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# Social Justice and the Warren Court: A Preliminary Examination\*

ARTHUR S. MILLER\*\*

*Whether courts should attempt to advance social justice is a much debated topic in American jurisprudence. The conventional wisdom about the judicial process is to the contrary. In this article, Professor Arthur S. Miller suggests that the Supreme Court's innovative civil rights and civil liberties decisions during Chief Justice Earl Warren's tenure had the ultimate effect of helping to preserve the status quo of the social order. Its decisions, coming at a time of economic abundance, were a means of siphoning off discontent from disadvantaged groups at minimum social cost to the established order. The "activist" decisions under Warren were thus of a profoundly conservative nature. Using a recent biography of Chief Justice Warren as a point of departure, Professor Miller's analysis is a provocative examination of the Supreme Court's work during the years of 1953 to 1969.*

## I. INTRODUCTION: THE ESSENCE OF CONSTITUTIONAL DECISION-MAKING

"Judicial power," Chief Justice John Marshall once asserted, "is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."<sup>1</sup> That, of course, was the conventional wisdom of the day, stated in classic terms by Blackstone: the judge is "sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new

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\* This essay began as a review of BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIARY BIOGRAPHY* (1983), but became an article. Schwartz's book was published by the New York University Press.

\*\* Professor Emeritus of Law, George Washington University; Adjunct Professor of Law, Nova University Law Center. Copyright is reserved to the author. The essay is based upon the author's work in progress, a book tentatively entitled *GETTING THERE FROM HERE: CONSTITUTIONAL CHANGES FOR A SUSTAINABLE SOCIETY*.

1. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824). For a well-known judge's reaction to that statement, see B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 169-70 (1921).

law, but to maintain and expound the old one.”<sup>2</sup> Marshall’s and Blackstone’s “wisdom”—it was hardly that—still abides, as witness almost any coursebook used in law school and certainly any of the standard constitutional law coursebooks. The editors routinely proceed on the assumption that the ancient “wisdom” is the norm, and construct tortuous edifices of legal doctrine to show to their satisfaction that there is something other than “the will of the judge” in constitutional decisions. In this, they are aided by commentators who parse Supreme Court decisions with an intensity similar to that of Scholastics arguing over the meaning of the ancient texts of Aristotle and Plato. Judges, too, contribute to the intellectual confusion—possibly because they want to make their opinions look scholarly or because they want to write in the language with which lawyers are familiar or because they have law clerks mint-fresh from law school and law review training who follow the paths of judicial elucidation honored by time but little else.

All of this is quite well known and is, indeed, one of the commonplaces of the day. But the ancient practices continue. Why they do so is an important question. Some commentators, such as Professor Paul Mishkin, argue that even sophisticated laymen are too naive to understand the truth about the process of judging.<sup>3</sup> It is entirely all right, in this view, for law professors and even law students to know more than the Marshall/Blackstone version of judging. But, they assert, the dirty little secrets about judging should be kept within the confines of the profession.

I think there is another reason: the vested interest that those who edit coursebooks and write textbooks have in the existing system. Upon admitting that Marshall and Blackstone were wrong, Pandora’s Box would spring open; the books would have to be completely rewritten. Furthermore, there is the vested interest that law professors have in the “case method” of instruction. Cut below the surface of judicial decisions, however, and the professoriate will quickly find themselves adrift without a rudder or a compass. The case method is probably the worst possible means of transmitting information. Its employment is based on the supposition that engaging in the verbal jousts that travel under the banner of the Socratic method helps legal neophytes “to think like lawyers.”<sup>4</sup>

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2. 1 W. BLACKSTONE, COMMENTARIES 69.

3. See Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62 (1965). See also M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* c.1 (1964).

4. See generally Levinson, *Taking Law Seriously: Reflections on “Thinking Like a Lawyer,”* 30 STAN. L. REV. 1071 (1978).

Thinking like lawyers is, I suggest, a form of brain damage. It is a means of addressing the very real problems of very real people in an intellectual vacuum. High-level abstractions take the place of thorough analyses of those problems. A "principled" opinion becomes the *ne plus ultra* of the judicial process. The never adequate and seldom defined notion of sovereign "reason" should rule, so we are told, and many commentators wax apoplectic about what they consider to be the failure of judges to follow the dictates of principle or of reason. Granted, this ideal should be considered a desirable means of deciding cases. But the spotted actuality is to the contrary. Although Chief Justice Marshall in 1803 could assert that "[t]he government of the United States has been emphatically termed a government of laws, and not of men,"<sup>5</sup> no thoughtful person realistically believes that today. Indeed, said the *London Economist*, "in 1960-80 America became a government of laws instead of men. The country had previously thrived by being exactly the opposite, although its lawyers wrote books pretending it wasn't. In the castrated great society after about 1966, appeals and decisions about everything began to meander right up to the political or bureaucratic top."<sup>6</sup>

The *Economist* was only partially correct: despite appearances to the contrary, American government—the constitutional order—still remains a government of men. Law in its interdictory sense constrains or restrains governmental officials only slightly, especially those at the higher levels. All too often, the rule of law becomes the rule of discretion; in other words, the rule of politics. In such a situation, reason or principle, whatever the *jurisprudence publique* may say, gives way to a form of *jurisprudence confidentielle*.<sup>7</sup>

Yves Simon once asserted that in a democratic state "deliberation is about means and presupposes that the problem of ends has been settled."<sup>8</sup> People can agree that their rights and liberties can be affected or dealt with by the state when they also agree on the aims that their collective endeavor should attain.

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5. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

6. Macrae, *President Reagan's Inheritance*, 277 THE ECONOMIST No. 7165, at 13, 22 (Dec. 27, 1980).

7. W. REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 12-13 & *passim* (1979) (drawing upon N. LEITES, THE OPERATIONAL CODE OF THE POLITBURO (1951)). For a well-known state judge's application of Reisman's methodology, see R. NEELY, HOW COURTS GOVERN AMERICA (1981).

8. Y. SIMON, PHILOSOPHY OF DEMOCRATIC GOVERNMENT 123 (1951).

That is true of all forms of dispute settlement and resolution, whether it is the give-and-take of routine face-to-face dealings, the operation of the political system, or the invocation of the courts to settle constitutional controversies. (The latter are always the “pathological” disputes, those that cannot otherwise be settled by other means of social control.) “Democracy implies . . . that the *way* in which men adjust or resolve their differences is of crucial importance, that conflicts of opinion as to what constitutes the right moral and political ends are not to be resolved arbitrarily—(e.g.), by fiat of a stronger or allegedly superior group—but are to be mediated and temporarily adjusted through a political process that builds on the free exchange of opposing ideas. . . .”<sup>9</sup>

Put another way, the fundamental constitutional principle is procedural due process. But that assumes a common acceptance of “the right moral and political ends.” By assuming no dispute about the *goals* of social action, people within a nation that calls itself democratic can afford to allow the *tactics* to be decided through the political process or through resort to official organs. The central spirit that underlies the entire scheme is that of compromise, of a willingness to give up some immediate gain (or suffer some loss) because the system is perceived as fair and the greater (common) good is thereby realized. A corollary is that once the ritual has been followed—once “due procedure” has been allowed to run its course—there will be a general willingness to abide by the results.

That, I think, is a fair description of such “process-oriented” commentators upon the Supreme Court as the late Alexander Bickel<sup>10</sup> and Dean John Ely.<sup>11</sup> It is, as has been said, the accepted view of most Supreme Court-watchers. Little by little, however, the intellectual underpinnings of that conventional position are perceived as being built on shifting sands. Consider, in this respect, the position of black Americans in American society. Accorded, at long last, formal equality under the law (under the *jurisprudence publique*), it is beyond question that for most blacks, that is at best an empty promise. Many white Americans, obviously with exceptions, simply are not willing to assimilate people of color into the mainstream of society. The result is a *de facto* caste system, with the majority of blacks becoming ever more a permanent segment of the underclass in America. The point is, that the *ends*, the goals of identified social action, are in

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9. D. SPITZ, *DEMOCRACY AND THE CHALLENGE OF POWER* 106 (1958) (emphasis in original).

10. A. BICKEL, *THE MORALITY OF CONSENT* (1975).

11. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

disagreement with the private reality of too many citizens. Under the *jurisprudence confidentielle* of the constitutional order, therefore, the law permits massive actual discriminations against the eleven to twelve percent of Americans who were born with black skins.

The result, for present purposes, is that adherence to "reason" or to "principle" in Supreme Court adjudication is, or should be, a futile quest. As Nobel Laureate Herbert A. Simon recently asserted: "Reason, taken by itself, is instrumental. It can't select our final goals, nor can it mediate for us in pure conflicts over what final goal to pursue—we have to settle these issues in some other way. All reason can do is help us reach agreed-on goals more efficiently."<sup>12</sup> Accepting Professor Simon's assertion to be correct, the question becomes one of determining (and enforcing) those "agreed-on goals." That is the essence of constitutional decision-making.

## II. THE JUSTICES MAKE UP THE LAW AS THEY GO ALONG

That "essence of constitutional decision-making" brings up the data now at hand in Bernard Schwartz's recently published book *Super Chief*, a biography of Chief Justice Earl Warren.<sup>13</sup> *Super Chief* ranks with Mason's biography of Chief Justice Harlan Fiske Stone<sup>14</sup> as a documented study of what transpired behind the velvet curtain during the sixteen years that Earl Warren occupied the center seat of the Supreme Court. When Schwartz's book is added to such others as Woodford Howard's biography of Justice Frank Murphy,<sup>15</sup> Walter Murphy's *Elements of Judicial Strategy*,<sup>16</sup> and even Woodward and Armstrong's keyhole look into the High Bench,<sup>17</sup> we now have readily at hand data that illuminate the judicial process in action since Stone became a Justice in

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12. H. SIMON, *REASON IN HUMAN AFFAIRS* 106 (1983).

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

14. A. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* (1956) (describing the two decades up to 1946).

15. J. HOWARD, *MR. JUSTICE MURPHY* (1968) (helping to fill the gap between 1946 and 1953, when Warren succeeded Fred Vinson as Chief Justice).

16. W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964).

17. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN* (1979) (providing information about the post-Warren period). I do not, of course, suggest that this exhausts the literature. See for example, Miller & Bowman, "Slow Dance on the Killing Ground": *The Willie Francis Case Revisited*, 32 DE PAUL L. REV. 1 (1982).

1925. The lesson, illustrated by Professor Schwartz's effort, is clear and unmistakable: no longer can constitutional scholars parse Supreme Court decisions as the main, and usually sole, focus of attention in trying to understand what the Court decides. What Professor Schwartz documents in plethoric detail may be simply stated: the Justices make up the law as they go along.

This revelation, in and of itself, is no flashing insight. It has long been known by Court-watchers (but, as has been mentioned, no one wants to blurt out the fact that the Emperor has no clothes). Even some of the present-day Justices—notably Byron White and William Brennan, both of whom were weaned on the heady milk of the Legal Realist movement—have acknowledged as much in opinions.<sup>18</sup> Chief Justice John Marshall, of course, pretended otherwise, but that was probably for the purpose of staving off mounting criticisms of some of his rulings. *Cohens v. Virginia*<sup>19</sup> is one such example where Judge Spencer Roane of Virginia called it “[a] most monstrous and unexampled decision” that “can only be accounted for from that love of power which all history informs us infects and corrupts all who possess it, and from which the upright and eminent Judges are not exempt.”<sup>20</sup>

It is worth at least passing mention that Marshall himself was uneasy about Supreme Court lawmaking. Soon after the attempted impeachment of Justice Samuel Chase in 1805, Marshall wrote an astonishing letter to Chase proposing to forgo the whole pretension to judicial supremacy in the meaning of the Constitution. “I think,” Marshall stated, “the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those judicial decisions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the judge who has rendered them unknowing of his fault.”<sup>21</sup> That was in the early nineteenth century, fifteen years before the *Cohens* decision that so enraged Spencer Roane. By 1821, Marshall's Supreme Court had managed to construct the formal legal edifice for federal as well as judicial supremacy.

A century and a half after John Marshall, the Supreme Court's position in the governing order is as solid, and perhaps even more solid, than it has ever been. Even those who bitterly criticize some of its decisions do not dispute the legitimacy of the High

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18. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595-96 (1980) (Brennan, J., concurring); *Miranda v. Arizona*, 384 U.S. 436, 531 (1966) (White, J., dissenting).

19. 19 U.S. (6 Wheat.) 264 (1821).

20. 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 15-16 (1922).

21. *Quoted in R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY* 28 (1941).

Bench's exercise of governmental power. Raoul Berger, a leading spokesman in this area, maintains in a series of tendentious books and articles that the Supreme Court has in some instances acted unconstitutionally.<sup>22</sup> Berger demands that the Justices adhere to the intentions of the framers as the *sine qua non* of proper judicial action. That they have seldom done so does not deter him. For example, even as far back as the *Dartmouth College Case*,<sup>23</sup> Marshall conceded that the framers had not contemplated the issue before the Court. Additionally, when Chief Justice Roger Taney did follow the intentions of the framers, in the dreadful *Dred Scott*<sup>24</sup> case, the Court suffered what Charles Evans Hughes later called "self-inflicted wounds" that badly harmed it.<sup>25</sup>

In recent years, the Justices have made an exponential jump in their self-assumed powers by stating, and getting away with it in *Cooper v. Aaron*,<sup>26</sup> that the Court's rulings are general norms binding the nation. They do not always do so; at times the Justices take pains to limit the scope of their rulings. But following the usual reasoning, constitutional decisions are *de facto* class actions, with the "class" being the nation at large. In my judgment, *Cooper* set the pattern because it was the Warren Court's most important decision (although Schwartz does not say that),<sup>27</sup> and it has become sufficiently routine so that the logically impossible is now commonly accepted: a general principle may be inferred from one particular decision. That, of course, makes the Justices a third branch of the national legislature and, indeed, the highest branch.<sup>28</sup>

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22. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977) (criticizing the Supreme Court's interpretation and application of the fourteenth amendment).

23. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

24. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

25. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 50-54 (1928). Other "wounds" Hughes mentioned were the *Legal Tender Cases* and the *Income Tax Cases*.

26. 358 U.S. 1, 18 (1958) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177).

27. See Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron*, 58 U. DET. J. URB. L. 573 (1981).

Chief Justice Warren thought that *Baker v. Carr*, the Tennessee reapportionment case, "was the most important case of [his] tenure on the Court." SCHWARTZ, *supra* note 13, at 410. That, however, can hardly be correct. The combination of *Cooper v. Aaron* and *Brown v. Board of Educ.* far overshadowed *Baker v. Carr* and every other case decided during Warren's tenure.

28. The concept that a Supreme Court decision is "the law of the land" rather than merely "the law of the case" has, of course, its detractors. See, e.g., Ely, *The*



The concept that the Supreme Court deems itself the highest branch has become familiar learning and need not be reworked here. I do not propose in what follows to delineate what Professor Schwartz has to say either on this notion in particular or his book in general, with one exception. Schwartz does set forth an inside view of the Supreme Court that is replete with numerous anecdotes drawn from interviews with colleagues of Warren and with his law clerks. All of this is supplemented by an exhaustive search of the collected papers of many of the Justices plus other bibliographical sources. It is a tremendous job. Yet Schwartz errs in exactly the same place as is his strength by emptying his file cabinets and card catalogs, with the result that he strings together in a journalistic style what took place during Warren's tenure as Chief Justice. There is no analysis of the meaning of what Warren did, nor is there an attempt to explicate why he did it.

In some respects, such a product may be considered to be quite enough. I take it that Professor Schwartz assumes that the facts as he has determined them speak for themselves. Accordingly, there is no need to delve deeper. But Schwartz does not ask what seems to be the important and demanding questions: *Why* did the civil rights/civil liberties revolution characteristic of the Warren Court come at that point in history? After all, the Bill of Rights had been in the formal Constitution for a century and a half, and the fourteenth amendment was formal law for almost 100 years. Second, what, if any, sociological function did that revolution serve? Obviously, neither question is easily answered. And equally obviously, the answers overlap or at least complement each other, especially when viewed in connection with the concept of social justice.

### III. JUDICIAL PRESUMPTIONS, RESULT-ORIENTATION, AND THE PRINCIPLE OF REASON-DIRECTED SOCIETAL SELF-INTEREST

It is axiomatic, to begin with, that there is no such thing as unbiased knowledge or impartial judging. Everyone, including judges, carries his "can't-helps" around with him, as in the statement "I can't help believing such-and-such." We must, accordingly, "reject the ideal model of an empty mind passively contemplating pure data presented to pure awareness. . . ."<sup>29</sup>

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*Wages of Crying Wolf—A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973), in which Professor Ely asserts—incorrectly in my judgment—that the *Roe* ruling "is not constitutional law." (Ely should tell that to Chief Justice Burger.) The idea, enunciated expressly for the first time in *Cooper v. Aaron*, is what makes the Supreme Court's rulings so important.

29. P. RHINELANDER, *IS MAN INCOMPREHENSIBLE TO MAN?* 98 (1973).

That is the tacit assumption of coursebook editors, and other commentators, who believe that such an ideal model should not only be striven for but is humanly possible to achieve. But that is not the case, as Schwartz exhaustively documents. "The ideal of a knowledge embodied in strictly impersonal statements," Michael Polanyi maintained, "now appears self-contradictory, meaningless, a fit subject for ridicule. We must learn to accept as our ideal a knowledge that is manifestly personal."<sup>30</sup>

There is no need to labor the point. I take it as one of the givens of human, including judicial, activity. The problem is what to do about it. Gunnar Myrdal believes that the most that can be done is for a writer to "face his valuations,"<sup>31</sup> to state as best he can where he comes from when he comments upon the human condition—or, indeed, when he is chosen to judge his fellow humans. The need is for candid disclosure of one's biases or, perhaps better, one's personal philosophy. "The decisions of the courts on economic and social questions depend on their economic and social philosophy . . ." asserted Theodore Roosevelt.<sup>32</sup> The same may be said about commentators: their opinions about judicial decisions depend on their "economic and social philosophies." Thus I begin this analysis of the work of the Warren Court with the admission that I find most of the decisions of that Court entirely desirable. When one views in retrospect what the Justices did during Warren's sixteen years, it is difficult to understand why there was any controversy about many of their rulings.

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30. M. POLANYI, *THE STUDY OF MAN* 27 (1958). See also P. BRIDGMAN, *THE WAY THINGS ARE* 308-09 (1959); M. POLANYI, *PERSONAL KNOWLEDGE* (1958); K. MANNHEIM, *IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE* (1951). Mannheim states: "The juristic administrative mentality constructs only closed static systems of thought, and is always faced with the paradoxical task of having to incorporate into its system new laws, which arise out of the unsystematized interaction of living forces as if they were only a further elaboration of the original system." *Id.* at 105. See also Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960), reprinted in A. MILLER, *THE SUPREME COURT: MYTH AND REALITY* 51 (1978).

31. See G. MYRDAL, *VALUE IN SOCIAL THEORY: A SELECTION OF ESSAYS ON METHODOLOGY* (Streeten ed. 1958). See also *id.* at ix, xxxiv-xxxvi, 54, and 155 for interesting insights.

32. 43 CONG. REC. 21 (1908) (annual message to Congress), more completely stated as: "The chief lawmakers in our country may be and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy, . . ."

Some I disagree with—*Ginzburg*,<sup>33</sup> *O'Brien*,<sup>34</sup> *Williams v. Georgia*,<sup>35</sup> and *Naim v. Naim*<sup>36</sup> are four which I think were unfortunate. I also have trouble with *Barenblatt*.<sup>37</sup> But those are exceptions. Warren is no hero of mine, but compared with some of the others who served with him on the Court, he fully deserves the accolade of Justice William J. Brennan: "For those who served with him, Earl Warren will always be the Super Chief."<sup>38</sup>

Second, after more than 200 years as a nation-state, with a judiciary that ever increasingly is important in the governing process, there is no settled, widely-accepted conception of how judges *should* operate. The myth system erects an impossible standard for judges to attain. That mythology, plus the pervasive secrecy that surrounds all courts, means that there is precious little knowledge about how they *do* operate. Professor Schwartz, and the others mentioned above, have helped to sweep aside the curtain of secrecy, but much more needs to be known before comprehensive knowledge about the appellate process (to say nothing about trial courts) will become available. Most lawyers, as Chief Justice Roger Traynor of the California Supreme Court suggested some years ago, have only the haziest knowledge about the nature of the appellate judicial process.<sup>39</sup>

Third, it follows from the first point made above, that what is important to know about the Supreme Court Justices is why they adhere to certain often-unarticulated major premises when they approach decisions in specific cases. As Justice Oliver Wendell Holmes said in 1905, a constitutional decision depends "on a judgment or intuition more subtle than any articulate major premise."<sup>40</sup> That sentiment was echoed by Dean Eugene Rostow in 1962: "there is an inescapable Bergsonian element of intuition in the judges' work—in their ordering of 'facts,' in their choice of premises, in their formulation of the postulates we call 'rules' or 'principles,' in their sense of the policy or policies which animate the trend, or change it."<sup>41</sup> If that is true, as surely it is, then what price reason or rationality or the call for principled decisions? Holmes said it well in 1899, in language reminiscent of Professor

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33. *Ginzburg v. United States*, 383 U.S. 463 (1966).

34. *United States v. O'Brien*, 391 U.S. 367 (1968).

35. *Williams v. Georgia*, 349 U.S. 375 (1955).

36. *Naim v. Naim*, 350 U.S. 891 (1955).

37. *Barenblatt v. United States*, 360 U.S. 109 (1959).

38. SCHWARTZ, *supra* note 13, at vii.

39. Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157, 158 (1960).

40. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

41. Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MTN. L. REV. 123, 144 (1962).

Simon's observation, quoted above: "I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results."<sup>42</sup>

There is a corollary to this proposition. If, as Cardozo once asserted, "the thing that counts chiefly is the nature of the premises,"<sup>43</sup> the important matter to perceive is that the relevant or apposite premises in constitutional cases tend to be multiple rather than single. Schwartz amply documents the point. In litigation, at least two conflicting major premises can always be formulated, one embodying one set of interests and the other embodying the other. The adversary system of litigation at the appellate level can be justified on no other basis. It is a poor lawyer indeed who cannot find some authority for the result his client desires once a human dispute has gone beyond informal settlement, and certainly beyond the trial court. Put another way, constitutional cases, those the Supreme Court decides on the merits, tend to be "trouble" or "hospital" cases. They represent the pathological instances in society. The parties call upon the courts because they cannot settle their disputes extra-judicially.

The importance of premises in constitutional adjudication is displayed in *Kennedy v. Mendoza-Martinez*,<sup>44</sup> which is discussed by Schwartz insofar as the internal dynamics of the Supreme Court were concerned, but not as to the specific point about premises. In a classically clear example of how premises are both taken for granted without inquiry into their worth, *pace* Holmes, and tend to travel in pairs of opposites, the decision merits careful study. As Justice Potter Stewart said in dissent:

The Court's opinion is lengthy, but its thesis is simple: (1) The withdrawal of citizenship which these statutes provide is "punishment." (2) Punishment cannot constitutionally be imposed except after a criminal trial and conviction. (3) The statutes are therefore unconstitutional. As with all syllogisms, the conclusion is inescapable if the premises are correct. But I cannot agree with the Court's major premises—that the divestiture of citizenship . . . is punishment in the constitutional sense of that term.<sup>45</sup>

Which, then, is the "correct" premise—Stewart's or that of Justice Arthur Goldberg, who wrote for the majority? Neither of the

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42. O. HOLMES, COLLECTED LEGAL PAPERS 238 (1920).

43. B. CARDOZO, THE GROWTH OF THE LAW 62 (1924).

44. 372 U.S. 144 (1963).

45. *Id.* at 201-02 (Stewart, J., dissenting).

learned judges vouchsafed an explanation as to why his premise was correct or, for that matter, why he chose it in the first place. We were left without guidance or insight into those questions. What Stewart made explicit in his dissent is characteristic of all constitutional decisions (and, as mentioned, documented in exhaustive detail by Schwartz). To a great extent, these unanswered questions regarding premises make the call for reason or principled decisions a bootless quest.

Fourth, it is beyond argument that all judges are "result-oriented," as, indeed, are all commentators on the judiciary. The term apparently is one of Justice Felix Frankfurter's neologisms.<sup>46</sup> He used it, as Schwartz notes, to castigate some of his colleagues on the High Bench, particularly Chief Justice Warren and Justices Hugo Black, William Brennan, and William Douglas. It has since been used by the coterie of commentators who are votaries in the cult of Frankfurter worship. Their principal stance is that of judicial self-restraint, supposedly the hallmark of Frankfurter's jurisprudence. Accordingly, this group of Frankfurter worshippers sneer, in one way or another, at those judges who are more "activist" and who believe that attention should be paid to the consequences of decisions. That Frankfurter and his acolytes are basically in error on the level of *description*, to say nothing about *prescription*, almost goes without saying. Frankfurter himself was far from the non-activist that he liked to say. Chief Justice Warren so believed:

Warren also thought that Frankfurter's vote and opinion in the 1957 case of *Rowoldt v. Perfecto* showed that Frankfurter's restraint doctrine was often a facade to mask the fact that the Justice could be as human in his decision process as any of the Brethren. . . . When Warren met his law clerks after the *Rowoldt* conference, he told them that Frankfurter had provided the vote for the bare majority to reverse. The clerks expressed surprise because Frankfurter's action was so inconsistent with his previous decisions [dealing with deportation because of Communist affiliations]. At this, the Chief said, "Well, you know, I think Frankfurter is capable of a human instinct now and then. Frankfurter really obviously just felt sorry for this poor old immigrant." . . .

Warren used to express irritation at Frankfurter's constant lecturing of the Justices that they were nothing but a group of "result-oriented judges," who did not have the courage to vote for a decision that was mandated by precedent, where they felt it was not the right decision. To Warren, a case such as *Rowoldt* demonstrated that Frankfurter could be as "result-oriented" as any of the Brethren.<sup>47</sup>

Indeed, he could. One searches in vain for any time, save perhaps the *Steel Seizure Case*,<sup>48</sup> when Frankfurter voted *against*

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46. See, e.g., SCHWARTZ, *supra* note 13, at 267.

47. *Id.* at 266-67. For further evidence of Frankfurter's result-orientation, see Miller & Bowman, *supra* note 17, *passim*.

48. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Frankfurter, J., concurring). The *Steel* case is really not apposite, for it was essentially not so

what the federal government wanted to do in an important case. An "intense patriot,"<sup>49</sup> Frankfurter was also a close advisor of President Franklin Roosevelt, both before and after he became a judge. He usually found ways to sustain federal governmental action, even in *Korematsu v. United States*.<sup>50</sup> In that and other wartime cases, the Court, including Frankfurter, came perilously close to becoming a part of the "executive juggernaut."<sup>51</sup> Result-orientation, pure and simple. The same may be said for Frankfurter's actions in *Louisiana ex rel. Francis v. Resweber*,<sup>52</sup> where he, while stoutly maintaining that he was exercising judicial self-restraint and deferring to state authorities in a capital punishment case, obviously pursued a set of his own personal values.

Some judges have been more candid than Frankfurter and have admitted that result-orientation is inevitable. Two examples will suffice: Judge Braxton Craven of the Fourth Circuit Court of Appeals and Judge J. Skelly Wright of the District of Columbia Court of Appeals. In a little noted but important article, Craven flatly stated that all judges are result-oriented, the difference between them being mainly that some know it and some do not.<sup>53</sup> As for Wright, he wrote this in 1963:

I also agree with you that criticism of court decisions because they have not been "reasoned" or because they fail to expound the principles on which they rely and show how the principles lead to the result should be answered. In my judgment, a court opinion is not a mechanical thing producible by computer. *Intellectual honesty requires an admission that most opinions are result-oriented—initially, at least, visceral reactions to a given set of facts. Whether the initial reaction becomes the final result depends on a subsequent check of the legal authorities which support it. And if the initial reaction is strong enough, it will tend to overcome precedents which stand in the way.*<sup>54</sup>

Sixteen years later Judge Wright reiterated in other words his earlier candid admission:

[I] think the key . . . is doing justice within the law. You have to stay

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much a question of governmental power as a dispute between the President and Congress, as Justice Black's opinion for the Court made clear.

49. See H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER passim* (1981).

50. *Korematsu v. United States*, 323 U.S. 214 (1944).

51. A. MASON, *supra* note 14, at 666.

52. 329 U.S. 459 (1947). For a discussion, see Miller & Bowman, *supra* note 17.

53. Craven, *Paeon To Pragmatism*, 50 N.C.L. REV. 977 (1972).

54. Letter from Judge Wright to Arthur S. Miller, Oct. 9, 1963 (emphasis added) (used with permission). I asked him in 1982 if he still adhered to that position, and he replied in the affirmative. For discussion, see A. MILLER, *A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT c.9 & passim* (forthcoming in 1984, to be published by Greenwood Press).

within the law, but you can press against the law in all directions to do what you perceive to be justice. . . . I think it's justified to do what's right. I know that sounds like gobbledegook . . . but there're certain things that remain pretty accepted as what the law is, and it's just a question of how vigorously, how enthusiastically you embrace these things, particularly in the civil rights area.

I guess I am an activist, but I want to do what's right. When I get a case, I look at it and the first thing I think of automatically is what's right, what should be done—and then you look at the law to see whether or not you can do it. That might invert the process of how you should arrive at a decision, of whether you should look at the law first. . . . I am less patient than other judges with law that won't permit what I conceive to be fair. Now, there's a legitimate criticism of that, because what's fair and just to X may not be fair and just to Y—in perfect good faith on both sides. But if you don't take it to extremes, I think that it's good to come out with a fair and just result and then look for law to support it.<sup>55</sup>

Judges Craven and Wright—and, indeed, Chief Justice Warren, as Schwartz documents—openly concede the fact of judicial result-orientation. They are not aberrational: to the extent that we know anything about the nature of the judicial process, all judges so operate. That appears to be the clear lesson from the massive detail delineated in *Super Chief*.

Finally, if the foregoing is true, then the question becomes: what results? What is “right” and “fair” to Judge Skelly Wright? What was “fair” to Chief Justice Warren? The question brings up the concept of *social justice*. While this is not the time or place to do more than adumbrate some of the essentials of social justice, my basic point is that during Earl Warren's tenure as Chief Justice, the Supreme Court generally—when, that is, he could command a majority—followed the idea that the Court's task was to try to help America realize social justice. In that, Warren and his principal cohorts—Douglas, Brennan, Goldberg, Fortas, and (at times but not always, especially in his later years) Black—believed that there was much more to judging than a purely procedural approach, as so many advocate. They adhered to Professor William A. Galston's view, not overtly, to be sure, but tacitly:

[T]he quest for a purely institutional or procedural solution to the practical problem of obtaining justice is futile. Every community, whether democratic or not, must rely on a rudimentary sense of fairness and equity among its members. This sense is not innate, but must rather be fostered through some system of education. The traditional American penchant for political engineering or institutional tinkering is thus profoundly one-sided; democratic procedures are almost vacuous in the absence of collectively held moral convictions.<sup>56</sup>

The Warren Court, insofar as it followed the views of the Chief Justice, was a part of a national system of education. The Jus-

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55. Quoted in J. BASS, UNLIKELY HEROES 115-16 (1981).

56. W. GALSTON, JUSTICE AND THE HUMAN GOOD 279 (1980). In the quoted statement, Professor Galston notes his agreement with J. RAWLS, A THEORY OF JUSTICE (1971).

tices, in the words of Judge Wright, were the "conscience of a sovereign people."<sup>57</sup>

What, then, is social justice? It is basically a form of distributive justice, concerned with the ways in which benefits are distributed in society through its major institutions: how wealth is allocated; personal rights are protected; and other positive benefits are divided among the populace. Dr. David Miller maintains that the "most valuable general definition of justice is that which brings out its distributive character most plainly: justice is *suum cuique*, to each his due."<sup>58</sup> Furthermore, "[t]he just state of affairs is that in which each individual has exactly those benefits and burdens which are due to him by virtue of his personal characteristics and circumstances."<sup>59</sup> Implicit in that definition is the idea that "equals should be treated equally."

How can it be determined what a person's "due" actually means? Dr. Miller carefully distinguishes "conservative" from "ideal" justice:

For, from one point of view, we are disposed to think that the *customary* distribution of rights, goods, and privileges, as well as burdens and pains, is natural and just, and that this ought to be maintained by law, as it usually is: while, from another point of view, we seem to recognize an ideal system of rules of distribution which ought to exist, but perhaps have never yet existed, and we consider laws to be just in proportion as they conform to this ideal.<sup>60</sup>

Similarly, D.D. Raphael has contrasted "conservative" and "prosthetic" justice. The former has the object of preserving "an existing order of rights and possessions, or to restore it when any breaches have been made," while the latter aims at "modifying the *status quo*."<sup>61</sup> In essence, the Warren Court balanced the ideal of justice as rights against the instinctive belief in justice in an ideal or prosthetic sense. The Constitution of 1787 is basically one of rights, but in the sense of "vested" rather than "civil" rights. Rights, Dr. Miller believes,

generally derive from publicly acknowledged rules, established practices, or past transactions: they do not depend upon a person's current beha-

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57. Wright, *The Role of the Courts: Conscience of a Sovereign People*, 26 THE REPORTER No. 5, at 27 (Sept. 26, 1963). See also A. MILLER, *supra* note 54, at c.1 for further discussion.

58. D. MILLER, *SOCIAL JUSTICE* 20 (1976) (emphasis in original).

59. *Id.*

60. *Id.* at 25 (quoting H. SIDGWICK, *THE METHODS OF ETHICS* 273 (1907) (emphasis in original)).

61. Raphael, *Conservative and Prosthetic Justice*, 12 POL. STUD. 149, 154-55 (1964) (emphasis in original).



viour or other individual qualities. For this reason it is appropriate to describe this conception of justice as "conservative." It is concerned with the continuity of a social order over time, and with ensuring that men's expectations of one another are not disappointed.<sup>62</sup>

Social justice as rights requires judges to protect the "is" (the status quo) in society. Judges generally do so, including members of the Warren Court. Where Warren and his activist colleagues diverged was in discerning, however intuitively, that the "is" that is to be protected at times necessitates more than blindly and stubbornly following precedent.

The task of the judiciary in any modern industrial society is to be part of governmental order and thereby to underpin the stability of the system and protect the system by resisting truly serious attempts to alter it.<sup>63</sup> No one becomes a judge in the United States who is not either a member of that nebulous but nonetheless existent group called the Establishment or has views similar to that group. The legal profession is rights oriented. The basic doctrine of constitutional law has long been that of "vested rights." Those rights revolve principally around the concept of property, the protection of which, John Locke maintained, was the first duty of government.<sup>64</sup> Litigation is spawned when those rights, or perceived rights, come into conflict with other perceived rights, or human needs. The tensions emanating from those conflicts are reconciled in courts presided over by an Establishment judge that seeks to protect rights, and is often guided by application of what will later be called the Principle of Reason-Directed Societal Self-Interest.

Rights do not exhaust the concept of social justice; needs must also be considered. James C. Davies has accurately maintained that no one can expect humans to participate in politics (which is what constitutions are all about) until certain basic human needs are fulfilled.<sup>65</sup> Human needs theory is not only a means of explaining certain political behavior but also a basis for judging politics and political institutions.<sup>66</sup> Indeed, one can validly argue that reasonably adequate satisfaction of human needs is the ultimate purpose of politics, and thus of constitutions. The Warren Court often focused on human needs in making decisions. The essential

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62. D. MILLER, *supra* note 58, at 26.

63. See Miller, *The Politics of the American Judiciary*, 49 POL. Q. 200 (1978); J. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (1977).

64. Quoted in Gramm, *Industrial Capitalism and the Breakdown of the Liberal Rule of Law*, 7 J. ECON. ISSUES 577, 599 n.17 (1973). For further discussion, see Miller, *Toward a Definition of "The" Constitution*, 8 U. DAYTON L. REV. 633, 671-91 (1983).

65. Davies, *The Development of Individuals and the Development of Politics*, in HUMAN NEEDS AND POLITICS 74 (R. Fitzgerald ed. 1977).

66. See the several essays in HUMAN NEEDS AND POLITICS *supra* note 65.

point, however, is that in so doing, the Justices—usually, but not always, less than all of them—also protected vested rights.

The Justices perceived the problem of satisfaction of human needs as basic to social stability. They were concerned with the continuity of social order over time. Stability and continuity are conservative virtues which, paradoxically, were furthered by the liberal, activist decisions of the Warren Court. Put another way, the Justices were fully aware that people today live in a time of extremely rapid social change and bent their efforts to help preserve the fundamental values of an open society. They knew that as society changes, so too must the law, subject of course to the notion that there are certain basic rights that are immutable and that should be protected—protected in the sense of making them applicable to the citizenry at large. Whereas the Supreme Court before Warren was mainly concerned with the protection of the established property interests, under Warren, the High Bench, by moving to protect many of the poor and disadvantaged, also helped those highest in the social pecking order. I do not contend that this thought was foremost in their minds, or even that they thought about it at all. What I do assert, however, is that it is a necessary inference that should be drawn from a survey of their many decisions.

But what are *human needs*? Only a brief statement is necessary or possible at this time. Perhaps best known is Abraham Maslow's hierarchy: "physiological, safety, love, esteem, and self-actualization."<sup>67</sup> Professor William A. Galston argues that the concept of need has a "threefold classification: natural need, social need, and luxury."<sup>68</sup> Natural needs are "the means required to secure, not only existence, but also the development of existence."<sup>69</sup> Developmental needs include adequate nurturance, adequate education, institutions that permit the exercise of a wide range of capacities, and a variety of friendships and social relations.<sup>70</sup> Luxury, of course, needs no special explanation. According to Dr. David Miller, "[h]arm, for any given individual, is

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67. Maslow, *A Theory of Human Motivation*, 50 PSYCHOLOGICAL REV. 370, 394 (1943). While that formulation need not be accepted, as Professor Christian Bay has commented, it should be used until a more useful alternative model is provided. Bay, *Needs, Wants, and Political Legitimacy*, 1 CAN. J. POL. SCI. 241, 247 (Sept. 1968).

68. W. GALSTON, *supra* note 56, at 164.

69. *Id.* at 164.

70. *Id.* at 164-65.

whatever interferes directly or indirectly with the activities essential to his plan of life; and correspondingly, his needs must be understood to comprise whatever is necessary to allow those activities to be carried out."<sup>71</sup>

Obviously, the concept of human needs as a philosophical and jurisprudential construct is complex and controversial. It calls for reorientation of orthodox thinking about the law and legal institutions. To analyze the judicial process generally and the Warren Court's work specifically, employing a dichotomous model of rights and needs, is to tread upon legal *terra incognita*. Yet when one deals with language that is part of a constitutive act (i.e., the Constitution of the United States), much more than purely legal phenomena must be considered. H.J. McCloskey has explained that needs are things which ought, where possible, to be available, not withheld or prevented, and indeed, be supplied where necessary. Where needs cannot be met, society or the world ought to be reordered so that they are capable of being met, or obtained by the person with the need, provided that greater goods are not thereby jeopardized. Finally, a discussion respecting human needs and needs of particular persons involves reference to natures, the perfection, development, and nonimpairment of which are good.<sup>72</sup>

To an indeterminate extent, and not always consistently, Chief Justice Warren and his colleagues were interested in reordering society to lend help to those in need. They perceived their goal as a moral imperative and as a means by which the fundamental values of constitutionalism could be preserved. That way of thinking leads to a fundamental dualism, one overt and the other tacit, that comes together in the Principle of Reason-Directed Societal Self-Interest.

Consider, for example, the principle of equality. Although Professor Peter Westen has recently attempted to show that it is an "empty idea,"<sup>73</sup> it was far from that for members of the Warren Court. For the first time in American history, the Court put substantive content into a concept that Americans have—under the myth system—struggled to fulfill since the commitment to equality contained in the Declaration of Independence. Not that the myth comported with bleak reality, as indentured servants, slaves, Indians, women, and others, knew and know all too well.

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71. D. MILLER, *supra* note 58, at 134.

72. McCloskey, *Human Needs, Rights and Political Values*, 13 AM. PHIL. Q. 1 (1976).

73. See, e.g., Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Compare Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983).

The Declaration's commitment to equality was dropped in the Constitution of 1787. Not until 1868, when after the sanguinary Civil War the fourteenth amendment was added, did "equal protection" become an express constitutional command. Even then, the hard fact was that what the paper promises quickly proved to be ephemeral for many Americans. Black Americans, as J.R. Pole has remarked, did not have "the consolations of equality or the practice of protection."<sup>74</sup>

For a great many years, the Supreme Court did not enforce the equal protection clause. In *Hall v. DeCuir*,<sup>75</sup> for example, it struck down a Louisiana statute requiring similar accommodations for all travelers and expressly forbidding discrimination on the basis of color. "[E]quality does not mean identity," intoned Justice Nathan Clifford for the Court,<sup>76</sup> in what was to become a famous aphorism—and thereby helped to commit the freed slaves to a *de facto* caste system. That system was further constitutionalized in 1896 when the Court determined through an intuition known only to the majority Justices that equal protection meant "separate but equal."<sup>77</sup> Pole asserts that "white racial prejudice was profound and resilient, as the history of Reconstruction shows. The Court chose to settle [the problem of racial antagonism] not in accordance with its authority under the Fourteenth Amendment . . . but in accordance with the actual distribution of social and political power in Southern States."<sup>78</sup> To conclude that in so doing the Justices were major contributors to development of a boiling reservoir of social discontent is not a difficult step.

The Supreme Court Justices were, of course, quite aware of the *de facto* caste system in America. Where they differed was not in their perception but in what to do about it; or more precisely, what they as judges could or should do about it. Not until 1938, in the *Missouri Law School Case*,<sup>79</sup> did a majority of the Justices see fit to begin undermining the wall of separation between the castes. That development began a series of judicial and executive decisions that culminated in 1954 in *Brown v. Board of Educa-*

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74. J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 193 (1978).

75. 95 U.S. 485 (1878).

76. *Id.* at 503.

77. *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896).

78. J. POLE, *supra* note 74, at 193.

79. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

tion.<sup>80</sup> Interestingly, the key decision may well have been executive rather than judicial. When President Roosevelt was dragooned into signing an executive order in 1942 calling for non-discrimination in employment in war industries,<sup>81</sup> black Americans began to increase their pressure group tactics, but mainly against the courts. Neither the caste system nor the Supreme Court has been the same since; although it must still be noted that the change in legal status for black Americans has come more in the formal positive law than in the living operational code of the nation.

During Warren's tenure on the Supreme Court, equality became a major theme of governmental policy. The lead often came from federal judges, including the Supreme Court. Few scholars have asked why the judicial explosion in civil rights and liberties, both revolving around the equality concept, came when it did. In 1927, Justice Holmes sneered that equal protection—the Constitution's reification of equality—was “the usual last resort” of constitutional arguments, and summarily dismissed Carrie Buck's plea that she should not be involuntarily sterilized by the state of Virginia.<sup>82</sup> Within a generation that judicial attitude had altered. The question is why.

I have suggested above that the Court under Warren, by helping to protect the poor and the disadvantaged, also aided those highest in established society. Briefly, two factors seem to be significant in developing an answer to the civil rights/civil liberties revolution and its cause. First, in the post-World War II period the United States entered its true Golden Age.<sup>83</sup> Beginning in 1945 the economic pie seemed to be getting larger and larger; an economy of abundance was being created. It therefore became possible to carve slices out of that pie for the theretofore “have-nots” but without diminishing the material well-being of the “haves.”<sup>84</sup>

Second, the Warren Court's egalitarian decisions were a means of siphoning off discontent from the disadvantaged. Blacks, for

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80. 347 U.S. 483 (1954). There was a follow-up decision the next year: *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

81. See L. RUCHAMES, *RACE, JOBS, AND POLITICS* (1953). See also Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27 (1955).

82. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

83. That Golden Age has now run its course, and with it has come an economy of scarcity—and the apparent end of the Second Reconstruction.

84. One other factor is worth noting and study: blacks and others among the underclass were forced to fight and at times to die in World War II, Korea, and Vietnam. My hypothesis is that governmental programs promoting equality are a part of the trade-off, the payment, made for that sacrifice.

example, were at least extended gains under the *formal* Constitution. In other words, the equality decisions should be seen as part of the development of a permissive society, one that also provided the economic basis of material betterment for more and more people. The consequence is that the bulk of the populace is relatively docile, although how long that will continue is by no means certain.

By no means is it suggested that this analysis was uppermost in the minds of the Supreme Court during Warren's tenure. To the extent, however, that the analysis is accurate, it may be said that not only the disadvantaged profited from the Warren Court's decisions. They were of course the obvious or manifest beneficiaries. But it also seems correct to say that those who have always benefited under the law and the Constitution, the moneyed and the propertied, were also served as hidden or latent beneficiaries. That some of the latter class have not been perceptive enough to realize that token satisfaction for the demands of the underclass helped to protect them does not belie the point.

Earl Warren and those who identified with him acted on the assumption that the person, particularly members of disadvantaged groups, was a free-standing individual struggling to retain or to gain a measure of personal identity and security in an increasingly bureaucratized society. Knowing that one's personhood or identity comes from being able to stand tall in the community, Warren sought to enhance the status of some on the lower rungs of our *de facto* class society, both because they deserved it as persons and because of larger community interests. Dr. David Miller remarks that "[j]ustice as respect for established rights, without regard to how those rights are distributed among persons, is intelligible when it is seen as the principle which restrains men from destructive greed."<sup>85</sup> It is intelligible when those who are favored by fortune have the good sense—the common sense, that most uncommon of all the senses—to perceive that it is in *their* interest to help the less favored.

It is on this basis that the Warren Court can and should be evaluated. If we acknowledge that people will act from self-interest, it then becomes a task of any society to enunciate policies that will establish a social milieu in which self-interest has reason to be enlightened. As Professor Herbert A. Simon has remarked:

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85. D. MILLER, *supra* note 58, at 175.

Success depends on our ability to broaden human horizons so that people will take into account, in deciding what is to their interest, a wider range of consequences. It depends on whether all of us come to recognize that our fate is bound up with the fate of the whole world, that there is no enlightened or even viable self-interest that does not look to our living in a harmonious way with our total environment.<sup>86</sup>

Warren's focus was not as broad as that of Simon, but nonetheless the point is accurate. Warren sought to help Americans answer George Orwell's question about Great Britain: "Whether the British ruling class are wicked or merely stupid is one of the most difficult questions of our time, and at certain moments a very important question."<sup>87</sup> Are America's rulers "wicked or merely stupid"? The question demands an answer. It is the essential question presented by the human rights revolution of the Warren Court.

The point is that Warren, as Chief Justice, intuitively realized the importance of satisfying human needs in order to attain and retain the collective values of stability and vested rights. He did not outwardly or consciously adhere to the Principle of Reason-Directed Societal Self-Interest; but his decisions, taken together, are an invitation to those on top of the social totem pole to use *their* reason to perceive that it is in *their* self-interest for the needs of the less favored to be reasonably satisfied—within ecological restraints, of course. In so doing, Warren followed his instincts: hard-headed compassion; knowing what was fair and decent under the circumstances; and translating those instincts for helping the "great unwashed" into an implicit signal for those who rule to make the requisite adjustments so that all can benefit. He used his reason to determine, as best he could, where the self-interest of society reposed in any given circumstance. At times, to be sure, he may well have been wrong; and at times, furthermore, he flatly refused to follow his instinct for fairness to its logical conclusion. But his record, on the whole, displayed an understanding that, as Professor Ronald Dworkin said in a different context, "[o]ur constitutional system rests on a particular moral theory, namely, that men have moral rights against the state."<sup>88</sup> Warren knew that those moral rights required an "activist" Supreme Court, and did not hesitate to use his full powers in that direction. Rather than being targeted for impeachment by some misguided people, he should have been applauded for doing the necessary: for making decisions that helped to knit the fabric of society closer together.

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86. H. SIMON, *supra* note 12, at 107.

87. Quoted in Hitchens, *Anthony Wedgwood Benn: Can He Put England Together Again?*, Mother Jones, Nov. 1981, at 14.

88. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 147 (1977).

The Principle of Reason-Directed Societal Self-Interest is by no means a new technique of governance. Alexis de Tocqueville noted 150 years ago that the United States had an ingrained drive toward equality. "Equality," he wrote, "every day gives every man a multitude of little delights. The charms of equality are felt every hour and are within everyone's reach: the noblest hearts are not insensitive to them and the commonest souls delight in them. The passion to which equality gives birth must thus be at once energetic and general."<sup>89</sup> So it must, although America's ruling class has not been quick to perceive the point. Tocqueville knew that: "I am of the opinion, on the whole, that the manufacturing aristocracy which is growing up under our eyes is one of the harshest which ever existed in the world."<sup>90</sup>

In many respects, the Progressive movement, *circa* the turn of the century, was an acknowledgment that that harshness should be ameliorated, not necessarily in the interests of the working class but to bleed off social discontent. The policies that emanated from Progressivism were, in some observers' eyes, designed to do just that.<sup>91</sup> Those policies gave the appearance of regulation without much internal content; they were tokens rather than substantial changes, symbolic gestures toward reform. Only when the Great Depression hit the nation in the 1930's was there even a grudging concession by the "manufacturing aristocracy" that New Deal programs designed to alleviate economic distress were desirable. The New Deal—with social security, unemployment compensation, labor relations, and agricultural adjustment statutes as the most important measures—was a social safety valve which helped to diminish discontent among those who were being denied any real chance of fulfillment of the American Dream. It was a means by which the system of corporate capitalism could be saved at a minimum cost. The worst aspects of poverty and economic distress were dealt with. But clearly the central dedication of the Franklin Roosevelt administration was to business recov-

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89. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (quoted in J. POLE, *supra* note 74, at 131).

90. *Quoted in* L. BERG, H. HAHN & J. SCHMIDHAUSER, *CORRUPTION IN THE AMERICAN POLITICAL SYSTEM* 11 (1976).

91. *See, e.g.*, G. KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* 5-6 & *passim* (1963). *Compare* R. LUSTIG, *CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY, 1890-1920* (1982).



ery, rather than to social reform.<sup>92</sup> Nonetheless, "the sheer need of governments to allay working-class discontents that were dangerous to the stability of the state"<sup>93</sup> was obviously central to the New Deal ethos. After all, it was Bismarck, the conservative chancellor of Germany and no admirer of democracy, who pioneered the welfare state in the late nineteenth century, and for precisely the purpose of dampening working-class discontent.

The revolution wrought by the Warren Court came about because it became possible for the first time in history to satisfy some of the pent-up economic demands of the underclass. That revolution's function was to allay the populace, insofar as law could do it, by giving at least the appearance and at times the reality of equality, of "equal justice under law." It served as a safety valve. But it should be realized that the judicial revolution, and thus the change in the formal law of the Constitution, was merely one part of a more profound social revolution. A cultural change has taken place during the past few decades. A permissive society, at times helped by the Court, has come into being: a drug culture has blossomed; the most flagrant pornography is no longer outlawed; alcohol consumption has escalated; abortions have become routine; and freedom of expression receives the highest degree of protection in American history. At the very time that additional controls are being placed upon human activity, some personal freedoms are not only permitted, they are encouraged.<sup>94</sup>

The basic function of all of this, it seems to me, should be determined. All political and social phenomena have definite functions; they facilitate the adaptation of a system or regime to changing conditions. Judicial decisions are political epiphenomena, and courts are instruments of politics both in their law-making proclivities and in the fact that they often are the targets of interest groups. The judiciary's main function is to produce decisions that are not only system-maintaining but system-develop-

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92. Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in *TOWARDS A NEW PAST* 264-65 (B. Bernstein ed. 1963).

93. C. MACPHERSON, *THE REAL WORLD OF DEMOCRACY* 14 (1966).

94. One is hard pressed to find *any* Supreme Court decision upholding personal freedoms when *important* societal matters are at issue. In other words, freedoms are honored under the constitutional order when their exercise makes little or no difference. The *locus classicus* for that proposition is perhaps *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding the conviction of a man for publicly burning his draft card as a protest against the Vietnam war). See SCHWARTZ, *supra* note 13, at 683-85, 728. I have suggested elsewhere that, in Auguste Comte's phrase, the United States is moving toward a condition of "popular dictatorship with freedom of expression." See A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL 7 & passim* (1981) (citing A. COMTE, *SYSTEM OF POSITIVE POLICY* (1851)).

ing. Any political order requires both stability and a process of orderly change.

Judges facilitate both elements. They buttress the constitutional order—the “system”—by making incremental changes to reflect societal conditions. Earl Warren was, first and foremost, a member of the Establishment. But he was one who saw more clearly than others that there must be some play in the constitutional (and thus, the social) joints if the system is to endure. To repeat the example noted earlier, by 1953, when Warren became Chief Justice, the assault against the caste system of the United States that separated people by skin color had become a moral imperative of the Constitution. Thus, by aiding black Americans insofar as the Court could, benefits accrued not only to blacks but to the nation as a whole.

#### IV. CONCLUSION

There is much more, of course, to the concept of social justice, and there is much more to be said in analyzing the work of the Warren Court. This, however, is only a preliminary paper. Professor Schwartz has given us a remarkable amount of data to further our understanding of the High Bench, and he has pointed in the direction of even greater understanding by his numerous interviews and his perusal of the collected papers of some of the Justices.

In many respects his very propensity for detail, accompanied by his failure to erect an organizing principle or set of principles for the “Super Chief,” dulls and blurs his effort. By treating the Warren Court chronologically rather than by substantive areas of concern (first amendment, national security, and the like), Schwartz’s revelations about the internal dynamics of the Court become, through sheer repetition, boring. We know something about what happened regarding a number of the cases, but has he told the complete story? That is doubtful, simply because no one can really learn everything that took place in the resolution of any given case that the Court decided.

Schwartz’s findings, furthermore, will occasion no surprise in any experienced Court-watcher. Only the incurably idealistic or naive person will find anything in *Super Chief* that shocks or unduly disturbs. His book will not change the minds, the attitudes, or the habits of those who edit coursebooks in constitutional law

or write textbooks, either about the entire subject or a segment thereof. Those worthies will continue their solemn ways, following the "wisdom" of Marshall and Blackstone set forth at the beginning of this essay, which ultimately means that "constitutional theory, including the theory of judicial review, has come to a dead end."<sup>95</sup> The great merit of Schwartz's *Super Chief* is that it, with several other studies, can provide the factual basis for a new theory, of which, unfortunately, there is presently little evidence of serious thought.

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95. A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT *xi* (1982).