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## Almost an Age of Justice

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## BOOK REVIEW

### ALMOST AN AGE OF JUSTICE

THE UNPUBLISHED OPINIONS OF THE WARREN COURT. By Bernard Schwartz. New York: Oxford University Press. 1985. Pp. 470.  
\$29.95

REVIEWED BY STEVE GEY\*

Over sixteen years have passed since Earl Warren retired as Chief Justice. During this period the Warren Court has become an icon. Liberals write books to assure other liberals that the constitutional legacy of the Warren Court, although tattered, still prevails.<sup>1</sup> At the other end of the political spectrum, judicial conservatives actively seek to bury the Warren Court once and for all, their main target being that Court's "activism" and its supposedly freewheeling methods of constitutional interpretation. As it was during its heyday, the Warren Court continues to be the focal point of debate over constitutional policy. Despite their differences, both liberals and conservatives subscribe to the received myth of the Warren Court. It was, they believe, a singular Court. The common perception is that the pronouncements of the Warren Court differed both in style and substance from those of its predecessors and of its successor. The myth thus hints of Camelot: we shall never see its like again.

Bernard Schwartz fully accepts the myth surrounding the Warren Court. This befits Professor Schwartz's academic interests; he is the author of the definitive biography of Earl Warren.<sup>2</sup> In fact, *The Unpublished Opinions of the Warren Court* could be considered an extensive appendix to the Warren biography. The book consists mainly of unpublished drafts of opinions in eleven cases reviewed by the Warren Court, as well as additional unpublished material (such as memoranda, letters, and conference notes) incorporated in short explanatory passages preceding and following each collection of draft opinions. The cases discussed run the

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1. See, e.g., *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (V. Blasi ed. 1983).

2. B. SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* (1983).

gamut of public law issues considered by the Warren Court, including several of the Court's most famous decisions: *Brown v. Board of Education*,<sup>3</sup> *Griswold v. Connecticut*,<sup>4</sup> and *Time, Inc. v. Hill*.<sup>5</sup>

One interesting aspect of this book is that it provides substantial evidence to debunk the myth with which the author seems to identify. Many of the cases illustrate how timorous the Warren Court was in crafting what we now remember as a constitutional revolution. Indeed, several of the cases cited by Professor Schwartz as embodying the Warren Court's judicial progressivism were almost decided differently. For example, the Court came close to issuing a majority opinion in *Bell v. Maryland*,<sup>6</sup> which involved a civil rights sit-in demonstration, that was avowedly hostile to the civil rights cause with which the Warren Court is now identified. Moreover, this retrograde opinion was to have been written by Hugo Black, a supposed stalwart of the Court's liberal wing.<sup>7</sup>

In concentrating on the politicking and coalition-building that characterized the debate concerning each case, Professor Schwartz provides evidence—if not analysis—to explain the Court's failure to effect a true judicial revolution. This material indicates that, contrary to the common perception, the Warren Court never formulated a consensus about the nature and goals of its constitutional jurisprudence. Like the Burger Court, the Warren Court produced opinions that were defined more by the personal idiosyncrasies of its members than by a shared, systematic view of the legal universe. It was inevitable, therefore, that the decisions of the Warren Court ultimately reinforced the status quo: the Court successfully attacked some of the legal system's more noticeable fail-

3. 347 U.S. 483 (1954) (hereinafter cited as *Brown I.*); 349 U.S. 294 (1955) (hereinafter cited as *Brown II.*).

4. 381 U.S. 479 (1965).

5. 385 U.S. 374 (1967).

6. 378 U.S. 226 (1964).

7. If a majority had joined Justice Black's proposed *Bell* opinion, it probably would have been interpreted by contemporary commentators as indicating the Court's hostility to fundamental aspects of the civil rights movement, not just to the isolated activities associated with sit-in demonstrations. The bill that would become the Civil Rights Act of 1964 was then being debated in Congress; the civil rights decisions issued by the Court during this period therefore inevitably took on broader implications. In his draft dissent to Justice Black's opinion, Justice Brennan wrote, "We of this Court . . . are not so removed from the world around us that we can ignore the current debate over the constitutionality of Title II if enacted. . . . [W]e cannot be blind to the fact that today's opposing opinions on the constitutional question decided will inevitably enter into and perhaps confuse that debate." B. SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 187 (1985).

ings, but the system's ideological framework survived the Warren era intact. In other words, there has been no counterrevolution in the Burger Court because there was no Warren Court revolution in the first place.

### I. PERSONALIST JURISPRUDENCE AND THE WARREN COURT

In modern times the United States Supreme Court increasingly has come to operate atomistically. Personalist jurisprudence—highly subjective, individualistic, and idiosyncratic—has come to the fore, fueled by the growth of the Supreme Court's bureaucracy. Four full-time law clerks can turn out a prodigious number of opinions in one Term. Given the ability to produce an opinion supporting one's point of view on a particular subject, the Justices seem to have found it difficult to resist exercising that faculty. Differences in degree thus become differences in kind, justifying a full exegesis in a separate opinion. Majority opinions reflect the development of independent power centers within the Court by becoming committee products. These opinions take on all the characteristics of that breed; their sharp edges are filed, they are focused as narrowly as possible, and they tend to propose—at most—incremental change.

The evidence provided by Professor Schwartz indicates that this malady afflicted the Warren Court just as it does the present body, although perhaps not to the same degree. The Court's own members recognized this. Schwartz quotes a letter from Justice Frankfurter to Justice Reed: "The history of the Supreme Court is not the history of an abstraction, but the analysis of individuals acting as a Court . . ."<sup>8</sup> But even a Court defined by the rigid individualism of its participants develops cliques and coalitions. And by dint of personal persuasiveness, sheer persistence, or intellectual wherewithal, some Justices exert far more influence within the Court than their colleagues. Even in an exalted farmyard, some animals are more equal than others.

Professor Schwartz depicts this competition for influence within the Warren Court very well. According to the author, it was a three-way battle: the Chief Justice and Justice Black each believed himself to be the leader of the Court's progressive wing, and after the initial honeymoon period of Warren's leadership, Justice Frankfurter sought to lead what Schwartz terms "Warren's oppo-

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8. *Id.* at 5.

nents." The odd thing about the development of an opposition coterie within the Court is that its agenda did not proceed from the particular to the abstract. The Justices' divergent treatments of the issues often seem to have been based more on style and personality than on judicial theory. Even the bugaboo "judicial activism" does not account for the supposed split, for in many of the cases the Justice most reluctant to act was Hugo Black.

Professor Schwartz's portrayals of Justices Frankfurter and Black are especially unflattering. Frankfurter is depicted as an arrogant and supercilious man. He was one of the Court's few true intellectuals during this period, and he let everyone know it. But notwithstanding the leadership qualities Frankfurter knew he possessed, he was a general without an army. In a battle for influence, Warren the political operator could beat Frankfurter the snob every time. Some of Frankfurter's petulance may be attributable to his recognition that for the remainder of Warren's tenure the Court's agenda would be controlled by someone else. Or it may be attributable to his feelings of superiority to the newly ascendant Warren. These feelings sometimes manifested themselves in childishly hyperbolic outbursts. Frankfurter is quoted as having said to Warren in conference, "You're the worst Chief Justice this country has ever had."<sup>9</sup> In another conference Frankfurter is said to have "screeched" at Warren, "Be a judge, god damn it, be a judge!"<sup>10</sup> Warren was not the lone recipient of Frankfurter's ire, however. When told of the death of Chief Justice Vinson, Warren's predecessor, Frankfurter remarked to two former law clerks, "This is the first indication that I have ever had that there is a God."<sup>11</sup>

The portrait painted of Justice Black is significant for its contrast with the Justice's reputation as one of the country's great civil libertarians. In the materials selected by Professor Schwartz, we are shown the conservative, southern side of Black. These materials also demonstrate the seldom-noted fact that Justice Black was a progenitor of the movement presently afoot to interpret the Constitution literally and in strict conformity with the purported view of the founding fathers.<sup>12</sup> Schwartz refers to this aspect of Black's thought when he speaks of the Justice's "black-

9. *Id.* at 11.

10. *Id.* at 12.

11. *Id.* at 446.

12. See *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985) (Rehnquist, J., dissenting); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

letter approach" to the constitutional text.<sup>13</sup> The author also provides several examples in which this "black-letter" approach produced results discordant with the civil libertarian creed usually attributed to Justice Black.

For example, during its 1969 Term the Court granted certiorari in *Maxwell v. Bishop*,<sup>14</sup> an Arkansas death penalty case in which the state and lower federal courts had affirmed the defendant's death sentence. The case raised two important issues: whether a defendant in a capital case is entitled to a bifurcated trial in which the issues of guilt and punishment would be decided separately, and whether a state must enunciate standards limiting the circumstances under which a jury can sentence a defendant to death. The Court ultimately reversed on a third, much narrower ground: that potential jurors had been excluded from the jury merely because of their stated opposition to the death penalty, in violation of *Witherspoon v. Illinois*.<sup>15</sup> Justice Black, however, opposed reversal on all three grounds. At the first *Maxwell* conference, Justice Black stood alone in voting to affirm the lower court ruling.<sup>16</sup> In response to draft opinions addressing the bifurcated trial issue, Black circulated a cursory dissent: "This country has managed to get along without the constitutional requirement of such trials for around 180 years and it seems late in the day for this Court to announce such a constitutional rule."<sup>17</sup> Black viewed the Constitution as a static document; in his view its terms were not adaptable to changing times, nor were its principles capable of evolution to accommodate unforeseen circumstances. Black's opposition to the Court's approach in *Maxwell* was a natural consequence of his niggardly reading of the constitutional text. "This is any way [sic] only a fight to abolish capital punishment. That's for the legislature, not the courts."<sup>18</sup>

Black's constitutional interpretation was at times too rigid and unrealistic even for the advocates of strict judicial passivity. Justice Frankfurter once asked Black pointedly "if he would point out the clause which [prohibits] the President [from] seiz[ing] the

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13. B. SCHWARTZ, *supra* note 7, at 9.

14. 398 U.S. 262 (1970).

15. 391 U.S. 510 (1968).

16. B. SCHWARTZ, *supra* note 7, at 396.

17. *Id.* at 427.

18. *Id.* at 442.

Steel companies.”<sup>19</sup> Black blithely answered that “he never declared anything unconstitutional which was not clearly prohibited by the Constitution.”<sup>20</sup> As this exchange between Frankfurter and Black illustrates, Justice Black shared with other strict constructionists the tendency to apply extraconstitutional values in a case and then attribute the result to the requirements of a “clear” constitutional text. This tendency is illustrated most clearly by Professor Schwartz’s excerpts from several race cases considered by the Warren Court: *Bell*, *Brown I*, and *Brown II*.

*Bell* was an appeal by several black students who had been arrested when they sought to eat at a whites-only lunch counter. Because the state convicted them of criminal trespass, the students claimed the state had used its police power to enforce the discriminatory policies of the lunch counter owners. The students cited *Shelley v. Kraemer*<sup>21</sup> for the proposition that such use of state action violated the fourteenth amendment. At its initial conference on the case, the Court voted five to four to reject the students’ constitutional claim and affirm the convictions.<sup>22</sup> Justice Black was the leading advocate of affirmance. In what Professor Schwartz describes as an “emotional” presentation to the conference, Justice Black declared that “he could not believe that his ‘Pappy,’ who operated a general store in Alabama, did not have the right to decide whom he would or would not serve.”<sup>23</sup> As senior Justice in the majority, Black assigned the opinion to himself.

Black circulated a draft majority opinion elaborating his belief that the Constitution favored the property rights of the shopkeepers rather than the civil rights of the black students. “It would betray our whole plan for law and order to say that a citizen, because of his personal prejudices, is cast outside the law’s protection . . . .”<sup>24</sup> According to Justice Black, the fourteenth amendment did not bar the state of Maryland from enforcing segregation of privately owned restaurants, “so long as it does not do so with an evil eye and a prejudiced heart and hand.”<sup>25</sup> The important thing

19. *Id.* at 25 (footnote omitted); see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

20. B. SCHWARTZ, *supra* note 7, at 25.

21. 334 U.S. 1 (1948).

22. B. SCHWARTZ, *supra* note 7, at 146.

23. *Id.*

24. *Id.* at 154-55.

25. *Id.* at 147. Professor Schwartz uses this quote in his introduction to the draft opinions. The text of the draft majority opinion contains a much tamer version of this passage. See *id.* at 160-61.

was that the property owner be allowed to run his business in his own way. "If free enterprise means anything, it means that."<sup>26</sup> As interpreted by Justice Black, *Shelley* concerned the enjoyment of property rights: that case protected the rights to "own, occupy, enjoy, and use" property in any manner the purchaser wished.<sup>27</sup> According to the Justice, the black students in *Bell* were themselves violating this principle by foisting their presence upon unwilling white shopowners. "We cannot subscribe to [the students'] one-sided interpretation of a constitutional provision, the very heart of which is a guarantee of equal treatment under law to all."<sup>28</sup> To Justice Black, the facial neutrality of Maryland's trespass laws was key.

Justice Black's ambivalent attitude toward applying the fourteenth amendment to the institution of segregation is also evident in Schwartz's treatment of *Brown I* and *Brown II*. Although Justice Black joined the unanimous opinion of the Court in both cases, he urged the Court not to attempt the impossible. "I was brought up in an atmosphere against federal officials," he said at the *Brown II* conference, "which is rooted in the race question. . . . The South would never be a willing party to Negroes and whites going to school together."<sup>29</sup> Black's solution amounted to a pronouncement that segregation is bad, while foregoing any attempt at enforcement. There will be only a "glacial movement" toward desegregation, he told his colleagues, and "[t]he less we say the better off we are. . . . It is futile to think that in these cases we can settle segregation in the South."<sup>30</sup>

These vignettes cogently illustrate Jerome Frank's axiom that a judge's personality is the pivotal factor in law administration.<sup>31</sup> The principles of the fourteenth amendment that Black applied in his draft opinion in *Bell* were derived as much from his experience as a white in the segregated South as they were from a careful consideration of the Constitution. This adds another dimension to the personalism that guided the Warren Court. The gradualist approach of that Court was mandated not only by differences in the theoretical approaches of the Justices, but also by the broad varia-

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26. *Id.* at 161.

27. *Id.* at 157.

28. *Id.*

29. *Id.* at 461.

30. *Id.*

31. J. FRANK, *LAW AND THE MODERN MIND* 120 (1930).

tions in their backgrounds, educations, temperaments, and personalities.

## II. THE VISCERAL JUSTICE OF SUPER-CHIEF

One shortcoming of *The Unpublished Opinions of the Warren Court* is that Professor Schwartz remains generally noncommittal on the Court's internecine conflicts concerning specific cases. He commits himself most fully in comments posed in the form of "what might have been," although some of these comments are presented a little too breathlessly, and the accuracy of Schwartz's retroactive prescience is dubious. The comments frequently seem to have been included only to lend an air of importance to opinions that are otherwise relatively inconsequential. For example, Schwartz stretches the case law beyond reason when he asserts that the Burger Court might never have handed down *Roe v. Wade*<sup>32</sup> if the Warren Court had decided the equal protection issue in *Shapiro v. Thompson*<sup>33</sup> under a rational basis test, as the majority originally intended, rather than a compelling interest test, as the Court did.<sup>34</sup> In other cases, Schwartz merely restates the obvious, as when he links *Roe* to its direct predecessor, *Griswold v. Connecticut*.<sup>35</sup>

In contrast to Schwartz's generally neutral stance with regard to individual cases, he does commit himself on the subject of the overall record of the Warren Court. He identifies with and supports what he perceives to be the reformist legacy of the Court. Schwartz seems to take for granted that there is a consistent theme running through the Court's opinions, but he does not identify or critique it. Because he treats the Warren Court legacy so gently, it is impossible to ascertain what he believes were the Court's failures. Schwartz lets a few gibes slip in about the shortcomings of some of the Associate Justices, but only indirectly, usually through a particularly telling anecdote. One of the best relates to Justice Black. Schwartz notes that Black always resented Chief Justice Warren getting much of the credit for the Court's actions. At Warren's retirement, the Justices circulated a traditional letter of farewell to the Chief. The letter included the phrase, "For us it

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32. 410 U.S. 113 (1973).

33. 394 U.S. 618 (1969) (holding unconstitutional the denial of welfare benefits to potential recipients who had lived in an administrative jurisdiction less than one year).

34. B. SCHWARTZ, *supra* note 7, at 391-92.

35. 381 U.S. 479 (1965); see B. SCHWARTZ, *supra* note 7, at 238-39.

is a source of pride that we have had the opportunity to be members of the Warren Court."<sup>36</sup> Justice Black changed this to: "the Court over which you have presided."<sup>37</sup>

The primary exception to Schwartz's unassertiveness is revealed whenever the text focuses on Warren himself. Here Professor Schwartz lets his true feelings show. It is not without reason that Schwartz titled his Warren biography *Super-Chief*.<sup>38</sup> Schwartz compares Warren to Chief Justice John Marshall, and notes with approval that Justice Douglas listed Warren as one of the three greatest Chief Justices of all time.<sup>39</sup> In a sidelong reproof to Justice Black, Schwartz writes that "[i]f any high bench can properly be identified by the name of one of its members, this high bench was emphatically the *Warren Court*."<sup>40</sup>

Warren indeed was the lodestar of the Court during this era. The Chief usually found a way to make his own voice stand out amid the cacophony that issued from the Supreme Court during his tenure. He often did so by employing purely political skills; theory mattered little to him, so he was able to spend all his time concentrating on the thing that did matter—the decisions. Except in extraordinary cases, Warren did not write his opinions. He would dictate the outline of the decision to his executive secretary and leave the rest to a clerk, "who was left with a great deal of discretion, particularly on the reasoning and research supporting the decision."<sup>41</sup> In many ways Warren was the quintessential Realist judge.

Warren's method of approaching the job of Chief Justice in large part explains the Court's successes. It also explains why the Court stopped far short of articulating jurisprudential principles that could address broader issues of economic justice and structural inequity. Warren was a visceral jurist. He could not always define injustice, but he knew it when he saw it, and he forced "his" Court to move toward its eradication. His activities prior to being appointed Chief Justice gave no indication of his empathetic capacities. While California's Attorney General, Warren was the leading

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36. B. SCHWARTZ, *supra* note 7, at 7.

37. *Id.*

38. *See supra* note 2.

39. Along with John Marshall, Douglas included Charles Evans Hughes. B. SCHWARTZ, *supra* note 7, at 7.

40. *Id.* at 8.

41. *Id.* at 448.

advocate of the wartime internment of Asian-Americans.<sup>42</sup> As Governor, he “strongly opposed” reapportionment.<sup>43</sup> His main legal experience was derived from his eighteen years as a prosecutor.<sup>44</sup>

Once on the bench, Warren’s focus shifted. This was clear from the Chief Justice’s first days on the Court. The first major case he confronted was also the most important that the Warren Court decided: *Brown v. Board of Education*. Warren turned what had been a four to four split between the Associate Justices serving under Chief Justice Vinson into a unanimous decision by those same Justices to strike down the separate-but-equal doctrine of *Plessy v. Ferguson*.<sup>45</sup> He accomplished this result by using his office unabashedly to press for what he considered to be the morally correct decision. “I don’t see how,” he told the first *Brown I* conference, “in this day and age we can set any group apart from the rest and say that they are not entitled to exactly the same treatment as all others.”<sup>46</sup> Warren did not attempt to parse the cases leading up to *Brown I*; the cases seem to have been irrelevant to him. It was more of an ethical matter, and a simple one at that.

The decision in *Brown I* was so important to Warren that he broke with his usual habit and wrote a first draft of the opinion himself. Schwartz notes one particularly revealing sentence of this draft that appears in a paragraph explaining the Court’s reasons for declaring unconstitutional every instance of segregation in public schools: “To separate [black children] from others of their age in school solely because of their color puts the mark of inferiority not only upon their status in the community but also upon *their little hearts and minds* in a form that is unlikely ever to be erased.”<sup>47</sup> The phrase “their little hearts and minds” is characteristic of Warren. His clerks would later add citations to case law and sociological tracts to the opinion, but these abstract elements undoubtedly did not appeal to the Chief Justice. It was the specific injury to identifiable persons that piqued Warren’s interest and his concern. The nature of the injury sustained by blacks under a system of segregation had been personalized for Warren years before. Schwartz quotes Edgar Patterson, a black man who was Governor Warren’s driver: “Warren would ask, ‘Tell me about how you felt

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42. *Id.* at 5.

43. *Id.* at 6.

44. *Id.*

45. 163 U.S. 537 (1896).

46. B. SCHWARTZ, *supra* note 7, at 446.

47. *Id.* at 455 (emphasis added).

when you were a little kid, going to school. And then I used to tell him about some of the things that happened in New Orleans, the way black kids felt.'"<sup>48</sup>

Warren's feelings on this subject are also evident in his draft dissent in a companion case<sup>49</sup> to *Bell*. The style and emphasis of this opinion substantially differ from that of Justice Black's majority opinion draft in *Bell*.<sup>50</sup> Warren's opinion contains not even one citation to a case; it concentrates instead on describing the facts of the alleged trespassing infraction in great detail. Warren emphasized that the context of the alleged offense magnified the discriminatory impact of applying the Maryland trespass law to these defendants. The Chief Justice noted that the drugstore in which the arrests occurred permitted blacks to make retail purchases and to order takeout food from the lunch counter. The only thing they were not allowed to do was sit down at the lunch counter and eat a meal. "The Court has thus elevated to the status of constitutional protection a claimed property right which is at best the right to solicit the patronage of Negroes at a lunch counter if they stand up, but to deny it if they sit down."<sup>51</sup> The formalistic interpretation Justice Black applied to the state trespass statute infuriated and offended Warren.

[T]he arrest, although technically for the crime of trespass, can solely be justified as for the purpose of enforcing the store's policy, a policy which, as noted, was founded on a right to compel Negroes to stand up to buy their food solely for the reason that they were Negroes. The store might as well have offered to feed only Negroes who would crawl in on their hands and knees, or, as in other caste systems, who would purchase food under conditions that would not cause their shadow to fall on the food of whites. It saddens me deeply to think that this Court, which has so far advanced the notion of the equal dignity of all men before the law, would sanction the right so publicly to first shame and then punish one who merely seeks that which any white man takes for granted.<sup>52</sup>

Facts are not always so colorful as those in *Bell*, and Warren's approach limited his ability to deal with the more complex and

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48. *Id.* at 449.

49. *Barr v. Columbia*, 378 U.S. 146 (1964).

50. B. SCHWARTZ, *supra* note 7, at 164; see also *supra* text accompanying notes 21-28.

51. *Id.* at 167.

52. *Id.* at 169.

abstract problems associated with economic inequality and the injustice it engenders. In a sense, his world view precluded any attempt to deal with the deeper schisms of American society. Warren's was in many respects a conservative view; he did not demonstrate any basic disagreement with the present distribution of resources and political power. He was quite willing to tinker with and streamline the system, but not to change it. Even if he had developed an inclination to alter the structure of American policy in any substantial way, he did not have at his command the critical methodology to do so. Warren's method of approaching a case, with its heavy emphasis on the facts, its latent emotionalism, and its tendency to base decisions on a consensual view of constitutional terminology did not allow him to break many intellectual molds. Without the desire or the ability to formulate a new theoretical structure for constitutional provisions such as the equal protection clause, nor to actively enlarge upon and apply constitutional protections in new areas of social intercourse, Warren and his Court were destined from the outset to offer only incremental change. The point is, Warren would not have wanted it any other way.

### III. CONCLUSION

The popular myth of the Warren Court has not changed much in the years since Earl Warren retired. The Warren era still is viewed as the reign of the legal *sans-culottes*.<sup>53</sup> This myth has survived in the face of evidence that the Warren Court never challenged any of the fundamental aspects of American political life. In 1953, as in 1969, the United States was one of the more politically conservative countries in the industrial West. Nothing the Warren Court did changed this: power was distributed in roughly the same manner at the end of his tenure as it had been at the beginning. The Warren Court left the basic verities of the American political and economic landscape as it had found them.

Even if the Warren Court did not manage to accomplish significant systemic change, it nevertheless was able to achieve a measure of equity in individual cases—a pointillist justice, as it were. The value of Professor Schwartz's account is that it shows us small fragments illustrating this aspect of the Warren Court's work. The question he leaves unanswered is whether the Warren Court

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53. See the comment by Justice Frankfurter, *id.* at 12.

reached the limit of the Supreme Court's—and thus the law's—capability to act as the agent of truly radical social change. If the answer to that question is yes, and if that answer means that notions of distributive justice can never be judicially introduced into our constitutional scheme, then Schwartz has told a story more melancholy than he realizes.

Professor Schwartz's treatment of Earl Warren and his Court displays one form of moderate judicial activism, and one manner of pursuing equity by increment. But this is by no means the only model for judicial behavior, and the Warren Court does not represent the apotheosis of the Supreme Court in its role as constitutional interpreter of last resort. Perhaps one day we will have a Chief Justice who combines Warren's compassion and political acumen with Douglas' iconoclasm and Frankfurter's intellect. Until that day we are obliged to recall the Warren Court period with the same ambivalence exhibited by the populace of Brecht's Grusinia regarding the rule of their renegade judge Azdak:

The period of his judging [was] a brief golden age,  
Almost an age of justice.<sup>54</sup>

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54. B. BRECHT, *THE CAUCASIAN CHALK CIRCLE* 128 (E. Bentley trans. 1947).

