COMMENTARY

Earl Warren as a Judge

By BERNARD SCHWARTZ*

Introduction

It is now fifteen years since Earl Warren retired as Chief Justice of the United States and ten years since his death.[1] Enough time has passed to confirm the common estimate that the Warren Court era constitutes one of the most significant in American judicial history, second only to the Marshall Court. During Warren's tenure, the Supreme Court virtually rewrote the corpus of our constitutional law. Concepts and principles that had appeared unduly radical not too long ago became accepted rules of law. In this sense, the Warren period was a second formative era in Supreme Court history, in which public law underwent changes as profound as the ones occurring in the country at large. The Warren Court led the movement to remake constitutional law in the image of an evolving society. In doing so, the Justices had to perform the originative role that the jurist normally is not called upon to exercise in more stable times—a role usually considered more appropriate for the legislator than for the judge.

The constitutional revolution wrought by the Warren Court is now widely recognized, but there is no consensus concerning the role of Earl Warren in bringing it about. More particularly, was the Chief Justice in fact responsible for the decisions handed down by the Warren Court or was he only its titular head?

Too many constitutional scholars assume that the latter answer is the correct one. They claim that while Warren may have been the nominal head of the Court that bears his name, other Justices furnished the actual leadership. For example, Dunne's biography of Hugo Black proposes that Justice Black was really responsible for the "judicial revolution" that occurred during the Warren years.[2] More recently, a review of

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1. Chief Justice Warren retired on June 23, 1969 and died on July 9, 1974.

2. G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION chs. 14-19 (1977).

my own biography of Chief Justice Warren asserts that "the Brennan Court" provided a more appropriate title of the High Bench while Warren sat in its center chair.[3]

Justice Black himself always believed that he had led the judicial revolution during Warren's tenure. Black resented the acclaim that the Chief Justice received for leading the Court. As Black saw it, the Warren Court had only written into law the constitutional principles that he had advocated for many years.[4] When Warren retired as Chief Justice, the Justices prepared the traditional letter of farewell. The draft letter read: "For us it is a source of pride that we have had the opportunity to be members of the Warren Court." Black changed the last phrase to "the Court over which you have presided."[5]

My biography of Warren portrays him as a strong Chief Justice whose leadership of the Court is best characterized by the book's title, *Super Chief*—the title used by Justice Brennan after the Chief Justice's retirement and adopted by members of the Court who looked back with nostalgia at the Warren years.[6] The laudatory sobriquet does not, however, answer the question of Warren's effectiveness *as a judge*. Nor was that question answered in *Super Chief*, which presented a factual account of the work of the Warren Court. By emphasizing the Court's deliberations during important cases, the biography intended to reveal what happened behind the red velour curtain. Critical analysis of Warren's judicial performance was intentionally not included.

I. Leadership Not Scholarship

This Commentary, on the other hand, attempts to analyze Earl Warren as a judge. The analysis begins by paraphrasing Macaulay's famous statement: "There were gentlemen and there were seamen in the navy of Charles II. But the seamen were not gentlemen, and the gentlemen were not seamen."[7] There have been scholars and there have been

3. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 923 (1983).

4. During the 1963 Term, the Court overturned a number of precedents that had become law over Justice Black's dissent. A. BICKEL, POLITICS AND THE WARREN COURT 168 (1965). *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

5. "Dear Chief" Draft with changes in Black's handwriting (June 23, 1969) (Hugo L. Black Papers, Library of Congress).

6. *See* B. SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 771 (1983).

7. 1 T. MACAULAY, HISTORY OF ENGLAND 279.

great Justices on the Supreme Court. But the scholars have not always been great Justices, and the great Justices have not always been scholars.

To be sure, outstanding scholars did sit on the Warren Court; among them, Felix Frankfurter stands out. Frankfurter was as learned a Justice as ever sat on the Supreme Court. His scholarship far exceeded the bounds of legal arcana, unlike so many juristic scholars. The range of the Justice's scholarly interests is illustrated not only in his opinions and published writings, but also in his amazingly varied correspondence with the leading intellectual figures of the day—ranging from Alfred North Whitehead to John Dewey to Albert Einstein.[8] Publication of Frankfurter's best letters would serve not only law, but scholarship and literature as well.

Yet, Frankfurter may have been a better letter writer than he was a judge. With all his intellect and scholarly talents, Frankfurter's judicial career remained essentially a lost opportunity. As far as public law was concerned, he may well have had more influence as a law professor than as a Supreme Court Justice.[9] Although Frankfurter may have expected to be the intellectual leader of the Court, as he had been of the Harvard law faculty, the Chief Justice himself performed the true leadership role in the Warren Court.

But Warren was never a legal scholar in the Frankfurter sense. "I wish that I could speak to you in the words of a scholar," the Chief Justice once told an audience, "but it has not fallen to my lot to be a scholar in life."[10] The Justices who sat with him have all stressed that Warren may not have been an intellectual like Frankfurter,[11] but then, as Justice Stewart observed, "he never pretended to be one."[12]

In assessing the importance of scholarship as a judicial attribute, one should distinguish sharply between a member of the Supreme Court and its Chief Justice. Without a doubt, Justice Story was the greatest legal scholar ever to sit on the Court. His scholarship enabled him to make his outstanding judicial record, and his legal expertise supplied the one thing that Chief Justice Marshall lacked. Indeed, Marshall is reputed to have once said: "Brother Story here . . . can give us the cases from the Twelve Tables down to the latest reports."[13] It is safe to assume that

8. *See generally* Felix Frankfurter Papers (available in the Library of Congress).

9. *Cf.* J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 87 (1975).

10. J. POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 193 (1979).

11. Conversations with several Justices (Sept. 1979 and unrecorded dates).

12. Interview with Justice Stewart (Sept. 1979).

13. G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 91 (1970).

Story's learning often fleshed out the Chief Justice's reasoning with the scholarly foundation needed to support some Marshall opinions.

Still, no one conversant with American law will conclude that Story was a greater judge than Marshall. Story's scholarship could scarcely have produced the constitutional landmarks of the Marshall Court. When Marshall died, Story's admirers hoped that he would become the new Chief Justice.[14] But Story's appointment could have been a disaster; the scholar on the bench would have been a misfit in the Court's center chair.

This hypothesis is not mere conjecture. It is supported by the Court's experience under Chief Justice Stone, who, like Frankfurter, had been a noted law professor. From an intellectual viewpoint, Stone was an outstanding judge. Yet he failed as Chief Justice; his lack of administrative ability nearly destroyed the Court's effectiveness. The Stone Court presented a spectacle of unedifying atomization wholly at variance with its functioning as a collegiate tribunal.[15]

Stone's ineffectiveness was shown in his conduct at the conferences, a crucial stage in the Court's decisionmaking process. As Justice Stewart remarked, "Stone's problem was that, at a conference, he himself always insisted upon having the last word, and that's not the way you preside—always arguing with the person that had spoken." The result, as Stewart characterized it, was, not a discussion, but "a free-for-all."[16]

Warren clearly did not equal Stone as a legal scholar. But his leadership abilities and skill as a statesman enabled him to be the most effective Chief Justice since Charles Evans Hughes. Those Justices who served with him stressed Warren's leadership abilities, particularly his skill in conducting the conference. "It was incredible," said Justice Brennan just after Warren's death, "how efficiently the Chief would conduct the Friday conferences, leading the discussion of every case on the agenda, with a knowledge of each case at his fingertips."[17]

A legal scholar such as Stone treated the conference as a law school seminar, "carrying on a running debate with any justice who expresse[d] views different from his."[18] At conference, Warren rarely contradicted the others and made sure that each of them had his full say. Above all, he stated the issues in a deceptively simple way, reaching the heart of the

14. "The Supreme Court," Harvard President Josiah Quincy toasted, "may it be raised one Story higher." *Id.* at 307-08.

15. J. LASH, *supra* note 9, at 152.

16. Interview with Justice Stewart, *supra* note 12.

17. N.Y. Times, July 10, 1974, at 24.

18. J. LASH, *supra* note 9, at 152 (quoting Justice Frankfurter).

matter while stripping it of legal technicalities. As the *Washington Post* noted, "Warren helped steer cases from the moment they were first discussed simply by the way he framed the issues."[19]

In his first conference on *Brown v. Board of Education*,[20] Warren presented the question before the Court in terms of racial inferiority. He told the Justices that segregation could be justified only by belief in the inherent inferiority of blacks and, if *Plessy v. Ferguson*[21] was followed, it had to be upon that basis.[22] A scholar such as Frankfurter certainly would not have presented the case that way. But Warren's "simplistic" words went straight to the ultimate human values involved. In the face of such an approach, arguments based on legal scholarship would have seemed inappropriate, almost pettifoggery.

The work of a Chief Justice differs greatly from that of other members of the Court as far as legal scholarship is concerned. A person without scholarly interests would find the work of an Associate Justice most unrewarding, since an Associate Justice spends his Court time only hearing and voting on cases and writing opinions. Thus, while considering the appointment of a successor to Chief Justice Vinson, President Eisenhower asked a member of Governor Warren's staff whether Warren would really want to be on the Court after his years in high political office: "Wouldn't it be pretty rarified for him?" "Yes," came back the answer, "I frankly think he'd be very likely to be bored to death [as an Associate Justice]." But, the response went on: "My answer would be emphatically different if we were talking about the Chief Justiceship. He could run the place."[23]

The staff member's answer gets to the heart of the subject under discussion. The essential attribute of a Chief Justice is not scholarship but leadership. If he can "run the place" and induce the Justices to follow his lead, he will effectively head the Court.

The Chief Justice must still write his share of opinions backed by the traditional indicia of legal scholarship: discussion of complicated technical issues, citation and consideration of precedents, and learned-looking footnotes. But a lack of scholarly attainments does not necessarily preclude the production of learned opinions. The necessary scholarship can be supplied by the bright, young, ex-law review editors who serve as the

19. Wash. Post, June 15, 1983, at A16, col. 5.

20. 347 U.S. 483 (1954).

21. 163 U.S. 537 (1896) (establishing the doctrine of "separate but equal," which was overruled *sub silencio* in *Brown*).

22. B. SCHWARTZ, *supra* note 6, at 86-87.

23. *Id.* at 4.

Justices' law clerks. It did not take *The Brethren*[24] to make students of the Court aware of how much of the opinion-writing process has been delegated to the clerks. "As the years passed," wrote Justice Douglas of his own Court years, "it became more and more evident that the law clerks were drafting opinions."[25] The first drafts of the opinions that Chief Justice Warren assigned to himself were all prepared by his law clerks.

The Chief Justice would outline the way he wanted the opinion drafted, leaving the clerk with a great deal of discretion to flesh out the details of the opinion. Warren never pretended to be a scholar interested in research and legal minutiae. He left the reasoning and research supporting the decision to his clerks, as well as the task of compiling extensive footnotes, an indispensible component of the well-crafted judicial opinion.[26] Perhaps the most famous footnote in any Supreme Court opinion appeared in *Brown v. Board of Education*.[27] Noted footnote eleven listed seven works by social scientists to support the statement that segregation meant black inferiority.[28] Yet one of Warren's law clerks inserted the footnote into the opinion, and neither the Chief Justice nor the Associate Justices paid much attention to it at the time.[29]

II. Practical Experience and Decision Ability

Even if Chief Justice Warren was an effective leader, can it be said that he was a competent judge? One can go further and ask the question that was once asked about Justice Black: "Granting that [his] influence has been great, has he played the part of a judge?"[30]

In important respects, Warren as a judge differed from most occupants of the bench. Even his admirers admit that Warren was no Cardozo-type acolyte of the common law. This recognition appears as a natural corollary to the fact that he never devoted his life to the intricacies of juridical science. At the same time, it is erroneous to assume that because of his high political position at the time of his judicial appointment, Warren lacked experience in practicing law. His critics constantly charged that the Chief Justice had very little legal experience. Those

24. B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 9-10 (1979).

25. W.O. DOUGLAS, THE COURT YEARS 1939-1975, at 173 (1980).

26. B. SCHWARTZ, *supra* note 6, at 68.

27. 347 U.S. 483 (1954).

28. *Id.* at 494 n.11.

29. B. SCHWARTZ, *supra* note 6, at 107-08.

30. Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT 159 (S. Strickland ed. 1967).

dissatisfied with the decisions of the Warren Court used to say that they could expect nothing else from a tribunal not headed by a real lawyer.[31] But the charge was misplaced; Warren had more experience in legal practice than any other member of the Court to which he was appointed. He had headed one of the biggest law offices in California for thirteen years and served as the state's highest legal officer for another four years before becoming Governor.

Moreover, an examination of Warren's files as district attorney in the California State Archives reveals his skill as a lawyer, particularly in trial work. Warren personally appeared in court in many cases. In fact, he probably had more trial experience than most Supreme Court Justices. Willard W. Shea, the public defender of Alameda County when Warren served as county district attorney, referred to the record in Warren's most controversial trial and said, "if you flip pages rapidly and pick out the ones where Warren himself is doing either the examining or the cross-examining, it will give you considerable insight into his marvellous ability as a trial lawyer."[32]

Even more significant than practical legal experience is a judge's ability to reach a decision. The importance of this trait is illustrated by the career of the member of the Warren Court who most lacked it: Justice Whittaker. More than any other Justice, Whittaker found it difficult to make up his mind. Warren's "great strength," a Justice of the Warren Court told me, was "not to have to agonize. That was Charlie Whittaker's great problem, you know. He was a very, very conscientious man and a fine man, but he just didn't have the power of decision."[33] According to Justice Douglas, "In Conference, Whittaker would take one position when the Chief or Black spoke, change his mind when Frankfurter spoke, and change back again when some other Justice spoke."[34] After the conference, Whittaker would often agonize and agonize over deci-

31. *See, e.g.*, the statement by Senator McCarthy: "We made a mistake in confirming as Chief Justice a man who had no judicial experience and very little legal experience." N.Y. Times, May 12, 1956, at 6.

32. W.W. Shea, *Recollections of Alameda County's First Public Defender*, in PERSPECTIVES ON THE ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE (1972) (Earl Warren Oral History Project, Bancroft Library, University of California, Berkeley). *See* G. WHITE, EARL WARREN: A PUBLIC LIFE 34 (1982).

The trial record referred to is that of the celebrated *S.S. Point Lobos* murder case. The defendants, three of whom were maritime union members, were convicted of second degree murder for the slaying of the *Point Lobos*' chief engineer. People v. King, 30 Cal. App. 2d 185, 85 P.2d 928 (1938). The case was Warren's most controversial because the trial occurred during a crippling nationwide port strike. *See generally* J. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 84-94 (1967).

33. Interview with Supreme Court Justice (Sept. 1979) (name withheld by request).

34. W.O. DOUGLAS, *supra* note 25, at 173.

sions, swinging back and forth in key cases, which would make it most difficult for the Chief Justice and the others.

Chief Justice Warren, in contrast, had been making important decisions throughout his career and, by the time he arrived at the Court, decisionmaking was second-nature to him. He had an open mind and was amenable to persuasion, but he never struggled over decisions.

Nor did Warren ever delegate his decision power. His clerks might prepare drafts of opinions, but the Chief Justice constantly stressed to them that they were not "unguided missiles."[35] Once Warren made up his mind on a decision, he would stubbornly hold to it. As Justice Byron White recalled, Warren "was quite willing to listen to people at length . . . but, when he made up his mind, it was like the sun went down, and he was very firm, very firm about it."[36] The law clerks never had any doubt about who was the judge in the Warren chambers.

III. Fairness and Activism

There is an antinomy inherent in every system of law: the law must be stable and yet it cannot stand still.[37] It is the task of the judge to reconcile these two conflicting elements. In doing so, jurists tend to stress one principle or the other. Stability and change may be the twin sisters of the law, but few judges can keep an equipoise between the two.

Chief Justice Warren never pretended to try to maintain the balance. As soon as he had become established on the Court, he came down firmly on the side of change, leading the Supreme Court's effort to enable public law to cope with rapid societal change. Warren strongly believed that the law must draw its vitality from life rather than precedent. What Holmes termed "intuitions" of what best served the public interest[38] played the major part in Warren's jurisprudence. He did not sacrifice good sense for the syllogism. Nor was he one of "those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result."[39] When symmetry and logic were balanced against considerations of equity and fairness, he normally found the latter to be weightier.[40] In the Warren hierarchy of social values, the moral outweighed the material.[41]

35. B. SCHWARTZ, *supra* note 6, at 68.
36. Interview with Justice White (Sept. 1979).
37. R. POUND, INTERPRETATION OF LEGAL HISTORY 1 (1923).
38. O.W. HOLMES, THE COMMON LAW 1 (1923).
39. *Id.* at 1, 35-36.
40. *Cf.* Jacob & Youngs v. Kent, 230 N.Y. 239, 242-43 (1921) (Cardozo, J.).
41. *Cf.* B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 57 (1927).

Throughout his tenure on the Court, the Chief Justice tended to use "fairness" as the polestar of his judicial approach. Every so often in criminal cases, when counsel defending a conviction would cite legal precedents, Warren would bend his bulk over the bench to ask, "Yes, yes—but were you fair?"[42] The fairness to which the Chief Justice referred was no jurisprudential abstraction. It related to such things as methods of arrest, questioning of suspects, and police conduct—matters that Warren understood well from his earlier years as district attorney in Alameda County, California. Decisions like *Miranda v. Arizona*[43] were based directly upon the Warren fairness approach.

The Chief Justice's emphasis upon fairness and just results led him to join hands with Justices Black and Douglas and their activist approach to constitutional law. Their activism led to Warren's break with Justice Frankfurter—the foremost advocate on the Court of the Holmes doctrine of judicial restraint. To Justice Holmes, the legislator was to have the primary say on the considerations behind laws; the judge's duty was to enforce "even laws that I believe to embody economic mistakes."[44] Frankfurter remained true to the Holmes approach, insisting that self-restraint was the proper posture of a nonrepresentative judiciary, regardless of the nature of the asserted interests in particular cases. Warren followed the canon of judicial restraint in the economic area, but he felt that the Bill of Rights provisions protecting personal liberties imposed more active enforcement obligations on judges. When a law allegedly infringed upon personal rights guaranteed by the Bill of Rights, the Chief Justice refused to defer to the legislative judgment that had considered the law necessary.

Warren rejected the Frankfurter philosophy of judicial restraint because he believed that it thwarted effective performance of the Court's constitutional role. Judicial restraint, in the Chief Justice's view, all too often meant judicial abdication of the duty to enforce constitutional guarantees. "I believe," Warren declared in an interview on his retirement, "that this Court or any court should exercise the functions of the office to the limit of its responsibilities."[45] Judicial restraint meant that, "for a long, long time we have been sweeping under the rug a great many problems basic to American life. We have failed to face up to them, and

42. A. LEWIS, PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION 139 (1964).

43. 384 U.S. 436 (1966).

44. 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 167 (M. De Wolfe ed. 1961).

45. *Earl Warren Talks About the Warren Court*, U.S. NEWS & WORLD REP., July 15, 1968, at 62, 64 .

they have piled up on us, and now they are causing a great deal of dissension and controversy of all kinds."[46] To Warren, it was the Court's job "to remedy those things eventually," regardless of the controversy involved.[47] The Warren approach in this respect left little room for deference to the legislature, the core of the restraint canon.

The crucial question in constitutional cases, according to Justice Frankfurter, was

> who is to judge? Is it the Court or Congress? Indeed, more accurately, must not the Court put on the sackcloth and ashes of deferring humility in order to determine whether the judgment that Congress exercise[s] . . . is so outside the limits of a supportable judgment by those who have the primary duty of judgment as to constitute that disregard of reason which we call an arbitrary judgment [?][48]

To Warren and his supporters, Frankfurter had posed the wrong questions. Their view was well-expressed by Justice Black when he replied to a letter asking whether the Court should defer to congressional judgment on constitutional issues. Black wrote:

> The question just does not make sense to me. This is because if the Court must "defer" to the legislative judgment about whether a statute is constitutional, then the Court must yield its responsibility to another body that does not possess that responsibility. If, as I think, the judiciary is vested with the Supreme, constitutional power and responsibility to pass on the validity of legislation, then I think it cannot "defer" to the legislative judgment "without abdicating its own responsibility . . . ."[49]

To Black, constitutional decisions should not depend upon any deference doctrine, but only "on the Court's honest judgment" on constitutionality.[50] "I think it is the business and the supreme responsibility of the Court to hold a law unconstitutional if it believes that the law is unconstitutional, without 'deference' to anybody or any institution. In short, as to this phase of the discussion, I believe it is the duty of the Court to show 'deference' to the Constitution only."[51]

The Chief Justice and his activist supporters on the Warren Court fully shared Black's view on deference. Detailed analysis of conference notes, memoranda, draft opinions, and extensive interviews reveal that

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46. *Id.*

47. *Id.*

48. Letter from Felix Frankfurter to John M. Harlan (May 9, 1957) (The Felix Frankfurter Papers, available at Harvard Law School).

49. Letter from Hugo L. Black to Fred Rodell (Sept. 5, 1962) (The Hugo L. Black Papers, available in the Library of Congress).

50. *Id.*

51. *Id.*

Warren never considered constitutional issues in the light of any desired deference to the legislature. Instead, he decided those issues based on his own independent judgment, normally giving little weight to the fact that a reasonable legislator might have voted for the challenged law.

For Warren, the issue on judicial review was not *reasonableness* but *rightness*. If the law was contrary to his own conception of what the Constitution demanded, it did not matter that a reasonable legislator might reach the opposite conclusion. When Warren decided that the Constitution required an equal population apportionment standard for all legislative chambers except the United States Senate,[52] the fact that no American legislature had followed the new requirement did not deter him from uniformly applying the standard. Justice Harlan's dissent may have demonstrated that the consistent state practice was, at the least, reasonable.[53] For the Chief Justice, however, legislative reasonableness was irrelevant when the practice conflicted with his own interpretation of the Constitution.

IV. Fountain of Justice

A much quoted statement by Anthony Lewis asserts that "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."[54] But Warren was more than the judicial counterpart of the Platonic philosopher-king. He consciously conceived of the Supreme Court as a virtual modern Court of Chancery, a residual "fountain of justice" to rectify individual instances of injustice, particularly where the victims suffered from racial, economic, or similar disabilities. He saw himself as a present-day Chancellor, who secured fairness and equity in individual cases, particularly where they involved his "constituency" of the poor or underprivileged.

"If the Chief Justice," Justice Stewart once commented, "can see some issue that involves widows or orphans or the underprivileged, then he's going to come down on that side."[55]

Until his retirement in 1962, Justice Frankfurter strongly disagreed with the Warren conception of the Court. The disagreement emerged when the Court agreed to reconsider the merits of cases involving employment injury under workers' compensation laws or the Federal Em-

52. Reynolds v. Sims, 377 U.S. 533 (1964).

53. *Id.* at 589, 602-15 (Harlan, J., dissenting).

54. 4 JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 2726 (L. Friedman & F. Israel eds. 1969).

55. Interview with Justice Stewart, *supra* note 12.

ployers Liability Act (FELA). Based on the facts, the Chief Justice's very first opinion reversed a lower court injunction against enforcing a workers' compensation award. The decision emphasized that "[t]his Act must be liberally construed in conformance with its purpose . . . ."[56] During the Warren years, the Chief Justice led the Court in reversing a large number of employment injury cases on their merits. In fact, Supreme Court "decisions relating to the sufficiency of the evidence under the FELA" increased four-fold during Warren's first three terms, compared with the three terms before he became Chief Justice.[57]

Justice Frankfurter believed the Supreme Court should never have taken these cases. "I do not think," he wrote to the Chief Justice, "the correction of an erroneous decision, after two courts have dealt with the matter . . . is the proper business of this Court."[58] In the Frankfurter view, the Supreme Court was not "a court for the correction of errors."[59] In a number of these cases, Frankfurter dissented[60] and "read his colleagues a lecture on the need to conserve the Court's time and energy, by avoiding trivial cases."[61]

The Chief Justice felt just as strongly that the job of the Supreme Court was to ensure a just result in these cases. Warren looked upon the Court as the last resort of the employees and their widows and orphans who had lost under the FELA and in other employment injury cases. The Chief Justice used to stress to his law clerks how important it was that the Court take some FELA cases each year to make sure that the lower courts understood that the statute was intended to protect the employee's right to recover.[62]

Yet Warren's conception of the Supreme Court as the residual "fountain of justice" went far beyond instances where recovery had been denied in employment injury cases. To the Chief Justice, the Court functioned to ensure fairness and equity in all cases where they had not been secured by other governmental processes. In Warren's view, the political branches of government had defaulted in such cases. Where a constitutional requirement remained unenforced due to governmental failure to compel obedience to it, the Court had to act. The alternative as Warren

56. Voris v. Eikel, 346 U.S. 328, 333 (1953).

57. Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 548 app. A (1957) (Frankfurter, J., dissenting).

58. Letter from Felix Frankfurter to Earl Warren (Jan. 26, 1956) (The Felix Frankfurter Papers, available in the Library of Congress).

59. *Id.*

60. The cases are cited in Ferguson v. Moore-McCormack Lines, 352 U.S. at 526 n.3.

61. N.Y. Times, May 19, 1959, § 1, at 1, col. 3.

62. This statement is based on the author's interviews with many former Warren clerks.

saw it was an empty Constitution, the essential provisions of which were rendered nugatory because they could not be enforced.

For example, the Chief Justice explained the Warren Court decisions requiring legislative reapportionment on the following basis: "Most of these problems," he declared some years after those decisions, "could have been solved through the political processes rather than through the courts. But as it was, the Court had to decide."[63]

This Commentary contends that this same legislative inaction influenced the most important cases decided by the Warren Court. The Chief Justice and his colleagues felt that they had to step in because the political branches had not acted to vindicate certain constitutional rights, and the government could not or would not act in the future to correct the situation. From this point of view, the Warren Court acted not so much out of an activist desire to remake the law and society, but rather out of the need to remedy the constitutional effects of governmental paralysis. Analyzing the principal decisions of the Warren Court sustains this thesis.

V. Political Default and Warren Court Decisions

A. *Brown v. Board of Education*

Any analysis of the Warren Court's principal decisions should begin with *Brown v. Board of Education*,[64] in many ways the watershed constitutional case of the century. When the *Brown* decision struck down school segregation as violative of the Equal Protection Clause, it signaled the beginning of effective civil rights enforcement in American law.

The *Brown* decision was a direct consequence of the political process' failure to enforce the Fourteenth Amendment's guarantee of racial equality. Before *Brown*, it had become a constitutional cliché that the amendment had not succeeded in securing equality for blacks; that failure largely resulted from governmental default. Government had not acted to eliminate the almost patent violation of equal protection; instead, both state and federal laws perpetuated the segregation that existed in much of the country, including the nation's capitol.

It was utterly unrealistic to expect state governmental action to end segregation in those states where Jim Crow had become the norm.[65] But Congress also failed to take action. Not only had Congress failed to out-

63. J. POLLACK, *supra* note 10, at 209.

64. 347 U.S. 483 (1954).

65. "Jim Crow" laws required segregation of blacks in virtually all public facilities. The laws were upheld in Plessy v. Ferguson, 163 U.S. 537 (1896).

law segregation in the states, it had affirmatively provided for segregation in Washington, D.C. Chief Justice Vinson emphasized this point in his presentation to the Justices while presiding at the first conference held on the *Brown* case. Vinson stressed that segregation had never been questioned by Congress. "However [we] construe it," he said, "Congress did not pass a statute deterring and ordering no segregation."[66] On the contrary, Congress itself had commanded segregation in the nation's capitol. "I don't see," Vinson affirmed, "how we can get away from the long-established acceptance in the District [of Columbia]. For 90 years, there have been segregated schools in this city."[67] Vinson did admit that "it would be better if [Congress] would act."[68] But Congress had not done so and there was no indication that it would in the foreseeable future.

No formal vote was taken in *Brown* during Chief Justice Vinson's tenure, but it appears that Vinson would have voted to uphold the constitutionality of school segregation.[69] Not surprisingly, he found support for his position in the congressional failure to outlaw the practice.

Chief Justice Warren approached the *Brown* issue from an entirely different point of view. Unlike his predecessor, Warren began his first *Brown* conference with a ringing declaration that segregation was unconstitutional. He stated the issue in moral terms: "[T]he more I've read and heard and thought, the more I've come to conclude that the basis of segregation and 'separate but equal' rests upon a concept of the inherent inferiority of the colored race."[70]

To one who felt this way, the claim of congressional acquiescence through inaction could scarcely justify the imprimatur of legality upon a patently immoral and unconstitutional practice. On the contrary, the years of legislative inaction coupled with the unlikelihood that Congress would attempt to correct the situation in the foreseeable future made it imperative for the Court to intervene. The alternative would leave untouched a practice that flagrantly violated both the Constitution and the ultimate human values involved. The Chief Justice found such an alternative unpalatable. Since the other branches had defaulted in their responsibility, the courts had to ensure enforcement of the constitutional prohibition against racial discrimination.

66. B. SCHWARTZ, *supra* note 6, at 74.

67. *Id.*

68. *Id.*

69. Letter from Felix Frankfurter to Stanley Reed (May 20, 1954) (The Felix Frankfurter Papers, available at Harvard Law School).

70. B. SCHWARTZ, *supra* note 6, at 86. *See also supra* notes 20-22 and accompanying text.

B. *Baker v. Carr*

Next to *Brown v. Board of Education*, the most significant case decided by the Warren Court was *Baker v. Carr*.[71] According to the Chief Justice, *Baker v. Carr* "was the most important case of my tenure on the Court."[72] The Court's decision in the case led to a drastic shift in political power throughout the nation. Through *Baker v. Carr* and its progeny,[73] the Warren Court ultimately worked an electoral reform comparable to that achieved by the British Parliament when it incorporated the program of the English Reform Movement into the statute book.

Even more than *Brown*, *Baker v. Carr* may be explained as a judicial response to the default of the political branches. The 1901 Tennessee statute at issue in the case, which apportioned seats in the state legislature, apparently was a fair law when enacted. As time went on, however, population shifts increasingly altered the picture. By the time Baker brought his lawsuit, the 1901 law no longer reflected the state's population distribution. Baker's complaint claimed that voters from urban areas had been denied equal protection "by virtue of the debasement of their votes," since a vote from the most populous county had only a fraction of the weight of one from the least populous county. The population ratio for the most and least populous districts by then was over nineteen to one.

To correct this situation by a nonjudicial remedy, the very legislature whose existence depended upon the malapportionment under the 1901 statute would have had to pass a new reapportionment law. That event would have been tantamount to the rural legislators who profited from the situation voting many of their seats out of existence. It would have been quixotic to expect them to do so. Political paralysis resulted with an inevitable increase in the gross disparities as time brought further demographic changes.

To remedy this problem, the Supreme Court finally had "to enter this political thicket."[74] No other feasible way existed to correct the patent violation of the constitutional command of voting equality. This lack of any other remedy strongly influenced at least one member of the *Baker v. Carr* majority, Justice Clark. He had originally voted not to hear Baker's suit and had agreed to join the Frankfurter dissent in the case. Justice Frankfurter had tried to firm up Clark's vote by suggesting

71. 369 U.S. 186 (1962).
72. E. WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).
73. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).
74. Colegrove v. Green, 328 U.S. 549, 556 (1946).

that he write separately to describe the other remedies open to Tennessee's voters.[75] Clark soon found that no other remedies existed. His discovery led him to write to Frankfurter:

> Preparatory to writing my dissent in this case, along the line you suggested of pointing out the avenues that were open for the voters of Tennessee to bring about reapportionment despite its Assembly, I have carefully checked into the record. I am sorry to say that I cannot find any practical course that the people could take in bringing this about except through the Federal courts.[76]

Clark, therefore, decided to switch his vote and join the *Baker v. Carr* majority.

While considering the matter, Justice Clark jotted down a note: "Here a minority by representatives ignores the needs and desires of the majority—and for their own selfish purpose hamper and opress them—debar them from equal privileges and equal rights—that means the failure of our constitutional system."[77] The Justice had decided that only a judicial remedy could redress that failure.

There is little doubt that the Chief Justice had come to the same conclusion. Warren's statement on the basis of his Court's reapportionment decisions bears requoting: "Most of the problems could have been solved through the political processes rather than through the courts. But as it was, the Court had to decide."[78] The decision in *Baker v. Carr* came down because "the political process" had failed to remedy the constitutional violation that deprived Baker of an equal vote.

C. *Mapp v. Ohio*

The government's failure to remedy another constitutional violation formed the foundation for the opinion in *Mapp v. Ohio*,[79] a decision that Justice Fortas characterized as "the most radical decision in recent times."[80] The *Mapp* decision held that the exclusionary rule, which bars evidence obtained in violation of the Fourth Amendment's ban against unreasonable searches and seizures, applies in state as well as federal cases.

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75. Letter from Tom C. Clark to Felix Frankfurter (Feb. 3, 1962) (The Felix Frankfurter Papers, available at Harvard Law School).

76. Letter from Tom C. Clark to Felix Frankfurter (Mar. 7, 1962) (The Felix Frankfurter Papers, available at Harvard Law School).

77. Note of Tom C. Clark (The Clark Papers, available at Tarlton Law Library, University of Texas).

78. J. POLLACK, *supra* note 10, at 209.

79. 367 U.S. 643 (1961).

80. Interview with Justice Fortas (Sept. 1979).

The *Mapp* majority was strongly influenced by Ohio's failure to take action against Fourth Amendment violations by state police officers. *Wolf v. Colorado*,[81] the leading case prior to *Mapp*, noted that the Fourth Amendment was "basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[82] Nevertheless, *Wolf* refused to hold that the federal Constitution required application of the exclusionary rule in state criminal cases.[83] The result was, in the words of the *Wolf* opinion, "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[84]

Wolf refused to extend the exclusionary rule to state cases because that rule was not, "in the face of prospectively available alternative remedies such as private damage suits, the pressure of an informed public opinion and internal police disciplinary measures, so clearly the only safeguard against invasion of privacy by *local* officers."[85] In *Mapp*, however, the Court found "the claimed alternative safeguards . . . unsatisfactory in their deterrence of police invasions of privacy."[86]

Though the *Mapp* opinion made this point, it was spelled out more fully in the draft opinion that Justice Clark circulated two months before he delivered the opinion of the Court. Like the final opinion, Clark declared in his draft that "other means of protection" to safeguard the Fourth Amendment right, other than the exclusionary rule itself, were "worthless and futile."[87] The draft, however, more specifically addressed what it termed the "obvious futility of any longer seeking to relegate the Fourth Amendment to the protection of other remedies."[88]

Concerning "private damage remedies," Justice Clark's draft asked, "how can we expect to defend 'the indefeasible right of personal security' by telling him who suffers its invasion to seek damages for 'the breaking of doors?' "[89] In addition, he asserted that "[a]n aroused public opinion and internal police discipline are equally without the deterrent value."[90] According to Clark's draft,

81. 338 U.S. 25 (1949).
82. *Id.* at 27-28.
83. *Id.* at 33.
84. *Id.*
85. Clark, Draft opinion in *Mapp v. Ohio*, at 5 (The Tom C. Clark Papers, available in the Tarlton Law Library, University of Texas).
86. *Id.* at 6.
87. 367 U.S. at 651-52.
88. Clark, *supra* note 85, at 11.
89. *Id.*
90. *Id.* at 12.

> it appears hopelessly impractical to consider formulation of an effective body of public opinion as a remedy practicably available to those who suffer unconstitutional invasions of their privacy. They are in large measure criminal defendants, and more unlikely organizers of an effective and respectable public opinion would be difficult to find.[91]

The default of other remedies led directlty to the *Mapp* decision. As Clark noted in his draft, "The question is whether there presently exists available to citizens of the non-exclusionary states any remedy which can be said to meet 'the minimal standards of Due Process.' One fails of discovery, and we are bound to require adherence to the constitutionally mandated rule of *Weeks*"[92]—i.e., the exclusionary rule.

Once again, the Warren Court made a far-reaching decision because it concluded that there was no other way to effectuate a constitutional right. The remedies suggested by the *Wolf* Court had proved to be futile, and the Court could not depend on the political branches to implement the Fourth Amendment safeguard. On the contrary, government failure to take any enforcement action led to the *Mapp* situation. If the Court did not act, the constitutional safeguard would remain nugatory.

Though Chief Justice Warren did not play a leading role in the *Mapp* decision, he concurred in the approach just stated. One case referred to in *Mapp* was *Irvine v. California*,[93] in which Warren joined a majority decision affirming a conviction based on evidence obtained in violation of the Fourth Amendment. Although Warren followed the *Wolf* approach in *Irvine*, he joined Justice Jackson in going out of the way to state that, if the police in *Irvine* had willfully violated the Fourth Amendment, their conduct constituted a federal crime. Warren and Jackson directed the clerk of the Court "to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States."[94]

Warren later informed his law clerks that nothing ever came of forwarding the record and opinion to the Attorney General.[95] The failure of the Department of Justice to investigate the situation showed Warren that the judicial abnegation in *Irvine* had been misguided. If constitutional rights would remain unenforced in practice, the Chief Justice had to consider a more activist judicial role. As Warren put it in an interview just after he retired, either the Court would act to enforce the constitu-

91. *Id.*
92. *Id.* at 13 (referring to Weeks v. United States, 232 U.S. 383 (1914)).
93. 347 U.S. 128 (1954).
94. *Id.* at 138.
95. *See supra* note 62.

tional guarantees involved in these cases, "or we let them go and sweep them under the rug, only to leave them for future generations."[96]

D. *Miranda v. Arizona*

Next to *Mapp v. Ohio*, the Warren Court rendered its most important criminal law decision in *Miranda v. Arizona*.[97] It was also the most controversial. *Miranda* gave rise to complaints from law enforcement officers throughout the country, who denounced the Court for putting "another set of handcuffs on the police department."[98]

"The *Miranda* decision," the Court recently revealed, "was based in large part on this Court's view that the warnings which it required police to give to suspects in custody would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house."[99] From this viewpoint, *Miranda* was a direct consequence of Chief Justice Warren's own experience as a district attorney. Justice Fortas, a member of the *Miranda* Court, said that the decision "was entirely [Warren's]."[100] The Chief Justice's conference presentation led the way to the majority decision[101] he himself delivered.

In *Miranda*, as in the other cases discussed, Warren was influenced most by the fact that the required warnings were the only effective way to protect Fifth Amendment rights during police interrogation. The *Miranda* majority was as aware as the dissenters in the case that the Court's requirement "would have the effect of decreasing the number of suspects who respond to police questioning."[102] But the need to prevent unconstitutional police practices outweighed that factor. "The *Miranda* majority . . . apparently felt that whatever the cost to society in terms of fewer convictions of guilty suspects, that cost would simply have to be borne in the interest of enlarged protection for the Fifth Amendment privilege."[103]

Warren's own experience as a former district attorney played a crucial role in his thinking. Methods of arrest, questioning of suspects, and police conduct in the station house were matters that the Chief Justice intimately understood from his years as prosecutor in Alameda County,

96. *The Law: The Legacy of the Warren Court*, TIME, July 4, 1969, at 63.
97. 384 U.S. 436 (1966).
98. J. WEAVER, *supra* note 32, at 234 (quoting Los Angeles Mayor Sam Yorty).
99. New York v. Quarles, 104 S. Ct. 2626, 2632 (1984).
100. Interview with Justice Fortas, *supra* note 80.
101. *See* B. SCHWARTZ, *supra* note 6, at 589.
102. New York v. Quarles, 104 S. Ct. at 2632.
103. *Id.*

California. Above all, he recognized the problem of police abuses and the lack of effective methods to deal with them. All that had been said in *Mapp* about the lack of remedies against Fourth Amendment violations applied with even greater force to practices in police interrogation rooms. Here, as with the other cases previously discussed, there was little likelihood of effective action by the other branches of government to rectify the problem. Political default again made judicial action imperative. Once more, if the Court did not step in, there was no way to "reduce the likelihood that suspects would fall victim to constitutionally impermissible practices of police interrogation."[104]

Conclusion

How then can Earl Warren's work as a judge be summarized?

Chief Justice Warren will never rank with the consummate legal craftsmen who have fashioned the structure of Anglo-American law over the generations—each professing to be a pupil, yet each a builder who added his few bricks.[105] But Warren was never content to deem himself a mere vicar of the common law tradition. Instead he was the paradigm of the "result-oriented" judge, who used his power to secure the result he deemed right in the cases that came before his Court. Employing the authority of the ermine to the utmost, he never hesitated to do whatever he thought necessary to translate his own conceptions of fairness and justice into the law of the land.

In reaching what he considered the just result, the Chief Justice was not deterred by the demands of stare decisis. For Warren, principle was more compelling than precedent. The key decisions of the Warren Court overruled decisions of earlier Courts.[106] Those precedents had left the enforcement of constitutional rights to the political branches. Yet, the latter had failed to act. In Warren's view, this situation left the Court with the choice either to follow the precedent or to vindicate the right. For the Chief Justice, there was never any question as to which was the correct alternative.

Warren cannot be deemed a great juristic technician, noted for his mastery of the common law. But he never pretended to be a legal scholar

104. *Id.*

105. *Cf.* Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361 (1939).

106. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942)); Baker v. Carr, 369 U.S. 186 (1962) (discussed *supra* at text accompanying notes 71-78); Mapp v. Ohio, 367 U.S. 643 (1961) (discussed *supra* at text accompanying notes 79-96); and Brown v. Board of Education, 347 U.S. 483 (1954) (discussed *supra* at text accompanying notes 64-70).

or to profess interest in legal philosophy or reasoning. To him, the outcome of a case mattered more than the reasoning behind the decision. He took full responsibility for the former and delegated the latter, in large part, to his law clerks.

The result may have been a deficiency in judicial craftsmanship that subjected Warren to constant academic criticism, both during and after his tenure on the bench. Without a doubt, Warren does not rank with Holmes or Cardozo as a master of the opinion, but his opinions have a mark of their own. Warren would go over the drafts prepared by his clerks and make changes, usually adding or substituting straightforward language typical of his manner of presentation. "He had a penchant for Anglo-Saxon words over Latin words and he didn't like foreign phrases thrown in if there was a good American word that would do."[107]

As a consequence, the important Warren opinions have a simple power of their own; if they do not resound with the cathedral tones of a Marshall,[108] they speak with the moral decency of a modern Micah. Perhaps the *Brown* opinion did not articulate the juristic bases of its decision in as erudite a manner as it could have, but as the Chief Justice wrote in his memorandum transmitting the *Brown* draft, the opinion was "prepared on the theory that [it] should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory."[109] The decision in *Brown* emerged from a typical Warren moral judgment, with which few today would disagree. The Warren opinion was so *right* in that judgment that one wonders whether additional learned labor in spelling out the obvious was really necessary.

When all is said and done, Warren's place in the judicial pantheon rests, not upon his opinions, but upon his decisions. If impact on the law is the hallmark of the outstanding judge, few occupants of the bench have been more outstanding than Chief Justice Warren. In terms of influence, he must be placed only second to Marshall in the rank of Supreme Court Justices. The decisions made by his Court, mostly under his direct lead, accomplished what a member of the Court termed "the most profound and pervasive revolution ever achieved by substantially peaceful means."[110] That statement summarizes the importance of the Chief Justice and his Court.

107. Interview with Robert J. Hoerner, former clerk of Chief Justice Warren (Mar. 1979).

108. *Cf.* B. CARDOZO, *Law and Literature*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 342 (M. Hall ed. 1947).

109. Memorandum from Earl Warren to Members of the Supreme Court (May 7, 1954) (The Clark Papers, available at Tarlton Law Library, University of Texas).

110. B. SCHWARTZ, THE AMENDMENT IN OPERATION: A HISTORICAL OVERVIEW OF THE FOURTEENTH AMENDMENT, CENTENNIAL VOLUME, at 34 (quoting Justice Fortas).

Justice Fortas once said that in his conference presentations, Chief Justice Warren normally went straight to the ultimate moral values involved—just as he did in his first *Brown* conference. Faced with that approach, traditional legal arguments seemed out of place. As Fortas put it, "opposition based on the hemstitching and embroidery of the law appeared petty in terms of Warren's basic value approach."[111]

The same appears to be true when we consider Earl Warren's judicial performance. To criticize him for his lack of scholarship or judicial craftsmanship seems petty when we weigh these deficiencies against the contributions he made as leader in the greatest judicial transformation of the law since the days of John Marshall.

111. Interview with Justice Fortas, *supra* note 80.