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Hail to the Chief: Earl Warren and the Supreme Court

Dennis J. Hutchinson
University of Chicago

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*Dennis J. Hutchinson**

EARL WARREN: A PUBLIC LIFE. By *G. Edward White.* New York: Oxford University Press. 1982. Pp. x, 429. $25.

SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY. BY *Bernard Schwartz.* Unabridged edition. New York: New York University Press. 1983. Pp. xii, 833. $29.95.

If a man shall be judged by his foes as well as by his friends, then Earl Warren led a charmed life as Chief Justice of the United States. For the sixteen years that he occupied the office, Warren benefited from extravagant praise by public figures and friendly scholars, and from condemnation by racial bigots, Birchers, and religious zealots. When Warren retired from the Supreme Court in 1969 and again when he died five years later, it was said that an era had passed with him: a moral epoch, which somehow he personified, had ended.[1] In the nine years since Warren's death, his enemies and critics have found new targets, but his place in history is now jeopardized by some of his best friends — or at least those sympathetic to the era and the man who symbolized it. G. Edward White and Bernard Schwartz, both of whom must be counted among Warren's friendly critics,[2] have produced book-length studies that focus on the Chief Justice and the Court over which he presided. Both books claim to be biographies in the traditional sense, but neither is: White has written an extended essay attacking what he sees as the conventional historical stereotype of Warren,[3] and Schwartz has produced a term-by-term narrative, with occasional asides, about the Court's deliberations and major constitutional decisions between 1953 and 1969. White's book, for all its scrupulous attention to the facts and its elegant presentation, reads more like a brief than a biography, and a curiously dated brief at that. The issues for White are the issues shaped by Warren's severest academic critics in the 1960s. In order to rescue Warren *post mortem*, White resorts to rather slippery definitions of

* Associate Professor in the College and Associate Professor of Law, The University of Chicago. A.B. 1969, Bowdoin College; LL.M. 1974, The University of Texas at Austin; M.A. 1977, Oxford University. — Ed.

1. For the most recent expression of this sentiment, *see* Parrish, *Earl Warren and the American Judicial Tradition*, 1982 A.B. FOUND. RESEARCH J. 1179.

2. White was law clerk to Warren during the third year of Warren's retirement, 1971-1972. For an earlier appraisal by White of the Warren Court, see G. WHITE, THE AMERICAN JUDICIAL TRADITION ch. 14 (1976). For an example of Schwartz's early estimate of Warren, see Schwartz, *"Warren Court" — An Opinion*, N.Y. Times, June 30, 1957, (Magazine), *reprinted in* THE SUPREME COURT UNDER EARL WARREN 48 (L. Levy ed. 1972).

3. *Cf.* p. 5.

terms such as conservative, progressive, and jurisprudence. Along the way, the reader loses sight of Warren, who is caught in a web of taxonomy.

Schwartz's book is less pretentious but more revealing. The Warren who emerges from Schwartz's year-by-year chronicle did not dominate the Court, spiritually or intellectually; he merely presided over it. The selection of cases and the assignment of opinions were skillful, but the ideas of the Court that set fires in the minds of men and women during the period came not from Warren but first from Hugo Black and then quickly, and for the balance of Warren's tenure, from William J. Brennan. Schwartz's argument belies his subtitle: it was "the Brennan Court."[4]

I

Professor White lists three "assumptions" about Warren's public life which he seeks to challenge in his book:

> The first is that Warren was a conservative California Politician; I shall suggest that neither the term "conservative" nor the term "politician" accurately describes Warren's career as a California public official. The second is that Warren underwent a marked change in his attitudes once on the Supreme Court. I shall argue that his public life can be seen as of a piece and that the surface contradictions in his thought can be seen as manifestations of a deep commitment to a general set of principles that were consistent in themselves. The third is that Warren was not a legal technician and that his jurisprudential views were largely derivative. I shall contend that Warren was merely a different kind of legal technician, unorthodox rather than inept, and that his theory of judging, while uniquely his, was not without its own theoretical integrity. [P. 4.]

The agenda is puzzling. The first two assumptions have little to do with Warren's legacy, reputation or importance as Chief Justice of the United States. The elected public official and the Chief Justice presumably have different roles and responsibilities, so the relevance of the relationship between the two is not immediately clear. In any event, White devotes his most sustained and felt attention to the third assumption, which he seems to think stands in the way of Warren's ultimate certification to judicial greatness.

White states that Warren relied for his view of the Constititution not on history, text, or precedent, but on an acute ethical sensibility to the human consequences of the case at hand:

> Warren's craftsmanship as a jurist was thus of a different order from that identified with enlightened judging by proponents of judicial restraint. Warren saw his craft as discovering ethical imperatives in a maze of confusion, pursuing those imperatives vigorously and self-confidently, urging others to do likewise, and making technical concessions, if necessary, to secure support. In believing his concessions on matters of doctrine to be "technical," Warren was defining his own role as a craftsman. It was a role in which one's sense of where justice lay and one's confidence in the certainty of finding it were elevated to positions of prominence in constitutional adjudication, and where craftsmanship consisted of knowing what

4. *Cf.* Rodell, *It is the Earl Warren Court*, N.Y. Times, Mar. 13, 1966 (Magazine), *reprinted in* THE SUPREME COURT UNDER EARL WARREN, *supra* note 2, at 137.

> results best harmonized with the ethical imperative of the Constitution and how best to encourage other justices to reach those results. [Pp. 229-30.]

The craftsmanship of "ethicism," as construed by White, thus has two components: (1) an intuitive certitude of what the Constitution should stand for in any given case, and (2) a rhetorical capacity to persuade others, at least a majority of the Court, to see things the way he did. White realizes that this version of craftsmanship verges, to say the least, on the solipsistic. He quotes with approval Anthony Lewis' well-known description of Warren as "the closest thing the United States has had to a Platonic Guardian,"[5] and asks: "Is Lewis right in suggesting that the posture of an ethicist is fatally dependent on the ethicist's own character?" (p. 359).

Even if one is ethically cock-sure of the bottom line, the future significance of a judicial decision depends largely on how the bottom line is rationalized. White seems to concede that the second component of Warren's craft was often inadequate to the task, and identifies Brennan as "Warren's judicial technician. He was capable, in cases such as *Baker v. Carr,* or *New York Times v. Sullivan*, of supplying doctrinal rationales for decisions in which Warren strongly believed" (p. 185).

Brennan's importance, which emerges more vividly in Schwartz's book, goes well beyond what White describes. Not only did Brennan provide the theoretical framework for Warren's ethical intuitions, but he did so in a way that held together majority opinions that might otherwise have splintered into several precedentially-insignificant voices. In a larger sense, Brennan provided a doctrinal coherence — admittedly not accepted by all — for what the Court was doing. To the extent that the Court over which Warren presided has any intellectual legacy that is accessible to those trained in doctrine and not in ethics, it is Brennan who is responsible.

What did Warren provide other than a handy vote and a symbolic figurehead for the legal and social revolution that the Court touched off? Perhaps Warren's stature was assured in the minds of many with the decision during his first term in *Brown v. Board of Education.*[6] His achievement, widely praised at the time, was not only in authoring the opinion that found state-imposed segregation in public schools unconstitutional, but also — almost more important — in pulling together a unanimous Court for the result and the opinion.[7] For White, *Brown* is the "crucible" for Earl Warren that shaped his role and his vision of his job (ch. 6), and he recounts the now familiar story of how unanimity was achieved.[8]

Brown may have been Warren's crucible (White's evidence is very circumstantial), but it is too much to say that Warren deserves the lion's share of responsibility for the unanimity that the justices displayed on May 17,

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5. P. 359, quoting Lewis, *Earl Warren,* in IV L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2721, 2726 (1969).

6. 347 U.S. 483 (1954).

7. *See generally* Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979).

8. *See* Ulmer, *Earl Warren and the Brown Decision,* 33 J. POL. 690 (1971), *reprinted in* L. FRIEDMAN & H. SCHEIBER, AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 343 (1978); Hutchinson, *supra* note 7, at 34-44. *See generally*, R. KLUGER, SIMPLE JUSTICE (1976).

1954. I have argued elsewhere in detail that, far from shaping a unanimous Court for *Brown*, Warren inherited a Court that had been largely prepared, since 1950, to rule unanimously that segregation in public schools was unconstitutional.[9] In that year, the Court held that state-imposed segregation at the college level violated the Equal Protection Clause of the fourteenth amendment. The internal evidence of the Court's deliberations in those cases, *Sweatt v. Painter*[10] and *McLaurin v. Oklahoma State Regents*,[11] makes abundantly clear that the justices knew what was coming, knew that it would be impossible to rule the other way, and felt that unanimity was an extremely valuable tool for securing compliance with the decision. Warren's achievement in *Brown* was to head off a possible dissent by Stanley Reed and a threatened concurring opinion by Robert H. Jackson. The achievement is significant, but it is not on the order of achieving the result singlehandedly.

Warren's achievement in *Brown* was purchased at a high price. The sticking point in the Court's deliberations prior to Warren's arrival was not so much result as remedy. Chief Justice Vinson, and Justices Reed, Jackson and Clark had all expressed anxieties more over implementation than over the substantive decision. When Warren became Chief Justice after what too many have viewed as Vinson's timely death, he immediately realized the problem and solved it in melodramatic fashion: he persuaded the justices to decide the substantive issue first and to delay decision on the decree until later. The tactic worked perfectly, but the divisions over the remedy were postponed rather than defused. When the case was reargued a year later, it became clear that the remedy was, if anything, an even more bewildering question than it had appeared to be under Vinson. Having been unanimous once, the justices felt that they had to be unanimous again or risk undermining the moral force of their first decision. Warren again wrote for a unanimous Court, but this time unanimity was limited to the lowest common denominator among the nine — which produced equivocation and temporization on every line. To a large extent, then, the unanimity Warren helped to consolidate in *Brown I* boomeranged in *Brown II*.[12]

Warren's tactics for marshalling the Court in the *School Segregation Cases* deserve only qualified praise even from those who view judicial performance, especially by a Chief Justice, as essentially a function of internal administration. Moreover, Warren's behavior with respect to the opinions in the segregation cases demonstrate the nature and price of craftsmanship based on ethics. In *Bolling v. Sharpe*,[13] the companion case to *Brown* from the District of Columbia, the first draft of Warren's opinion for the Court held that federally-imposed segregation in the District's schools violated the fifth amendment, because "[i]t would be unthinkable that the Federal Government should have a lesser duty to protect what, in our present circum-

9. Hutchinson, *supra* note 7.

10. 339 U.S. 629 (1950).

11. 339 U.S. 637 (1950).

12. 349 U.S. 294 (1955).

13. 347 U.S. 497 (1954).

stances, is a fundamental liberty."[14] Warren changed the sentence, and thus the entire constitutional basis for the opinion, when Justices Black and Frankfurter objected to reliance on the substantive due process jurisprudence of the McReynolds era. According to White: "The precise doctrinal steps that the Court took to justify the eradication through constitutional analysis were far less important to Warren than the Court's reaching the result of eradication unequivocally and unanimously" (p. 228).

Whatever one thinks of the appropriateness of the constitutional analysis assumed by White's observation, neither Warren then, nor White now, seem to appreciate fully the costs of Warren's casual attitude toward the theoretical content of opinions issued by the Court. "Deeds without doctrines," as Robert G. McCloskey once called them,[15] are self-defeating. In the short run, they leave the Court vulnerable to attack for being willful rather than rational; in the long run, they provide an empty legacy to inheritors of the faith. Professor Ronald Dworkin, by no means unsympathetic to the mission of the Warren Court, criticized Justice Douglas for the same failure.[16]

If Douglas's constitutional theories were wishful or transparently fanciful, Warren's were simply empty. "Evolving standards of decency"[17] may be a convenient rationalization, but it hardly provides much guidance for future cases. And to say that a contrary result would be "unthinkable" only invites doubt — at least as a general principle.[18] At times, Warren even gave away more doctrinally than he might have wished had he looked down the road: his contribution to the jurisprudence of the Equal Protection Clause in *McGowan v. Maryland*[19] has been an annoying obstacle in the past decade to those who have tried to carry on the egalitarian revolution that began during his tenure.[20] If one looks to Warren for an enduring legacy, as White seems to invite us to do, one finds more symbol than substance.

II

Unlike White, Schwartz does not get bogged down in theory or in elaborate arguments to rehabilitate Warren's reputation for the ages. Facts, not concepts, are Professor Schwartz's meat. He has combed most[21] of the

14. The draft is published in its entirety in Hutchinson, *supra* note 7, at 93. White's discussion is at pp. 226-28.

15. McCloskey, *Deeds without Doctrines,* 56 AM. POL. SCI. REV. 71 (1962), *reprinted in* R. MCCLOSKEY, THE MODERN SUPREME COURT 221 (1972).

16. Dworkin, Book Review, NEW YORK REV. OF BOOKS, at Feb. 19, 1981, at 3, 7.

17. Trop v. Dulles, 356 U.S. 86, 101 (1958).

18. *See generally* Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 232-34 (1972).

19. 366 U.S. 420 (1961). *See also* McDonald v. Board of Election Commrs., 394 U.S. 802 (1969).

20. For Justice Brennan's attempts to put some teeth into the *McGowan* test, see, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 182 (1980) (dissenting opinion); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498, 511 (1975) (dissenting opinion); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973).

21. It does not appear that Schwartz consulted the working papers of Justice Robert H.

available judicial papers for the period (those of Hugo Black, Harold Burton, Tom Clark, William O. Douglas, Felix Frankfurter, and John Marshall Harlan), interviewed former clerks to Warren, and talked on and off the record with all the living justices who sat with Warren except Thurgood Marshall. The materials for a rich and sustained portrait are all on the table: The result is less a biography of Warren than an annotated set of internal minutes for October Terms 1953 through 1968.

The Chief Justice who emerges from this welter of detail is, however, vivid and possessed of a great presence, unlike the bloodless abstraction pictured by Professor White. Thus, of the 1956 Term, Schwartz writes:

> In most respects Earl Warren could have been a character out of Sinclair Lewis or Sherwood Anderson. Justice Potter Stewart's comments are worth requoting: "Warren's great strength was his simple belief in the things we now laugh at: motherhood, marriage, family, flag, and the like." These, according to Stewart, were the "eternal, rather bromidic, platitudes in which he sincerely believed." These were the foundation of Warren's jurisprudence, as they were of his way of life.
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> When we add to this Warren's bluff masculine bonhomie, his love of sports and the outdoors, and his lack of intellectual interests or pretensions, we end up with a typical representative of the middle America of his day. Except for one thing — Warren's leadership abilities. As Stewart sees it, Warren may not have been an intellectual, but "he had instinctive qualities of leadership." [P. 204.]

Warren, as Schwartz shows, also had a temper that could flare when provoked (p. 336) and a consuming vanity. Schwartz shows Warren reacting furiously because he had not been informed that morning coats would be worn at a London reception (p. 284); ticking off the American Bar Association for "deliberately and trickily contriv[ing] to discredit the Supreme Court which I headed" (p. 285); and tongue-lashing a journalist who had committed the double sin of painting a favorable picture of Richard M. Nixon and an unflattering one of Warren: "You people are persecuting me because you know I can't strike back" (p. 337).

If Warren hated anything more than "persecution" by those who saw the world differently than he did, it was Nixon. Professor Schwartz shows that Warren became infuriated at Nixon during the 1952 Republican Convention, when Nixon publically and privately promised to support Warren for President but "betrayed" him by supporting Eisenhower, thus earning Warren's enduring contempt — a contempt that Schwartz says was an "almost visceral repugnance" (p. 21). Forget the bland and self-effacing Warren of his *Memoirs*,[22] the man who had no unkind words for anyone. Warren hated "Tricky Dick — that's what we used to call him," "a crook and a thief" (p. 21). According to Schwartz, Warren announced his retirement in 1968 in order to prevent the appointment to the Chief Justiceship from going to Nixon, who he feared would be elected President in the fall.

Jackson. Jackson served only part of one term with Warren, however, and his papers may shed little light on the Chief Justice.

22. E. WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN (1977). For a perceptive essay on Warren and his memoirs, see Powe, *Earl Warren: A Partial Dissent*, 56 N.C. L. REV. 408 (1978).

When the maneuver failed, Warren regretted that he had not simply decided to stay in office.[23] The book closes with Warren exulting at the news, delivered by Justice Brennan, that the Court had stonewalled Nixon in the tapes case.[24] A few minutes later, Warren died.

Warren's place in history depends not on his personality or his choice of enemies, but on his performance as Chief Justice of the United States. Schwartz views leadership as Warren's most important contribution to the Court, and he constantly refers to Warren's leadership and his leadership qualities, although the content of the terms rests largely on inference. Warren frequently was a necessary fourth vote to bring a controversial case before the Court (as in *Baker v. Carr*,[25] where he joined Black, Douglas, and Brennan) (p. 411). He kept his clerks watching for the "right" case to overrule *Betts v. Brady*[26] (p. 458). He assigned opinions fairly and shrewdly, which kept the troops happy (pp. 460-61). And he assigned to himself opinions that he suspected would generate extensive and unpleasant criticism — such as *Brown, Miranda v. Arizona*,[27] and *Reynolds v. Sims*[28] to spare his associates (and to make his place in history?).

If Warren was a great leader, it was due in part to good luck: He enjoyed, from the beginning of October Term 1962 when Arthur Goldberg took his seat, the ideological companionship of four other justices who could be relied on for the most part, at least until the end, to see the Constitution and the Court's mission the way he did (Black, Douglas, Brennan, and first Goldberg, then Fortas). Or as Schwartz puts it: "Even the most inspiring general must, however, have the troops who are willing and able to follow his lead. Chief Justice Warren received his most capable lieutenant after Sherman Minton resigned in 1956" (p. 204).

Minton was replaced by William J. Brennan, who was more than Warren's "most capable lieutenant." He was Warren's intellectual chief-of-staff from the first term in which he sat. Brennan was the man whom Warren called on to produce an opinion where the tentative majority was united as to result but sharply divided over reasoning. Brennan also did the anonymous dirty work of crafting per curiam opinions that were in fact committee reports in highly controversial cases (*Cooper v. Aaron*[29] and *Alabama v.*

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23. "If I had ever known what was going to happen to this country and this Court, I *never* would have resigned. They would have had to carry me out of here on a plank—." P. 771.

24. United States v. Nixon, 418 U.S. 683 (1974).

25. 369 U.S. 186 (1962).

26. 316 U.S. 455 (1942). "Even before the 1961 Term began, the Chief's new law clerks were instructed by one of the prior term's clerks. 'Keep your eyes peeled for a right to counsel case. The Chief feels strongly that the Constitution requires a lawyer.'" P. 458. *Betts* was overruled March 18, 1963, in Gideon v. Wainwright, 372 U.S. 335 (1963).

27. 384 U.S. 436 (1966).

28. 377 U.S. 533 (1964).

> To one interested in Warren, the *Gideon* case [written by Justice Black] is a good illustration of his fairness in assigning opinions. He did not take the "big" cases for himself, except where, as in the *Brown* segregation case, he thought it was important that the Court speak through the Chief Justice, or, as in *Reynolds v. Sims* or *Miranda v. Arizona*, he wanted to bear the brunt of the expected criticism.

P. 460. That may be true, but Schwartz also demonstrates amply throughout the book that Warren was not averse to the limelight.

29. 358 U.S. 1 (1958). For other accounts of Brennan's work in the Little Rock school case,

United States[30] (pp. 463-64) are the most prominent examples), and it was Brennan who occasionally supplied the theory in a concurring opinion that filled in the gaps left by a bold but incohesive opinion for the Court (his opinions in the controversial religion cases, *Engel v. Vitale*[31] and *Abington School District v. Schempp*,[32] stand out as the de facto opinions for the Court).[33] In addition to writing *Cooper v. Aaron*, for which he received no public credit, Brennan frequently served as Warren's editor before an important opinion was circulated (as in *Miranda v. Arizona* (pp. 590-91)) and occasionally he even helped the most independent author on the Court, Justice Douglas. The most startling fact about the genesis of opinions that Schwartz catalogues is that Brennan, not Douglas, designed the spectral theory of *Griswold*, which Douglas, in a first draft, had tried to dispose of on the basis of freedom of association under the first amendment (pp. 577-80). Warren thought that the case might be handled on the basis of *Yick Wo v. Hopkins*[34] (p. 577). In case after case, Schwartz documents in numbing detail how Brennan would accommodate his own drafts and views in order to preserve an opinion of the Court that was tumbling toward a plurality or worse.[35] Warren may have given the orders, but it was Brennan who put together the General's victories.

When the public record is added to Schwartz's numerous behind-the-scenes examples of managing the Court, Brennan emerges clearly as the single most important justice of the period. The list of his opinions for the Court on constitutional questions reads like a syllabus for any comprehensive study of what is usually referred to as the "Warren Court."[36] Under

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see Hutchinson, *supra* note 7, at 73; Heck, *The Socialization of a Freshman Justice: The Early Years of Justice Brennan* 10 PAC. L.J. 707, 723-24 (1979).

30. 373 U.S. 545 (1963).

31. 370 U.S. 421 (1962).

32. 374 U.S. 203 (1963).

33. *See* McCloskey, *Principles, Powers, and Values,* in R. MCCLOSKEY, *supra* note 15, at 290-321. *See generally* Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841 (1980).

34. 118 U.S. 356 (1886).

35. *See, e.g.,* Baker v. Carr, 369 U.S. 186 (1962) (pp. 413-14); Wong Sun v. United States, 371 U.S. 471 (1963) (pp. 456-57); Heart of Atlanta Motor Hotel v. United States, 379 U.S. 241 (1964) (pp. 554-55); Katzenbach v. McClung, 379 U.S. 294 (1964) (pp. 554-55); Katzenbach v. Morgan, 384 U.S. 641 (1966) (pp. 601-02); Warden v. Hayden, 387 U.S. 294 (1967) (pp. 640-41); Curtis Publishing Co. v. Betts, 388 U.S. 130 (1967) (pp. 651-52); Terry v. Ohio, 392 U.S. 1 (1968) (pp. 691-92); Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968) (pp. 705-06); Shapiro v. Thompson, 394 U.S. 618 (1969) (pp. 725-32).

36. *See, e.g.,* Jencks v. United States, 353 U.S. 657 (1957) (defendant's right to exculpatory materials before trial); Roth v. United States, 354 U.S. 476 (1957) (constitutional standard for obscenity); Baker v. Carr, 369 U.S. 186 (1962) (justiciability of apportionment); NAACP v. Button, 371 U.S. 415 (1963) (first amendment protection of civil rights lawyers' solicitation of business); Fay v. Noia, 371 U.S. 391 (1963) (habeas corpus); Sherbert v. Verner, 374 U.S. 398 (1963) (free exercise of religion); New York Times v. Sullivan, 376 U.S. 254 (1964) (constitutional standard for libel); Malloy v. Hogan, 378 U.S. 1 (1964) (application of fifth amendment to states, overruling Twining v. New Jersey, 211 U.S. 78 (1908)); Dombrowski v. Pfister, 380 U.S. 479 (1965) (federal court intervention into state court proceedings to vindicate constitutional rights); Katzenbach v. Morgan, 384 U.S. 641 (1966) (Congressional power under section five of the fourteenth amendment); Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968) (expansion of remedy under *Brown v. Board of Educ.*); Shapiro v. Thompson, 394 U.S. 618 (1969) (unconstitutionality of durational residency requirements for welfare).

Warren E. Burger and on a different Court, Brennan's impact has been reduced dramatically. Nonetheless, he is still capable of stitching together majorities, on occasion, that are reminiscent of the old days.[37]

III

Taken together, White and Schwartz have collaborated unwittingly to put Warren in his place. Although Warren was an important and courageous figure and although he inspired passionate devotion among his followers, as the warm tributes in the *Harvard Law Review*[38] movingly attest, he was a dull man and a dull judge. His significance has been magnified out of proportion by the enemies he made and by the short-hand by which the constitutional revolution over which he presided became known. Despite the habit of mind that continues to call it the "Warren Court" and the occasional vague encomia that some of his colleagues supplied to confirm the myth,[39] if any single justice deserves to be identified with the constitutional revolution engineered by the Supreme Court in the last generation, it is William J. Brennan and not Earl Warren.

There are now five biographies of Earl Warren, counting the recent contributions of White and Schwartz.[40] None does justice to its subject, although Professor Schwartz does Warren the great courtesy of treating him on a human scale and not as larger than life. A critical analysis of the Brennan period is needed now, but five biographies of Earl Warren are enough.

Brennan's opinions through 1966 are collected in S. FRIEDMAN, AN AFFAIR WITH FREEDOM (1967).

37. *See, e.g.*, Plyler v. Doe, 102 S.Ct. 2382 (1982); Weber v. Steelworkers, 443 U.S. 193 (1979) (Title VII and "affirmative action"); Craig v. Boren, 429 U.S. 190 (1976) (equal protection for women); Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973) (further expansion of remedy under *Brown v. Board of Educ.*); Eisenstadt v. Baird, 405 U.S. 438 (1972) (personal autonomy); Goldberg v. Kelly, 397 U.S. 254 (1970) (procedural due process).

38. *See* Brennan, *Chief Justice Warren*, 88 HARV. L. REV. 1 (1974); Black, *An Impression of the Late Chief Justice*, *id.* at 6; Pollak, *The Legacy of Earl Warren*, *id.* at 8; Ely, *The Chief*, *id.* at 11. *See also Proceedings in the Supreme Court in Memory of Mr. Chief Justice Warren,* 421 U.S. v. (1975).

39. Schwartz takes his title and epigraph from Brennan: "To those who served with him, Earl Warren will always be the Super Chief" (p. vii). *See also* A. GOLDBERG, EQUAL JUSTICE (1971); Fortas, *Chief Justice Warren: The Enigma of Leadership*, 84 YALE L.J. 405 (1975). But even Fortas found Warren's importance unquantifiable, indeed almost "occult." *Id.* at 406. *See also* Powe, *supra* note 22, at 421 (Warren's "greatness" is "elusive").

40. *See also* L. KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY (1967); J. WEAVER, WARREN: THE MAN, THE COURT, THE ERA (1967); J. POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA (1979).