notwithstanding his clear affinity for the Warren Court, does not try to blunt the sharp blows of contemporaneous criticism. He faithfully recounts Frankfurter's critique of Warren to Justice Harlan: "I am afraid [Warren's] attitude towards the kind of problems that confront us are more like that of a fighting politician than that of a judicial statesman" (p. 274). For good measure, the author quotes Frankfurter's complaint in 1963 about "present result-oriented jurisprudence" of the Warren Court and noting the "shoddy way, professionally speaking, they are turning out . . . cases" (p. 271).

Professor Schwartz's account suggests that things got sufficiently carried away that in employee injury cases, "the Chief and his allies would vote in

24. *Id.* (quoting 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 2726 (L. Friedman & F. Israel ed. 1969)).

25. See H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 182-190 (1981).

favor of the worker against overwhelming evidence" (p. 271). Writing Frankfurter from London, Dean Acheson noted sarcastically that the House of Lords had likely not heard of the Supreme Court's rule that "in negligence cases the defendant always loses" (p. 272). Frankfurter chafed under the Warren Court majority's insistence upon taking "uncertworthy" employer liability cases, another manifestation of the Chief Justice's insistence upon "doing justice." Justice Stewart summed it up well: "If the Chief Justice can see some issue that involves widows or orphans or the underprivileged, then he's going to come down on that side" (p. 267). Not surprisingly, the Supreme Court docket exploded with previously routinely denied cases under the Federal Employers Liability Act.²⁶

The author does not pass judgment on all this, save for in the opening pages of the book discussed above. He limits himself to reporting faithfully the results of his prodigious digging through the contemporaneous records of the sixteen Terms during which Earl Warren presided over the Court. For this Professor Schwartz deserves much credit. It would be heavy baggage indeed for a single volume to canvas the case-by-case adjudications of the Court and then provide a critique of the numerous matters being reported. To be sure, Professor Schwartz's role as the researcher produces moments when the reader hungers for analysis, rather than being moved on as in a cafeteria line to the desserts of a term already laden with an abundance of salads and entrees.

For example, Professor Schwartz reports in his matter-of-fact style on the landmark Warren Court cases analyzing the law of federal habeas corpus, particularly *Fay v. Noia*²⁷ and *Townsend v. Sain*.²⁸ The book's treatment of these two cases is entirely descriptive in nature. No attempt is made to evaluate the historical bases or analytical premises of the cases which, with *Brown v. Allen*,²⁹ decided shortly before Earl Warren's cross-country move from Sacramento, transformed overnight federal habeas corpus into an important area of federal civil jurisdiction. What is admittedly frustrating about Professor Schwartz's silence in evaluating or critiquing such cases is that *Fay*, it is generally agreed, represented the most evident sort of historical revisionism by the Warren Court in order to avoid the injustice or unfairness in one individual's

26. See *Ferguson v. Moore-McCormick Lines, Inc.*, 352 U.S. 521, 524 (1957) (Frankfurter, J., dissenting); see also Steinberg, *The Federal Employers' Liability Act and Judicial Activism: Policymaking by the Courts*, 12 WILLAMETTE L.J. 79 (1975); Note, *Supreme Court Certiorari Policy in Cases Arising Under FELA*, 69 HARV. L. REV. 1441 (1956).

27. 372 U.S. 391 (1963) (federal courts have power under federal habeas corpus statute to grant relief even though applicant failed to exhaust state remedies by not appealing state conviction; statute refers only to failure to exhaust state remedies still available at time of application to federal court).

28. 372 U.S. 293 (1963) (held an evidentiary hearing is required in federal habeas corpus cases to review state trial court ruling on admission of alleged coerced confession, but most noted for prospective enunciation of elaborate standards governing habeas corpus hearings).

29. 344 U.S. 443 (1953).

remaining in prison while his cohorts had been granted a new trial. In reviewing *Fay*, one of the Nation's most distinguished federal appellate judges, Henry J. Friendly of the Second Circuit Court of Appeals, said:

It has now been shown with as close to certainty as can ever be expected . . . that, despite the 'prodigious' research evidenced by the *Noia* opinion, the assertion that habeas as known at common law permitted going behind a conviction by a court of general jurisdiction is simply wrong.³⁰

The failures of the Warren Court to set forth principled grounds for its far-reaching decisions have of course been fully catalogued elsewhere. Even the Court's heartiest defenders acknowledge severe defects in its judicial craftsmanship. Professor White, for example, has readily admitted that the Chief Justice's "reasoning was often technically imperfect, opaque, or assertive."³¹ The thoughtful criticism of the late Alexander Bickel has become a classic part of modern constitutional commentary. The Warren Court, Professor Bickel suggested, "relied on events for vindication more than the method for reasoning for contemporary validation."³² The Court, he argued, was zealously pursuing the ideal of the Egalitarian Society, as Professor Phillip Kurland had previously suggested,³³ and the role of precedent and lawyerly analysis was quite clearly of secondary importance. The sixteen-year enterprise was, in a word, guided by faith—a secular faith in a just, humane society that would ultimately vindicate the Court's adventure by agreement with the enlightened results of the Court's handiwork: "Such a faith need not conflict with, but it overrides standards of analytical reason and scientific inquiry as warranties of the validity of judgement."³⁴

The ultimate evaluation of the Court during Earl Warren's tenure therefore depends upon the standard one applies in measuring the Court's contribution. To the extent one is comfortable with the model of Judicial Guardianship, the test of the pudding is in the results—whether one agrees with the substantive results of what the Warren Court wrought in various areas of law. Romantic attachments to the idea of a permanent Counsel for the Public Good, protected by the independence conferred by article III, and wielding enormous power to bring about fairness and justice through the liberally available process of litigation, is, of course, at the base of such proposals as Professor Arthur S. Miller's iconoclastic call for a Counsel of State.³⁵

The Guardianship approach is, to say the least, susceptible to the concern expressed so clearly by Judge Hand in the Holmes Lectures at Harvard in

30. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170-71 (1970).

31. G. WHITE, *supra* note 3, at 365.

32. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 12 (1970).

33. Kurland, *Forward: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1964).

34. A. BICKEL, *supra* note 32, at 14.

35. A. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT* 297-303 (1982).

1958:

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, a part in the direction of public affairs.³⁶

Ultimately, the choice comes down to whether the "embroidery and hem-stitching" of the law is of overriding significance to the judicial process, which in turns depends on the importance one attaches to the notion of democratic government. For the principle that the people are sovereign, in that the electoral process is the continuing exercise of bedrock sovereignty subject to the constraints of the fundamental law of the Constitution, is at the base of the great dissents of Holmes and Brandeis and of the modern theory of limited judicial power. "If Holmes' theory, appealing as it is to believers in democracy, is to be supplanted by Warren's it will take a reasoned demonstration."³⁷

Professor Schwartz's book makes no pretense at offering a reasoned defense of the Warren Court's jurisprudence. This is history, valuable and readable, but nothing more. The first half of the book is by far the most interesting, tracking the quick transformation of Earl Warren into the unabashedly activist judge and the escalating ideological battle between Justice Frankfurter and Chief Justice Warren, aided closely and effectively by Justice Brennan, who drew many of the more difficult assignments from the Chief Justice. The principal adherents to the philosophy of Holmes and Brandeis, Frankfurter and Jackson, were gone by 1962. With Frankfurter's retirement, the book becomes much less interesting, which is by no means the fault of the author. Frankfurter's retirement in 1962, Professor Bickel aptly states, "measurably contracted the universe of judicial discourse."³⁸ While Frankfurter's philosophical heir, the second Justice Harlan, provided intellectual leadership for the dwindling band of dissenters—particularly with the appointment at various times of Justices Goldberg, Fortas, and Marshall—the book inevitably takes on a more pronounced descriptive tone as the Court marches to its landmark criminal procedure decisions such as *Gideon v. Wainwright*³⁹ and *Miranda v. Arizona*.⁴⁰

The book manages to end more with a bang than a whimper, as the account turns to the final two Terms, 1967 and 1968, when Justice Black and the Chief Justice, staunch allies in the '50's who had parted company in the great civil rights sit-in cases of the 1960's, joined forces to achieve, at the twilight of Warren's tenure, results that seem to be departures from the mainstream of Warren Court jurisprudence. "During the 1967 Term, Warren and

36. L. HAND, *THE BILL OF RIGHTS* 73 (1958).

37. Isenbergh, *Book Review*, 93 YALE L.J. 384, 391 (1983) (reviewing G. WHITE, *supra* note 3).

38. A. BICKEL, *supra* note 32, at 4.

39. 372 U.S. 335 (1963) (sixth amendment right to counsel in criminal prosecutions made obligatory on states by the fourteenth amendment).

40. 384 U.S. 436 (1966).

Black were to join in several decisions that were seen by some as retreats from the activist protection of individual rights which had been the hallmark of the Warren Court" (p. 683). Warren and Black joined to carry the day in *United States v. O'Brien*,⁴¹ the draft-card burning case, to hold that the concept of "symbolic speech" was not amply broad to bring O'Brien's activities within the protection of the first amendment. Although the conference's result prompted what the author calls "virtual guerilla warfare against the decision" by the law clerks, their zeal was unrequited:

[Warren's opinion for the Court] recognized that the communicative element in O'Brien's conduct brought the First Amendment into play. But it found that the government had a *substantial* interest (not the *compelling* interest Brennan had urged was necessary) in assuring the continuing availability of draft cards which justified the law prohibiting their destruction. [pp. 684-85.]

This deference to stated governmental interest was also evident in *Terry v. Ohio*,⁴² the stop-and-frisk case. In *Terry*, the Chief Justice recognized the legitimate and strong law enforcement interest in self-protection as against the asserted fourth amendment interests of the individual. But as an example of a recurring theme in the book, it was Justice Brennan who supplied, as in other decisions, much of the rationale for the Chief Justice's opinion, including re-shaping the analysis from one of probable cause to one of reasonableness under the fourth amendment (pp. 685-91). In fact, it would seem from Professor Schwartz's research that Justice Brennan⁴³ provided for the Chief Justice what Felix Frankfurter had been unable to provide, namely intellectual guidance to a Chief Justice more concerned about the fairness and justice of result than the "embroidery and hemtitching" of the law. While Professor Schwartz refers to Justice Brennan as the Chief Justice' principal lieutenant, it would seem more accurate, based upon the author's account of the voluminous exchange of notes, memoranda, and draft opinions, to view Justice Brennan as the Chief Justice's primary legal counselor and advisor. If the Warren Court had a "Chief Counsel," it would appear to have been, ironically, the Eisenhower appointee from New Jersey, not the titans of the Court, Black and Douglas, appointed by Franklin Roosevelt.

The final Term, 1968, gave rise to the landmark fourteenth amendment case of *Shapiro v. Thompson*,⁴⁴ the right-to-travel case in which the Chief Justice was in stout dissent from his longstanding allies. The issue in this case was the constitutionality of Connecticut's one-year residency requirement for eligibility for federally funded Aid to Families with Dependent Children.⁴⁵ In

41. 391 U.S. 367 (1968).

42. 392 U.S. 1 (1968).

43. See generally S. FRIEDMAN & W. BRENNAN, *AN AFFAIR WITH FREEDOM* (1967).

44. 394 U.S. 618 (1969) (state law restricting welfare benefits to persons who have resided in the state for at least one year burdens the exercise of the right to travel).

45. *Id.* at 623.

an intriguing account of the decisional process in the case, Professor Schwartz describes the fact that the case had originally been argued late in the 1967 Term. Chief Justice Warren had led the conference to a tentative vote, six to three, in favor of *upholding* the state's residency requirement. Being in the majority, the Chief assigned the opinion to himself and promptly circulated an opinion concluding that Congress had authorized the states to impose residency requirements such as Connecticut's; that the constitutional test was the mild form of "rational basis" scrutiny under the fourteenth amendment, and that the authorization by Congress "has the necessary rational basis to overcome an equal protection attack" (p. 727).

Two days later, Justice Douglas circulated a short dissent, but it was only the harbinger of a thirty-page dissent circulated thereafter by Justice Fortas. The Fortas opinion concluded that Connecticut's law impermissibly infringed the constitutionally protected right to travel and denied equal protection. The Fortas draft caused Justice Brennan deep misgivings about his expressed agreement with Warren. Brennan switched his vote, and with Justice Stewart remaining unsettled, the four-four split on the Court with the Term's conclusion rapidly approaching led the Justices to set the case for reargument in the 1968 Term.

The reargument, heard in October 1968, the Chief's final Term, led Justice Stewart to vote with Fortas and Brennan. The vote was now five to three in favor of striking down the statute, with Justice White abstaining. Chief Justice Warren, in the majority the prior year, now found himself, along with Justice Black, in dissent along with Justice Harlan.

Justice Douglas, as the senior Justice in the majority, assigned the opinion to Justice Brennan, who authored what Professor Schwartz understatedly labels "a broad opinion expanding the scope of judicial review in equal protection cases" (p. 728). Reviving the "compelling interest" standard that he had unsuccessfully urged upon the Chief Justice in the *O'Brien* case the preceding Term, Justice Brennan's draft opinion, which ultimately commanded a solid majority, "extended the 'compelling interest' standard to cases involving 'fundamental rights,' such as the right to travel" (p. 728). This approach was irretrievably far removed from the "rational basis" test employed by Chief Justice Warren in his ill-fated circulation in the late spring of the 1967 Term.

After an abortive effort to modify the Brennan majority opinion to enable the Chief to join, Warren stuck to his analytical guns and dissented, maintaining that the appropriate test of constitutionality was the "rational basis" test articulated in his earlier draft opinion. Justice Black switched sides once again, joining with the Chief in attacking a constitutional revolution that had now seemingly gotten out of hand. The creators of the revolution were, in their final days on the Court, becoming more Burkean in disposition. Professor Schwartz says it well:

"The Chief and the Alabaman had, of course, been the principal architects of the constitutional edifice created by the Warren Court. But judicial revolutions, too, may devour their creators. Warren, like Black, had begun to take

exception to the tendency of some of the Brethren to expand individual rights at the expense of essential societal interests." [P. 732.]

The latter day opinions in such cases as *O'Brien* and *Shapiro* in no way suggest that the Chief Justice had come to the view that the Warren Court majority had turned into a runaway Court. The Chief's movement away from the activism that spawned *Reynolds v. Sims*,⁴⁶ *Mapp v. Ohio*,⁴⁷ and *Powell v. McCormack*,⁴⁸ the last a 1968 Term decision, must be analyzed case-by-case, rather than forced into a Procrustean view that Earl Warren was, as it were, sorrowfully repenting of the past as retirement from the bench loomed ahead. It is, rather, a tribute both to the complexity of the personalities on the Court and the difficulty of the issues before them that Warren—and Black—voluntarily got off the constitutional train somewhere short of its ultimate destination.

In a word, an opinion or two, inconsistent with the Zeitgeist of the Warren Court of the early and middle years, does not alter the conclusion, abundantly demonstrated throughout Professor Schwartz's history, that Earl Warren was the unashamedly energetic National Guardian, protecting the losers in a democratic process that the Governor-Chief Justice distrusted. Distrust of democratic institutions and their untidy results on the part of a politician-turned Chief Justice may seem at best curious and at worst incompatible with the theory and practice of self-governance through representative institutions. But distrust of those institutions is, ironically, perhaps to be more expected of an eminently practical man of affairs who had spent his career only in the executive branch of state government than those of a more academic or theoretical bent, such as Holmes or Frankfurter or Harlan.

We are still too close to the Warren era to draw ultimate conclusions; it is much easier to get concurrence as to the nature and contribution of the Supreme Court under Marshall or Taney than under a Chief Justice who was in office only fifteen years ago. But whatever time must pass before history renders final judgment on the Warren Court, it will be difficult as against the formidable voices of Frankfurter and Harlan, even if those voice are less powerful than those of their intellectual forebears, Holmes and Brandeis, for legal history not to conclude that a Court with the unbridled enthusiasm for reform that characterized the Warren era could not, at bottom, have its charter continue for long without the sort of cathartic intervention manifested by Roosevelt's Court-packing plan.⁴⁹ Representative institutions are simply too deeply rooted in the framework of the American experience for the long continued exercise of raw, wholesale policymaking power by a judiciary that is, by design, the least democratic part of our governmental structure.

46. 377 U.S. 533 (1964) (equal protection clause requires the districts for each house in a state legislature to be equal in population).

47. 367 U.S. 643 (1961) (exclusionary rule applicable to the States).

48. 395 U.S. 486 (1969).

49. J. ELY, *DEMOCRACY AND DISTRUST* 46-47 (1981).

