

THE LEGACY OF EARL WARREN

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Earl Warren was a modest man, and a realist. One of his greatest strengths was that he knew his limitations. We would do him less than the evenhanded justice he so devotedly dispensed if, in his death, we painted him larger than life.

He would, for example, have been the last to claim that his decade as Governor of California was free of error. He surely felt chagrin, in after years, for having said, in 1943: "If the Japs are released, no one will be able to tell a saboteur from any other Jap."¹ And the chagrin must have been only slightly mitigated by the knowledge that he was only following the nonpartisan bigotry laid down as national policy by Franklin Roosevelt — and, in 1944, sustained by the Supreme Court in *Korematsu*.² Nonetheless, just as Roosevelt was, all things considered, a great President, so Warren was, all things considered, a remarkable Governor. And it is a fair surmise that Warren would have easily adapted his executive skills to the national agenda had he, after the Sacramento years, merely become President.

But it so fell out that the Presidency was denied him; and that, at the age of sixty-two, he was instead summoned to different and wholly unfamiliar responsibilities; and that for sixteen years he fulfilled those responsibilities with diligence and honor.

Like any other judge, he was not free of error. But, on a scale not matched by any other judge, he brought a measure of redemption to his country.

Redemption — recommitment to the promise declared at Gettysburg, codified in the Fourteenth Article of Amendment to the Constitution, repudiated in *Plessy*,³ and mocked in *Korematsu* — this was the meaning of *Brown v. Board of Education*.⁴ *Brown* and its companion cases had been argued the Term before Warren came to the Court. But, apparently unable to resolve the issues, the Justices had directed reargument. The new Chief Justice's participation seems to have been catalytic. Irresolution was replaced by unanimity. On May 17, 1954, Warren read the decision which gave to his generation of Americans, and to the generations

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¹ 4 L. FRIEDMAN & F. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT* 1789-1969, at 2728 (1969).

² *Korematsu v. United States*, 323 U.S. 214 (1944).

³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴ 347 U.S. 483 (1954).

which will follow, the opportunity — and the obligation — to pursue the last clear chance to be the last best hope of earth. “The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable to the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice — under law — is thus made a living truth.”⁵

By conventional notation we speak of “the Warren Court,” or “the Hughes Court,” or “the Taney Court” — slicing the Court’s almost two centuries of continuity into Chief Justice-size units. The notation is unfortunate, since it conveys a sense of Chief Justicely dominion over his colleagues which, as every schoolchild does not know, was true only of the Marshall Court. In Warren’s case, because his sixteen Terms embraced so vast and volcanic a constitutional terrain, popular misconception laid at his door accountability for many decisions in which he was simply one of five or more agreeing Justices. To be sure, quite apart from *Brown*, he wrote for the Court, and to that extent presumably played the principal role in shaping the Court’s approach, in many major cases.⁶ But even in those cases there are no compelling indications that he was, as in *Brown*, the single decisive judicial catalyst, but for whose presence the timing and substance of constitutional development might have been radically different. And of course it is not reasonable to suppose that Warren, or any other single member of the Warren Court, would have routinely exercised controlling leadership over his colleagues. A Court which contained Justices of the stature and the fierce independence of Black and Frankfurter and Harlan, to say nothing of their surviving brethren, could hardly have been a one-Justice show. In that sense, the commentaries on the Court’s work which adorned highway billboards in the ’fifties and the ’sixties — “Impeach Earl Warren”; “Mommy, why won’t Chief Justice Warren let me pray at school?” — gave Warren more credit than was his due.

But in another sense the billboards were close to the mark. *Brown*, decided in Warren’s first Term, inexorably set the tone for much that was to come after — under Warren, and under Chief Justice Burger as well. To strike down racial servitudes rationally impelled the Court to begin to cast a critical eye at legal disadvantage flowing from poverty, alienage, sex, creed, and philosophic or political principle. To insist on equality before the law was to lead the Court to insist on equal opportunities to participate in the electing of lawmakers. To require courts to

⁵ *Cooper v. Aaron*, 358 U.S. 1, 19–20 (1958).

⁶ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Powell v. McCormack*, 395 U.S. 486 (1969).

administer the law fairly was to ask as much of governors and legislators, prosecutors and police, workmen's compensation boards and parole boards, housing authorities and wardens and state university administrators — all those cloaked with the law's majesty and obligation.

Distilled from the full corpus of Warren's judicial work is a single comprehensive theme: his passion for the rectitude of law. It animated his opinions. And it illuminated the courtroom over which he presided. To attend an argument before Warren was to sense his innate courtesy. But it was also to know that he expected lawyers to be fellow officers of the Court and fellow servants of the law: vigorous advocacy was obligatory, but to advance a claim in a manner faithless to the record was *malum prohibitum*, an unpardonable contempt of Court and Constitution.

Long before he left the bench, Warren's insistence on the integrity of American law had reached far beyond his courtroom. Throughout the nation and across the world he became, through the reverent exercise of his high office, the embodiment of the highest aspirations of American law — Chief Justice of the United States as only Marshall had been before him.

If Warren was not a great Justice — a Miller, a Holmes, a Brandeis, a Frankfurter, or a Black — he was indubitably a great Chief Justice, whose heart and mind were dedicated to fulfillment of the duties he revered. Indifferent to formality, he would have tired quickly of these obsequies. Perhaps we can honor him in terms he would have savored best if we turn to his account the words with which, on behalf of the Court, he marked the death of Frankfurter: "We . . . mourn his passing, both as our associate and friend, but we also know that his ebullient spirit would want us to get on with our always unfinished work."⁷

⁷ 2 THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY 428 (L. Pollak ed. 1966), quoting N.Y. Times, Mar. 2, 1965, at 43, col. 3.