

**Super Chief: Earl Warren And His Supreme Court—A Judicial Biography.** By Bernard Schwartz.<sup>1</sup> New York: New York University Press. 1983. Pp. 772. \$29.95.

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“Super” is a tired word, so overworked by sportscasters and advertisers that it can no longer stand on its own as a word of specific description but must lean on its subject. Earl Warren’s public image as a man, summed up by Professor Bernard Schwartz through a quotation from John Gunther (“Earl Warren is honest, likeable and clean”) would lead most people to agree, in the lexicon of the teenager, that he was a super guy. In this sense there is every reason to believe from the evidence presented by Professor Schwartz and others that most of the associate justices who worked with Warren rightly regarded him as a super chief. This surely was one meaning intended by Justice Brennan when he said that “to those who served with him, Earl Warren will always be the super Chief.” But he probably also intended to convey a grander meaning, to say that Earl Warren had established a standard of judicial excellence. Professor Schwartz leaves no doubt that he borrowed Justice Brennan’s words for his title with that grander meaning in mind. He begins the development of his thesis in his subtitle. We later learn from his text that he meant exactly what he said: the Warren Court was Warren’s Court. By page seven Schwartz has ranked Chief Justice Warren in the “judicial pantheon” with John Marshall, an achievement made all the more intriguing by Schwartz’s observation that Warren’s earlier career, though hugely successful, contained “no hint of greatness.”

Schwartz’s brief for the greatness of the chief justice has two major points. One is the quality of the Warren Court’s results. His admiration for the product of the Court, sometimes explicit, is pervasively implicit in the book. Indeed, he seems to regard the virtues of the Warren style of judging, and of the Warren Court’s results, as self-evident—not an uncommon assumption in the academic environment, and one that helps to dispose of the otherwise

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overwhelming problem of how to assess many hundreds of often complex cases.

Yet even a chief justice has only one of nine votes. That this chief was extraordinarily persuasive is Professor Schwartz's second point: Warren forged majority support for his positions by sheer dint of his leadership. In the earlier years of his tenure the Court was badly split. "Even in so fragmented a Court, however, not every decision was reached by a closely divided vote. In a number of cases, the chief justice was able to lead the Brethren to adopt his view by a substantial majority."<sup>3</sup> The peak of Warren's leadership was almost reached by the middle years of his tenure:

The coming 1963 Term looked as though it would be a particularly happy one for the Chief Justice. The Court had followed his lead in every important case during the term that had just ended. There was every prospect that the term ahead would provide even more opportunities for the Justices to *remake our law in the Warren image.*<sup>4</sup>

A few years later, the chief was still in control: "Warren's dissents in the *Marchetti* and *Grosso* cases were, however, the rare exceptions during the 1967 Term. The Chief Justice wrote a dissent in only one other case. . . . In the term's other cases, Warren was able to lead the Court to the decisions he favored."<sup>5</sup>

Schwartz attributes Warren's talent for leadership to the instinctive qualities that made him a successful governor, and to his fairness. "Warren's forte was not so much intellect as it was leadership."<sup>6</sup> "The Justices who sat with him have all stressed that Warren may not have been an intellectual like Frankfurter, but then, as Justice Potter Stewart puts it, 'he never pretended to be one.'"<sup>7</sup> According to Stewart, Warren "didn't lead by his intellect and he didn't greatly appeal to others' intellects; that wasn't his style. But he was an instinctive leader whom you respected and for whom you had affection, and . . . , as the presiding member of our conference, he was just ideal."<sup>8</sup>

Whether the chief justice was also chief architect is a question of fact that bears principally on Warren's personal place in history. In making the case for Warren as architect, Professor Schwartz displays some of the bias that is normal for the advocate. His evidence, it seems to me, is inconclusive. Justice Black, he tells us, came to resent the credit that Warren had received for the

3. B. SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 349-50 (1983).

4. *Id.* at 491 (emphasis added).

5. *Id.* at 701.

6. *Id.* at 29.

7. *Id.* at 31.

"constitutional revolution" wrought by the Warren Court, believing that it merely reflected adoption of principles that Black had advocated for years.<sup>8</sup> A less interested observer might well agree that Chief Justice Warren's contribution has been exaggerated. What seems to be missing is a plausible theory according to which the activist majorities would not have existed without his leadership. Professor Schwartz notes Warren's rejection of Frankfurter's influence after about two years on the Court and his combining with Black and Douglas to form a "liberal nucleus."<sup>9</sup> The momentum of Warren's judicial activism was not fully established, however, until Justice Brennan replaced Sherman Minton in 1956.<sup>10</sup> All three of the justices with whom Warren was now joined to form nearly a liberal majority were intellectually superior to the chief. None of them is generally thought of as a follower. Schwartz describes Black, in the words of others, as an extraordinarily "powerful" man, one with whom, according to Justice Jackson, "[y]ou must go to war . . . if you disagree."<sup>11</sup> He describes Douglas as a self-centered and headstrong "maverick, who went his own way regardless of the feelings of the Brethren," one who "seemed more interested in making his own stand public than in working to get it accepted."<sup>12</sup> More surprisingly, at one point Schwartz depicts Justice Brennan as subordinate to Warren: "Even the most inspiring general must, however, have troops who are willing and able to follow his lead. Chief Justice Warren received his most capable lieutenant . . . in 1956 . . . [when] President Eisenhower appointed William J. Brennan, Jr. . . ."<sup>13</sup> Yet Brennan, unlike Warren, appears to have needed no substantial period of time to get his bearings as a Supreme Court justice. Schwartz notes that during the 1956 Term and in all his following terms Warren voted with Black and Douglas in virtually all cases involving individual rights.<sup>14</sup> He concludes that during this same 1956 Term, his initial one, "Brennan also became a follower of the Black-Douglas approach."<sup>15</sup>

Justice Brennan indeed appears to have been a most capable ally of the chief. Professor Schwartz states that he quickly became Warren's "closest colleague" and that "an intimacy developed be-

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8. *Id.* at 629-30.

9. *Id.* at 200.

10. *Id.* at 206.

11. *Id.* at 32-33.

12. *Id.* at 51.

13. *Id.* at 204-05.

14. *Id.* at 207.

15. *Id.* at 208.

tween them of a type that never took place" between Warren and Black or Douglas. "The Chief would turn to Brennan when he wanted to discuss a case or some other matter on which he wanted an exchange of views. The two would usually meet on Thursday, when Warren would come to Brennan's chambers to go over the cases that were to be discussed at the Friday conference."<sup>16</sup>

Others, including Professor Schwartz, can estimate better than I the direction of the main current of influence between Warren and Brennan or Warren and Black or Douglas. Justice Brennan's opinions do not manifest a personality that could easily be swayed from its natural inclinations. And it is my impression that in the remainder of *Super Chief* (the 1957-1968 Terms), references to Brennan in his roles of speaking for a position in conference, working over opinions to maintain majority support, writing opinions in cases regarded as unusually important, and simply persevering to achieve particular results, are second in frequency only to references to Warren. At times Justice Brennan seems almost to overshadow his super chief. From the evidence presented, the hypothesis that the Warren Court's direction was principally determined by the coincidental coming together of four justices who were of like mind on a host of issues seems to be as plausible as any. Given the other changes in personnel during Warren's tenure, securing at least a fifth vote cannot usually have required herculean exertions.

This book provides fresh evidence of the important and questionable role of the justices' clerks. Pointing out that the chief justice's office was primarily responsible for the *in forma pauperis* petitions, Schwartz describes the way they were processed during Warren's tenure and concludes that "in practice, the Warren clerks were the Supreme Court on I.F.P. petitions." He continues:

As far as Warren and most of the Justices were concerned, this was also true of the handling of ordinary cert petitions and appeals. With some exceptions (notably in the chambers of Justices Frankfurter and Brennan), the work on the petitions was done by the clerks. In the vast majority of cases, the Justices' knowledge of the petitions and the cases they presented was based on their clerks' cert memos, and they would normally vote in accordance with the memos' recommendations. This was as true of Warren as of most of the others. . . . He would . . . rarely discuss [the memos] with the clerks and would usually follow their recommendations.<sup>17</sup>

In traditional Supreme Court litigation (adverse parties with a real and personal stake in the outcome) the parties and their lawyers may have little interest in who writes the opinion in their

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16. *Id.* at 205-06.

17. *Id.* at 67.

case, if they can be assured that the justices, not their clerks, will decide the case. But the first step, insurmountable in the overwhelming majority of cases, is getting to the Supreme Court at all. At the point of entry most lawyers can have no idea whom they are addressing if it is the clerks who man the gate. Nor can they have any idea of the level of understanding of the issues that the clerks will bring to bear on their petitions for review. For those cases that do get through the gate the authorship of the opinions is important to posterity. When we are reminded of the role played by the clerks at this stage, it is amusing (but sad) to consider the way lawyers and lower court judges pore over the nuances of the language in the Court's opinions, seeking to determine what the great justices meant.

Several of Warren's opinions clearly bear the marks of recent law graduate authorship. Schwartz confirms this, leaving no doubt that though Warren was independent in deciding what outcome he wanted, his opinions were largely written by the clerks.

The Chief would rarely go into particulars on the legal theories involved in the case. The clerk was left with a great deal of discretion on the details of the opinion, particularly the reasoning and research supporting the decision. . . . Warren never pretended to be a scholar interested in research and legal minutiae. These he left to his clerks, as well as the extensive footnotes which are part of the panoply of the well-crafted judicial opinion.<sup>18</sup>

Justice Frankfurter was particularly disturbed by the Court's use of clerks in reviewing certiorari petitions. His point also applies to the writing of the Court's opinions:

"The appraisal and appreciation of a record as a basis for exercising our discretionary jurisdiction is . . . so dependent on a seasoned and disciplined professional judgment that I do not believe the lads—most of them fresh out of law school and with their present tendentiousness—should have any routine share in the process of disemboweling a record, however acute and stimulating their power of reasoning may be. . ."<sup>19</sup>

On a larger point *Super Chief* is more reassuring. In case after case Professor Schwartz has reconstructed the debates among the justices concerning not only outcomes but frequently also the structures of supporting opinions. Although these debates are often boiled down to an exchange of "one-liners" among justices, they reinforce a belief that without exception the Court addresses the merits of its cases. There is no hint that the Court ever became the covert tool of either of the other branches of government, or that feelings of favoritism or vindictiveness towards an

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18. *Id.* at 68.

19. *Id.* at 69.

individual party or lower court judge entered into decision making. (This is not to say that no favor or disfavor was shown certain types of parties, such as workers versus railroads and other employers). Nor is there significant evidence of improper extrajudicial communications concerning pending cases.

Most of us will agree that the immediate consequences of Warren Court decisions were often beneficial, or at least attractive. One must then ask whether the conception of the judicial function which underlay many of those decisions is one that we want judges to adopt. Not everyone shares Professor Schwartz's implicit opinion that judges should simply remake the law in accordance with their notions of sound policy. Justice Stevens, in the course of describing his doubts concerning the apparent factual premises of certain federal legislation, expressed a contrary idea:

My conviction that Congress had ample [constitutional] power to enact this statute . . . is unrelated to my views about the merits of [the] legislation. . . . My personal views on such matters are, however, totally irrelevant to the judicial task I am obligated to perform. There is nothing novel about this point . . . [b]ut it is important to emphasize this obvious limit on the proper exercise of judicial power, one that is sometimes overlooked by those who criticize our work product.<sup>20</sup>

This old-fashioned sentiment is equally applicable to many issues of statutory construction. No one could reasonably suppose that our Constitution, not all of which is couched in phrases of infinite elasticity, and the reams of federal legislation passed since our founding, embody values that any individual judge could consistently endorse. In the normal course we would expect a judge to face myriad situations where values plainly stated, or plainly missing from the governing laws, point toward results different from those the judge would endorse if he were provided with plenary policy-making power.

It is no wonder, however, that the limit expressed by Justice Stevens is sometimes (I would say frequently) overlooked by those who criticize the Court's work. The lesson driven home by *Super Chief* and other books and essays praising Warren as one of our greatest chief justices is that Stevens's remark was naive if not hypocritical. For it was precisely Warren's refusal to acknowledge the limit noted by Justice Stevens that enabled him to achieve the greatness attributed to him as chief justice. In saying this I take Warren as I find him in *Super Chief*, but he appears to be the same man there as the one depicted in several other works.

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20. EEOC v. Wyoming, 103 S. Ct. 1054, 1068 (1983).

Professor G. Edward White puts the matter most succinctly and unabashedly.

My analysis of Warren as a jurist begins with some preliminary assertions. The Constitution spoke directly to Warren as a person, a judge, and an American citizen. He conceived of the Constitution as an embodiment of values that he believed in and as a basis for granting him, as a judge, power to protect those values. . . . The ethical imperatives that Warren read in the Constitution were so clear to him, and his duty to implement them so apparent, that matters of doctrinal interpretation were made simple and matters of institutional power became nearly irrelevant. . . .

The ethical imperatives that guided Warren as a judge reflected his personal morality in that Warren held a set of values that he believed represented moral truths about decent, civilized life. It was inconceivable to Warren that these values would not be embodied in constitutional principles. . . .<sup>21</sup>

In characterizing Warren as a jurist who failed to follow the canons of judicial restraint, critics have not distorted Warren's stance. Warren specifically rejected both institutional and doctrinal good sense. . . .<sup>22</sup>

Warren's "craftsmanship" as a jurist was thus of a different order from that identified with enlightened judging by proponents of judicial restraint. . . .

For proponents of judicial restraint the "rightness" of a result depended on the doctrinal integrity of the reasoning used to justify it; for Warren the vindication of moral principles provided its own justification. . . . His perspective did not give great weight to traditionally "legal" arguments where they were barriers to an application of the proper "ethical norm" and thus often appeared to eschew conventional techniques of legal reasoning, such as close analysis of a judicial precedent, the language of a statute, or the text of the Constitution. Since Warren's justifications for a result were often conclusory statements of what he perceived to be ethical imperatives, his reasoning as a jurist was regularly opaque. But opaque or unconventional reasoning is not the same as no reasoning. It merely invites one to analyze Warren's jurisprudence at a different level.<sup>23</sup>

Chief Justice Warren's approach was of course applied to statutory interpretation as well as constitutional exposition. Professor White's treatment of selected areas of legislative policy leaves the impression that it was a happy coincidence if Warren's personal sense of fairness paralleled legislative policy, and even then the parallel might be found only by pressing "the legislators' . . . theories to the limits of their logic."<sup>24</sup>

Professor Schwartz draws a similar picture. We see Warren being guided by "his polestar of fairness" in a case of legislative interpretation where his sense of fairness, according to Frankfurter, with whom Schwartz apparently agrees, was substituted for the legislative text.<sup>25</sup> Schwartz refers to a much quoted statement by Anthony Lewis that "Earl Warren was the closest thing the

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21. G. WHITE, EARL WARREN, A PUBLIC LIFE 218 (1982).

22. *Id.* at 220.

23. *Id.* at 229-300.

24. *Id.* at 302.

25. B. SCHWARTZ, *supra* note 3, at 198.

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.'"<sup>26</sup> Schwartz puts it this way: "He consciously conceived of himself as a present-day Chancellor, whose job was to secure fairness and equity in individual cases, particularly where they involved his 'constituency' of the poor or underprivileged."<sup>27</sup>

To what lengths might the chief justice go in serving his "constituency" and on what experience might he draw? From his interviews and studies, Professor Schwartz has no doubt that Warren's approach to the FELA cases of the fifties and sixties "can be traced directly" to Warren's having once worked for a railroad where he observed how such jobs "used up the men."<sup>28</sup> Chief Justice Warren led the way to a fourfold increase in decisions dealing with sufficiency of evidence in FELA cases. "At times, the Chief and his allies would vote in favor of the worker even against overwhelming evidence."<sup>29</sup> (This is in reference to a case in which "all" the law clerks had recommended denying certiorari.) We are told that as a high-school boy Warren worked for the Southern Pacific Railroad during the summer. Professor White also attributes Warren's stance on economic issues to his experience with and reaction to the Southern Pacific.<sup>30</sup>

Most of the criticism of the Warren Court has been about the quality (integrity) of many of its opinions. In extreme forms this sort of criticism implies that if the reasoning of an opinion is flawed, so must be its result. Professor White notes the illogic of that position when he discusses critics from the school of judicial restraint, using *Brown v. Board of Education* as an example. If critics of *Brown* mean that a well-reasoned opinion could not have been written to support the Court's result, I think they are wrong. By Supreme Court standards, *Brown* was a fairly easy case from a purely legal standpoint, in which a two-page opinion might have sufficed. Nor does it tell us much about the Court if an occasional result appears to have been arrived at more by intuition than by the application of neutral principles. An opinion that will not wash clutters the landscape and causes confusion for a time, but later clarification or narrowing of premises may remove those problems while leaving an entirely defensible result intact.

Judging judges involves matters of degree, just as do judg-

26. *Id.* at 267.

27. *Id.*

28. *Id.* at 9.

29. *Id.* at 271.

30. G. WHITE, *supra* note 21, at 302.

ments about the law. Warren, as described by his admirers, did not merely issue an occasional "instinctive" or inadequately reasoned opinion, but was generally guided by a personal set of values that he elevated above (or equated with) the kinds of legal authorities to which all judges profess allegiance. The main ground for objecting to this use of judicial power is summarized by Professor White:

The fact that judges contribute to the content of law, or even make glosses on the Constitution, does not mean that they are expected to become independent of the corpus of wisdom to which they are contributing. When they prefer their independent judgments to that corpus, one could say that they are betraying a trust.<sup>31</sup>

White goes on to suggest that such a judge might yet achieve greatness, if his ethical values are "right" most of the time, a judgment that will turn on "public acceptance" of them. Even then, he says, we should be entitled to opinions which explain and justify the judge's ethical premises. By this criterion he found Chief Justice Warren to be somewhat flawed.<sup>32</sup>

Professor White's analysis accepts the Platonic Guardian concept of the Supreme Court, provided only that we have wise and eloquent guardians. In considering this thesis, we should not overlook the Court's role in cases involving legislative policy. A Court populated by justices of Warren's type, encouraged to be "great" and thus further emboldened to equate personal preferences with law, would sit not only as a constitutional convention of detail in continuous session, but also as a super legislature. Perhaps the public could accept such a vision of their federal judiciary, but we may be sure that they would do so only if they could elect the judges to brief terms and, as an additional precaution, retain a right of recall.

If Chief Justice Warren was not seriously concerned about the "theoretical baggage" of judicial opinions (and I am not convinced that he was as unconcerned as he is now being portrayed to have been), most other judges are, and will continue to be, because nothing less than at least the appearance of such real concern can be squared with their status under the Constitution. We cannot expect a justice like Warren candidly to disclose when his personal ethics are controlling. Troublesome precedent can be distinguished whether it is fairly distinguishable or not; congressional purpose will always prevail, though it may take a creative search of legislative history, or a willingness to subject the English

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31. *Id.* at 365.

32. *Id.* at 365-66.

language to more stretching than it will bear, in order respectively to discover the appropriate purpose and to allow the legislative text to accommodate the result. And if neither text nor history will bend, a standard that legislative language must speak with "compelling" force can be devised.

The costs of all this are sufficiently hidden or at least subtle to elude hard proof. We must therefore rely on speculation and impressionistic evidence. One thing seems clear: the admiration heaped upon judges like Warren inevitably tends to diminish the number of judges who accept Stevens's premise that judges too are bound by the rule of law. Because the Warren model is not true to our just expectations, what begins as admiration must eventually turn to cynicism, especially since the judges inevitably claim to regard themselves as bound by the traditional sources of legal authority, if only in order to make their decisions more palatable. Strained interpretations of precedents, of texts, and of legislative history undermine respect for law. If we grant that our instincts about justice must often be followed without tangible proof that they are right, then let us consider the possibility that our instinctive aversion to this sort of dishonesty may also be well founded.

Of course lawless judging neither began nor ended with the Warren Court. But that Court made an historic contribution. It helped to persuade a new generation that Platonic Guardians are on the whole a good idea, that the Nine Old Men, though perhaps wrong about economics, were right about judging. If strong-minded justices of a different stripe than Warren again become dominant, no doubt some professors will dust off their files of aphorisms about judicial restraint. But who will take them seriously?

The Supreme Court's role as a teacher of the citizenry has often been emphasized. We sometimes forget that the Court is even more directly a teacher of the lower federal courts, of administrative agencies, and to a lesser degree of the state courts. Our country's highest ideal—a government of laws, not of men—posits a degree of generality in the law and its applications as itself a necessary element of fairness, of institutional protection from idiosyncratic judgments. We can expect many judges presented with the Warren model for greatness to be, by their own choice, poor students. But we can also expect many others to be avid pupils. Few of the vigorous, politically astute individuals who become judges need much encouragement to conclude that the exercise of power is enjoyable. It seems fair to say that one legacy of the Warren Court's example is a significant increase in similar behav-

ior in the lower federal courts. Equal justice under law (my reference is to the widows and orphans problems, not to issues of invidious discrimination) has to be the loser.

It seems generally to be supposed that the proliferation of law, litigation, and litigation expense in the federal sector is the result of an increasingly complex society and a more active legislative branch. These factors cannot be discounted, but should the judiciary be excluded from the calculus? Is it merely the complexity of modern statutes that accounts for the increasing number of judicial opinions, many of them extraordinarily prolix and detailed; the all-over-the-park splits among circuits and sometimes among panels of the same circuit; the heightened vulnerability of lower court judgments to reversal or modification on review? Is it possible that too many individual notions of fairness are being expressed; that as a result only high-priced specialists can competently work their way through the multitude of nuances to be found in mountains of precedents, providing frequently surprising glosses on legislative text and later glosses on the glosses; that too much is simply up for grabs through litigation, when litigants, perhaps having lost in their bid for legislative fairness as they see it, can appeal to the judiciary's sense of fairness?

When Chief Justice Warren joined the Court, constitutional law was in some ways excessively respectful of the values—sometimes vague and dubious ones—served by federalism and separation of powers. The addition to the Court of a mind that was antipathetic to doctrinal complexities promised to help bring a more sensible balance to the law. But Warren, with the aid of others, tipped the scale too far the other way. It was a less famous, but a wiser justice who admonished an earlier Court that “[c]ourts are not the only agency of government that must be assumed to have capacity to govern.”<sup>33</sup>

The utility of *Super Chief* as a source of information does not hinge on whether one agrees with Professor Schwartz's themes concerning Warren's achievements. A major purpose of the book was to describe the decision-making process in all of the “most important” cases of the Warren Court, including an enormously ambitious effort to reconstruct the closely guarded private conferences of the justices, even to occasional paraphrasing of discussions in conversational form. In making this effort Schwartz relates that he examined the conference notes of at least one justice who was present at each conference. In addition, he studied the papers of several Warren Court justices, and interviewed

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33. *United States v. Butler*, 297 U.S. 1, 87 (1936) (Stone, J. dissenting).

many justices and many more former law clerks, including thirty former Warren clerks. He has drawn verbal sketches of the Warren Court justices, giving substantially more attention to some, for example Justice Frankfurter, than to others.

The book is well written and packed with interesting though not startlingly new information. Professor Schwartz frequently provides additional evidence of relationships among the justices that have been noticed by others in more general terms. These relationships are most often shown through exchanges of notes and memoranda among the justices and through some letters, such as the Frankfurter-Hand correspondence. Former clerks appear also to have been ready sources of information regarding their own or other justices who served during their brief tenures.

It is, in sum, a valuable book, even if one has more reservations about Chief Justice Earl Warren than its author does.