The Most Dangerous Branch: The Supreme Court and its Critics in the Warren Court Era

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To Vernon Hickman

I became a historian for many reasons but the time spent in your household in my formative years made me notice the indelible “pastness of the past.” For that perspective, I will forever be grateful. This dissertation is for you, grandfather.

Acknowledgments

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Abstract

The Most Dangerous Branch: The Supreme Court and its Critics in the Warren Court Era

The United States Supreme Court has, unsurprisingly, attracted considerable scholarly scrutiny. Legal historians, political historians, political scientists and those in the legal academy have devoted much attention to the roles the Supreme Court has played in the governance of this country and in shaping the society in which Americans have lived. One era of the Supreme Court in particular, the so-called Warren Court era that existed from 1953-1969, featured a Court that made invaluable contributions to the project of ensuring that this country, its leaders and citizens came closer to living up to the ideals that the country's sacred constitutional text ostensibly demanded.

However noble these efforts by this particular Supreme Court, it attracted a boisterous, sincere and sizable number of forceful critics. Their pervasiveness and relevance of their criticisms influenced the politics and shouting matches of the era. Some of the critics even sat on the Court. The workings of the Court have never required that all of the justices concur in the results and rationales reached in "saying what the law is." Thus some of the more important criticisms of the Court's work came directly from the bench. More notable, however, were the criticisms that attended to the Court's work provided by the broader body politic. Everyone from police officers to noted scholars, conservative intellectuals to aggrieved mothers and fathers, offered pointed criticisms of rulings that they believed were decided incorrectly. For reasons this dissertation attempts to explain, countless Americans from this era recognized not only that they could contribute to a larger conversation about the Court's work but also did so in such a way that their deeds and words were not just idle examples of discontent. They were

important contributions to the era's politics, political realignments, legal debates and the lived experiences of so many who could not help but afford attention to a Court that existed as one of the most inarguably important legal tribunals in American history.

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Introduction
The Most Dangerous Branch: The Supreme Court and its Critics in the Warren Court Era

Let's clean up our Supreme Court and be America again.[1]

The United States Supreme Court has served throughout American history as an arbiter, setting boundaries and often rendering commandments that the other branches of government, as well as the states and private citizens, are supposed to follow. Yet, as the eloquent Associate Justice Robert H. Jackson (1892-1954) famously wrote about the Court: "We are not final because we are infallible, but we are infallible only because we are final."[2] Legal rulings, however, have attracted legal and extra-legal criticism. Even the finality, to use Jackson's term, of the Court's rulings has become contested in the nation's wider political environment. Particularly in those eras of American history in which the Court has served as a force to impede change (the 1850s and New Deal era, for instance) or bring it about, the Court has attracted a sizable following of critics. The vitriol reached far and wide during the era of the Warren Court from 1953-1969.

Throughout American history the Supreme Court had just as often served as a force for property, tradition and as bulwark against reform. Something happened, though, during the 1950s and then 1960s: The United States Supreme Court became an indubitable ally to liberalism. This alliance concerned post-World War II U.S. conservatives. They observed the federal judiciary, and in particular the Supreme Court, siding with American liberalism in fostering an era of unprecedented federal regulation

[1] Mrs. Robert Ogle to John Ashbrook, September 19, 1968, Ashland University, John M. Ashbrook Collection, Box 4, Folder 21 (hereinafter JAC).
[2] *Brown v. Allen*, 344 U.S. 443, 540 (1953).

and growth in government. Even well beyond the late 1960s, as constitutional scholar Mark Tushnet has written, "conservatives [could] take the Warren Court to represent everything a Supreme Court should not be."[3] Federal regulations put upon schools, the economy and seemingly private economic affairs offended the strong libertarian bent of these individuals who had apparently done little but lose the key battles since the New Deal era. While the Warren Court did not serve as the principle cause of big government, it did not oppose it either.

The Warren Court instead continued the jurisprudential turn in a direction away from impeding any regulations put upon American business, industry and economic life. In so doing it focused upon applying exacting scrutiny to those cases and controversies involving individual rights and liberties. Conservative Court-watchers of the era often questioned the explosion of newly recognized constitutional rights that seemed to threaten societal cohesion and the investigative or prosecutorial efforts of government at all levels. Conservatives could easily get past the apparent contradiction of seeking to protect the U.S. Constitution all while condemning those who invoked its very provisions to support their causes, whether they were suspected criminals or parents attempting to have public school led prayers and Bible readings ruled unconstitutional. Because the Supreme Court, and the liberal justices on the Warren Court in particular, offered these improper and dangerous readings of the constitutional text, opposing developments in constitutional law hardly counted as opposing the document itself. Critics of the Court

[3] Mark Tushnet, ed., *The Warren Court in Historical and Political Perspective* (Charlottesville: The University Press of Virginia, 1993), 1. Tushnet's contribution to this volume is a good one in that it treats the Warren Court as an important political force in the 1960s. He reminds us that the Warren Court did not truly become the unabashed force of liberalism until 1962, and lasted until Warren's departure in 1969. The court's liberal credentials extended from, as Tushnet puts it, "decisions [that] were compatible with the policy agenda of political liberals" and in "enforcing norms of fair treatment and racial equality." (quotes at 2-3.)

did not believe they were denigrating the Constitution, they were merely offering competing claims about the Constitution's meaning and the Court's role in determining that meaning. In many respects, the so-called Warren Court, an entire branch of the federal government, became an enemy. The presumed "least dangerous branch" became the most dangerous branch.

Throughout the era, the open—which hardly meant always honest—denunciation of the country's top legal tribunal had numerous consequences and tells us about the broad importance of the most dangerous branch in the era. Examining this era anew offers insights about, first and foremost, the increasing relevance of conservative assumptions and prescriptions in the United States. Many of these assumptions and prescriptions fit comfortably within longer-standing concerns, confirming the essential conservatism of the country. In particular, concerns over what some called krytocracy, or rule by judges, animated many throughout the era, doing so as part of a broader American distrust of centralized power. Courts, like the other branches of government in a system of divided powers and responsibilities, were not supposed to exercise undue influence, possibly crowding out other actors in the political process. Moreover, some observers contended that the Court intruded upon the sphere of powers reserved for legislatures, both federal and state. The Court's impatience with the coordinate branches or with other avenues for social change manifested itself in controversial decisions like *Brown v. Board of Education*, *Miranda v. Arizona* and those involving legislative apportionment. Academic critics offered objections, opponent congressman fulminated and workaday critics, while untutored in the nuances of the law, expressed alarm over American traditions that the Supreme Court had vacated.

What is more, age-old questions about judicial reasoning and the role of the Court and public opinion are inseparable from this era of constitutional law and politics. The Supreme Court may or may not follow the election returns and over time may very well follow as much as lead the popular will; nonetheless, negative perceptions of the Court still have mattered inherently and in shaping the political landscape within the United States. Academic opinion, grassroots frustration and the disquiet of national politicians all contributed to an era in which a substantial debate occurred over the propriety of judiciary-led political changes. In many respects, the debate predated Earl Warren's tenure as chief justice and has lasted well beyond his departure. Nevertheless, there was a signal battle over constitutional law and its interpretation, not to mention the role of the Court, in the 1950s and 1960s. What people thought about the Constitutional developments of the Warren era thus represents an attractive topic for discovering how jurisprudential ideas and seminal rulings had consequences. The historian, in debt to the past and the discovery of estimable provisional truths that stir debate as much as settle it, owes something to the Court's critics, even the many unsavory ones, in an effort to understand the role of the Court and its foes in American political life.[4] This dissertation thus revisits some of the more notable arguments of the Court's varied opponents.

Criticism of the Court may not have been the quintessential trademark of post-war U.S. conservatism, but it was assuredly a trademark. Indeed, many of the important principles of American conservatism, from preferences for local and state authority to a confusing, messy populism, appeared frequently in the opposition to the Court and its

[4] Encouraging historians to investigate the past, think about its importance and proffer judgments, however far from objective or scientific, is the mandate I take from, most notably, historian James Kloppenberg. See James T. Kloppenberg, "Objectivity and Historicism: A Century of American Historical Writing," *The American Historical Review*, Volume 94, October 1989, 1011-1030.

rulings.[5] What is more, the ubiquity of opposition to the Court leads us to realize that conservatism had allies who, for other reasons, would not even be counted as conservative—a reminder of the wide appeal available in the politics of the Court. What we can say is that principled and unprincipled opponents made contributions to a climate of opinion in which the perceptions of the Court had tremendous consequences. Law enforcement leaders, ordinary citizens, political candidates and office-holders, conservative spokespersons and even members of the academy all registered disapproval. Rulings, from those on desegregation and the rights of minorities in 1954 to those involving residency requirements for welfare benefits in 1968 and 1969, garnered frequent comment. Not all Warren Court critics read the *National Review*, belonged to the Young Americans for Freedom, or supported Barry Goldwater in the 1964 election, but many of the ideals that conservative Americans espoused met with a firm opponent in the Warren Court and its prominent rulings.

Conservative principles abounded in the rhetoric and opposition of massive resistance to school desegregation, itself the noxious creation of important Southern Democrats such as politicians Harry Byrd, Howard W. Smith, and Strom Thurmond. The Republican Party too had its diversity, with Court criticism as something that its members often pursued, again particularly in the 1960 as the crime rate increased and as the Democratic Party controlled the White House. Both major political parties also

[5] Consider David Lawrence's conservative musings as one example. The conservative editorialist, Lawrence wrote about the means by which unacceptable Court rulings could earn rebuke. Though acknowledging the channels open through the constitutional amendment process, Lawrence called attention to a bevy of other options featuring Congress, electing different office-holders, and legislative action. Key to all of these efforts: the activism of aggrieved citizens. In fact, every single gambit began with his language "a citizen may." Accrediting Court criticism as the work of the people only could help ensure that the entire enterprise was not just dismissed as the work of the few and, in turn, displays that conservatives too, when convenient, can support the idea of getting the voice of the people heard. See David Lawrence, "Ways to Restrict Supreme Court," *The Evening Star*, September 19, 1958, Princeton University, Seely G. Mudd Library, David Lawrence Papers, Box 171.

responded to other matters of law and politics that involved the Supreme Court. In short, the Court's critics, while often conservative, fit in both major political parties. Be that as it may, criticism of the Warren Court helped bind conservatives together. On this issue, the cohesiveness of anti-communism for conservatives—whether intellectuals to everyday citizens—has outlived its usefulness as the preeminent explanation for how conservatism came together, particularly since anti-communism united so many on the American political scene.

Domestic politics had primacy. Notably, the Warren Court influenced the political realignments of the era. Contemporaries knew this. Consider long-time House member and important committee chairman Howard W. Smith (D-VA). Smith (1883-1976) rose to the position of House Rules Committee Chairman in 1955, having already served in Congress since 1930. Smith became one of the most powerful politicians in the entire country, effectively limiting and controlling the legislative agenda for the entire House of Representatives. Aside from his power, that is far too easily underappreciated or forgotten even by serious political historians of the era, we must not ignore the conservatism that guided Smith's lamentations about the federal government and its fiscal policies, attempts to over-improve society and willingness to crowd out state and local prerogatives. Smith persistently viewed the Supreme Court as public enemy number one. The Court's school desegregation rulings had guaranteed that Smith's protestations against the Court had ample appeal to those Americans who opposed racial equality.

Smith's May 1960 speech before the Virginia State Democratic Party should be required reading for anyone who wants to understand the fiscal conservatism and

unapologetic racism that animated most Southern congressman in that era. Democrat in name, these politicians increasingly seemed to have no home; the Court's work helped deprive them of a home. Smith, as did many of his colleagues, hardly advised jumping ranks to join the Republican Party, for it was that party that had put Earl Warren on the Court, watched over the Civil Rights Act of 1957, and seemed to support radical changes in civil rights. What one can say with no hint of exaggeration is that the United States Supreme Court stood at the forefront in the realignment in American politics that occurred from the 1960s onwards, with the Democratic Party becoming a minor party throughout the American South. Smith's protests for disaffected Democrats not to join the ranks of the Republican Party are a vestige of a far different era.[6] Increasingly, over the next two decades the Republican Party became the ally of Southern conservative interests.

Just as the Court's work contributed to the demise of the Democratic Party in the South, it also attracted many strident critics who came to represent the opposition to the Court and where it fit on the era's political spectrum. Politics has often been reduced to caricatures. Historians can help challenge misconceptions. One unfortunate, tired conception has been that the Warren Court's critics were, for the most part, philistine right-wingers just as easily swayed by groundless talk of conspiracy as they were by defensible criticisms to the Court's rulings. Debates that have existed over the American political spectrum and the Warren Court since that era have continued to influence any debate that continues in our own. Though Chief Justice Earl Warren's memoirs contain more than a few instances of outright self-deception, he accurately stated: "The Court

[6] For Smith's 1960 speech see *Congressional Record*, May 24, 1961, 10891-10892.

was under attack by powerful interests nearly all the time I was there."[7] Warren, even while still on the bench, fairly recognized the lunacy in some of the complaints, but in labeling one of his assailants a "Goldwater Birchite" he fell victim to an unhelpful and dismissive generalization. He missed the chance to separate out plausible criticisms of the Court from negative reactions of the American far Right.[8]

Warren's evaluations and tone, frequently and unfortunately, presented the Court's foes as little more than an angry cabal. Contemporary and future scholarly allies of the Warren Court have too often joined Warren in wondering how anyone but John Birchers and others of the radical fringe could despise the inimitable Supreme Court. These dismissals of the Court's foes have come from citizen Court-watchers and scholars alike. For instance, much of the mail sent in support of Earl Warren, from his June 1968 announcement of his intention to depart the bench to his actual departure following the 1968-1969 term, reveals just how much this popular contemporary caricature circulated. Warren supporters reliably derided the critics as members of the impeach Earl Warren Crowd of the radical right.[9]

No better example of this extreme right-wing existed than the John Birch Society (JBS). Birchers recognized the parlous influences of communism behind the Court's doings, making sure to push the agenda of removing Earl Warren from the Court. Members of the Court took notice of the JBS efforts. The justices assailed some of their

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[7] Earl Warren, *The Memoirs of Earl Warren* (Garden City, New York: Doubleday, 1977), 312.
[8] Earl Warren to William Douglas, handwritten note, March 22, 1966, Library of Congress, Manuscript Division, William Douglas Papers, Box 1139.
[9] See, generally, Library of Congress, Manuscript Division, Earl Warren Papers, Box 107-110 (hereinafter EWP). Whether or not Warren read these missives—as he claimed he did not read the letters sent in support or disagreement with the era's rulings—is less relevant than the mood these messages evidence. Warren's overall treatment of his critics, as his memoirs attest, is often not his finest hour as he too coolly dismisses their motives or calls attention to the John Birch Society. And Warren, despite his indications in his memoirs, did read these letters and share them with his colleagues. On Warren not reading any of the letters sent to him about cases see *The Memoirs of Earl Warren*, *supra* note 7, at 302.

critics under shorthand terms such as “Bircherite” and took delight in local showings of anti-Bircher films or national derogation of the JBS by groups such as Freedom House.[10] William Douglas, for instance, alerted his colleagues to an election year 1968 John Birch Society produced film on the Warren Court set to air at a high school in the Washington D.C. suburb of Chevy Chase. The chief justice playfully suggested in response that he could "hardly wait to see the John Birch Society film about our Court."[11] Hysterical, often conspiratorial right-wing groups, however, simply did not represent the most potent or most important source on the American right in the 1950s and 1960s. As such, we should recognize that opposition to the Supreme Court was not just the work of a crazed contingent either. Historical perspective will help as we work against the glib notion that most criticism of the Court featured roadside signs calling for the impeachment of Earl Warren, simple-minded bigots, “southern bullies” or the fanatical complaints that the Court existed as vital part of a communist conspiracy.[12] Once and for all we should appreciate that the mailing lists for the JBS did not contain every single critic of the United States Supreme Court.

Ultimately to evaluate the Warren Court era and the importance of constitutional law in American life without understanding the Court’s foes is to not understand the era at all. Most importantly, we must first appreciate those areas of jurisprudence that most upset the Court’s opponents. Accordingly, we will learn about the varied sour reactions to seminal developments involving the desegregation of schools, criminal procedure,

[10] “Statement on the John Birch Society by the Board of Directors for Freedom House,” May 1, 1961, William Douglas Papers, Box 593.
[11] Earl Warren to William Douglas, March 6, 1968, EWP, Box 332.
[12] The “southern bullies” line is taken from a letter to Louisiana Congressman John Rarick that one Earl Warren supporter had forwarded to the Chief Justice. Felix Milan to John Rarick, July 23, 1968, EWP, Box 108.

apportionment, school prayer and bible readings.[13] To do so we will consult jurists, social commentators, politicians, academics and even the otherwise voiceless citizens. Though we will often chronicle reactions to specific decisions alone, we will just as well seek to convey the broader indictment of the Court's handiwork in these areas of constitutional law. In understanding the grievances, we will also encounter the more notable prescriptions that the myriad critics offered. However quixotic they may have seemed then (or seem now), the prescriptions for working against the Court represented a visible sign of the sincerity many brought to the efforts. From the attempts to nullify key rulings through constitutional amendments to the frequent episodes of explicit and implicit civil disobedience, these critics undoubtedly hoped that enough political pressure might influence the Court to change its direction. If the Court did not correct its past misdeeds, its opponents hoped that the Court would at least not repeat them. Moreover, the actions in Congress helped spur and validate grassroots disobedience. The Supreme Court in the era was simply inextricable from the country's political environment.

In chapter one this dissertation provides an overview of the Warren Court era, affording particular attention to biographies of the eighteen jurists who served for some time on the Supreme Court from the 1953 through 1969. In order to learn about the justices it is necessary to have a general appreciation of their experiences before joining

[13] Though in no way systematic or scientific in its breadth, the process of identifying what developments in constitutional law in the 1950s and 1960s that most unsettled observers has benefited from limitless perusal of sources. Constituent mail, missives sent to Supreme Court justices, the *Congressional Record*, important conservative publications such as *Human Events*, *Battle Line*, *National Review*, *The New Guard* and *Modern Age*, the writings of prominent academic critics of the Court and secondary source material all have confirmed the choices I make. Just as one example though, of the myriad letters sent to Earl Warren upon his announcement that he intended to leave the bench, time and again those who lambasted the Court cited a typical list of Court transgressions. Apportionment, crime, communism, civil rights, segregation in schools, and prayer appeared so frequently as to exclude, for the most part, other complaints. Also, contemporary evaluations from the ACLU often cited the same list of controversial constitutional issues. See, for instance "Analysis of Hearings and Constitutional Amendments to Permit Prayer and Bible-Readings in Public Schools," May 4, 1964, Princeton University, Seeley G. Mudd Library, ACLU Papers, Box 808, Folder 17.

the Court, their broad voting habits, views on the role of the judiciary in governance and general importance on the Court. Justice Felix Frankfurter and Justice John Harlan II earn close attention because of the role they played as generally consistent advocates of judicial restraint; on the other hand, Chief Justice Earl Warren and Hugo Black, William Brennan and William Douglas also earn close attention because of their frequent, but by no means universal, support for the jurisprudence and outcomes that came to identify the liberal course.

Chapter two surveys the early developments, from the 1950s, of the Court's school desegregation mandate from *Brown v. Board of Education*. Easily overlooked then, as now, *Brown* had many key trademarks that revealed the Court's moderation. Such moderation provided evidence of the Court's substantial interest in the public reaction to a ruling that, in putting segregated schooling on a road to extinction, was not moderate in its longer-term implications. The 1954 ruling attracted immediate and long-lasting animosity, promoting the most acerbic constitutional controversy of the twentieth century. The New Deal era had featured a battle between the forces of reform and the Court; President Truman had to defend his unprecedented seizure of the steel mills; President Nixon's attempts to stand above the law during the Watergate crisis brought into relief decades-long growth in presidential power; and the continuing fallout over *Roe v. Wade* assuredly ranks highly. Massive resistance to school desegregation, however, influenced the course of the entire Warren Court era. The fallout over school desegregation also requires that the historian take great care in evaluating the fallout to other Court rulings. Accordingly, we must consider the difficult question of whether or

not the country's racial injustices and prejudices are, in any meaningful way, separable from other constitutional and political debates.

Chapter three provides an evaluation of the fallout to *Engel v. Vitale* and *Abington v. Schempp*, two decisions from the early 1960s that invalidated public school prayer and public school Bible readings. Protestant Christianity had maintained an unmistakable place in the American public schoolhouse for centuries. The Court, however, accepted the arguments that the First Amendment's apparent prohibition on the fusion of church and state, the so-called Establishment Clause of the First Amendment, mandated removing two of the most important examples of this fusion. Many contemporary witnesses to these developments reacted furiously to what they considered a costly gamble with the spiritual health of the country. The arguments they supplied ranged from exaggerated fears over the expulsion of Christianity from public life to far more sound objections that modern legal authorities had misunderstood the true intentions of those who had adopted the Establishment Clause in the first place. Interestingly, some of the more vocal opponents of governmental power advocated positions that put governmental power at its zenith in its command of the individual spiritual choices of impressionable public school pupils. The fallout from *Engel* and *Abington* thus revealed one of the contradictory, but hardly crippling, elements in American conservatism. The so-called culture wars that have raged throughout American history have often featured a prominent role for faith. Many of those who have carried out these battles over the past five decades have continued to look upon the removal of God from the public school classrooms as a compelling cause for long-term American educational and cultural demise.

Chapter four invites a clear reconsideration of the Court's contributions to representative democracy: the "one-person, one-vote" ideal for legislative districts. While it is now almost axiomatic that the Court's apportionment decisions from the 1960s helped the political process clean up a system thoroughly out of balance with principles of representative democracy, the arguments advanced to oppose rulings in *Baker v. Carr* and its progeny were healthy, arguably some of the most nuanced and persuasive of any arguments in opposition to the Court's work. Decisions that Chief Justice Earl Warren even regarded as the most important of the Warren Court era revealed a liberal Court majority willing to actuate political reform, albeit in a manner that hardly confirmed that the Court follows the will of the public. Opponents of the Warren Court's apportionment jurisprudence lost out for many reasons, but one of them was not the paucity of reasonable constitutional, historical and policy arguments that counseled against these rulings.

Chapter five takes on the criticisms of the Court's widely contested criminal procedure rulings. The thinking about the varied criminal procedure rulings informs us about the sometimes narrow American political spectrum, particularly on questions of crime. The Court's critics often seriously objected that the Supreme Court had actually caused criminal incidents to increase, particularly during the 1960s. Reactions about the Court's supposed causal role in the crime problem poured into the offices of U.S. Congressman. One Virginia constituent expressed confidently to Senator William Spong (D-VA) that Congress could not expect the Supreme Court to monitor itself; Congress had to take an active role in rescuing the country from a crime problem the Court had

caused.[14] The Citizens for Good Government group of Farmville, Virginia likewise complained of a Court that had made recent riots and criminal acts more likely.[15] Prominent national politicians led these charges of Court complicity in the crime problem. Representative John Ashbrook (R-OH), chairman of the American Conservative Union, consistently blamed the Court for rulings that fostered crime and did little to protect the rest of society. Indeed, all throughout 1968, Ashbrook, an ardent supporter of Richard Nixon in that election year, put the Court front and center as the responsible agent for the crime problem.[16] Evaluations of the varied reactions to the Court's criminal procedure rulings are indispensable for understanding how and why Nixon cleverly campaigned against the Warren Court in 1968.

Chapter six, while seemingly a detour, presents an overview of the contributions of the era's preeminent Court-watcher/public intellectual, Alexander Bickel. Bickel labored tirelessly to improve the public's understanding of the Court's work and the changes in the law and politics throughout the country. What renders Bickel particularly significant is that he reveals that undeniably thoughtful criticism of the Warren Court existed, and not just in the law reviews. He permits us to collapse, albeit not entirely, the clunky distinctions between the accepted and the outrageous. Scholars existed as some of the most vocal critics of the Warren Court's work. Rather than dismiss the complaints from below as mere gimmicks, we can recognize that the one of the most important scholar Court-watchers of the era voiced concerns, however more subtle, that had parallels in the larger political and grassroots critique.

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[14] James B. Spratley to William Spong, July 28, 1967, Box 53, Senator William Spong Papers, University of Virginia Small Special Collections Library (hereinafter WSP).
[15] Foster B. Gresham to William Spong, July 26, 1967, Box 53, WSP.
[16] One will find myriad examples of correspondence in Ashbrook's papers that testify to this line of thinking. Notably see, 1968 Executive Files, Boxes 3 and 4, JAC.

Chapter seven evaluates Richard Nixon and his 1968 campaign for the presidency. During his efforts to secure the nomination and later in the general election campaign, Nixon and his key domestic policy advisors sought to position the Nixon camp as a responsible, conservative critic of the excesses of the Warren Court, particularly those involving criminal procedure. While some may now place much doubt on the actual impact of Court inspired legal and political change, Richard Nixon and his 1968 campaign advisors most certainly did not. Growing disapprobation for the Court connected to the tumult of the 1960s and the rising distrust for government from points along with U.S. political spectrum. While the Ronald Reagan years, Attorney General Edwin Meese and the shouting matches over the judiciary since 1981 assuredly deserve a position of importance, Nixon, his 1968 campaign and later appointments to the Court deserve status as pioneers. Conservatives, since that era, have waged a non-stop effort to exorcise the demon of judicial activism. Conservatives might have lost in 1964 and Nixon certainly was not the "ideal" candidate in 1968 but at least conservatives could unmake, so the argument proceeded, the Warren revolution. Nixon, at least on this important political issue, was assuredly an acceptable conservative.

I.
A Court of Consequence: The Warren Court Revisited

It is too often forgotten in these times that the American federal system is itself constitutionally ordained, that it embodies values profoundly making for lasting liberties in this country, and that its legitimate requirements demand continuing solid recognition in all phases of the work of this Court. The "incorporation" doctrines, whether full blown or selective, are both historically and constitutionally unsound and incompatible with the maintenance of our federal system on even course.[1]

It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.[2]

Only those heedless of legal history can deny that in construing the Constitution the Supreme Court from time to time makes new constitutional law or alters the law that has been.[3]

You are aware of the fact, are you not, that today a great many people are very much concerned about the decisions of the Supreme Court?[4]

Even before he had occupied the Oval Office for one year, Dwight D. Eisenhower had the opportunity to put his mark on the United States Supreme Court.[5] Chief Justice Fred Vinson's September 1953 death permitted the new president to appoint Earl Warren. Vinson, a New Dealer and former Kentucky senator, had overseen a fractured Court that hardly challenged Alexander Hamilton's characterization of the Court as "the least dangerous" of the coordinate branches that made up the federal government.[6] Former President Harry S. Truman had appointed Vinson, who at the time headed up the United

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[1] *Pointer v. Texas*, 380 U.S. 400 at 409 (1965), (Harlan, J., dissenting).
[2] *Mapp v. Ohio*, 367 U.S. 643 at 672 (1961), (Harlan, J., dissenting).
[3] Robert H. Jackson, *The Supreme Court in the American System of Government* (Cambridge: Harvard University Press, 1955), 56.
[4] Senator Sam Ervin question to Thurgood Marshall during the 1967 Senate Judiciary Committee Hearings of Thurgood Marshall. Available in *Nomination of Thurgood Marshall, Hearings Before the Committee on the Judiciary, United States Senate, Ninetieth Congress, First Session*, (Washington, DC: US Government Printing Office, 1967), 26.
[5] Hereinafter the discussion of the appointment to the United States Supreme Court during the 1950s and 1960s benefits from Henry J. Abraham, *Justices, Presidents and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II, 5th edition* (Lanham, Maryland: Rowman & Littlefield, 2007), 199-203.
[6] *The Federalist Papers*, no. 78, available at < http://avalon.law.yale.edu/18th_century/fed78.asp>.

States Treasury Department, to the Court in 1946 to replace the recently deceased Chief Justice Harlan Fiske Stone. An ardent FDR and Truman supporter, Vinson had seen his political loyalty earn him the nomination; nevertheless, many had hoped that he would bring comity to a Court that become a jurisprudential and personality war zone under former Chief Justice Stone.[7]

The Vinson Court (1946-1953) had a mixed judicial record. As a case in point, it stood up to President Truman in the Steel Seizure Case, thus placing important limits upon a president's powers in taking over private property. Yet, the same Court served as an ample accessory to governmental power in *United States v. Reynolds*, a ruling that permitted the federal government to employ the states secrets doctrine to withhold valuable evidence from a group of widows who sought redress for the deaths of their civilian husbands as a consequence of a 1948 B-29 crash over Georgia.[8] Other rulings of the era further served to reinforce the status quo, sometimes curtailing individual liberties. In *Adler v. Board of Education*, for instance, the Court upheld a New York civil service law and its enforcement law—the so-called Feinberg Law—that effectively existed as a Smith Act for public school teachers. The New York law provided for the removal of school teachers who had belonged or continued to belong to subversive organizations or those groups that advocated the forcible overthrow of government.[9] Even more noteworthy, a Vinson Court majority facilitated repression in the 1951 ruling

[7] Melvin I. Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson, 1941-1953* (Columbia, SC: University of South Carolina Press, 1997), 148-149.
[8] *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579 (1952); *Reynolds v. United States*, 345 U.S. 1 (1953). For *Youngstown* (The Steel Seizure Case) see Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (New York: Columbia University Press, 1977). On *Reynolds* see Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (Lawrence, Kansas: The University Press of Kansas, 2006). The U.S. government has continued to rely upon the state secrets doctrine ever since to shroud possibly illegal and embarrassing governmental actions.
[9] *Adler v. Board of Education of the City of New York*, 342 U.S. 485 (1952).

in *Dennis v. United States*, a decision that granted constitutional consent to the federal Smith Act prosecutions of the top Communist Party of the United States of America leadership.[10]

Vinson's lack of leadership qualities and the low respect his colleagues had for him hurt relations on the Court. Feuds among the justices continued. Justice Felix Frankfurter frequently clashed with two of his fellow FDR appointees, Hugo Black and William Douglas. The professor-jurist Frankfurter knew much about the Court, its history, mores and its rulings but little about getting along with his fellow justices. Over the years of his judicial service these troubles continued. The Frankfurter-Douglas feud simmered up until Frankfurter's retirement in 1962.[11] Justice Robert Jackson, who often served as a Frankfurter ally and had likewise earned a spot on the Court during the FDR presidency, also had an acrimonious relationship with Black and Douglas. The amiable Vinson just did not have the necessary stature with his colleagues to calm the storm.[12]

The Vinson Court also made contributions that unsettled the status quo and provided sustenance to some liberal causes, even as it turned away from protecting important contested civil liberties.[13] One of the more notable involved the increasing liberalization of civil rights law and civil rights expectations. Vinson Court majorities served as important allies to the National Association of Colored People (NAACP) campaign to weaken the legal cover granted to segregation, particularly in higher

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[10] *Dennis v. United States*, 341 U.S. 494 (1951).

[11] See Phillip J. Cooper, *Battles on the Bench: Conflict Inside the Supreme Court* (Lawrence, Kansas: The University Press of Kansas, 1999), particularly 25-27. Frankfurter and Douglas accused one another of sleights, both real and imagined, and disagreed on many interpretations of the Constitution. The primary constitutional disagreements earn discussion later in this chapter in the biographical snippets of each Justice.

[12] For a fuller treatment of the battles between Justices Black and Jackson see Dennis Hutchison, "The Black-Jackson Feud," *Supreme Court Review* (1988), 203-244.

[13] I have benefited from William Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953* (Cambridge, London: Cambridge University Press, 2006), 658-706.

education. In important cases involving higher education, the Court, in *Sipuel v. Board of Regents of the University of Oklahoma*, *McLaurin v. Oklahoma State Regents*, and *Sweatt v. Painter*, signaled clearly that segregated educational institutions had a short legal life ahead of them.[14] Another important ruling involved how state action helped ensure ostensibly private discrimination. In the 1948 ruling in *Shelley v. Kraemer* the Court ruled that state law could not support restrictive covenants, effectively undermining one of the more important services that government could provide for otherwise non-state discriminatory action.[15] Notwithstanding, these important cases, the Vinson Court scarcely served as an unsettling force, and perhaps that made sense following the chaotic early New Deal years when the Court had existed as a nocuous opponent of reform. Ultimately the Vinson Court is often remembered most for its internal feuds, its important desegregation rulings and a desegregation decision that it did not decide upon before Vinson's death in September 1953.[16]

Vinson's tenure also featured the first oral arguments *Brown v. Board of Education*. In December of 1952 and on into 1953 the Court's members could not come to any agreement on disposing of the issues raised over segregated public schools. A majority of the justices had come to recognize that segregated schooling should no longer have legal cover; nevertheless, some of the justices were uncomfortable with the idea of a judicial decree accomplishing this worthy end. The problem thus involved finding a

[14] *Sipuel v. Board of Regents of the University of Oklahoma* 332 U.S. 631 (1948); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).
[15] *Shelley v. Kraemer*, 334 U.S. 1 (1948).
[16] Those who afforded the Court any attention whatsoever knew of the internal problems on the Court. Upon the appointment of Earl Warren, the *Wall Street Journal* cited "personal feuds" as one of the important obstacle the Court (and thus Warren) faced. See "The New Chief Justice," *Wall Street Journal*, October 1, 1953, 10.

suitable rationale for outlawing school segregation.[17] Some justices hoped for unanimity or more information to guide the eventual decision, and as such the case was put over for re-argument for the following term. The delay had much to do with ensuring a turn against segregated public schools that could find support from all of the justices. Even after the re-hearing in 1953, some discontent existed. Justice Reed, for instance, even as late as the late winter of 1954 still seemed like a possible dissenting voice.

Shortly before the Court stood to hear the second set of arguments in *Brown*, Chief Justice Vinson died from a heart attack. The often snide Justice Frankfurter allegedly quipped that Vinson's death gave credence to the idea of a higher power. Even if apocryphal, the comment is not something that Frankfurter would have been above registering; moreover, the comment perfectly illustrates the apparent nadir to which the Court had descended.[18] The man who Eisenhower chose to replace Vinson, Earl Warren, arguably served as the paragon of the thirty-fourth president's "middle way" and its call for a moderate Republican Party.[19] Promised the first vacancy on the Court, Warren almost became the solicitor general instead but fate intervened with the death of Chief Justice Vinson. Earl Warren earned the September appointment while Congress was not in session. As a recess appointment Warren could serve as the interim chief justice until such time as the Senate chose to confirm or deny the appointment.

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[17] On the varied questions and concerns that explained some of the judicial reticence that existed see Michal J. Klarman, "Brown at 50," *Virginia Law Review*, Volume 90, (October 2004), 1613-1633.

[18] One piece of evidence comes from Frankfurter's clerk at the time, Alexander Bickel. In writing to Philip Kurland (University of Chicago Law School) years later, Bickel professed that he did hear Frankfurter utter words precisely of this nature about "an act of Providence" explaining Vinson's death. Alexander Bickel to Philip Kurland, September 22, 1967, Yale University, Sterling Library, Alexander Bickel Papers, Series I, Box 10 (hereinafter ABP).

[19] Dwight D. Eisenhower, *Mandate for Change: 1953-1956*, (Garden City, NY: Doubleday & Company, 1963). For a recent, though unsatisfactory, analysis of Ike's "middle way" see Steven Wagner, *Eisenhower Republicanism: Pursuing the Middle Way* (Dekalb, Il: Northern Illinois University Press, 2006).

Warren, who at the time of his appointment served as the third-term governor of California, had important consensus political instincts and hardly had governed as someone who would stoke controversy. He had burnished his credentials and his crossover appeal with his own version of the "middle-way" in California politics. The ability to get along well with others and to secure adjutants who might otherwise oppose the ends Warren sought would help immensely in his work as chief justice.[20] Whatever debt the new Republican president owed Warren for his help securing the California delegation at the 1952 Republican National Convention, some observers have attempted to find more exciting reasons that may have existed for Warren's selection. One of the more conspiratorial suggestions is that Warren frustrated a more conservative leadership in California's Republican Party. [21] Accordingly, arch-conservative California Senator William Knowland and Eisenhower's Vice-President Richard M. Nixon would not have regretted, and may have even encouraged, Warren's removal from the California political game.[22]

Eventually, in the spring of 1954, Warren's appointment came before the full Senate. While opposition temporarily held up full senatorial confirmation, Earl Warren

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[20] See Kermit Hall, "The Warren Court in Historical Perspective," in Bernard Schwartz, editor, *The Warren Court: A Retrospective*, (Oxford: Oxford University Press, 1996), in particular 296-297. Hall argues that "Warren led through collaboration." Hall also reminds us of the importance that attended to Warren's role of assigning the opinion writing tasks to those opinions in which he was a member. According to informal Court protocol, the senior justice assigns the responsibility of drafting opinions. The chief justice though, whatever his length of service, is accorded the privilege of assigning opinions when he votes with the majority.

[21] Henry Abraham discusses but hardly endorses this viewpoint. Abraham, *supra* note 5, at 201.

[22] Such a view would depend upon a comity between Knowland and Eisenhower that did not exist and perhaps over-emphasizes Vice-President Nixon's role in the White House. Nonetheless, Warren and Nixon, despite their Californian political grounding, had no use for one another. In describing the rationale and process that guided Nixon's selection, Eisenhower's first Attorney General Herbert Brownell acknowledged that Warren did nothing to advance or support the push for Nixon to become the vice-president. Given Nixon's penchant for holding grudges one must not doubt that he never forgot Warren's lack of support. See Eisenhower Library Oral History Project, Herbert Brownell Interview, OH-362, February, 2, 1978, 18.

ultimately earned the unanimous consent of the Senate in March 1954.[23] Only the most unaware would fail to realize that countless Americans, from the consequential to the often voiceless, in the years ahead would come to think the 1954 debate over Warren's appointment a lost opportunity to forestall a legal revolution.

Before coming to Washington Warren had already lived a full life of sixty-two years, with most of his adult life bound up in public service. Republican in name, Warren came of age in California; his politics defied easy classification. As a local and later state official, Warren had some predictable distrust of Washington, exercising doubts over the propriety of the New Deal for instance. Nevertheless, he was by no measure a rigid proponent of state rights.[24] Eisenhower may have not wholeheartedly welcomed the appointment of Warren to the Court, much less making him chief justice, but one cannot miss the irony, in knowing of what the Warren Court became, in realizing that at least in 1953 Eisenhower had made an appointment that made the otherwise lifeless slogan of the "middle way" seem like an actual political guiding light.[25]

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[23] Abraham, *supra* note 5, at 191-194. Also see Jim Newton, *Justice for All: Earl Warren and the Nation He Made* (New York: Penguin, 2006), 279-291. Newton evaluates North Dakota Senator and Judiciary Committee Chariman William Langer's attempts to slow down the nomination. Langer, in a reminder of the paradoxes of that era's politics, both supported the New Deal and detested the United States' growing role in international affairs. Like any national political figure he also detested the thought that he had his views overlooked. Langer relied upon innuendo and reckless charges to hold up the process. Newton's excellent book benefits from recently released Senate Judiciary Committee records that only became available fifty years after the 1954 hearings. Warren, much to his credit, held his cool during these attacks.

[24] Newton, *Id*. at 70-72.

[25] Countless scholars rely upon the often-told story of Eisenhower complaining about his appointments of Earl Warren and William Brennan to the Court. Questions of the verity of this or that Eisenhower complaint about either appointment are sideshows to two far more important observations. For one, Warren undoubtedly appealed to Ike's putative moderate political inclinations. Secondly, this moderation only could go so far. With Eisenhower and those such as Brownell who frequently cited the balance of powers, federalism and some of the more limiting aspects of government, Eisenhower would have been a disinterested observer of the legal-political scene not to lament the developments of the Warren Court during the 1950s, and even more so those of the next decade. For Brownell's refusal to accept that Ike regretted these appointments or would have at least expressed this regret to others see John Burke and Herbert Brownell, *Advising Ike: The Memoirs of Attorney General Herbert Brownell* (Lawrence, KS: University Press of Kansas, 1993), 163-175 (in particular 173).

Warren's political instincts and notable actions as a California politician hardly portended a Warren-led judicial crusade. As a case in point, Warren, before he joined the Court, had firmly supported the removal of Japanese citizens and non-citizens from the West Coast during World War II, and he too had resisted the calls for reapportionment in California. War-time fears and state politics might help explain his past, but his judicial future still involved a different course as he participated in rulings that forced the country to come closer to its ideals of equality before the law—both with racial discrimination and with the seemingly mundane issue of the construction of legislative districts.[26] Warren was not the first justice (or the last for that matter) to reach judicial outcomes that his past alone had not portended.

In the end we could, with little controversy, contest the notion that the Warren Court even existed as some discrete historical actor. Thinking of an era of the Court's history via the shorthand of assigning salience to any one occupant of the chief justice spot is not a choice free from demerits; nothing magical happens merely because one justice replaces another—even if it is the chief justice. As just one rival notion, many observers later came to regard the Court as Justice William Brennan's as much as Warren's. Brennan, after all, came to the Court not long after Warren and remained on the Court well after Warren's departure in 1969. Brennan too had an unusual role in fashioning some of the important coalitions and opinions that are liberal hallmarks. Even after Warren left the Court, Brennan continued to serve as an ardent proponent of defending individual liberties and serving as a steward for many of the liberal ideals that

[26] Bernard Schwartz, "Earl Warren," in Bernard Schwartz, editor, *The Warren Court: A Retrospective*, (Oxford: Oxford University Press, 1996), 257.

carried the day in an earlier era.[27] Nevertheless, many of the Court's contemporaries thought of a "Warren Court" regardless of the diverse meanings present or the extent to which one man, Earl Warren, did or did not deserve fame or infamy. *Brown v .Board of Education*, the ruling that occurred near the end of Warren's first term, ensured that the convenience of speaking of a Warren Court had justification as a discrete political actor. The Warren Court attracted innumerable enemies. In their worldview a Warren Court most assuredly existed. Hence to speak of a Warren Court need not demand that Warren led while his fellow liberals always followed; he did come to exercise an important influence on the Court's direction.[28]

In retrospect many of the later critics of the Earl Warren Supreme Court would have preferred to replay the unobtrusive Vinson Court era. Court members during that era did not get along but at least the Court kept its intrusions at minimum. The Warren Court, however, helped the United States live up to many of its important (and presumptively cherished) ideals. Notions of equal opportunity, protections for the rights of the accused, preferences for open access to democratic channels of participation and providing expanded space for dissenters and non-conformists all existed as part of general agreement. Disputes assuredly existed on the Court during the Warren Court era, but the Court members, for the most part, neither called for a return to the activist ways of an earlier era when the Court frustrated the New Deal, nor did they question many of

[27] See, for instance Robert Post's essay "William J. Brennan and the Warren Court," in Mark Tushnet, editor, *The Warren Court in Historical and Political Perspective*, (Charlottesville, VA: The University of Virginia Press, 1993), 123-138.

[28] See G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges*, 3rd edition, (New York: Oxford University Press, 2007), 267-268. Consider one of Senator Harry Byrd's tirades against the Court at his annual picnic in 1959. Byrd "call[ed] the present Supreme Court the Warren Court so as to distinguish between those great justices and members of the Court who previously have served." Harry Byrd, "August 19, 1959 Excerpts of Speech at 37th annual Orchard Picnic," Harry Byrd Papers, 9700-d, Box 1, University of Virginia, Small Special Collections Library.

the tenets of liberalism or the broader emphasis upon the expansion and recognition of individual rights and liberties. Whatever understandable scholarly doubts over the extent to which Court rulings produced real change, such doubt can only go so far. The Warren Court existed as both partner to New Deal/Great Society liberalism and as an active agent, compelling an often recalcitrant body politic to embrace what many, but no means all, liberals would have accepted as better society.

What is more the Warren Court carried out its work during one of the more dynamic and contested eras of American history since the Civil War of the 1860s. The Court's dockets, the arguments that appeared in amicus briefs and the rulings it produced reflected something about these contests of the 1950s and 1960s. That these decades featured partisan re-ordering, the heyday of American liberalism, campus crusaders, and the continued growth of governmental responsibilities is undoubted. The Warren Court never stood far from these developments.

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Any discussion of the Warren Court necessarily begins with Earl Warren. Warren had advanced his own career as a Republican California politician who had obtained national attention. His prior career belied, in important ways, the jurisprudential liberalism his very name came to represent. Born on March 19, 1891, he had lived his entire life as a Californian. He took degrees, one in law, from the University of California at Berkeley. Prior to his election to higher office in California, Warren had worked for nearly two decades as a prosecutor. In California politics he later appealed to voters as a mainstream candidate in races for attorney general and governor, hewing to the left or right when appropriate. His run for attorney general in 1938 crossed party

boundaries as he went before the voters as the nominee of the Republican, Democrat and California's Progressive Party. He later became governor of California in 1942, winning re-election in 1946 and 1950. As one of the more notable episodes from Warren's time as attorney general and governor, the exclusions and internment of those of Japanese ethnicity earned Warren's active support during World War II. Years later Warren admitted that his support for such an awesome abuse of governmental power had been a mistake, but did so only after he had left the Supreme Court. In 1948 he joined the Republican national ticket with its presidential candidate Thomas Dewey. Had the soothsayers been right in that historic election, Earl Warren might have become a little remembered vice-president instead of the man whose name is widely associated with one of the most consequential (and controversial) periods in American constitutional law. Yet, if only to reveal the change in Warren's reputation over his years on the Court, by 1969, upon his retirement, a new president who had campaigned against the Warren Court, offered the chief justice position to Warren's 1948 running mate. Had Dewey accepted the offer, he would have done so under an expectation that he do many things. Imitating the judicial career of Warren would not have been one of them.

He was not widely regarded as a first-rate lawyer or someone who had a great legal mind. He did have reliable conceptions of right and wrong. Those who looked to the law for predictable results could rely, for the most part, on Warren, increasingly in later years as the Court became even more solidly liberal in the 1960s, to side with the interests of the accused, minorities and those who stood seemingly powerless. The laudatory appraisal of historian Bernard Schwartz might go too far, but he contended that

"Earl Warren, in the judicial pantheon, can only be compared to John Marshall."[29] Warren may have lacked a judicial philosophy that would endear him to the legal academy and certainly to his other critics, but Warren carried out his judicial duties during his sixteen years on the Court in a manner consistent with what he thought were the principles of right and wrong that the law should maintain.

The Warren Court evolved over time. Warren's arrival alone did not ensure rulings that would unsettle the status quo and serve to make the Court a star player in the heyday of a U.S. political age in which liberalism seemed the dominant influence. He had numerous judicial allies, but the number of allies (and thus the more notable rulings) increased over time, particularly so in the 1960s with the arrival of Arthur Goldberg, his replacement in 1965 by Abe Fortas and later still with Thurgood Marshall's arrival in 1967. Hence, while the Warren Court existed from 1953 until Warren's retirement in 1969, many scholars would now accept that the "true" Warren Court came into existence during the 1960s.

One of the most important voices of the Warren Court's evolving liberal bloc served on the Court longer than any member before or since, the shrewd but combative William O. Douglas. Slightly younger than Warren, Douglas was born in 1898. Born in Minnesota, he spent most of his years growing up in the western United States, notably in Yakima, Washington. Douglas labored mightily to cover his expenses at Whitman College in Washington and later back east at Columbia Law School.[30] Before taking a seat on the Court in April 1939 at the tender age of forty, becoming FDR's fourth appointment, he had put his legal talents to use in academic and governmental posts. He

[29] Bernard Schwartz, *supra* note 26, at 256.
[30] Vern Countryman, editor, *Douglas of the Supreme Court: A Selection of his Opinions* (Westport, CT: Greenwood Press, 1959), 10-11.

labored on the legal faculty at Columbia University and later, following a chance meeting with then Yale Law School Dean Robert Hutchins in 1928, ended up at Yale.[31]

Like many other Yale academics, Douglas soon joined up in the New Deal cause. Before replacing the legendary Justice Louis Brandeis, Douglas also put his business law talents to work at the Securities and Exchange Commission (SEC), the New Deal era creation designed to regulate the United States stock market and securities trading. Eventually Douglas even headed the SEC. Throughout his long judicial career he became known for his outspoken support for unpopular causes, often expressing such support in interviews, appearances and within the many books he wrote. Their titles alone remain telling. Titles such as *Right of the People, A Wilderness Bill of Rights* and *Points of Rebellion* unmistakably revealed the political views of Justice Douglas.

Douglas also maintained even larger political ambitions—many other justices did likewise—that others outside of the Court did little to deter. For instance, FDR often flirted with having Douglas leave the Court to become the chief manager of the United States defense effort in the run up to World War II.[32] In 1944, with the removal of Vice-President Henry Wallace from the Democratic ticket, Douglas existed as one the frequently mentioned (and considered) replacements. Harry S. Truman, who did get the spot that year, later had to make his own choice of a running mate in 1948, an election in which Douglas could have easily taken the second spot on the national ticket. It is a testament to the importance of both William Douglas and Earl Warren to American

[31] Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (New York: Random House, 2003), 76-80 and 95-105. He also, though only technically, ended up as a faculty member at The University of Chicago but never actually went there as he instead used the Chicago position to improve his lot at Yale.
[32] *Id*. at 190-196.

political life that two of the later Court's liberal jurists could have very well faced off against one another on the presidential campaign trail during the historic election of 1948.

Douglas served for a record thirty-six years on the Court. The long tenure permitted Douglas to serve under not only Earl Warren but also the three men who had preceded Warren and the man, William Burger, who replaced Warren in 1969. Douglas's legal views—in particular the role the Court should play in governance—and his personality made him an adversary of Justice Felix Frankfurter. Much like Warren, Douglas maintained reliable standards of fairness, liberty and equal treatment that he expected the law to respect—particularly as his years on the Court increased. Of all the men who sat on the Warren Court, perhaps only Warren rivaled Douglas in garnering public attention and public hostility and veneration. Douglas produced books, sat for interviews, existed as a public figure and even had his clerks respond to some of his hate mail. One might say that he wanted to reach the public, and his outsize ego helped him justify doing so. Douglas's extra-judicial activities help explain some of this but so too did the record of the Court. His identification as a vital proponent of incorporation, First Amendment freedoms and a Court freed from past shibboleths made Douglas a lively target.

Douglas frequently embraced unpopular causes. In counseling Justice Brennan in May 1957 how messy the entire domestic cold war had become and how inimical it continued to be for political participation, Douglas revealed his legal worldview and unconventional thinking. Urging Brennan to adopt an even more libertarian posture, Douglas sounded off on even the entire concept of "affiliation." Far too often individuals could advocate for civil rights or a host of other controversial causes, but just because

those positions coincided with the advocacy of communists hardly served as any evidence of one's party membership. Affiliation, simply put, remained none of the government's business until legitimately outlawed forms of subversion—what might be termed action—were involved.[33]

Douglas even faced off against impeachment efforts throughout his tenure, the most serious of which occurred in 1970, after Warren had left the Court but as nomination battles to replace Warren Court members had poisoned the political atmosphere. With little coincidence, the serious effort to oust William Douglas in 1970 only drew strength from an environment the Warren Court's most consequential critic, Richard Milhous Nixon, had helped create. Douglas remained on the Supreme Court until 1975.

Hugo Black served as a long-standing ally for liberal causes. The Alabaman Black had already served on the court since 1937, about twenty months before Douglas arrived in August 1939. Born in the hardscrabble world of Alabama farm country in 1886, Black would thus have a life-long interest in mitigating some of life's harsher injustices. Both on and off the Court, he exuded confidence, intelligence, mulishness, and could often be as difficult to get along with as some of his other brethren.[34] He earned a law degree from the University of Alabama in 1906. Thereafter he carried out his lawyerly duties in the field of personal injury—in an era well before such practice served as an almost universal punch line to disparage attorneys. Political goals also motivated him. He labored as a police court judge and later a prosecuting attorney during

[33] William Douglas to William Brennan, May 9, 1957, William Brennan Papers, Manuscript Division, Library of Congress, I: Box 3 (hereinafter WBP).
[34] See, generally Howard Ball, *Hugo Black: Cold Steel Warrior* (New York: Oxford University Press, 1996), and Tinsley Yarbrough, *Mr. Justice Black and His Critics* (Durham, NC: Duke University Press, 1988).

the waning days of the progressive era. Eventually he represented his native state of Alabama in the United States Senate from 1927-1937. In the Senate Black persistently supported FDR's New Deal and had earned the acclaim of organized labor; his support for FDR even included support for the president's court-packing plan, but this and other experiences from his time in the Senate hardly endeared Black to many of his fellow legislators.

Justice Willis Van Devanter's, who was one of the infamous "Four Horseman" who frustrated FDR's New Deal programs with decision after decision in the 1930s, left the Court following its 1936-1937 term. FDR thus had the opportunity to put someone of presumed New Deal congeniality on the Court. Senator Joseph Robinson, a Democrat from Arkansas, had championed FDR's court-packing efforts in the Senate, but his unexpected death in July 1937 not only helped ensure the defeat of the efforts but also removed the one man FDR had stood ready to appoint to the Court to replace Van Devanter.[35] Hugo Black in turn earned FDR's first, long-awaited, Supreme Court appointment, much to the chagrin of some in the Senate who did not look favorably upon their young Alabaman colleague.[36]

Perhaps political ambition, much like with Douglas, inspired Black's predilections, but Black's one-time membership in the Ku Klux Klan, however practical, remains one of the dishonorable episodes of Black's past.[37] Rumblings about his membership had occurred before Black's nomination earned the assent of the Senate, but they scarcely figured in delaying confirmation. After his Senate confirmation, evidence

[35] William Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1996), 145.
[36] Howard Ball, *supra* note 34, at 92-93.
[37] For Black's motivations for joining the Klan: *Id*. at 60-62.

soon spread that Black had been a Klan member up until 1926. FDR either had been indifferent or just plain careless with the appointment. Editorial opinion and public opinion not overwhelmingly but with prevalence called on Black to step down from the Court. He used a trademark FDR gambit to fend off the many questions, appealing to Americans with a radio broadcast on October 1, 1937. During the broadcast he gingerly disassociated himself from the Klan and its hateful principles without mentioning the organization by name.[38] Black stayed on the Supreme Court until 1971.

Prior to joining the Court Black stood up as an ardent foe of the activist Court that had become one of the top enemies of FDR and his economic programs. Thus he harbored preferences for judicial restraint, but those preferences rarely extended to matters involving individual liberties. Black professed veneration for the Constitution, insisting that one could only take its meaning from the most literal readings of the document and the intentions of those who had struck of the sacred governing document for the United States. As one of Black's principal judicial biographers has put it, for Black "the Constitution was his legal Bible, the fundamental pathway to the achievement of political and ethical freedom in America."[39] One could consult various opinions he joined, wrote or in which he filed dissents but his 1968 Carpentier Lectures at Columbia University reveal Black's philosophy—at least as he sought to explain it.[40] Some of this literalism was easier because of plain meaning, for instance of the First Amendment's language that "Congress shall make no law . . . abridging the freedom of speech." As he

[38] "Radio Talk is Brief," *New York Times*, October 2, 1937, 1.
[39] Ball, *supra* note 34, at 27.
[40] According to one biographer of Black, the decision to do the Carpentier Lectures had as much as anything to do with Black responding to some of his critics and commentators who noticed a different, more conservative Black during the 1960s. Earlier one might consult his 1960 lecture on the Bill of Rights at NYU. Black also did a somewhat unprecedented television interview with CBS in 1968. See Roger K. Newman, *Hugo Black: A Biography* (New York: Pantheon Books, 1994), 488-501 and 581-587.

put it, "The right to think, speak and write freely without governmental censorship or interference is the most precious privilege of citizens vested with power to select public policies and public officials."[41] He confessed that in his judicial worldview "the guarantees of freedom of speech, press and religion are the paramount protections against despotic government afforded Americans by their Bill of Rights and that courts must never allow this protection to be diluted or weakened in any way."[42] Though there have been other forceful proponents of the putative first freedom, few have held a position of such influence over deciding the very contours of that freedom.[43]

Black authored one of the more controversial rulings of the Warren era in a 1962 ruling outlawing state mandated school prayer.[44] He also served as a reliable supporter for some of the important developments in criminal procedure and the rights of the accused. All and all, he voted reliably with the liberals, although he could abandon the Warren liberals at times, particularly as the 1960s progressed. He increasingly had difficulties, personal and jurisprudential, with some of the Warren liberals, including Douglas and Warren. [45] Frequently he wondered about decisions and the interpretations

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[41] Hugo L. Black, *A Constitutional Faith* (New York: Alfred A. Knopf, 1969), 43.

[42] *Id*. at 44. Nonetheless, the exalted position for the first amendment did not command anything near unanimity on or off the Court. For one critical view see Learned Hand, *The Bill of Rights* (Cambridge, Harvard University Press: 1958), 56-69

[43] Despite his life-long espousal of first amendment absolutism and criticism of balancing tests, even Black stood unwilling to broaden the protections for types of expression he deemed, for whatever reason, not worthy of protection. One might consult, for instance, Black's dissent in the 1969 ruling in *Tinker v. Des Moines Independent Community School District*. Des Moines public school students had worn black armbands to show their disapproval for the Vietnam War. The majority opinion held that even public school students had first amendment rights; Black disapproved of the majority's holding. Later in this chapter's discussion of the hallmarks of Warren era case law we will see Black stand in dissent in a special category of cases involving clashes between the free expression rights of civil rights protesters and the interests of order and private property. For *Tinker*, 393 U.S. 503 (1969).

[44] *Engel v. Vitale*, 370 U.S. 421 (1962). The *Engel* ruling will receive thorough attention in chapter three.

[45] On Black's increasing alienation from the Warren liberals at the 1960s progressed, see Roger K. Newman, *supra* note 40, at 520-570. Also see Bernard Schwartz and Stephan Leshner, *Inside the Warren Court* (Garden City, NY: Doubleday & Company, 1984), 238-239. Schwartz might grant too much emphasis to Justice Black's wounded ego in this account, but it still makes for lively reading and a sound run-down on the animosities that Black developed.

that made them possible. If anything, Black hoped to see some limits. He may have approved of many of the liberal results of the Warren Court, but not always how it arrived at those results. Unlike some of his more stalwart liberal justices, Black did not seem as willing to support some of the more important decisions that protected the rights of minorities and further protected individual liberties, even in putative free expression cases involving civil rights and war protesters.[46]

In *Adderly v. Florida*, a 1966 ruling, Black wrote for a five-man majority that affirmed the trespass convictions of Florida A&M students who had converged upon a Leon County, Florida jail to protest the jailing of fellow students. The students had as an unmistakable goal sought out the jail as a site to express their grievances over race and segregation practices. Black's majority opinion acknowledged that the Florida trespass statute targeted conduct, and in its application had not infringed upon the student's freedom of expression.[47] These cases even allowed Black to explore judicial line-drawing, weighing some values (private property for instance) against others such as free speech and participation. However much he criticized his colleagues for such balancing in other contexts, even the "absolutist" Black engaged in such balancing, however infrequently, in reaching conclusions.[48] Hugo Black remained on the Court until his declining health forced him to retire in September 1971. He died barely a week after his retirement from the Court.

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[46] For a discussion of Black's later career defections from the liberal bloc see Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* (New York: New York University Press, 1983), 629-679.
[47] *Adderly v. Florida*, 385 U.S. 39 (1966).
[48] For a discussion of Black's occasional embrace of balancing see Tinsley Yarbrough, *supra* note 34, at 188-190.

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The Warren Court also had two forceful and frequent advocates of a much different judicial vision, that of restraint or the "passive virtues" of a more reticent judicial branch: Felix Frankfurter and John Marshall Harlan II.[49] Felix Frankfurter proved that the myths of generational, class and immigrant mobility were not only myths.[50] He had come to America from Vienna, Austria in 1894, but through his skill, diligence, the valuable contacts he made (including FDR) and Harvard pedigree (first in his law school class of 1906) managed to not only become an important governmental advisor and public intellectual but also a professor at his beloved Harvard Law School.

He came of age during the progressive era (roughly dated as the late 1890s through the end of World War I in 1918). Even with that era's manifold attributes, some more contradictory than others, that in turn have led historians to question whether or not a coherent progressive era existed, Frankfurter undoubtedly represented some of the important credos of what might arguably earn the designation progressivism. He argued before the Supreme Court for minimum wage and maximum hours statutes; advocated policies that would empower labor; wrote for *The New Republic*; participated with Roger Nash Baldwin in the founding of the American Civil Liberties Union; worked along side Henry Stimson in the U.S. Attorney's Office before tagging along when Stimson went to

[49] The "passive virtues" language belongs to Yale University Professor and one-time Frankfurter clerk Alexander Bickel. Bickel will earn thorough attention in a later segment of this dissertation. An emphasis upon forestalling rule by judges and the debate over judicial restraint exists throughout this project. Though we can doubt the sincerity that lay behind some, but by no means all, of those outside of the Court who argued for restraint primarily because of disagreement with the Court's decisions, both Frankfurter and Harlan, as well as their academic proxies, carried this cause with subtlety, sincerity and with intentions that we should continue to take seriously. It is important, nevertheless, to realize that the arguments over restraint do not deny that there were other goals, many in the sphere of public policy, that even Hugo Black and Felix Frankfurter, not to mention other Warren Court members, would have recognized as estimable. Again, the disagreements turned most often on the propriety of the judiciary taking on a lead role in hastening these goals and the rationales advanced to support the various liberal Warren Court holdings.

[50] The sketch of Felix Frankfurter profits immensely from Melvin Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* (Boston: Twayne Publishers, 1991).

Washington, D.C.; held other important governmental posts; worked on behalf of the National Consumer League; stood up for Nicola Sacco and Bartolomeo Vanzetti, challenging, because of prosecutorial and judicial malfeasance, the 1921 prior prosecution of the two Italians for murder and robbery; and taught countless law students throughout his long association with Harvard Law School. If, as Herbert Croly once put it, the generation of progressive era leaders had to become knowledgeable, skillful, effective managers willing to plan, not just let society evolve on its own, Felix Frankfurter assuredly fit the mold.[51]

The diminutive Frankfurter more than compensated for his stature with his incisive mind, sheer ambition and many disciples who spread throughout Washington. Indeed, his legion of pupils and wide political contacts enticed former National Recovery Administration leader Hugh S. Johnson to label Frankfurter "the most influential single individual in the United States" in 1936.[52] FDR, in his first term, had wanted to appoint Frankfurter as solicitor general, but only earned Frankfurter's informal service as an advisor (and influence through Frankfurter's many protégés working in Washington) during much of his first two terms as president. Tommy Corcoran, Harry Hopkins and Harold Ickes were just three important advisors who hoped to see Frankfurter on the Court. Following the death of Justice Benjamin Cardozo during the summer of 1938, FDR, who had already appointed New Deal loyalist Hugo Black and Solicitor General Stanley Reed to the Court, felt he had to placate the western United States in appointing someone from that region of the country. Frankfurter, despite his considerable skills,

[51] Herbert Croly, *The Promise of American Life* (New York: The Macmillan Company, 1909), 6. It goes without saying that progressive era reformers, writers and politicians often had doubts about the prudence of courts of law exerting too much political and legal influence. Frankfurter's embrace of judicial restraint likely had progressive era influences to rival those from the New Deal era.
[52] *Fortune*, January 1936, 63.

could not meet that requirement so he instead helped FDR with sorting out the qualifications of potential nominees.[53]

Roosevelt did not fail to persuade the professor to join the government though when the administration could not find a suitable westerner, informing Frankfurter in early January 1939 that he would earn a spot on the Court. Like others who have reached such a pinnacle, Frankfurter could protest any claim that he had lobbied for the appointment or had even sought it out. Such a protest was at best a sign that the immodest Frankfurter could at least feign modesty. The appointment brought him to institution that he loved and had spent his legal and educational career preparing to lead.

The New Republic could not suppress its celebration of the appointment of one of its own, locating allegedly universal support for Frankfurter since "even enemies of the New Deal approved the actual choice once it was made."[54] Rumblings about Frankfurter's "radicalism" did occur; nevertheless, he earned the consent of the Senate.[55] Frankfurter became FDR's third of eventually nine Supreme Court appointments, taking the judicial oath of office on January 30, 1939.

FDR's Secretary of Interior Harold L. Ickes had allegedly told FDR: "If you appoint Frankfurter, his ability and learning are such that he will dominate the Supreme Court for fifteen or twenty years to come. The result will be that probably after you are dead, it will still be your Supreme Court."[56] Ickes did not hold to that assessment in perpetuity. Though he did not live long enough to witness Frankfurter's entire twenty-

[53] Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Years* (New York: The Free Press, 1982), 274-275.
[54] *The New Republic*, January 18, 1939, 298.
[55] After all, Frankfurter had been accused by no less than Theodore Roosevelt of being a communist for his views on the forced deportation of striking miners from Bisbee, Arizona in 1917. Frankfurter had served on a commission to investigate the labor woes in the barely five-year old state.
[56] Harold Ickes, *The Secret Diary of Harold L. Ickes: The Inside Struggle, 1936-1939* (New York: Simon and Schuster, 1954), 540.

three year career on the bench, Ickes became disillusioned with Frankfurter's jurisprudence. Frankfurter's ardent foe Justice Douglas even indicated that Ickes and Frankfurter became "very bitter enemies, hardly speaking to each other."[57] The disillusionment with Frankfurter did not confine itself to Ickes.

Yet, one can question the presumed dissonance between the Frankfurter before he went to the Supreme Court and the Frankfurter on the bench. An observer of Frankfurter's legal career once wrote: "No jurist went on to the Bench with his views about the Court and the Constitution better known."[58] On the Court Frankfurter stood to be counted as a persistent advocate of judicial restraint—that philosophy only made sense and could only have excited Ickes and fellow New Dealers who had learned to detest a Supreme Court that persistently got in the way of New Deal agencies and initiatives. Yet, many would come to think Frankfurter too inflexible in his devotion to restraint. With the passage of time the previous celebration of judicial restraint had lost some of its luster, particularly for the New Dealers. In the years before Warren joined the Court, FDR appointees Frank Murphy and Wiley Rutledge, not to mention Black and Douglas, stood against Frankfurter. During Warren's tenure, both the chief justice and then William Brennan added to an emergent liberal group that challenged Frankfurter's philosophy.

No one source explained Frankfurter's allegiance to judicial restraint.[59] Consulting Frankfurter's own language—even with his penchant for hyperbole in his

[57] Walter Murphy interview of William Douglas, January 18, 1962, <http://www.princeton.edu/~mudd/finding_aids/douglas/douglas6.html>
[58] Joseph P. Lash, *From the Diaries of Felix Frankfurter* (New York: W.W. Norton and Company, 1975), 69.
[59] Sanford Levinson takes precisely this approach in examining Frankfurter's patriotism, conception of America's democratic system and experiences in explaining his allegiance to the ideals of judicial restraint.

musings to friends and colleagues—is of value. In writing to one of his former clerks, Alexander Bickel, about the Warren Court, Frankfurter held that the New Deal era Court committed unpardonable transgressions. Frankfurter had already left the Warren Court but he remembered a version of the past in connecting the New Deal era Court's misdeeds to the Warren Court's misdeeds. The "reprehensible decisions" of the Warren Court, as Frankfurter termed them, represented not legal conclusions but fiat. The notion that the Warren Court issued rulings but did not reason to them had increasingly become gospel among some of the more thoughtful critics of the Warren Court. Had he even broadened his perspective in commenting to Bickel, Frankfurter might have even said that he had learned to distrust judicial power because of an entire generation of judges who had relied upon substantive due process to frustrate socio-economic reform.[60] Bickel, in his mentor's opinion, should continue to scrutinize a Court that ignored precedent and disregarded its important duty to reach minimalist decisions.[61]

Frankfurter's devotions to judicial restraint had much to do with his legal education and New Deal era perspective. Hugo Black's version of restraint, grounded in the reactions to the overreach of the New Deal era Court and reliance upon textual literalism, led to different jurisprudential visions than those of Frankfurter (and Harlan as we will soon encounter). Frankfurter's ideals of deference, reaching minimal decisions, and avoiding constitutional questions offended Black's idea that if the text of the Constitution provided clear directives the Court had to follow. Black thought such deference—again based upon New Deal era lessons—should extend principally to

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See: Sanford Levinson, "The Democratic Faith of Felix Frankfurter," *Stanford Law Review* 25 (1973), 430-448.

[60] Urofsky, *supra* note 50, at 29-33.

[61] Felix Frankfurter to Alexander Bickel, March 18, 1963, Library of Congress, Manuscript Divisions, Felix Frankfurter Papers, Box 24, Reel 14 (hereinafter FFP).

economic legislation; Frankfurter countenanced a broader deference that above all else sought to forestall rule by the judiciary, but nonetheless put much power in the hands of judges to decide not to decide. (Of course none of the Warren Court members ever came out as unabashed proponents of government by judiciary; nevertheless, some of the Warren liberals seemed to support the cause anyway. Justices Frankfurter and Harlan most decisively did not.) Frankfurter also resisted the Court's incorporationist track whereby it accepted, in a provision-by-provision basis, that many of the guarantees of the first eight amendments, particularly those involving criminal procedure, applied to the states through the Fourteenth Amendment.[62]

Frankfurter recognized that the law could change. He also did not reject interpretation, realizing that the Constitution assuredly had spaces and silences that permitted honest disagreement over such interpretation. However, defective interpretation had an inextricable connection to overzealous jurists who ignored the popular will and that the Court did not draw its support as neatly from the consent of the governed as did the legislative branch. Frankfurter counseled that the Supreme Court had to exercise deference to the popular will and its rival, and in many respects, superior branches of government and more well-informed agencies that could do a much better job of protecting individual rights, let alone determining so many other legal boundaries.[63] He too recognized that legal innovations and seeming departures came at a

[62] For an article that appeared after Frankfurter left the bench see Felix Frankfurter, "Memorandum on Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment," *Harvard Law Review*, Volume 78 (February 1965), 746-783.

[63] This summary of Franfurter's views leans upon Jeffrey D. Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson* (Lanham, MD: Rowman & Littlefield, 1996).169-177. For an excellent analysis of both Black and Frankfurter's experiences and how those experiences shaped their conceptions on the question of the power of judges see Mark Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (Ithaca, NY: Cornell University Press, 1984).

presumptive cost. Writing to his fellow Justice Harold Burton in 1952 Frankfurter encouraged his colleague to think of *stare decisis* not just as something that judges respected so that the citizenry could know what to expect from the law. Frankfurter's contended that "the real reason for the doctrine is our notion of law as something not episodic and ad hoc—the dispensation of justice in individual cases by judges applying individual notions of right and justice. Departure from a decided case, and particularly a recent decision and by a shift in the personnel of the Court, is bound persuasively to radiate the notion that law has no continuity, is not more or less impersonal rule of conduct that binds a society together, but is the expression of the happenstance of this judge or that deciding a controversy."[64]

Above all else, Frankfurter thought he could best explain the law to his fellow justices and perhaps even the rest of the nation. Reacting to a 1957 opinion he had joined that produced considerable furor (*Jencks v. United States*), Frankfurter, writing to Justice William Brennan, adopted the blame for the backlash. The controversial 1957 ruling had featured a Court judgment that allowed Clinton Jencks to escape punishment for his failure to state truthfully his role as a labor union leader with communist party connections. Jencks got out of his legal quandary because the authorities responsible for his prosecution remained unwilling to furnish Jencks with the testimony that had led to his original conviction. Franfurter confessed to Brennan—in an attempt early in Brennan's tenure no doubt to curry favor with his younger colleague—that had he just written a concurring opinion explaining what the majority really meant, the problems

[64] Felix Frankfurter to Harold Burton, January 2, 1952, Harold Burton Papers, Box 90, The Library of Congress, Manuscript Division, Washington, D.C (hereinafter HBP).

would have been less considerable.[65] He did precisely that in the 1958 ruling in *Cooper v. Aaron* about desegregation in Little Rock, Arkansas, a move that infuriated many of his colleagues. Frankfurter's character traits leave little doubt that he believed in the power of his words to rectify the damages done by other, lesser jurists.

Writings, opinions and correspondence persistently revealed this encouragement of a restrained judiciary. Correspondence with Harvard professor Zechariah Chafee frequently turned to Frankfurter's admonitions on judges exercising undue scrutiny and overturning laws merely because they thought the laws poorly constructed, bad policy or just wrong. Writing to Chafee amidst the 1950s and the continued pre-occupation with subversion, Frankfurter made sure to chastise the entire enterprise. Nonetheless, he cautioned Chafee, the judge had to refrain from having personal viewpoints determine questions of constitutionality.[66] Legislatures had the obligation to fashion laws; courts, on the other hand had to exercise much more discretion. Courts producing reform could not go along with the values of democracy. As Frankfurter put it: "To talk about judicial review being a democratic process is to make words stand on their heads as much so as the Kremlin makes them stand on their heads."[67] Better words may have never been spoken about the paradox of courts engaging in democratic action.

A vital part of Frankfurter's thinking involved the acceptance of the citizenry—a cornerstone objection that many would voice in response to controversial Warren era rulings. Barely a month before the announcement of the opinion in *Brown* Frankfurter spoke before the American Philosophical Society on this precise topic. He claimed that

[65] Felix Frankfurter to William Brennan, August 29, 1957, Library of Congress Manuscript Division, WBP, Box I: 3.
[66] Felix Frankfurter to Zechariah Chafee, December 3, 1956, FFP, Reel 25.
[67] Felix Frankfurter to Zechariah Chafee, December 17, 1952, FFP, Reel 25.

"the chief reliance of law in a democracy is the habit of popular respect for the law. Especially true is it that law as promulgated by the Supreme Court ultimately depends upon confidence of the people in the Supreme Court as an institution."[68] Frankfurter repeated this same theme frequently, notably in his dissent from the 1962 Court ruling in *Baker v. Carr*. In that case Frankfurter wrote:

> The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[69]

A man at once difficult to admire yet admirable, Felix Frankfurter famously clashed with his colleagues and lacked the collegiality of some of his fellow jurists. He did not know how to get along with those who were, or at least viewed themselves as, his legal and intellectual equals. He could claim it his duty to follow his "own Victorian standards of discretion" in not complaining of fellow jurists or revealing sensitive information, only to then proceed to do so in a way that none of his colleagues could have rivaled.[70] Felix Frankfurter, who himself had occupied the putative "scholar spot" on the Court, explained that the scholarly judge understood history and would know better than to allow the Court to trod down a path of error that it had previously traveled.[71] He carried out his judicial duties with a confidence that he just knew better than his fellow judges. His haughty nature undoubtedly cost him support. Though he initially had some success in courting Earl Warren, Frankfurter's chances of capturing the new chief

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[68] Felix Frankfurter, "The Judicial Process and the Supreme Court," in Philip Elman, ed. *Of Law and Men: Papers and Addresses of Felix Frankfurter, 1939-1956* (Hamden, Connecticut: Archon Books, 1956), 31.
[69] *Baker v. Carr*, 369 U.S. 186, 267 (1962).
[70] Felix Frankfurter to Zechariah Chafee, November 9, 1948, FFP, Reel 25. Justice James Wilson, of Pennsylvania, was one of George Washington's initial six appointments to the Court. Wilson was the first occupant of the so-called scholars spot.
[71] Felix Frankfurter, recorded interview by Charles McLaughlin, June 19, 1964, 54, John F. Kennedy Library Oral History Program.

justice's allegiance all but disappeared after Warren had sat on the Court for a few terms.[72]

Felix Frankfurter suffered a stroke not long after the announcement of the decision in *Baker v. Carr* at the end of March 1962. Frankfurter's resignation from the Court in the fall of 1962 for health reasons represented a milestone of sorts, for his replacement Arthur Goldberg solidified a liberal Court majority ushering in the golden age of Warren Court. His departure from the bench assuredly did not mean that those who lobbied outside of the Court for judicial restraint would quiet their voices. Luckily for those who espoused the virtues of judicial restraint, another man remained on the Court willing to dissent from some of the Court's seminal rulings of the 1960s.

The obdurate Frankfurter had an important ally who, although sharing many of his jurisprudential leanings, carried out his duties much differently. John Marshall Harlan II came to the Court with an important judicial pedigree. His grandfather, John Marshall Harlan I, had served on the Court from 1877-1911, famously authoring a lone dissent in the 1896 ruling *Plessy v. Ferguson* that established the "separate but equal" doctrine. The grandson earned a Supreme Court appointment following a notable career in private legal practice, time in the U.S. Attorney's Office in New York helping along the country's quixotic attempt at alcohol prohibition and a brief tenure as a federal appeals court judge.[73] He had taken an undergraduate degree at Princeton University before earning a prestigious Rhodes Scholarship, which he used to study at the University of Oxford. Thereafter he worked simultaneously for a New York law firm while enrolled

[72] See Bernard Schwartz, "Felix Frankfurter and Earl Warren: A Study of a Deteriorating Relationship," *The Supreme Court Review*, (1980), 115-142.
[73] For background I consulted "John Marshall Harlan II, Associate Justice of the Supreme Court 1955–1971: Remembrances by his Law Clerks," *Journal of Supreme Court History*, Volume 27, Issue 2, 138-175.

at New York University Law School. His corporate law experience and patrician background provided for important contacts in the world of politics. He developed important relationships with the Republican brass, including New York Governor and presidential candidate Thomas Dewey and Eisenhower confidant Herbert Brownell.[74] In addition to his estimable legal training, judicial heritage and important contacts, Harlan just looked and acted like a Supreme Court justice. Though mild opposition to his appointment occurred, principally from those who expressed wild concerns over Harlan's loyalty and presumptive sympathies for world government and other international thinking, the opposition to his appointment only managed to delay but not to derail the nomination. In March 1955 the United States Senate, with only eleven opposition votes, accepted the Harlan appointment. Harlan represented Eisnhower's second of five eventual appointments to the Court.[75]

Harlan's judicial thinking had consonance with that of Frankfurter. First and foremost, Harlan did not believe that courts of law should exist as a primary problem-solving agent in the nation's political and even legal battles. Courts could not and should not act as a super-legislature, consistently questioning the wisdom of the rival branches of government. Federalism too mattered to Harlan. While he undoubtedly had contemporaries, from the world of politics to the contested streets of Selma, Alabama, who disingenuously relied upon federalism to thwart improved race relations, Harlan genuinely thought that crowding out the states could damage liberties and stifle experimentation. Precedent too mattered to Harlan; past rulings had to exert a predominant influence over any case that came before the Court, and, as such,

[74] Tinsley E. Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court* (New York: Oxford University Press, 1992), 79.
[75] *Id*. at 100-113.

overturning established doctrine had to be a last resort. The Court also had to reach decisions based upon the arguments and issues properly put before it, not find whatever vehicle it could for expanding its incorporation project or egalitarian visions. Importantly, one cannot say that Harlan had a static view of the law, however much he accepted the virtues of precedent far more than many of his colleagues. On the Court he frequently counseled respect for abstention doctrines, the merit of slow change and rulings, whenever possible, of limited scope.[76]

Many of the Warren Court's members held Harlan in high regard, even amidst their disagreements over outcomes and legal reasoning. Unlike Frankfurter, his frequent partner in the cause for judicial minimalism, Harlan did not offend his colleagues with dogmatic lectures, pretentiousness or brusqueness. What is more, he lacked the dogmatism of not only Frankfurter, but also Black and Douglas. Earl Warren accurately described Harlan as someone who "could disagree without being disagreeable, and was in all respects an ideal colleague."[77] One of his principal biographers even lauds the jurist as quite possibly "more eloquent, balanced, cautious and ultimately effective defender of their mutual positions than Frankfurter himself." Moreover, as the same biographer points out, by the time the more liberal Warren Court came to exist, Frankfurter had left the scene; hence, "John Harlan, not Felix Frankfurter . . . was the principal Court critic of Warren era trends."[78] His dissents from some of the Warren Court's hallmark rulings

[76] As a single but important example, one might consult Justice Harlan's concurrence in the 1965 ruling of *Griffin v. California*. Griffin extended the Court's incorporationist track of applying Constitutional provisions against self-incrimination to the states. Harlan disagreed with the incorporationist path and reasoning but nevertheless felt bound to concur because of the Court's 1964 ruling in *Malloy v. Hogan*. For his opinion see *Griffin v. California*, 380 U.S. 609, 615-617 (1965).
[77] Earl Warren, "Mr. Justice Harlan, As Seen by a Colleague," *Harvard Law Review*, Volume 85, No. 2, (December 1971), 370.
[78] Yarbrough, *supra* note 74, at xiii.

should be required reading for any of those who seek thoughtful explication of the virtues of a restrained judiciary

Harlan did not object to every innovation and liberal ruling of the Warren era. The desegregation cases, some important criminal procedure and freedom of expression rulings earned his support. He had an overall jurisprudence that confirmed a principled conservatism. But he did frequently stand up to those rulings that his principled conservatism and esteem for judicial reticence could not tolerate. Harlan resisted the manifold developments with the rights of the accused. His written opinion in *Mapp v. Ohio,* an exclusionary rule case, offered a reasoned denunciation of Court overreach. Developments with apportionment also earned his thoughtful skepticism. Both Harlan and Frankfurter wrote dissenting opinions to *Baker v.Carr*, each joining the other's dissent. The apportionment developments, of which *Baker* served as the launching pad, are perhaps the *sine qua non* of the judicial aggressiveness that Harlan hoped to deter.

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Numerous others served for at least some time on the Court from 1953-1969. We will briefly meet these individuals, encountering them in the order in which they were appointed to the Court, and commenting upon, as much as generalizations allow, the side of the Black-Douglas-Warren and Frankfurter-Harlan divide, and this overriding concern about krytocracy, that is rule by the judiciary, to which these judges provided their allegiance. In addition to Black, Douglas and Frankfurter, FDR appointed six other individuals to the High Court: Stanley Reed, Frank Murphy, Harlan Fiske Stone, James Byrnes, Robert Jackson and Wiley Rutledge. Of these six, only Reed and Jackson served while Earl Warren presided over the Court. Reed served on the Court until his retirement

in February 1957, while Warren's first term as chief justice represented Jackson's last year on the Court.

Stanley Reed, FDR's second solicitor general, earned an appointment to the Supreme Court in January 1938. The solicitor general serves as the federal government's attorney when it is involved with arguments before the Supreme Court. As such, Reed's tenure as solicitor general featured some of the most important arguments ever made before the High Court in those cases in which the constitutionality of various New Deal measures came under review. Though the solicitor general is often called the "tenth justice," the office has this mythical status as a steppingstone to the Court itself. Reed became the second office-holder to take a seat on the Court, following in the footsteps of William Howard Taft. Reed hailed from Kentucky. He had earned undergraduate degrees from Kentucky Wesleyan and Yale University before spending one year studying law at the University of Virginia, some time at Columbia University Law School and even at the University of Paris. Despite his impressive educational achievements, Reed never completed a law degree. He spent many years in legal practice in Kentucky and worked in state politics briefly. Reed later went to work as the general counsel for the Federal Farm Board in 1929 and later came to hold the same position for the Reconstruction Finance Corporation in 1932, all before becoming solicitor general.[79] In stark contrast to how Court nominations have worked in the past four decades, the retirement of George Sutherland from the Court in January 1938 did not presage a

[79] John D. Fassett, "The Buddha and the Bumblebee: The Saga of Stanley Reed and Felix Frankfurter," *Journal of Supreme Court History*, 28: 2, (2003), 165-196. Also see John D. Fassett, *New Deal Justice: The Life of Stanley Reed of Kentucky* (New York: Vantage Press, 1994), 10-82.

lengthy confirmation battle or delay.[80] In a sequence that might startle modern observers accustomed to drawn-out conflicts over such nominations, Reed took his seat even before February arrived following a Senate vote with nary a dissenter.

On the Court he did not have a well-defined allegiance to either the Frankfurter or Black-Douglas wing. He did have the chance to cast votes confirming the wide power for Congress to regulate business, industry and the nation's economic life under the Commerce Clause—the very powers often denied to it only a few short years before while he served as solicitor general. In the few terms he sat on the Warren Court, Reed gingerly supported the burgeoning civil rights crusade, just as he had done before Warren had joined the Court.[81] But such support did not come without some hesitancy. While he served with Warren, Reed served as one of the Southern voices to join the seminal *Brown* rulings. He did not, however, emerge as a protector of liberties and freedoms to the extent that fellow FDR appointees Black and Douglas did. His principal biographer accords Justice Reed a status, for the most part, as one who balanced the individual rights claims against the needs of the larger community, in essence a Supreme Court communitarian.[82] Balancing thus prompted Reed to support the arguable suppression of

[80] The first two FDR appointments involved replacing conservative jurists. Black had already replaced Van Devanter. Reed took the spot of Sutherland who was also one of the conservative "Four Horseman." The final two members of the quartet, Pierce Butler and James Clark McReynolds, had left the Court even before the United States entered World War II in December 1941.

[81] Reed, for instance, authored the important majority opinion in 1944's *Smith v. Allwright*. *Smith* outlawed the all-white primary as a means to exclude other voters from the polls. *Smith v. Allwright*, 321 U.S. 649 (1944). On *Smith* and Reed's role see Charles L. Zelden, *The Battle for the Black Ballott: Smith v. Allwright and the Defeat of the Texas All-White Primary* (Lawrence, KS: University Press of Kansas, 2004), 101-106.

[82] See generally Fassett, *New Deal Justice*, *supra* note 79.

freedoms of suspected communists or those called upon to help identify subversives in appearances before investigatory bodies.[83]

Reed, for instance, wrote an important dissent in the 1956 ruling, *Pennsylvania v. Nelson*, on Pennsylvania's Sedition Act. The majority opinion, written by Earl Warren, held that the 1940 federal Smith Act superseded parallel state-level attempts to outlaw the overthrow of the U.S. government. Reed's dissent, in which two other Justices joined, rejected such interference in Pennsylvania's (or any state for that matter) attempts to contribute to national security. Though myriad Court decisions attracted public, academic and political scorn during the Warren era, this particular decision represented a veritable grab-bag of contestable issues involving federalism, national security and the questionability of unelected judges substituting their interpretations on legislation for those who had actually crafted and voted upon the legislation.[84] He also dissented in *Communist Party v. Subversive Activities Control Board*, another 1956 Warren era decision that seemed to augur a turn away from *Dennis* and deference to the witch-hunting cause. Reed retired from the Court midway through the 1957 term.

Robert Jackson, Reed's successor as solicitor general, joined the Court before the start of the 1941 term. Though born in Pennsylvania, Jackson spent most of his formative years in western New York.[85] Jackson represented something of a dying breed. Unlike every Supreme Court appointment after him, (but like his contemporary Stanley

[83] Michal R. Belknap, *The Supreme Court Under Earl Warren: 1953-1969* (Columbia, SC: The University of South Carolina Press, 2005), 59-62.
[84] *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).
[85] Thurgood Marshall also held the position during two years of the Lyndon Johnson administration. He became the fourth and most recent occupant of that office to ascend to the High Court. Robert Bork would have been the fifth to take a seat on the Court. He served as solicitor general during a portion of the Nixon presidency and throughout Gerald Ford's tenure. Bork ultimately faced rejection from the Senate in his 1986 nomination to succeed Justice Lewis Powell. Barack Obama's May 2010 nomination of Solicitor General Elena Kagan to the Court thus represents anomaly as much as it represents continuity.

Reed) he had not earned a law degree before passing the bar examination.[86] Jackson successfully engaged in private practice for two decades in Jamestown, New York, laboring away as a legal generalist with a diverse band of clients. Democratic Party allegiance and involvement in state politics at a young age provided fortuitous interaction with Franklin D. Roosevelt years before he became president. Though he did not seek out opportunities to abandon his legal practice, Jackson eventually went to Washington, becoming general counsel of the Bureau of Revenue in 1934. Later on he held various positions within the Justice Department, immediately followed Stanley Reed as solicitor general and then held the attorney general position from January 1940 until his appointment to the Court in July 1941. Whatever public service he provided, Jackson never signed on as a fervent New Dealer like Reed, Black and some of the others who joined the Court.[87] During FDR's Court reorganization fight in 1937 Jackson served as one of the most effective advocates for FDR's plan, even if, like Frankfurter, Jackson had qualms with the effort and the manner at which the administration presented it to Congress and the public.[88]

Much like some of his future colleagues on the Supreme Court, Jackson attracted chatter about potential vice-presidential and presidential prospects. As with so many of FDR's appointees, Jackson had to contend throughout his judicial career with the

[86] Jackson did spend one year at Albany Law School, becoming one its more important alumni, eclipsed perhaps only by the twenty-fifth president, William McKinley. For Justice Jackson I have consulted Constance Martin, "The Life and Career of Justice Robert H. Jackson," *Journal of Supreme Court History*, 2008, Volume 30, 42-67; Melvin Urofsky, *The Warren Court: Justices, Rulings and Legacy* (Santa Barbara, CA: ABC-CLIO, 2001), 48-50; Hockett, *supra* note 63, at 215-237.
[87] Hockett, *supra* 63, at 226-227.
[88] On Jackson and FDR's Court-packing plan see Stephen R. Alton, "Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D. Roosevelt's Battle with the Supreme Court," *William & Mary Bill of Rights Journal*, 1996-1997, Volume 5, 527-619. Much like Felix Frankfurter and William Douglas, Jackson offered counsel to FDR even after joining the Court. These instances of a member of the Court surreptitiously crossing the separation of powers divide to work with the president have not been unprecedented. Later we will encounter this issue as one of the many failings of Abe Fortas that helped explain his failure to replace Earl Warren in 1968 and resignation from the Court in 1969.

memories of an activist New Deal era Court that had thwarted reform. He thus could not help but have an awareness of the problems of an assertive Court. Jackson earned the consent of the Senate less than a month after his initial nomination in June 1941.

Known for his wit and writing style, Jackson wrote the seminal 1942 opinion in *Wickard v. Filburn* that granted wide latitude for the use of federal power pursuant to the Commerce Clause.[89] One of his more famous opinions—and a ruling that would have fit in the Warren years—occurred in the 1943 flag salute case *West Virginia Board of Education v. Barnette* in which the Court dramatically reversed course upon a ruling from a few years before. His *Barnette* opinion relied upon the First and Fourteenth Amendments to strike down a law that made saluting the American flag a mandatory part of the school day. Though Jackson often allied with Frankfurter, his vote and opinion in the *Barnette* case overturned a 1940 ruling that Frankfurter had authored.[90]

Alliance with Frankfurter while frequent did not represent the totality of Jackson's jurisprudence. One recent analysis of Jackson labels him as an occupant of middle ground between Black and Frankfurter. He supported the protection of individual liberties, and did not dispute that the judiciary should take on an active role in that effort.[91] He nonetheless put considerable stock in preserving federalism and in the primacy of the legislative function in fashioning law. Much like Frankfurter though Jackson could welcome liberal results but resist reaching those results by judicial decree.[92] By the time Warren arrived in 1953, Jackson unfortunately had strained

[89] *Wickard v. Filburn*, 317 U.S. 111 (1942).
[90] *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). Jackson had, of course, not yet joined the Court for *Minersville*. Harlan Fiske Stone filed a lonely dissent over the coercive requirement that all pupils had to participate in the pledge of allegiance and flag salute.
[91] See, generally Hockett, *supra* note 63.
[92] Michael Klarman makes this very point in explaining the unease that both Frankfurter and Jackson had initially with outlawing segregated schools. See Michael J. Klarman, *From Jim Crow to Civil Rights: The*

relations with Black and Douglas, and had come to identify with what could be labeled a less sanguine view of judicial power. Nevertheless, Jackson did play an important role in the *Brown* decision in 1954, if only in returning to the Court on May 17, 1954 for the Court's announcement of its unanimous decision. He had suffered a heart attack less than two months before; the appearance revealed Jackson's courage. Sadly, he suffered another heart attack, this time fatal, in October 1954, thus serving only one term as a member of the Warren Court.[93]

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FDR's successor, Harry S. Truman, appointed four justices: Fred Vinson, Harold Burton, Tom Clark and Sherman Minton. Three of these men served for some time on the Warren Court, and all of them have earned varying levels of scholarly scorn, sometimes as subpar jurists but often for their frequent willingness to side up as foes to the very rulings so often identified as Warren Court era hallmarks. All of the appointees, in the words of one study focused entirely upon this quartet, had a devotion "to the limited role of the judiciary in the scheme of government."[94] Scholar William Wiecek seemingly comes as close to praise as anyone might in stating that the Truman judges "contributed little positive or negative to the Court's jurisprudential and interpersonal rifts," and "evinced an ideological blandness shading off to moderate conservatism, reinforced by a commitment of all four of them to judicial restraint."[95] We might wonder if Wiecek's description is just another way of saying that these men lacked discernible

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Supreme Court and the Struggle for Racial Equality (New York: Oxford University Press, 2004), 299-300 and 303-306.

[93] Unfortunately no recent scholarly biography of Robert H. Jackson exists.

[94] Frances Howell Rudko, *Truman's Court: A Study in Judicial Restraint* (Westport, CT: Greenwood Press, 1988), 129.

[95] Wiecek, *supra* note 13, at 399 and 438.

legal and philosophical commitments and did not have the ferocity that motivated Black, Douglas, Frankfurter, Harlan and Jackson.

For his first appointment to the Court Harry Truman turned to Harold Burton. Burton had earned degrees as Bowdoin College and later an LL.B. from Harvard. Though Burton had ample experience in private legal practice, he had come to some national attention as mayor of Cleveland during the 1930s and as a Republican United States senator from the Ohio during the war years. He had served with Truman in exposing fraud and other questionable defense expenditures in the much heralded Special Committee to Investigate the National Defense Program. Burton's politics hardly dovetailed with those of his Ohioan Senatorial counterpart, Robert Taft. As evidence one might look to Burton's role in the 1946 Hospital Survey and Construction Act that provided for federal monies to increase the number of hospital beds nationwide.[96] He also endorsed a change to the U.S. Constitution that would have outlawed the poll tax. Senatorial service facilitated his elevation to the Court as he earned confirmation from his former colleagues on the very day, September 19, 1945, on which Truman announced the appointment.

On the bench Burton had no problems getting along with his counterparts, a quality far too often overlooked in the generally negative, or at least modest, appraisal that exists of Burton's thirteen years of Court service. For the most part, as with all of Truman's appointees, Burton had a general agreement with the ideals of judicial restraint. Few would have disagreed then or now with Anthony Lewis's labeling of Burton as a

[96] On this legislation see Jonathan Engel, *Doctors and Reformers: Discussion and Debate over Health Policy, 1925-1950* (Columbia, SC: University of South Carolina Press, 2002), 240-241.

judge of "conservative moderation."[97] Burton supported the civil rights developments of the Vinson and later Warren Court, but elsewhere he tended to disagree with many of the more liberal developments. Burton, for instance, dissented in *Griffin v. Illinois*, a 1956 ruling that represented all of what was to come with the Court and its criminal procedure revolution in later years. In *Griffin* the cobbled together majority scolded the state of Illinois for denying a free criminal trial transcript to indigent individuals who sought appellate review of their original conviction.[98] On the whole, he sided up with the Frankfurter wing, particularly in cases involving individual liberties competing against the interests of order, whether in matters of internal security, freedom of expression or criminal procedure.[99] Much like Justice Reed, Burton generally provided support to governmental loyalty-security efforts, dissenting with Reed in *Pennsylvania v. Nelson*. Justice Burton, already suffering from the onset of debilitating Parkinson's disease, retired from the Court in October 1957.

Truman second associate justice was Attorney General Tom C. Clark. Clark had earned undergraduate and law degrees from the University of Texas. He had worked in private practice intermittently, but worked as a public servant both in Texas and later on in Washington, D.C. at the Justice Department. When President Truman requested Attorney General Francis Biddle's resignation, not long after Truman had taken over for FDR, Clark became attorney general.[100] Clark was but one of the many beneficiaries of

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[97] Anthony Lewis, "Burton Quits High Court on Advice of Physicians," *New York Times*, October 7, 1958, 1.
[98] *Griffin v. Illinois*, 351 U.S. 12 (1956).
[99] Rudko, *supra* note 94, at 50-58.
[100] Biddle insisted, years later in his memoirs, that he told Truman that Clark was not a sound appointment as attorney general. Consistent with so much negativism that attended to Truman appointments, Biddle contended that Clark's rise had far much to do with his important political connections. Whatever the verity of Biddle's claims, had Truman not appointed Clark he might have later avoided appointing Clark to

Truman removing the old guard, as only Henry Wallace (Agriculture) and Ickes (Interior) remained as the summer ended.[101] As the head of the Justice Department, Clark took on an instrumental role in the administration's own contribution to the second Red Scare with its loyalty-security measures. Clark ardently supported the efforts.[102] He drafted infamous Executive Order 9835, the Truman administration's significant contribution to the era's loyalty-security cause. Though not the entirety of Clark's service as the nation's top attorney, the loyalty-security efforts represent continuity with his years on the Court and a contribution for which his name may forever earn derision or plaudits from those who continue to fight that battle years later. The era's pitched battles over past and present political loyalties aside, in 1949, though a tentative furor developed over his nomination, Clark joined a long list of attorneys general, from Roger B. Taney to Robert H. Jackson, appointed to the Supreme Court.

Harold Ickes' optimism over the Frankfurter appointment years before did not re-appear with the Clark appointment. Because of Clark's record as attorney general and the unpopularity of Truman with many important New Dealers, Ickes derided the appointment. Ickes lambasted an appointment that "degraded the Court" with a man who lacked the talents, legal acumen, respect from others and success as attorney general to be considered for the Court.[103] During his eighteen years on the bench though Clark rose above Ickes's biting appraisal, becoming at least the most respected Truman appointee.

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the Court—an appointment that that Truman came to lament. See Francis Biddle, *In Brief Authority* (Garden City, NY: Doubleday & Company, 1962), 365-366.

[101] Gary Donaldson, *Truman Defeats Dewey* (Lexington: University of Kentucky Press, 1999), 7.

[102] Robert Justin Goldstein, *Political Repression in Modern America: From 1870 to 1976* (Champaign, IL: University of Illinois Press, 2001), 299.

[103] *New Republic*, August 15, 1949, 11-12.

Clark thought his fellow Truman appointees more conservative, with Burton likely taking the lead.[104] While he defied easy categorization, Clark often fit in as a practitioner of restraint, deference to the coordinate branches and state and local law enforcement agencies and as a mild skeptic of some of the more liberal Warren Court developments. He remained an ardent cold warrior, supporting many of the efforts to identify, remove, sometimes prosecute and often marginalize suspected communists. Accordingly he filed dissents in cases such as *Cole v. Young* and *Yates v. United States*, 1956 and 1957 rulings respectively that evidenced the Warren Court's halting turn against the anti-subversion cause. But unlike the other two remaining Truman appointees, Burton and Sherman Minton, Clark joined the majority opinion in the much-maligned 1956 ruling that disavowed Pennsylvania's Sedition Act and hindered parallel state-led efforts. Still, like so many of the justices, he supported the Warren Court civil rights agenda, famously authoring the opinion that validated the Civil Rights Act of 1964.[105] He also wrote the majority opinion in *School District of Abington v. Schempp*, a 1963 decision that outlawed the practice of bible readings in public schools. He too had a willingness to join some, but by no means all, of the Court's more forceful innovations in matters of criminal procedure. He authored the important 1961 decision in *Mapp v. Ohio* but dissented in *Miranda v. Arizona*, the controversial 1966 decision that for many symbolized the excessive restrictions the Warren Court put upon law enforcement in its efforts to identify and investigate suspected criminals. Tom Clark left the Court in 1967 when Lyndon B. Johnson appointed Clark's own son, Ramsey, to the attorney general position that his father had held years before.

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[104] Oral History Interview with Tom C. Clark, Harry Truman Presidential Library, 215. Available at <http://www.trumanlibrary.org/oralhist/clarktc.htm.>

[105] *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964).

Truman's final appointment, Sherman Minton arguably continued the trend, identified often in contemporary commentary and ever since, of a reckless cronyism. The *New Republic*, for instance, thought Minton an improvement over Clark but still a reprehensible example of putting loyalty before all other considerations.[106] He had come from humble beginnings like his colleague Black. Minton had earned degrees, both undergraduate and law from his home state Indiana University, and had earned a master's degree in law from Yale in 1916. Though possessing important experience as a practicing attorney, he also developed an active interest in the fortunes of the Democratic Party. In taking to a life of public service, Minton had numerous electoral setbacks before a victory in 1934 allowed him to serve the Hoosier state in the United States Senate from 1935-1941. He thus shared with Black and Burton the privilege of prior legislative experience. After leaving the United States Senate he worked briefly at the White House before then serving for nearly a decade as a federal Court of Appeals judge. Truman appointed him to the Supreme Court in September 1949.

Even though the irascible Republican Senator William Langer of North Dakota—who only a few years later would cause problems with Earl Warren's appointment—regarded the Minton appointment as "splendid," notable discontent existed in some circles.[107] Presumptive supporters of the Democrats still had their continued doubts about Truman's selections. Republicans caused trouble for the Minton nomination, holding him to account for his past partisanship. Minton refused to appear before the Senate Judiciary Committee, essentially telling the Senate that he had been a politician in the 1930s but had changed his ways once he put on the judge's robes. Though a last

[106] *New Republic*, "Mr. Justice Minton," September 26, 1949, 9.
[107] *New York Times*, September 26, 1949, 33.

ditch effort to force Minton's appearance came to a vote in the Senate, his Republican foes just did not have the necessary votes. The Senate confirmed Minton on a 48-16 vote on October 4, 1949.[108]

Minton replaced a jurist, Wiley Rutledge, who would have most likely served as an able ally for the Black-Douglas-Warren trio. Like Frankfurter and Harlan, and his fellow Truman Justices, Minton sided up to the ideas of judicial restraint.[109] As he did with Harold Burton, Frankfurter made it his mission to pick up Minton's support for the judicial restraint cause. Minton's embrace of restraint led him to defer to the wisdom of governmental action, even when it may have put contested liberties in peril. Similar to the other Truman appointees, he reliably supported domestic anti-communism endeavors, authoring the *Adler* decision, one of the Vinson Court's less savory moments.[110] One of Minton's more telling—and some might argue notorious— opinions came just before the Warren Court era in *Terry v. Adams*, a white primary case. Minton's dissenting opinion found no state action evident in a Texas private association's primary that served as the effective precursor for selecting those candidates who would win in the Democratic county.[111] None of his eight colleagues joined in his views rejecting an actionable discrimination the Court should remedy; despite the variances in the majority and concurring opinions, all of the Justices recognized the state's involvement in countenancing voter discrimination. Originally Minton had allies, but Chief Justice Vinson, and Justices Reed and Jackson abandoned the dissenting cause.[112] And though

[108] "Minton is Confirmed for Court, 48-16," *New York Times*, October 5, 1949, 1.
[109] Frances Howell Rudko, *supra* note 94, at 113-115.
[110] *Adler*, s*upra* note 9.
[111] *Terry v. Adams*, 345 U.S. 461 (1953).
[112] Michael Klarman cites this case and the original dissenter's vote change to support two arguments. For one, he thinks in generally supports a view that justices can abandon their legal views in order to support political outcomes they support. Secondly, he asserts that these three justices and their vote changes

we glean only so much insight from citations of any one case, we again profit from *Griffin v. Illinois,* the 1956 ruling in which Minton, like Burton, dissented. Persistent health woes forced Minton to retire from the bench in October 1956.

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In addition Earl Warren and John Marshall Harlan, President Eisenhower also placed three other men on the Court, two of whom replaced FDR appointed members and one of whom replaced a Truman appointee. As a preview of sorts for the Frankfurter replacement in 1962, when Minton left the Court, his replacement, William Brennan, represented an important net gain for those with much less interest in, if not unconcealed hostility to, judicial restraint. Except for Warren, all of the other Eisenhower appointments had judicial experience. Presumably the emphasis on experience might help prevent a wildcard like Warren or, better still, appease some of the Court's opponents, who had become increasingly relevant by the time Eisenhower made his final appointments during his second term.[113]

William Brennan came from Newark, New Jersey. Born in 1906, he became the first member of the Court to have been born in the twentieth century. He took an undergraduate degree at the University of Pennsylvania and a law degree, in 1931, at Harvard University—where Felix Frankfurter served as one of his teachers.[114] As he put

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provides at least some support for the idea that original opponents of overruling *Plessy* might have later changed their minds so as to ensure a unanimous 1954 decision that outlawed segregated schools. Klarman, *supra* note 92, at 303.

[113] Eisenhower spoke of this commitment as something that he and Attorney General Brownell had established from the outset of the Eisenhower presidency. For this point I consulted Dwight D. Eisenhower Diary, February 5, 1957, President Dwight D. Eisenhower's Office Files, 1953-1961, Part 1: Eisenhower Administration Series, Reel 7.

[114] Kim Isaac Eisler, *A Justice for All: William J. Brennan, Jr., and the Decisions that Transformed America* (New York: Simon & Schuster, 1996), 27-31. Eisler points out that Brennan, though in possession of the important Harvard pedigree, did not distinguish himself while there, leading many of his

his legal talents to work, he labored as a corporate lawyer with a specialty in labor law before becoming a judge on the New Jersey State Supreme Court in 1951. Judge Brennan also had numerous advantages. He was youthful but still had important judicial experience. What is more, his Democratic Party membership could help solidify Eisnehower's bi-partisan credentials in a presidential election year. Finally, and perhaps most importantly, Brennan belonged to the Catholic Church. Since the July 1949 death of Justice Frank Murphy, the Court had been bereft of a Catholic justice; Brennan could thus help the Eisenhower election effort and the White House as it sought the support of this notable (and presumably coherent) voting bloc.

Both Deputy Attorney General William Rogers and Attorney General Herbert Brownell knew of Brennan but there does not appear to have been a substantial interest in ensuring Brennan's views of the law accorded with any circulating in the Eisenhower White House. In fact, the apparent indifference to Brennan's legal views in the Eisenhower White House still can surprise observers many years later.[115] Had they looked for a judge with more conservative views they would have wanted to look elsewhere. As one scholar of the appointment has written, "it is difficult to see how the men around President Eisenhower could have missed Brennan's liberalism," unless that is the interests of the administration in ensuring ideologically suitable justices simply did not match that of Eisenhower's successors, particularly those who appointed justices following the Warren Court era. Brennan's views and opinions, however designated

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classmates to recall that a man that many could not recall had made his way to the Court. Thirty-five years later, when Brennan left the Court, he had become one of the most well-known and influential lawgivers in American history.

[115] *Id*. at 86-91. Eisler describes the choice of Brennan as something carried out with little to any interest in his legal or political views. Brennan, as Catholic and state court judge, fit a desired niche and that was enough for the White House.

before he went to the High Court, were not consonant with those who preached from the altar of judicial restraint.[116]

The Brennan appointment caught many off guard. The *New York Times*, for instance, labeled the pick a "surprise."[117] Brennan never expected that he would go from seeming obscurity to the country's highest legal tribunal. Though remembered now for his affability, he did not have a propitious start with his future colleagues. Earl Warren accompanied Brennan on an initial visit to the Court to a chamber where the justices had retired to view an important fall television event: the 1956 World Series. Luckily Brennan had not interfered with the viewing of Don Larsen's historic perfect game, but the importance of even the first game of the series between the New York Yankees and the Brooklyn Dodgers prompted one justice to chide Brennan for hindering the view of the television.[118] The personable Brennan would not repeat such errors during his tenure that lasted until 1990, often using his amiability, intellect and flexibility to ensure that jurisprudential disagreements would not threaten other results he and others favored. Opposition to Brennan's appointment existed but just as often as a political bargaining chip as a sincere commitment to refusing to grant Eisenhower deference in his selection. Nevertheless, one lonely, but hardly courageous, Senator did stand in the way of Brennan's ascension.

Some of Brennan's speeches attracted the concern of the man whose time had mostly past, Senator Joseph McCarthy (R-WI). McCarthy pressed Brennan on the

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[116] The appointment of Brennan and the laxity with which the White House pursued an understanding of Brennan's legal views undermines the idea that Eisenhower and his administration could express surprise at Brennan's liberal views. For this argument see Stephen J. Wermiel, "The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record," *Constitutional Commentary*, 11 (1995), 515-538 (quote at 537).

[117] "President Names Jersey Democrat to Supreme Court," *New York Times*, September 30, 1956, 1.

[118] William J. Brennan Jr., "A Personal Remembrance," in Bernard Schwartz, *supra* note 26, at 9.

question of whether or not communism represented a legitimate political party or something to be outlawed. The interim justice could take cover behind his obligations to objectivity and not making statements that would seem to indicate how he might pre-judge cases, pending or otherwise, that would bear on the very question. McCarthy's efforts were mostly a distraction; whatever doubts some might have had about Brennan, or willingness to challenge the president's appointment prerogative, they would have just become accessories to McCarthy's largely moribund cause. Brennan earned the approval of the Senate with but one dissenting voice, that of the increasingly marginal McCarthy.[119] McCarthy would have stirred in his grave had he read the 1957 *Jencks. v. United States* opinion Brennan authored in his first term.

Brennan did not come to the Court with judicial loyalties that presaged a commitment to expanded rights for the accused, down-trodden and often voiceless. Soon after his arrival though he quickly became associated with Warren, Black and Douglas, joining in on the efforts to expand the protections for individual liberties and to ensure both substantive and procedural protections existed for an array of liberties. Predictably enough, Brennan's rapidly developing allegiance did not come about with Frankfurter sitting idle. Much like he had with Earl Warren, Felix Frankfurter attempted to counsel and shape Brennan; again the patron saint of judicial restraint did not succeed.[120]

During the years Brennan served with Warren he authored numerous legal landmarks, notably the important 1958 desegregation ruling in *Cooper v. Aaron*, the 1962 decision in *Baker v. Carr* that opened the doors of the federal courts to apportionment suits and *New York Times v. Sullivan*, a 1964 ruling that elevated freedom of expression

[119] For the seeming debate over Brennan's appointment I profit from Eisler, *supra* note 114, at 107-119.
[120] James Simon, *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America* (New York: Simon & Schuster, 1989), 235-238.

protections in making it much more difficult for public figures to recover damages for libel.[121] In 1967 he wrote for a five man majority in a controversial opinion that invalidated New York provisions that targeted teachers who belonged or had belonged to subversive and/or seditious groups. The teachers, because of any associating with subversive causes, faced off against the loss of their jobs. Brennan's opinion represented an about-face from the *Adler* ruling from fifteen years before.[122]

Even when not responsible for a Court opinion, Brennan's handiwork was noticeable. In *Miranda v, Arizona,* a case Brennan told the chief justice represented "one of the most important opinions of our time," he counseled Warren on matters from language, tone and in many respects encouraged Warren not to buckle under any pressures—a reference to the disquiet outside of the Court in the mid-1960s. Warren's original *Miranda* opinion had begun by speaking of "the role society must assume." Brennan encouraged the man he called super-chief to change the terms to "the restraints society must observe."[123] The final opinion reflected Brennan's counsel on this point and myriad others. Though Brennan has just as often received plaudits (and criticisms) for existing as a results-oriented judge, one who presumably had disinterest in the language employed if what made its way into an opinion could secure a majority, we can see Brennan had much interest in fashioning the conceptions *Miranda* would provide to those who read the opinion. Many would say that the greatness of his judicial career even surpassed the greatness of his liberal brethren from the Warren Court years. Brennan served on the Court until 1990.

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[121] *Baker*, *supra* note 80; *Cooper v. Aaron*, 385 U.S. 1 (1958); *New York Times v. Sullivan*, 376 U.S. 254 (1964).
[122] *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967).
[123] William Brennan to Earl Warren, May 11, 1966, WJBP, Box I: 142.

About mid-way through the 1956-1957 Court Term Stanley Reed retired. Charles E. Whittaker earned Eisenhower's fourth appointment in March 1957 as Reed's replacement. A Kansas native, Whittaker had important experience as a federal judge serving as a U.S. District Court member and later as judge on the U.S. Court of Appeals for the Eighth Circuit—all during Eisenhower's tenure in the White House. Whittaker quickly earned the unanimous assent of the Senate Judiciary Committee in the very month he earned the appointment.

Whittaker served on the Court for a short, undistinguished tenure. As but one sign of the low esteem he earned we might consult the unflattering comparison made by Justice Douglas who labeled Whittaker "in his ideas, close to the stone age man, General Curtis E. Lemay, who ran with George Wallace on the presidential ticket in 1968."[124] His humble Kansas origins and night law school education, not to mention his own lack of a high school diploma, revealed both his determination and helps explain his feelings of inferiority and his indecisiveness. His jurisprudential leanings were often haphazard—though he expressed a clear intention to follow precedent. His indecisiveness while a member of the Court has become something of a shopworn trademark of any characterization of his service. Justice Douglas remarked that Whittaker served as a constant prey for Frankfurter and his clerks, as they sought to persuade Whittaker to adopt their views.[125] Though he did not share an intellectual commitment to judicial restraint he nevertheless most often sided up against the Warren liberals.

Whittaker's dissenting opinion in the 1960 ruling of *Boynton v. Virginia* revealed that while he maintained generally conservative legal views, he did not have the

[124] William O. Douglas, *The Court Years 1939-1975: The Autobiography of William Douglas* (New York: Random House, 1980), 250.
[125] *Id*. at 173.

intellectual wherewithal to make a solid contribution to the cause of judicial restraint.[126] *Boynton* involved a lawsuit by a Howard University student who had, on a stop at the Richmond, Virginia bus terminal, entered a segregated restaurant at the facility. His failure to leave the whites-only restaurant led to his arrest and conviction for trespassing. Eventually Boynton's claim of the illegality of the action came before the Supreme Court. Justice Black's majority opinion relied upon the Interstate Commerce Act to insist that Virginia had infringed upon a statutory right, rather than rely upon provisions in the U.S. Constitution. The majority relied upon the statute-based rationale even though the NAACP, on behalf of Boynton, had not raised this legal issue. Justice Department briefs had done so but such claims came only after the legal issues in contention had been settled in earlier appeals.

Whittaker, joined by Justice Clark, dissented in *Boynton*. Had he merely objected to the Court's ruling and its reliance upon legal issues that had not been raised he might have just made an argument from the canons of judicial restraint and a minor contribution to the debate that Justice Harlan's *Reynolds v. Sims* dissent did so well four years later. Instead, the overwhelmed justice broadened his objections to the Court's work. Whittaker argued that the restaurant was a private, local operation that did not connect with the interstate actions of the bus company. Boynton's original trespass conviction, in Whittaker's opinion, could thus survive as a legitimate exercise of local police power. Conservative veneration of legal process and judicial restraint simply did not have an ally with Whittaker who, in a sense, could be as results-oriented as the despised Warren liberals.

[126] *Boynton v. Virginia*, 364 U.S. 454 (1960).

Charles Whittaker might have been many things but he was never of the Warren Court—if we take that to mean an influential participant in the era's debates over judicial restraint. He remained on the Court only until 1962, retiring under advice of his doctors to salvage his health.[127] Interestingly, much like the one-term James Byrnes, who left the Court in October 1942 to help FDR with the war effort, Whittaker became an open accessory to the criticisms of the Warren Court that existed in the 1960s. Though he hardly assailed the Court as directly as the abundant other critics of the era, the retired Justice Whittaker made sure to counsel an inelegant Burkean reliance upon tradition and fundamentals in his open discussions of what bedeviled the country in the 1960s. Free from the silences that Court service normally demanded, he cautioned against the civil rights claims, interest in eliminating inequalities, specter of enhanced governmental role in ensuring the welfare of its citizens and liberal views on crime. The former justice counted the Court as an important source of some of these ominous trends.[128]

Whittaker's mediocrity did not find repetition with Eisenhower's last appointment in 1958. That year he named the sturdy, industrious and moderate Potter Stewart to the Court to replace Harold Burton. Though born in Jackson, Michigan in 1915, Stewart grew up in Cincinnati, Ohio where his father James, a prominent local attorney, became mayor in 1937. Stewart received the best education, taking both his undergraduate and

[127] On Justice Whitaker see Peter C. Hoffer, Williamjames H. Hoffer and N.E.H. Hull, *The Supreme Court: An Essential History* (Lawrence, KS: University Press of Kansas, 2007), 339-340. Also see Richard Miller, *Whittaker: Struggles of a Supreme Court Justice* (Westport, CT: Praeger, 2001)

[128] One might consult Whittaker's rambling, often confusing speech before an audience at the University of Kansas in April 1966. The speech is reprinted in "A Former Justice Warns: Return to Law, or Face Anarchy," *US News and World Report*, April 25, 1966, 58. For a discussion of Whittaker's post-Court public speaking activities and the extent to which the work of the Court drew Whittaker's attention see Craig Alan Smith, *Failing Justice: Charles Evan Whittaker on the Supreme Court* (McFarland and Company, 2005), 226-231.

law degrees at Yale.[129] During World War II he served in the United States Navy. After the war he worked in private legal practice, working for elite law firms in New York City, where he had worked briefly before the war, and later in his hometown Cincinnati, Ohio.

Names such as former Attorney General Brownell and future Supreme Court Chief Justice Warren Burger appeared as possibilities for Eisenhower's last selection. And the administration had at least some interest in adding another Southerner to a Court to join Hugo Black.[130] Stewart had prior judicial experience but even his experience on the Sixth Circuit hardly made him a legal veteran since he came to the Supreme Court at the relatively young age of forty-three, only a few years older than the age at which William Douglas joined the Court.[131] The rare combination of federal judicial experience and youth made Stewart an almost perfect choice. Not that such perfection seemed evident to the United States Senate. Unlike recent Eisenhower appointments Stewart actually encountered noticeable opposition votes in the Senate. Stewart had earned the third Eisenhower recess appointment to the High Court; some friction might have been expected from senators already quite comfortable with challenging a lame-duck president. Stewart earned the recess appointment in October 1958 but the Senate hearings and confirmation vote did not arrive until the following spring. Stewart became ensnared, in particular, in the regional fissures over the Court's desegregation rulings.

[129] Unfortunately there is no biography of Potter Stewart, perhaps partially due to his decision to discard his papers. I have relied upon a selective reading of his Supreme Court opinions, the written evaluations of him by former clerks and much of the conventional wisdom in depicting Stewart. Particularly help came from Laurence Tribe, "Justice Stewart: A Tale of Two Portraits," *The Yale Law Journal*, June 1986, 1328-1333.

[130] Dwight Eisenhower to William Rogers, September 17, 1958, President Dwight D. Eisenhower's Office Files, 1953-1961, Part 1: Eisenhower Administration Series, Reel 25.

[131] William Johnson and Joseph Story were both thirty-two when they joined the Court in 1804 and 1812 respectively.

Those rulings played a substantial part in justifying the votes of various United States senators (seventeen of them) who voted against the Stewart appointment in May 1959.[132]

Stewart's jurisprudential loyalties were not as pronounced as those of the Warren Court liberals or Frankfurter and Harlan. Evaluations though have often spoke of his open-mindedness, respect for the views of others, and temperament but not a clear commitment to one side or the other on the essential debates over the extent to which the Court should or should not involve itself with contemporary legal disputes. The law is built upon myths of consistency and predictability; Stewart thought that decisions that came about because of these goals, first and foremost, violated the duties that a justice or any judge owed to those who came before a court. Stewart certainly supported some of the important holdings of the Warren era, but did not support the notion that the Court should over-involve itself in the country's important (and not so important) political and legal matters. His 1962 lone dissent in *Engel v. Vitale* provides an example of his moderation and unease with some of the more liberal outcomes, as in this case he stood in opposition to the Court's declaration that public school prayer constituted an impermissible state establishment of religion.

Permitting voluntary school prayer, in Stewart's view, represented nothing more than allowing a practice that balanced the free exercise of religion and the need to avoid the establishment of one.[133] Though Stewart never emerged as unquestioned advocate of one form of jurisprudence over another, he could not be counted on to join most of the Warren Court's liberal rulings. While in no way a member of the liberal Warren bloc, Stewart could disturb the status quo. Evidence of this comes from his willingness to

[132] Anthony Lewis, "Senate Confirms Justice Stewart," *New York Times*, May, 6, 1959, 32.
[133] *Engel v. Vitale*, 370 U.S. 421, 455 (1962)

entertain legal challenges to the constitutionality of the war in Vietnam, a willingness not shared by most of his colleagues—Justice Douglas, ever the maverick, had even less reticence in viewing the Vietnam war as something fit for adjudication.[134] Stewart also sided up as a strong supporter of First Amendment freedoms and the era's rulings that sought to stamp out discrimination. When Earl Warren left the Court in 1969, many considered the well-respected Potter Stewart as a presumptive front-runner to get the job—a possibility that then President Nixon did consider.[135] He remained on the Court until 1981 when he retired, paving the way for Ronald Reagan to appoint the first female Supreme Court justice, Sandra Day O'Connor.

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President John F. Kennedy hardly surrounded himself only with heirs to FDR-Truman liberalism. Camelot nonetheless—perhaps unwittingly—contributed to the halcyon days of the Warren Court. Kennedy's second appointment finally gave the Warren liberals (Black, Brennan, Douglas and Warren) a predictable, safe fifth vote. Thereafter the Court afforded even more attention to matters of individual rights, criminal procedure, democratic participation and in curtailing discrimination. Both men JFK put upon the Court had been born in the twentieth century, and were thus possible appointees who could, if they so chose, stay on the Court for decades. Only one of these men would do so, remaining until 1993, while the other served for only three terms, rivaling James Byrnes, who served for one term, as the twentieth century justice with the shortest tenure.

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[134] For a superb examination of the Warren Court, its reluctance to aid the cause of bringing an end to the war in Vietnam and how this frustrates the portrait of the Court as a policy-making, ultra liberal agent of the government see Michal Belknap, "The Warren Court and the Vietnam War: The Limits of Legal Liberalism," 33 *Georgia Law Review* (1998), 65-154.

[135] Abraham, *supra* note 5, at 215.

Charles Whittaker retired from the Court in March 1962. African-American federal appellate judge William Hastie emerged as an early presumptive favorite. Hastie picked up important early support from the attorney general, Robert Kennedy; RFK advocated Hastie's appointment for the good it would do for the U.S. global image since Hastie would be the Court's first African-American member.[136] Widespread support for a Hastie appointment existed with the leadership of the African-American community but some in the White House had other candidates in mind, including Harvard professor Paul Freund and state Supreme Court Judges Roger Traynor and Walter V. Schaefer. JFK ultimately decided upon one of Camelot's own: the Justice Department's second-in-command, Byron R. White.[137]

White had distinguished himself as football star—briefly playing professionally and earning compensation that helped him pay for his law school expenses. He attended Yale, taking up his legal education at the same time as future colleague, Potter Stewart. He also served in World War II, when he first met JFK. Wartime service delayed the completion of his law degree, but the war's end allowed White to return to Yale to complete the degree. Thereafter he put his law degree to use in working as a clerk for Chief Justice Vinson in 1946.[138] White also earned a prestigious Rhodes scholarship. Before going to Washington, White had success in private practice in his native Colorado and helped with Kennedy's election efforts in Colorado and later as national chairman of Citizens for Kennedy. During his time at the Justice Department White took on an

[136] James N. Giglio, *The Presidency of John F. Kennedy*, Second Edition, Revised, (Lawrence: The University Press of Kansas, 2006), 43.
[137] Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (New York: The Free Press, 1998), 313-322; Arthur M. Schlesinger, Jr. *A Thousand Days: John F. Kennedy in the White House* (Boston: Houghton Mifflin Company, 1965), 698.
[138] For a discussion of Yale and the influence of legal realism on White's Supreme Court jurisprudence see Allan Ides, "The Jurisprudence of Justice Byron White," *The Yale Law Journal*, November 1993, 419-461.

important role in the administration's May 1961 involvement, often in the form of damage control, with the Freedom Riders in Montgomery, Alabama.[139]

According to White's biographer, the Kennedy administration did not dig deeply into questions of White's potential jurisprudential leanings. What is more, we should not find much surprise here since JFK did not think the Court, judicial philosophy or the Court's role in the nation's political and legal life merited much of the president's concern. Besides, Kennedy did not need much reason to appoint a man who had proven his worth and loyalty.[140] Contemporary coverage hardly challenges what those who have studied the appointment have concluded: JFK chose an able, personal friend to take a seat on the Court but did not agonize over the Court's direction.[141] The selection met with immediate support, both from the Senate and from the fourth estate.[142] Even White's involvement in civil rights battles did not dissuade the powerful Senate Judiciary Chairman James Eastland of Mississippi from supporting the nomination.[143] Other Senators joined in support. White earned a quick, unanimous confirmation, joining the Court in April 1962.

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[139] Though examine Nick Bryant, *The Bystander: John F. Kennedy and the Struggle for Black Equality* (New York: Perseus Books Group, 2006), 246-247, for an interpretation that White hardly emerged as ardent proponent of civil rights or in ensuring the administration's vigor in pursuing such changes. Bryant's overall work accurately portrays that overarching conservatism of the administration's posture on civil rights, but the inculpatory tone of the book borders on the ahistorical. Far better is the narrative and analysis provided by historian Raymond Arsenault. See Raymond Arsenault, *Freedom Riders: 1961 and the Struggle for Racial Justice* (Oxford: Oxford University Press, 2006), 226-229 and 236-237. Also see Hutchinson, *supra* note 137, at 272-286.

[140] Hutchinson, *supra* note 137, at 327.

[141] Anthony Lewis, "Byron White Gets Whittaker's Seat on Supreme Court," *New York Times*, March 31, 1962, 1.

[142] Dennis J. Hutchinson, "The Ideal New Frontier Judge," *The Supreme Court Review*, 1997, 373-402 (in particular 390-391). Hutchinson concludes that, unlike Ike with Warren and Brennan, JFK, his administration and Camelot's protectors would have had little reason to lament, later on, White's appointment. The administration just did not care. On press support see *Chicago Tribune*, "The New Justice," April 2, 1962, 20.

[143] *Chicago Tribune*, "White's Court Choice Hailed by Senators," March 31, 1962, 4.

Other than his work for Kennedy, which earned him praise as a cool and pragmatic supporter of the president, White did not have much that could be used against him by the Court's growing number of opponents. Jurisprudential soothsayers had to remain unsure. White, much like Warren, came to the Court with his cards securely protected from those who would have hoped to predict his jurisprudential loyalties. On the Court he hardly made sure that JFK had, in his first appointment, aided the cause of Warren Court liberalism. Though not a doctrinaire advocate of judicial restraint, Justice White dissented from some important Warren Court trademarks (*Miranda v. Arizona* and *Escobedo v. Illinois* for example) and expressed reticence in denying the other branches of government the opportunity to govern. He counseled restraint more frequently than Stewart but not to the same extent as Harlan and Frankfurter. While he did not have an overarching jurisprudence, he placed value in adhering to judicial precedents, even those with which he may have personally disagreed and could surprise with his voting. White left the Court in 1993, providing another, newer generation of Democrat, William Jefferson Clinton, to appoint Ruth Bader Ginsburg as the Court's second female jurist.

Byron White might have been a paradigmatic New Frontiersman but Kennedy's other appointment, Arthur Goldberg, carried out his public and legal work as an undisputed liberal. He replaced Felix Frankfurter. A Chicago native, Goldberg had earned his law degree from Northwestern University, graduating first in his class. He later had a successful career as a labor lawyer, serving at one point as general counsel for the United Steelworkers of America and worked in the same capacity for the AFL-CIO until he left to become the United States Secretary of Labor in 1961. Justice Frankfurter's August 1962 departure came on the heels of a stroke that past spring that

had made it impossible for him to carry on his work on the Court. Goldberg would thus come to hold the Jewish seat on the Court, ensuring a continuity of sorts, but his confirmation would deprive the Court of its fiercest advocate of a restrained judiciary and instead provide it an unapologetic judicial liberal. Again as a reminder of this different era, Goldberg—even with the persistent political opposition to the Warren Court—met little senatorial resistance. Goldberg's confirmation, with only the dissenting vote of South Carolina's Strom Thurmond, occurred in time for the start of the Court's term in 1962.

One still has difficulty explaining the relative passivity Goldberg encountered from the Senate. Few Warren Court appointments went to the Supreme Court with their views and political loyalties more clear. As much as his hometown newspaper the *Chicago Tribune* speculated that Goldberg might just surprise observers and that he had the talents and open-mindedness to surprise, most observers picked up on his clear political and legal inclinations.[144] Conservative columnist David Lawrence, for instance, chided the president for selecting someone with no judicial experience and a career "as a partisan of the labor movement."[145] But even with the Court's direction in the balance, the presumptive opposition failed to carry out its counter-attack. Though the enemies of the Warren Court would go on the offensive in 1967 and 1968, one might still wonder why they waited so long.

We can profitably contrast Goldberg's judicial worldview with that of Kennedy's other appointment by realizing that both stood on opposite sides of an important divide

[144] *Chicago Tribune*, "Mr. Justice Goldberg," August 31, 1962, 14. Also, *New York Times*, "Mr. Justice Goldberg," August 30, 1962, 23.
[145] David Lawrence, *Los Angeles Times*, "Kennedy Plays Politics in Naming Secretary Goldberg to High Court," September 4, 1962, A5.

regarding the right to counsel and issues over self-incrimination. Goldberg authored the opinion for a five man majority in the 1964 ruling of *Escobedo v. Illinois*, a judgment that established important groundwork for the 1966 ruling in *Miranda v. Arizona*. Earl Warren made sure to praise Goldberg's opinion in *Escobedo*, in telling him two years later that the *Miranda* opinion "enshrine[es] yours."[146] As we will later realize, these two rulings represented, for the Court's foes, judicial intrusiveness at its apex. Goldberg had no reservations over the role the Court played in federalizing and liberalizing criminal procedure and criminal law.

Goldberg told Warren that he considered his time on the Court "the proudest and most fruitful period of my private and public career," yet his tenure was the second shortest of any twentieth century Justice and the shortest tenure of any person to sit with Warren.[147] Goldberg's departure from the Court presents, in the parlor game of counterfactuals, one of the more seminal but often unheralded departures in the history of the Court. JFK's successor Lyndon Baines Johnson appealed to Goldberg in 1965 to take over for the deceased Adlai Stevenson as the U.S. ambassador to the United Nations. Goldberg later admitted that he recognized the position presented a valuable opportunity to shape foreign affairs, and that LBJ had dangled other offers about returning to the Court or perhaps having Goldberg on the national ticket in 1968.[148] Had he remained on the Court, thus resisting the pressures from Kennedy's successor to resign, the Court and the country would have possibly been spared from Abe Fortas and the disastrous series of events that first led to his failed appointment to replace Earl Warren in 1968 and later, in

[146] Earl Warren to Arthur Goldberg, June 14, 1966, Arthur Goldberg Papers, Box I: 43, Library of Congress, Manuscript Division (hereinafter AGP).
[147] Arthur Goldberg to Earl Warren, October 11, 1965, AGP, Box I: 43.
[148] Abraham, s*upra* note 5, at 222.

1969, to his resignation from the bench. Indeed, the 1968 and 1969 Fortas fiascos provided a neatly wrapped gift to the Court's foes with which they could assail the Court all while sticking up for its integrity by publicizing Fortas's indiscretions.[149]

Whereas Justice Whittaker assailed, often inelegantly, the Court once he had left, Justice Goldberg, after his departure, stood up as an outspoken supporter of the Warren Court and its work. Even from his position at the United Nations he chided the law and order crowd of the late 1960s for the blame it put upon the Court for crime and woe. After he left the U.N. post, a failed bid for the governorship of New York and his return to private legal work, Goldberg continued, despite his brief service, to protect the Warren Court. One sees this, for instance, in his 1971 Rosenthal Lectures at Northwestern University Law School, which emerged as a spirited defense of the Court in general and the work of the Warren liberals in particular. The published version of Goldberg's remarks, *Equal Justice*, could not even benefit from an Earl Warren authored forward, since the former chief justice felt he could just not lend his name to a work so spirited and unequivocal in its defense of the Court and its recent work.[150]

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Abe Fortas and Thurgood Marshall became the last two Warren Court members. JFK's untimely death in November 1963 provided both for elevation of his vice-president and had a direct relationship to the overwhelming political pressures on the Court in 1968 and 1969. Historians and commentators endlessly fascinated by the counterfactual

[149] Henry Abraham too raises this point. Abraham, *supra* note 5, at 217.
[150] Arthur Goldberg, *Equal Justice: The Warren Era of the Supreme Court* (Evanston, Northwestern University Press, 1971). See chapter two for a synopsis of Goldberg's contribution. I learned of Warren's unpublished forward and his reasoning for not wishing to include it in Goldberg's *Equal Justice* from Justice Goldberg's papers. Arthur Goldberg to Joy Neuman, September 1, 1971 and Warren's unpublished forward available in AGP, Box I: 70.

speculation of what JFK would have done in southeast Asia could also wonder what would have happened had his successor Lyndon Johnson not had the opportunity to put on the Court someone whose off-the-bench activities provided more than enough justification for the Court's enemies to help ensure that the Court and the politics surrounding it became all the more salient (and damaging) in 1968.

LBJ engineered Justice Goldberg's departure from the bench in 1965. He appealed to Goldberg's own political vanity and aspirations both by having him take over as U.N. ambassador and in hinting that Goldberg might become the vice-president in 1968.[151] Replacing Goldberg with LBJ's trusted advisor and eminently qualified Abe Fortas represented no gain or loss for the Warren Court liberals, yet in time LBJ's own declining popularity, Fortas's foolish missteps and the widespread animus directed to the Court all conspired to bring the heyday of the Warren Court to a close. LBJ bears considerable responsibility for aiding the forces that sought to hasten the demise of the Warren Court; his appointment of Fortas in 1965 and later attempts to elevate his close friend to the chief justice spot should exist as notable failure on any scorecard of the Johnson presidency.

Abe Fortas, a native of Tennessee, had earned his law degree from Yale. At Yale he edited the *Yale Law Journal*, and generally impressed those who met him—including his valuable contact with Thurman Arnold and future Justice William Douglas[152] He thereafter served on the faculty at Yale before joining so many others who went to Washington to support the New Deal, working for a time at, among other places, the

[151] Robert Dallek, *Flawed Giant: Lyndon B. Johnson, 1960-1973*, (New York: Oxford University Press, 1998), 234.
[152] Laura Kalman, *Abe Fortas: A Biography* (New Haven: Yale University Press, 1990), 14-15 and 18. This biographical treatment of Fortas proved invaluable in understanding the jurist and provides a valuable source.

Agricultural Adjustment Administration, the SEC and the Department of the Interior. New Deal era government service helped Fortas secure valuable Washington, D.C. experience, and thereafter he joined up with Thurmond Arnold as a partner of the law firm Arnold & Fortas (later Arnold, Fortas & Porter).

In private legal practice Fortas both worked for the powerful and the not-so-powerful, becoming one of the most sought after lawyers in the country. Famously, Fortas appeared on behalf of Clarence Gideon before the Supreme Court, arguing for an expanded right to counsel that the Court adopted in the 1963 ruling of *Gideon v. Wainwright*.[153] Having previously met LBJ during the Texan's initial service in the House of Representatives, Fortas helped LBJ defend a slender victory in the 1948 Democratic primary when LBJ and his team had been accused of chicanery and ballot stuffing in a runoff contest for the nomination.[154] LBJ ended up in the Senate and Fortas had helped him do so. The two men had their political fortunes inextricably linked thereafter.

Fortas had mixed feelings about becoming a member of the Court, but one can never tell how much sincerity existed behind his resistance to LBJ's imperious commands. His principal biographer confirms that Fortas was, in fact, thrilled with the possibility of becoming a justice.[155] LBJ had no intentions of giving up Fortas's counsel, but once on the Court Fortas could also keep LBJ informed of the happenings on the Court.[156] Replacing Goldberg ensured that, just as Goldberg had before him, a Jewish

[153] *Gideon v. Wainwright*, 372 U.S. 335 (1963).
[154] Kalman, *supra* note 152, 200-205.
[155] Kalman, *supra* note 152, 241-243. Henry Abraham, on the other hand, repeats the idea that Fortas was at best ambivalent if not hostile to the idea. See Abraham, *supra* note 5, 224.
[156] Joseph A. Califano, Jr., *The Triumph and Tragedy of Lyndon Johnson: The White House Years* (New York: Simon & Schuster, 1991), 48-49.

justice would remain on the Court. And LBJ hardly wanted to see the Court backtrack; Fortas's voting behavior could reliably stand in for Goldberg's. Fortas received the unanimous support of the Senate Judiciary Committee.[157] Members of the Senate picked up on the Fortas relationship to LBJ, commenting in particular upon his involvement with the uproar over LBJ aide Walter Jenkins, but nothing developed that could have derailed the appointment.[158] For the most part then the hearings and the debate over the confirmation in 1965 had little of the animosity that would surround Fortas three years later when LBJ attempted to elevate Fortas to the chief justice position.[159] Even those senators still inclined to see communist influences at every turn seemed unwilling to hold Fortas to account for his past dalliances and associations with known and alleged subversives. Simply put, much had changed since McCarthy's lonely bashing of William Brennan in 1956. On August 11, 1965, Abe Fortas earned an easy confirmation from the Senate with only dissenting votes from three senators.

On the Court, Fortas predictably joined the liberal wing. Protecting individual rights and expanding the efforts at ending discriminatory practices had become the dominant motifs in the Warren Court's major decisions. Fortas signed on as a supporter of these efforts. He provided a crucial fifth vote in *Miranda v. Arizona*, and all in all he supported the project to federalize guarantees for those accused of crimes. His interests in the rights of the accused did not end with the expected. He authored, for instance, the majority opinion in the case *In re Gault*. *Gault* established that the recognized constitutional protections for the accused would—for the most part—also apply to

[157] "Senate Committee Oks Fortas for High Court," *Los Angeles Times,* August 11, 1965, 7.
[158] *Chicago Tribune*, "Fortas Wins Court Job by a Voice Vote," August 12, 1965, 3.
[159] Kalman, *supra* note 152, 247-248.

juvenile offenders. [160] Elsewhere, his 1969 opinion for a 7-2 majority in *Tinker v. Des Moines Independent School District* ensured that during a war—in this case the war in Vietnam—the United States would make an effort to respect the rights of dissenters, even high school students who, in 1965, sought to exercise their First Amendment rights in wearing black armbands to protest the unpopular war.[161] His departure from the bench in 1969, under pressure of impeachment, every bit as much as Warren's retirement that same year, marked the end of an important era in constitutional law and the country's relationship with the Supreme Court.

Thurgood Marshall became the final person to serve as a member of the Warren Court. Marshall, or as some called him "Mr. Civil Rights" because of his important political and legal work for the NAACP and its Legal Defense Fund, became the first African-American to join the Supreme Court. Born in Baltimore, Maryland, Marshall grew up in an age of segregation and denied opportunity. He earned a law degree from Howard University in Washington, DC—attending that institution for blacks since the law prevented him from matriculating at the University of Maryland's law school. At Howard he worked with the pioneering Charles Hamilton Houston, a man who dedicated his life to improving the lives of his fellow African-Americans, whether as a teacher to his important lobbying and legal work with the NAACP.[162] Unsurprisingly Marshall followed in his mentor's footsteps. After law school he wasted little time in becoming associated with the important work of the NAACP, taking a lead role in the group's important litigation efforts to combat and eventually destroy segregated life. By 1950

[160] *In re Gault*, 387 U.S. 1 (1967).
[161] *Tinker*, *supra* note 43.
[162] On Charles Hamilton Houston see Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (Philadelphia: University of Pennsylvania Press, 1983).

Marshall had become the director-counsel of the Legal Defense Fund. His efforts proved fruitful, particularly after the war as the Supreme Court and appeals courts chipped away at legally sanctioned segregation, particularly in educational settings. In his time with the NAACP, Marshall argued before the Supreme Court thirty-two times.[163]

Participating as one of the advocates for the NAACP before the High Court in the series of cases that became *Brown v. Board of Education* only confirmed Marshall's success and justifiable claim to the title Mr. Civil Rights.[164] Yet even Marshall had his ambitions and prudence, realizing that his ability to work for civil rights (and other ambitions) could be compromised by misguided ventures. In 1949, for instance, he stepped down as member of the board of directors of the National Lawyers Guild for what he viewed as the organization's intemperance in criticizing Judge Harold Medina for his actions at the trial of the eleven communist leaders that resulted in convictions, contempt citations for some of the defense attorneys and later the Supreme Court ruling in *Dennis v. United States*. Marshall expressed shock that the organization could be so quick to render an indictment, expressing a desire for all the facts to come in.[165] Later in his career, as he held judicial posts and performed governmental work, some within the African-American community and those involved with civil rights agitation would even look upon Marshall, much like they did Martin Luther King Jr., as too moderate.

Marshall became the nation's first African-American solicitor general in 1965. As solicitor general Marshall argued before the Court in some of the important liberal, Warren hallmarks, including cases that confirmed the constitutionality of the Voting

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[163] Randall Walton Bland, *Justice Thurgood Marshall: Crusader for Liberalism* (Bethesda, MD: Academia Press, 2001), 318-319.
[164] *Crisis*, "History of the Five School Cases," June/July 1954.
[165] Thurgood Marshall to Robert J. Silberstein, October 24, 1949, Thurgood Marshall Papers, Box 579, Library of Congress, Manuscript Division.

Rights Act of 1965.[166] When Justice Tom Clark had to resign from the bench in 1967—on the heels of his son Ramsay's appointment as U.S. attorney general—LBJ did not have to look far to make history. According to Robert Dallek, LBJ's appointment of Marshall could allow LBJ to take credit for expanding the Warren Court liberal majority and in providing another capstone example of the administration's commitment to civil rights. Choosing Marshall, in Dallek's view, "was the high-water mark for Johnson in an otherwise miserable year."[167]

Marshall's 1967 appearances before the Senate Judiciary Committee, what with the hearings' mixture of racism and animosity for the Warren Court, provided one of many trials of the Warren Court that directly preceded an election in 1968 that in many respects became a referendum on the Court. Numerous senators feared Marshall for his skin color; they too feared him for what his own vote would add to the Warren liberals. The 1967 hearings and debate over represented the opening salvo, along with congressional debates over crime legislation, in bringing the politics of the Court into clear display up through the next year's election. Marshall's July 1967 confirmation hearings revealed the shouting matches over the Warren Court at some of their worst and most interesting for the historian inclined to do more than just dismiss the opposition to Marshall as the preview to later confirmation fights. Nevertheless, that the opponents of the Warren Court, in the Senate, had waited so long to make a substantial challenge to an appointment reveals how crucial race as a factor was with those who opposed and heavily scrutinized Marshall. Appointment politics would never be the same after Marshall and later the 1968 fiasco over the move to get Fortas in the chief justice spot.

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[166] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v, Morgan*, 384 U.S. 1 (1966).
[167] Robert Dallek, *supra* note 151, at 438 and 442.

Right from the outset of the July 1967 hearings Marshall encountered the hostility of the Court's critics. Senators John McClellan (D-Arkansas) and Sam Ervin (D-North Carolina) put Marshall on trial for the Warren Court's doings, in particular those involving criminal due process. *Miranda* and *Escobedo* benefited from the votes of other justices, but Marshall would have to answer for the misdeeds of a Supreme Court of which he had not been a member. McClellan acknowledged that he had little doubt over the Marshall's qualifications; he worried openly however about the state of the country. Previewing a theme that only became more important in the presidential election year of 1968, McClellan, in his first question, asked Marshall about crime and a host of 5-4 decisions that seemed to make the country less safe. Although Marshall agreed that crime was a problem, he disagreed about its scope and did not accept the notion that a societal revolution was possible. McClellan though had only just begun; he wondered if crime was such a problem, as they both agreed, why then would not every agent of government—even the Supreme Court—join in to extirpate the menace.[168]

Senator Ervin echoed and expanded upon the objections of his colleague from Arkansas. Ervin quizzed Marshall about original intent, attempting to get Marshall to reveal in open testimony some level of hostility to the constraining, conservative notion that only through the text and those responsible for crafting it could anyone seek to interpret the meaning of the U.S. Constitution. He too chided Marshall for his unwillingness to answer questions about the Fifth Amendment and constitutional confessions, wondering aloud if he should just quit asking questions of Marshall. Ervin had a predictably narrow version of testifying against oneself that only allowed for

[168] Nomination of Thurgood Marshall, Hearings Before the Committee on the Judiciary, United States Senate, Ninetieth Congress, First Session, (Washington, DC: US Government Printing Office, 1967), 3-8.

courtroom confessions, not the other stages in the process. Ervin wanted answers on *Miranda*; Marshall refused to give him any. Marshall at least refused to support the notion that court rulings had made the crime rate increase.[169] Ervin also pressed Marshall on a key recent voting rights ruling of *Katzenbach v. Morgan*.[170] Even with all of the hostility, the Judiciary Committee endorsed Marshall in an eleven-five vote. The Senate later confirmed the nomination with only eleven dissenters.

Whether foes or friends of the Warren Court, few doubted where Marshall would fall on the jurisprudential spectrum. Much like Earl Warren, Marshall maintained a fervent interest in helping those for whom advantages were few and far between. The poor, disenfranchised, marginalized and minority interests had a constant champion in Marshall. Marshall though joined the Court late in the Warren era. He had, of course, outside of the Court existed as a clear champion of the tactic of using courts of law to foster social, legal and political change. Using the power of the Court to rule on civil liberties and civil rights claims to vindicate the contested rights of these groups was a Marshall trademark. He had made his name doing so for the NAACP. To have expected Marshall to jettison such views when he became an associate justice would have been foolish. Like Brennan and Warren most certainly, he had an expansive view of the Constitution—as much as his 1967 testimony attempted to hide it—and thought that the law should be updated to reflect contemporary realities.

He never quite had the same success on the Supreme Court that he had before.[171] Justice Marshall remained on the Court until 1991. Just as he was the last justice to gain

[169] *Id*. at 58.
[170] *Id*. at 66-74.
[171] See, generally, Howard Ball, *A Defiant Life: Thurgood Marshall and the Persistence of Racism in America*, (New York: Random House, 1998), 200-388.

an appointment to that historic Warren Court he too was the last remaining justice from that era to retire. Marshall's replacement, Clarence Thomas, though also an African-American, represented an entirely different judicial worldview.

II.
A Ruling for the Ages: *Brown v. Board of Education* and the Warren Court Era

When the Court has gone too far, it has provoked reactions which have set back the cause it was designed to advance, and has sometimes called down upon itself severe rebuke.[1]

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think Plessy v. Ferguson was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's Social Statics, it just as surely did not enact Myrdahl's (sic) American Dilemma.[2]

Hell, all Southerners are Republicans at heart, conservative, and just don't know they're Republican.[3]

"The unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law."[4] So began the chilling words of defiance expressed in the March 12, 1956 Southern Manifesto, announced under the innocuous but telling title "Declaration of Constitutional Principles." The document, read on the floor of the House and Senate that day, included the signatures of nearly every Southern congressman. The brainchild of Senator Strom Thurmond (D-SC), the Southern Manifesto represented the near united

[1] Robert Jackson, *The Supreme Court in the American System of Government* (Cambridge: Harvard University Press, 1955), 80.
[2] William H. Rehnquist, "A Random Thought on the Segregation Cases," Library of Congress, Manuscript Division, Robert H. Jackson Papers, Box 184 (hereinafter RJP).
[3] An un-identified lawyer for an anti-segregation group, quoted in Robert Penn Warren, *Segregation: The Inner Conflict in the South* (New York: Random House, 1956), 23.
[4] "Declaration of Constitutional Principles," March 12, 1956, University of Virginia, Small Special Collections Library, Harry Byrd, Sr. Papers, Box 1 (hereinafter HBYP). Howard W. Smith (D-VA) read the Southern Manifesto to the House. Smith prefaced his reading of the Southern Manifesto with the reminder that Supreme Court justices were "temporary occupants." The principles of limited government, federalism and the separation of powers, however, had longevity in their favor. The critics of the Warren Court, who rarely missed a chance to decry unsettled law, had to hope that the eventual changeover in personnel on the Court would account for changes in jurisprudence. Settled law can represent something worth defending; few of the Warren Court's critics truly defended it. For Smith's reading of the Manifesto see *Congressional Record*, March 12, 1956, 4515.

outrage, emotion, and above all else, negativism that had brought many together to oppose the Supreme Court's May 1954 desegregation ruling in *Brown v. Board of Education* and the follow-up implementation decision, so called *Brown* II, from May 1955.[5]

Congressional leaders who had signed the Southern Manifesto did so out of sincerity rather than just insincere and simple desires to preserve their political power. These defenders of the status quo put much on the line at the same time that they risked little. To encourage compliance and urge their constituents to escape their own cultural and historical obligations to racism proved too risky for Southern congressional leaders. Resistance, already the presumed policy, became the official national policy of these elected leaders. Their Southern Manifesto stated the causes of resistance and attempted to ward off the threat of token or even genuine acceptance of school desegregation by moderate citizens of the American South.

Signers had the burdens of protecting an authentic and at the same time imagined "southern way of life." Segregated schooling and a rigidly segregated public sphere served as the key facet of Southern life. Most of the signers also had concerns over the future of the Democratic Party in the South. The one-party control of political power in the region had taken hold during Reconstruction because of race and the region's economic backwardness. Those factors continued to validate one-party control into the 20th century.[6] After all, the Democratic Party in the South positioned itself as the only

[5] *Brown v. Board of Education*, 347 U.S. 483 (1954); *Brown v. Board of Education*, 349 U.S. 294 (1955). Two titles, in particular, proved invaluable in this chapter. Robert J. Cottrol, Raymond T. Diamond and Leland B. Ware, *Brown v. Board of Education: Caste, Culture, and the Constitution* (Lawrence: University Press of Kansas, 2003); James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and its Trouble Legacy* (New York: Oxford University Press, 2001).

[6] See Dewey W. Grantham, *The Life and Death of the Solid South: A Political History* (Lexington: University of Kentucky Press, 1992).

able defender of the region's priorities and prerogatives. The economic conservatism and racism of the Southern Democrats, however, increasingly put them at odds with Democrats from the rest of the country. Of the sixteen senators and ninety-five representatives who signed, only two came from the Republican Party.[7]

Adversarial in every way, the 923 word Southern Manifesto opposed *Brown*, *Brown* II and the desegregation imperative on the grounds of textual literalism, fidelity to legal precedent, judicial arrogance, derogation of federalism and a Court that engaged in making law. The defiant statement afforded no attention to the moderation of the *Brown* II "all deliberate speed" decree or any of the other signs of the Supreme Court's moderation. While the Court had clearly indicated that segregated schooling had a short life-span, it had not vanquished the practice with either of these opinions. One could search through rambling speeches before Congress or examine complaints registered in the pages of a range of publications with an anti-Court message, throughout the Warren Court era, only to find no more direct and inclusive attack on the Supreme Court. The

[7] The consequences for those who refused to sign were not, by any measure, disastrous. Lyndon Johnson did not sign the Southern Manifesto. Even before becoming vice-president and later president, Johnson still earned the favor of Southern resistance leader Harry Byrd (D-VA). Senator Byrd might have even had some satisfaction that LBJ had not signed since Byrd supported LBJ as a presidential hopeful in 1956, expressing regret that LBJ had not received the nomination over Adlai Stevenson. Byrd would even offer support for Johnson in 1960 but by 1964 had cooled considerably to the prospects for the Texan. In 1956, Byrd also had his hands in the camp for the Virginia Democrats for the Reelection of President Eisenhower group, which presented the opportunity to keep people in the Byrd machine and as Democrats without going over completely to the Republican Party. See Harry Byrd to Lyndon Johnson, October 10, 1956, HBYP, Series III; A. Willis Robertson to Harry Byrd, May 10, 1956, HBYP, Series III, expressing that support for any viable Democrat for the White House was a waste of time because Eisenhower seemed destined to win reelection; Lewis Powell to Harry Byrd, October 10, 1956, HBYP, Series III, on the problems keeping Virginia Democrats in the fold since so many worked for Eisenhower and the changing political loyalties of conservatives in Virginia. Though Virginia would return to the Democratic column once more in the 1964 campaign, Johnson's defeat of Goldwater represented the last Virginia win for Democrats until 2008. Anyone who surveys the correspondence of Byrd machine mainstays cannot help but note that these individuals, and those they presumed to represent, were increasingly without a major political party to call home. The Supreme Court's rulings, among other important factors, made this a reality.

pastiche of criticisms about the nascent Warren Court neatly all turned up in one historic example of Southern defiance.[8]

Just a few weeks before Walter George (D-GA) and Howard Smith (D-VA) had appeared, respectively, in the Senate and House to read the Southern Manifesto, Wayne Morse (D-OR) cited Mississippi Senator James Eastland's record of attacking the Court to argue against the elevation of Eastland to the chairmanship of the Senate Judiciary Committee. Morse decried Eastland's steadfast encouragement of resistance to the Court and denial of its de-segregation mandate. He thought it impossible that Eastland could have impartial views, charging his senatorial colleague with every attempt to revivify John Calhoun's doctrine of nullification. Morse had no doubt that the Court had ruled correctly by putting school segregation on a road to extinction.[9]

Eastland was but one of many Southern congressman who aided and actuated resistance, including his role in White Citizens' Councils. He had, in a typical moment not long after the May 1954 *Brown* ruling, explained that the Supreme Court must have been "brainwashed by left-wing pressure groups" to reach the decision.[10] Eastland had hardly let up since. Herbert Lehman, a one term Democrat senator from New York had put it bluntly, not long after *Brown*, in calling Eastland "a symbol of racism in America" and "a symbol of defiance to the Constitution of the United States as interpreted by the

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[8] For background on the Southern Manifesto see Anthony Badger, "The South Confronts the Court: The Southern Manifesto of 1956," *Journal of Policy History*, volume 20, no. 1, 2008, 127-142. Badger argues that the effort represented an attempt to stir up the citizenry in the South. Many of the leaders from the South, Badger contends, just did not think the public had enough awareness of the disaster that had put upon them and the toughness to stick to the fight. The measure also helped to bring any wavering Southern congressman in line. In examining the few who did not sign, such as Lyndon Johnson and Albert Gore, Sr., Badger suggests that more room for resistance to the massive resisters existed. Moderates who came on board might have taken a different course and not met political defeat. If Badger is correct, and I believe he is, the indictment of the Southern political leaders becomes even more valid.

[9] *Congressional Record*, March 2, 1956, 3816-3817. Editor of the *Richmond News Leader*, James Kilpatrick gave these ideas of interposition access to the wider public in his writings.

[10] *Congressional Record*, May 27, 1954, 7254.

Supreme Court."[11] Eastland had no problem, as did many of his congressional colleagues, standing up as just such a symbol. The opposition from Morse did not prevent Eastland's elevation to the chairmanship on March 2, 1956.

The Southern Manifesto and Eastland's new role as Judiciary Committee Chairman—a position he would keep until he left the Senate in 1978—provided tangible evidence of the tempest that continued to pick up momentum. An observer in 1956 could reasonably wonder if the Court's decree had any chance of encountering consent from those areas of the country reluctant to desegregate their schools. Countless Southern elected officials certainly had no inclination to aid consent. Nonetheless, with the optimism born out of its recent legal successes, the NAACP professed confidence that "Segregation . . . is doomed. It is doomed legally; it is doomed morally. The Negro masses are in revolt against it."[12] But whatever open confidence the NAACP maintained, a bevy of factors counseled against such optimism.

In 1956 and throughout the Warren Court era, many wholeheartedly opposed the supreme judicial body in the country and its mandate to end segregation in public schools with "all deliberate speed." Senator Eastland proudly affixed his name to the Southern Manifesto. That he could oppose the Supreme Court and its desegregation mandate revealed that in a different age, Southern congressman ran few risks and encountered considerable reward for their intransigence. Opposition to desegregation became the cornerstone element of the critique of the Warren Court.

[11] *Congressional Record*, March 2, 1956, 3820.
[12] "The NAACP and Extremism," *Crisis*, April 1956, 227.

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With little controversy, one can recognize that the most contested contributions of the Warren Court involved its civil rights rulings, particularly those that came about because of cases and controversies over the disparate treatment visited upon African-American school-children. Established law remained an active and enforced descendant of slavery. By force of law in seventeen Southern states and border-Southern states, African-American children attended segregated schools. A few other states possessed laws that allowed local officials to choose to maintain segregated schools. Kansas, for instance, with its small population of African-Americans did not require segregated schools but made it an option, which the Board of Education in Topeka chose to exercise. Even in the putative center of the free world, Washington, D.C., segregated schools prevailed not by custom, historic patterns or the economics that often explained residential realities but because of the force of law. Segregated schooling existed as one of many forms of differential treatment; from bus travel to drinking fountains, African-Americans in the public sphere had to face off against segregation. Jim Crow in its many *de jure* and *de facto* forms could be expected to more easily command the allegiance of African-Americans if they, as children, had grown up in a system of segregated schooling. Thus the preservation of segregated schooling, many in the South believed, represented an indispensable component in the preservation of the Southern way of life.[13]

[13] Lucas Powe, Jr. also makes this point, calling segregated schools the "cornerstone of white supremacy." See Lucas Powe, Jr., *The Warren Court and American Politics*, (Cambridge: Harvard University Press, 2000), 22. Paradoxically, the truth of this assertion ends up revealing how Earl Warren's 1954 *Brown* opinion represented a convergence with the ideas of those who hoped for continued school segregation. Both the classic Warren opinion and the powerful argument for the preservation of segregated education had the importance of public education as arguably the foundation of American public life and responsibility. For Warren, the importance of public education made it absolutely necessary for the country to get beyond segregation; for the segregationists, once public schooling became a place in which black and

Paradoxically, even after the United States had participated in two world wars in the name of democracy and self-determination, the country continued to support treating African-American children as unfit for the same education as their white peers. African-Americans had been treated as less than citizens for too long to expect high-minded rhetoric about improving the rest of the world to motivate substantial change at home. Previous decisions from the Supreme Court had, in the least, suggested an apparent path for ending segregated public schooling in the United States. Be that is it may, nothing seemed guaranteed in those incipient days of Earl Warren's tenure, a time when he had not yet become the face on billboards calling for his impeachment. What is more, the Supreme Court's vital contributions to civil rights and desegregation had indispensable help and complications from varied social, intellectual, scientific and global forces.

African-Americans, at mid-century, continued to face off against powerful disadvantages. They also pushed back against those disadvantages. In turn, various arguments and regionalized objections persisted in opposing racial justice. At mid-century, only the most optimistic expected radical departures that would change how society distributed risks, rewards and rights. White America, after all, determined the contours of citizenship. With considerable force of history and contemporary caprice, those contours existed to exclude African-Americans from public life and private reward, most commonly in the South but through the entire country. African-Americans lived on less money, resided in segregated areas with fewer services and sub-standard homes, and encountered fewer and less diverse employment opportunities.

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white students came together in a unified learning environment, the entire social structure would forever change.

Particularly galling, African-American children had limited, and in many places woefully substandard, educational opportunities. *Plessy v. Ferguson* and the legal cover of "separate but equal" was far and away a myth masquerading as law. The force of law, in many states, required segregated schools, but just as well could have required separate and unequal schools. The situation in South Carolina proved emblematic. Its constitution stipulated that "no child of either race shall ever be permitted to attend a school provided for children of the other race."[14] At mid-century, on average, in Clarendon County, South Carolina, every one dollar spent on the public school education of an African-American child meant three dollars spent on the education of white children.[15]

Token efforts existed in some places in the South to improve facilities and increase expenditures for African-American schools, but such efforts came most often from desperate attempts to preserve educational apartheid. As one example, James Byrnes actuated increased expenditures for South Carolina schools during his early 1950s governorship, but he did so to preserve segregated schools.[16] Any attempts to equalize or nearly equalize resources between white and African-American schools perpetuated American educational apartheid, which ensured that the color of one's skin had an overwhelming role in determining one's opportunities. The commitment in the South to preserving this education apartheid was strong. Even before the December 1952 initial hearing in *Brown*, states like Georgia and South Carolina had taken affirmative steps to

[14] South Carolina constitutional provision cited in "History of the Five School Cases," *Crisis*, June-July 1954, 338.
[15] Patterson, *supra* note 5, at 25.
[16] *Id*. at 38.

weaken or work around any decision that might require the dismantling of segregated schools.

Discriminatory actions, both private and governmental, ensured slow to non-existent change. Political rights and opportunities were limited. Potential political power in the North had yet to help break the resistance, rooted in racism, of the opponents of reform. Congress had not overcome its own regional and sometimes not so regional affiliation with racism. As a case in point, the efforts of the NAACP and some liberal advocates still had not convinced Congress to pass an anti-lynching law, even by mid-century. Although the House had originally passed legislation in the early 1920s, the Senate refused to approve such a law. A country that broadcast to the world FDR's Four Freedoms, one of which called for a "freedom from fear," could not see fit to establish a federal law to protect African-Americans from lynching. No anti-lynching law ever passed the Senate.

Even after the Warren Court became an important source of civil rights improvements, it never became the most important source. Too many other actors had undisputed influence both before and along-side the Court. African-Americans had long labored for improvements. Their relocation alone served as an important part of the post-World War II reform and activism. The African-American migration to the North that had started around World War I had continued apace, slowing during the lean years of the Great Depression, but picking up again during World War II. Labor needs prompted the outflow but so too did the obvious shortcomings of life in a region of the country still holding on to the "Lost Cause." After World War II the economic conditions did not

deteriorate as they had in 1918; hence, African-Americans were able to continue to prosper.[17] Rising prosperity bred rising expectations.

Prosperity, however, remained a relative matter. The economic deprivations faced by African-Americans were substantial. African-Americans worked in unskilled professions far more often than whites. The earnings of African-American individuals and families did not rival those of whites. While the post-war economy helped spur expectations, the dividends of the post-war economic boom did not reach all equally. Economic inequalities ensured that broader freedoms and choices remained elusive for many African-Americans.

Relocation to the North also provided blacks with a much greater opportunity to participate in electoral politics. African-Americans also increasingly became a viable group for politicians to woo. Their participation could be controlled and marginalized in some regions of the country but in other places had become a political attraction. Astute observers recognized this. James Rowe, writing in a memo that became the famous though misnamed Clark Clifford strategy memo for the 1948 Harry S. Truman campaign, certainly recognized the connection between emerging voting strength and expectations.[18] Getting the votes of the African-Americans had become essential for the Democratic Party—at least as a national party seeking the presidency. Their votes constituted a vital part of the electoral vote rich North. Ensuring that this presumed voting bloc continue to

[17] See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 171-193.
[18] Rowe was an ardent New Dealer, holding various positions in the New Deal network before becoming an important assistant to FDR and then assistant attorney general.

reap some economic reward, Rowe argued, could only help ensure that African-Americans shed their inherited identification with the party of Abraham Lincoln.[19]

Other Democrats, however, had an entirely different view on not just the voting allegiances of African-Americans but their very right to vote. Despite the Fifteenth Amendment, sundry restrictions existed throughout the country, but particularly in the South, to impede African-Americans from voting. In a state like Virginia, where the Harry Byrd Machine dominated state politics, the poll tax existed both to curtail voting and, importantly, to preserve political power. Not until 1964 did the United States Constitution contain an amendment, the 24th Amendment, outlawing the poll tax. The Warren Court affirmed the work of Congress and the states that had approved the 24th Amendment. In March 1966, over dissents from Black, Harlan and Stewart, a six person majority invalidated Virginia's poll tax.[20]

Demographic and electoral changes paired with the changes in scientific and social thought that increasingly turned against racialist and biological justifications for racial hierarchy. Changes in social thought also connected to the global face of the United States. Increasingly, the country's experiences in World War II and its later battle against communism provided a foreign affairs component to race relations and civil rights improvements in the United States.[21] Waging war, real and ideological, against foreign enemies who maintained racist and totalitarian practices required the United States to improve on its own record of intolerance and lawful discrimination. To allow

[19] For a discussion of the September 18, 1947 Rowe memorandum that served as an important strategy piece for the Truman election effort in 1948 see Gary Donaldson, *Truman Defeats Dewey*, (Lexington: University Press of Kentucky, 1999), 24 and 225.
[20] *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).
[21] See, generally, Mary Dudziak, *Cold War Civil Rights: Race and Image of American Democracy* (Princeton: Princeton University Press, 2002).

these contradictions to remain, after August 1945, weakened the U.S. as it presented itself as a model capitalist-republican regime that could lead the free world against communist adversaries.

President Harry S. Truman offered up this foreign affairs rationale in his 1948 civil rights message to Congress. Later, at the NAACP 1954 Freedom Fulfillment Conference, the NAACP Executive Secretary Walter White read a statement from U.S. Ambassador to the United Nations Henry Cabot Lodge, Jr. The statement put it clearly that the racial problems and discrimination in the United States, according to Lodge, served as "the Achilles Heel of our foreign policy."[22] The ACLU echoed President Truman and Ambassador Lodge in its later briefs supporting the NAACP and its calls to end school segregation in *Brown*.[23] Justice Department briefs in *Brown* also put much emphasis upon the perceived gains that would accrue to the country if it extirpated, however cautiously, segregated schooling.

After the famous decision, all kinds of supporters of civil rights improvements and school desegregation clung to these ideals. The United States had to provide fair opportunities and prize equality at home. *Brown* seemed to confirm that the country would not attempt a global leadership role all while it accorded a status of non-citizenship to most African-Americans. Even if the improvements at the time were more apparent than real, the country could at least claim that it had made progress in reaching its

[22] "Achilles Heel," *Crisis*, April 1954, 233

[23] Michal R. Belknap, *The Supreme Court under Earl Warren, 1953-1969*, (Columbia: University of South Carolina Press, 2005), 27. Also see Klarman, *supra* note 17, at 299, on how the cold war/foreign relations emphasis might best help explain the early support from both Justices Burton and Minton for ending desegregation. As the last chapter made clear, neither justice had a superb record as a supporter of liberal causes. Klarman argues that their positions might have borrowed much from the fact that both justices "were fierce judicial Cold Warriors."

aspirations of equality before the law. Many voices from the era confirmed the connection between the cold war and the country's domestic concerns.

For instance, the Executive Board of Amalgamated Local #842, a Maryland UAW-CIO affiliate, lauded *Brown* since it would "help refurbish American prestige in the world."[24] While he has deservedly not often earned high marks on his civil rights commitments, President Eisenhower cited the cold war and the necessity of the country having a good record on social justice and civil rights. Eisenhower did so famously in his September 24, 1957 address to the nation involving his decision to send troops to Little Rock, Arkansas to help defuse, at least somewhat, the crisis over the desegregation of Central High School.[25]

Even one of the paradigmatic, if short-tenured, Warren liberals picked up on how *Brown* and later civil rights rulings helped the United States in its global pursuits. Justice Goldberg commented to Chief Justice Warren, that the work of the Warren Court contributed mightily to the civil rights success story the country broadcast to its international allies and rivals. Goldberg's later citations of history in defending the Warren Court might have tended to hyperbole, but his thinking after he left the bench only revealed how many thought of the Warren Court's work as a powerful ally in America's global influence and power. The Court's jurisprudence during Warren's tenure, specifically on equal rights and refusing to allow the law to facilitate discrimination, presumably helped the U.S in its pursuit of foreign policy goals.[26] Later,

[24] Glen Brayton to Robert Jackson, May 19, 1954 and "Resolution on Civil Rights," in RHJP, Box 184, Folder 5.
[25] Tony Freyer, *Little Rock on Trial: Cooper v. Aaron and School Desegregation* (Lawrence: University Press of Kansas, 2007), 132.
[26] Arthur Goldberg to Earl Warren, October 11, 1965, Library of Congress, Manuscript Division, Arthur Goldberg Papers, Part I, Box 43 (hereinafter AGP).

however, the cold war's significance worked also in reverse. Particularly because of the concerns over domestic subversion, the defenders of desegregation called upon the alleged connection between civil rights reform and the radicalism of communism to cover over racism with internal and national security credibility.

Global priorities helped but civil rights groups had far more influence. Organizational advocacy ensured that the federal courts and the rest of the country encountered messages of racial justice. Well before the Warren Court came into existence, Thurgood Marshall, the NAACP Legal Defense Fund and the NAACP had decided to pursue a litigation-intensive strategy to expose unequal schooling and later end segregated schools. The NAACP had seen its membership rise during World War II and this increase only continued thereafter. For years the NAACP had pursued litigation in such a way to ensure that "separate but equal" at least had legal teeth. Evidence abounded, however, that the emphasis in most areas had always been on ensuring that facilities and opportunities remained separate but scarcely equal. But after some of the successes with the Supreme Court and unwilling to countenance further delay, the NAACP and its legal arm, the Legal Defense Fund, changed strategy. Rather than undermining separate but equal educational facilities, the organization opted to seek an end to the *Plessy v. Ferguson* regime, arguing that separation itself involved inequality in violation of the Equal Protection Clause of the Fourteenth Amendment.[27]

The NAACP did gain the apparent support of both the Truman and Eisenhower administrations, an important and portentous sign that the Court had allies—at least

[27] In June 1950 the NAACP decided to henceforward pursue a policy of ending segregated schools not just ensuring that separate schools had equitable resources. See Gilbert Jonas, *Freedom's Sword: The NAACP and the Struggle Against Racism in America, 1909-1969* (New York: Routledge, 2005), 58.

presumptive—in the federal government.[28] Despite its determined foes, the NAACP proved instrumental in undermining the case for segregation. Its persistent efforts to ensure implementation lived up to ACLU founder Roger Nash Baldwin's admonition that civil liberty victories never stay won. The NAACP would remain a partner and force every bit as consequential as the ACLU in the years ahead as the Warren Court became a force for legal liberalism. Indeed, throughout the 1950s and 1960s, the opponents of the Warren Court often chose to strike back at the Court through vicarious efforts that weakened the opportunities for the NAACP to carry out its work.

Other organizations also advocated for an end to segregated schools. For instance, the Southern Conference Educational Fund (SCEF), formed immediately after the end of World War II, served as an important voice for integration, doing so from its base in New Orleans, Louisiana. The SCEF reached out through its publication *The Southern Patriot*—a name that suggested one of its prevailing arguments in support of the end to segregation. Its long-tenured leader James Dombrowski made Justice Harold Burton aware that there were Southerners "devoted to the principles of the through-going democracy."[29] Of course, fitting to the times in which the Dombrowski-led group began operations, it quickly became subject to the typical threats put upon civil rights groups. Moderation, if not outright liberalism, never became overwhelming in the South but it did exist. Both before and after *Brown*, these forces also paradoxically gave some credence to the notion that the South had made improvements on its own. Thereafter *Brown*, even moderate political leaders, such as Florida Governor Leroy Collins and North Carolina Governor Luther Hodges, were able to use trickery and their own delaying tactics to

[28] Cottrol, Diamond and Ware, *supra* note 5, at 148.
[29] James Dombrowski to Harold Burton, January 18, 1948, Library of Congress, Manuscript Division, Harold Burton Papers, Box 76, Folder 12 (hereinafter HBP).

thwart the desegregation of schools and largely preserve the racial status quo in the South.[30]

A far more widespread organizational force in that region and throughout the country involved religion. African-American churches had a substantial role in ensuring that civil rights improvements had a real chance in a country that had always been slow to embrace reform. The importance of the church to African-Americans ensured that churches would continue to press the case for civil rights improvements. Particularly in urban areas, these churches served as vital sources for blacks to gather, worship and organize free from the overwhelming white political and economic control throughout American society. Churches also served as training centers for many of the leaders of the post-war civil rights movement.[31]

Nevertheless, the law remained a powerful weapon for those who supported the status quo in a society in which one's skin color remained a highly relevant legal consideration. Segregation had countless supporters who provided the law with its vitality. Whites held on to segregated schools out of custom, fear and pure race hatred. But the extent of simple and open self-delusion should not be forgotten. Defenders of the status quo stuck with the age-old notions of paternalism and home-rule based progress that the ruling white class had provided for those African-Americans who remained in the South.

One of the very notions that had circulated to justify the peculiar institution of slavery had only been actively updated to perpetuate the status of African-Americans as second-class citizens. For example, W.H. Lewis of the openly segregationist Southern

[30] On this point see Anders Walker, *The Ghost of Jim Crow: How Southern Moderates Used Brown v. Board of Education to Stall Civil Rights* (New York: Oxford University Press, 2009).
[31] See Aldon D. Morris, *The Origins of the Civil Rights Movement* (New York: The Free Press, 1984), 4-12.

Leadership Institute of Meridian, Mississippi wrote of this obvious paternalism and special Southern awareness of race relations to Justice Robert Jackson. Lewis reported that "The negro has made, in the past forty years, marvelous progress in the South." Such belief connected to the idea that the South could improve on its own. The paternalism even persisted in the Supreme Court's conference room. After the first arguments in *Brown*, Justice Reed informed the other justices that progress had indeed occurred, and that these local, state and private Southern improvements should influence the Court's decision. Whatever real but paltry improvements had occurred, the citations of such change only served to impede further reform.[32] Unsurprisingly, following *Brown* such thinking persisted as a weapon in the arsenal of those who sought to combat the desegregation imperative.

Another popular canard featured the objection that only a small minority of discontented African-Americans and members of the NAACP wanted change. This complaint often traveled in tandem with the conspiratorial notions that connected civil rights advocacy with communism or other hidden, malevolent forces. It also presented those in the South with the opportunity to plea for Southern control of reform, which would turn out to involve little reform and measures designed only to perpetuate the regional caste system. As one Southerner pleaded to Justice Jackson, dangerous "outside organizations and agitators," a fear even older than the country itself, could ruin everything.[33]

Inherited nonsense might gather a shred of support from actual evidence but mostly ignorance and delusion girded the cause of segregation and segregated schooling.

[32] Robert Jackson, Conference Notes, December 12, 1952, RHJP, Box 184.
[33] W.H. Lewis to Robert Jackson, December 10, 1952, RHJP, Box 184, Folder 5.

Clarendon County, South Carolina school superintendent L.B. McCord, in the original trial of *Briggs v. Elliot* that would later become one of the cases in the *Brown* bundle, provides a good as an example as any. The NAACP had chosen Clarendon County as one of the areas in which to challenge school segregation, most notably, because the area belied the claim that "separate but equal" even existed. The facilities and monies devoted to the separate schools for whites and African-Americans in that county revealed stark differences.[34] When Thurgood Marshall asked McCord why the schools were segregated the superintendent replied that Marshall "would have to ask the children why."[35] Racism existed as the cornerstone reason to support segregated schooling and, later, to oppose the Warren Court's desegregation mandate.

If such delusions were not enough, another popular and long-prevalent scare tactic, involved wildly exaggerated fears of African-American men and their sexual advances on white women. Numerous opponents to civil rights improvements, not to mention desegregation in schools, openly complained of this fear. Even President Eisenhower, at least according to Earl Warren's memoirs, conveyed in a conversation to Warren the sincerity of the trepidations in the South of those who did not want their white daughters in class sitting next to African-American boys.[36] After *Brown* the fears over inter-marriage, relationships and sexual relations continued. Harry Byrd (D-VA), who became one of the most prominent national political leaders of massive resistance, wrote to journalist James Kilpatrick, "What our people most fear is that by this close intimate

[34] See Peter Irons, *The People's History of the Supreme Court*, (New York: Viking, 1999), 383-384.
[35] This anecdote appears in Peter Irons, *Jim Crow's Children: The Broken Promise of the Brown Decision* (New York: Penguin, 2004), 66.
[36] Earl Warren, *The Memoirs of Chief Justice Earl Warren*, 291.

social contact future generations will inter-marry."[37] In one of the popular oppositional techniques of the Warren Court era, the slippery-slope thinking warned against changes. The Court's opponents, in the instance of segregated schooling, claimed that change in one area would only portend, if not cause, change in another. That the slippery-slope scare tactics had some element of verity to them hardly conceals the blatant racism behind the predictions. What is clear is that the defenders of segregation would go to almost any lengths to justify its continuation.

Evasions such as these became even more noticeable after the Warren Court ruled in *Brown v. Board of Education*, then in *Brown II* and in later desegregation cases such as *Cooper v. Aaron*. The forces, individuals, organizations and ideas that supported a continuation of segregated schools, even as the Supreme Court directed otherwise, set the tone for the gravest and most prolonged constitutional crisis in American history. The country and its relationship to its highest judicial body would never be the same after May 17, 1954. Opposition to the Warren Court from that day onward became difficult, if not impossible, to separate from the desegregation decision. The racial fissures that had existed at the core of American history broke wide open on that day. Not since the end of the U.S. Civil War had the stage been set for so much change and so much consternation over American race relations. One could also argue that perhaps no one day in all of American history has ever been more important for the perceptions of one of the three supposedly co-equal branches of government.

Years later, while addressing an audience at a December 1971 book launch of his *Equal Justice: The Warren Era of the Supreme Court*, Justice Arthur Goldberg, who had since retired, spoke of the Warren Court and its critics. Drawing upon history he

[37] Harry Byrd to James Kilpatrick, October 18, 1958, HBYP, Box 245.

attempted to deflect the criticism heaped upon the Warren Court, citing a presumed truth that attended to any Supreme Court. Goldberg told the audience, "The Court has been very much the center of the storm in the recent past, but any student of history knows that it has always been so and that this is nothing new."[38] It is both a testament to the good the Warren Court performed and the seriousness of its opponents that Goldberg was entirely wrong. Historical perspective has its limitations; Goldberg overplayed the reliance on history, as have others who have, for varying reasons, argued that the Warren Court only repeated a pattern inherent to the supposed "least dangerous branch." Controversy and consequence had certainly attended to the Taney Court for *Dred Scott* and the New Deal era Court that had frustrated reform, but the Warren Court had in fact attracted an opposition that was different, most notably because the opposition did not just fade away. The resistance that the justices knew would occur in response to *Brown* only carried over throughout the entire Warren Court era.

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The seminal 1954 *Brown v. Board of Education* ruling put an end to the legal cover provided to segregated schooling, even as it did not end school segregation. For those who think of the decision now primarily as a one that met with delay, massive resistance and the implicit rebuke provided by suburban flight, it is still useful to consider the importance the law bestowed upon segregated schooling.[39] Individual choices had had an able ally in the law itself; the Court's ruling took that support away from

[38] "Response by Justice Goldberg at the Presentation of his book *Equal Justice: The Warren Era of the Supreme* Court," December 21, 1971, AGP, Box 70.
[39] On the persistence of segregated schooling see Lawrence McAndrews, *The Era of Education: The Presidents and the Schools, 1965-2001* (Urbana: University of Illinois Press, 2006), 85-89.

segregationists. Even as resistance to the decision called into question the capability of one court to bring about tremendous social change, the ruling nevertheless existed as an important symbol. As historian Harvard Sitkoff put it, "*Brown* heightened the aspirations and expectations of African-Americans as nothing before had."[40] *Brown* both set the country on a course to escape its past and set the Court up as a despised foe for nearly the next fifteen years.

Despite the eventual unanimous decision, getting to that point was not easy for the nine justices. As one scholar of *Brown* explains it, the difficulty for some of the Court's members involved "a conflict between their legal views and their personal values."[41] Though some of the jurists despised segregated schooling, they had understandable concerns over the role that the Supreme Court might have in invalidating the practice. Moreover, even if the Court did call for an end to segregated schools, the justices had legitimate questions over how the Court could command what would involve a massive overhaul of public schooling. All of the justices appreciated the magnitude of the problem. Justice Frankfurter in particular recognized that an opinion from a divided Court might easily promote even greater non-compliance.

In a rare move, the Court entertained countless hours of oral arguments and re-arguments, over a two year span, before reaching a decision on the merits and implementation of its rulings. "Easy cases," as Lucas Powe Jr., explains the care the justice took and the difficulty in *Brown*, "hardly need a second go-round."[42] Precedent,

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[40] Harvard Sitkoff, *The Struggle for Black Equality, 1954-1992*, revised edition, (New York: Hill and Wang, 1993), 22.
[41] Michael Klarman, "*Brown* at 50," *Virginia Law Review*, October 2004, 1613-1633, (quote at 1614).
[42] Powe, *supra* note 13, at 23. He makes the point about the amount of time devoted to oral arguments, let alone other factors, as a compelling reminder that the results were not easy. *Baker v. Carr*, the first apportionment decision from 1962, also benefited from two rounds of oral arguments.

the ideals of judicial restraint, concerns over compliance and history all complicated any effort to outlaw segregation in public schools. Because of these concerns, numerous justices had qualms about overruling "separate but equal." Some of the justices wondered about the fallout from opposition to the ruling, others doubted that the intent of the Fourteenth Amendment framers commanded overturning segregated schools and others still accepted racist folkways.[43] Notably, Justice Jackson, in conference and from the re-argument in 1953 through the spring of 1954, took positions that sided up to the virtues of judicial restraint, regretting that the normal channels of political and legal change could not bring about an end to desegregation.[44] He even prepared a concurrence.[45] Yet, these positions and his possible concurrence scarcely made Jackson a supporter of racial discrimination. Other justices, such as Clark, Reed and Vinson, also had considerable doubts about the wisdom, let alone the constitutional basis, for overturning the settled practice of segregated schooling.[46] Reed remained the longest holdout.

First argued before the Court in December 1952 only to then be held over for subsequent re-argument on two more occasions, *Brown v. Board of Education* featured a bundle of cases from Delaware, Kansas, South Carolina, Virginia and the District of Columbia. Because of the peculiarities of the U.S. Constitution and the federal status of Washington, D.C., the case there led to a separate ruling in *Bolling v. Sharpe* that relied upon the Fifth Amendment. Only in the Delaware case had mildly favorable results occurred for the desegregation cause; all of the other cases had come from lower courts

[43] Patterson, *supra* note 5, at 54-57.
[44] Belknap, *supra* note 23, at 32.
[45] "Memorandum by Mr. Justice Jackson," March 15, 1954, RHJP, Box 184.
[46] Klarman, *supra* note 41, at 1614-1616

that had validated segregated schooling. Turning against the "separate but equal" doctrine required the Court to do more than just follow its own civil rights ruling of the past few decades. The 1938 *Gaines* ruling and Vinson Court precedents provided some support but this was after all public schools, with much larger stakes in play.[47] Those rulings had actually validated separate but equal as a workable and permissible standard. Segregationists still could wonder if the Court would overrule separate but equal or instead find a narrow way to meet the demands of those who called for an end to segregated schooling. What is more, the Court had to encounter both the country's history and its own contributions to America's caste system. Challengers to segregated schooling sought to invalidate a way of life that the Court itself had sanctioned, notably in the infamous 1896 ruling in *Plessy v. Ferguson*, which not only adopted the "separate but equal" standard but also stipulated that meeting that standard would not be an onerous task. The animosities on the Vinson Court did not presage quick and easy resolution of the desegregation matter. Predictably, the Court did not disappoint.

NAACP attorneys directly challenged segregated schooling as a violation of the U.S. Constitution and the Fourteenth Amendment. There would be no argument that the organization and those for whom it appeared merely hoped for separate but equal facilities. To support their objections, both briefs and oral arguments continued to rely upon academic work by Kenneth and Mamie Clark that posited a causal relationship between segregations and damaging effects on the psychology and learning of African-American children. The Court's eventual citations, if not reliance upon, seemingly

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

modern sociological and psychological evidence provided segregationists and critics of the Court one more point of attack.[48]

On the other hand, those who argued before the Court in defense of segregation grounded their cases in the increasing equalization of school facilities, past precedent, the intentions of the Fourteenth Amendment's framers and the inadequacy of the evidence introduced to prove the injurious affects of segregated schooling. Even a glance at some of the dialogue during the initial oral arguments in December 1952 helps reveal the tremendous divergences between the two sides and that the Court clearly had not made up its mind.

Thurgood Marshall, who argued for those who challenged the law in *Briggs v. Elliot*, openly spoke of "the badge of slavery" and a "badge of inferiority" as he sought to expose the rationales that propped up discrimination based on race. Attempting to assuage any fears, however, Marshall erred or misled the Court in suggesting, if not predicting, to the justices that the fallout would be comparable to the meager fallout from the higher education segregation rulings in *McLaurin* and *Sweatt*.[49] Marshall's December 9, 1952 appearance before the Court on behalf of the South Carolina parents largely became a question and answer session with Justice Frankfurter, who took every occasion to remind Marshall of the uniqueness and gravity of the cases. Marshall responded confidently. He did not deviate from the forceful position that appeared throughout the other presentations of those who sought an end to segregated schooling: racial

[48] Cottrol, Diamond and Ware, s*upra* note 5, at 140. Also see the oral arguments of Robert Carter and Thurgood Marshall in 1952 , Leon Friedman, ed. *Brown v. Board: The Landmark Oral Argument Before the Supreme Court* (New York: New Press, 2004), 17 and 38-39.
[49] Friedman, *Id*. at 46.

classifications for public school children inherently violated the U.S. Constitution and its Equal Protection Clause.

Former presidential candidate and distinguished legal advocate John W. Davis appeared to argue the cause for South Carolina. Prompted in no small part by Governor James Byrnes recent efforts at improving the resources of segregated schools, Davis told the justices right away that South Carolina had done precisely what the law required: providing equal educational facilities, equal salaries for teachers and an equal opportunity. Moreover, Davis challenged the entire foundations of Marshall's argument that seemed more suitable for the legislative arena not a courtroom designed to pass judgment on constitutional questions. The framers of the Fourteenth Amendment had not outlawed segregated schools, and even in response to Justice Burton's query about changing conditions, Davis responded with a bedrock ideal "that changed conditions may affect policy, but changed conditions cannot broaden the terminology of the Constitution." Even as Davis appeared to give some ground that conditions might change, he held firm to the ideal that the Constitution could not.[50] Clearly, the Court, at least if it were to concur with the arguments of either side in the desegregations cases in 1952, had encountered no real argument from either side that provided possibilities for constitutional compromise.

Others who appeared pressed a case similar to that made by Marshall and his adversary Davis. But after three days of oral arguments, conference deliberations and much consideration the Vinson-led Court could not reach a satisfactory resolution to the initial round of arguments in the *Brown* bundle. The votes were most likely there to overturn segregated schooling but not with the unanimity that Frankfurter and some of

[50] *Id*. at 51 and 55.

the other justices thought important.[51] By June 1953 the nine justices had yet to decide on the case. Divisions on the Court and the justices' awareness of the gravity of the problems helped ensure that a new set of oral arguments would be necessary. Furthermore, those justices already prepared or at least inclined to outlaw school segregation, notably Justice Frankfurter, recognized that a Court that spoke with one voice might best ensure public and political acceptance of any ruling. Accordingly, Frankfurter fashioned questions for the competing sides to consider for the next round. In setting the cases over for re-argument in the next term, the Court took a unique step.

Two months after he had come to the Court to replace the deceased chief justice, Earl Warren presided over the re-arguments in *Brown*. He had gingerly occupied the chief justice position. Acknowledging his inexperience, Warren temporarily allowed the Court's senior justice, Hugo Black, to run the conference sessions. Warren also brought a demeanor to the Court that made it a much different place than it had been during Vinson's tenure. The new chief justice made it a point to engage his colleagues in a diplomatic and approachable manner. By the time the Court entertained the re-argument, the competing sides had had the time to consider the questions put to them about the intent of the framers of the Fourteenth Amendment, where, if anywhere, the power to end segregation resided and, also about how the Court could proceed in implementing a desegregation decree.[52] After the three days of re-argument in December 1953, each side repeated charges and claims from before, and in addition staked out predictable positions on the intentions of the Fourteenth Amendment's framers. The re-hearing also benefited from the participation of the Eisenhower Justice Department, which inherited a

[51] Powe, *supra* note 13, at 23.
[52] Irons, s*upra* note 35, at 152.

commitment from the previous White House in support of the legal cause to end segregated schools. Whatever the demerits of the Eisenhower administration's later halting efforts in bringing about compliance, it at least provided support for ending segregated schools. The Justice Department briefs afforded particular attention to the national security and cold war arguments, positing that segregated schooling hurt the United States in its global leadership role.

The new chief justice, despite his fairness in running the conference of his colleagues, left no doubts about how he thought the Court should rule. Racial inferiority was all that supported the practice. Warren knew it and framed his presentation of the issues involved in such a way to make sure his colleagues knew it also. Much of the conference discussion dealt entirely with the ramifications of ending school segregation and the problem of compliance. Be that as it may, the Court had been unable to decide one of the important questions that Frankfurter had put to the attorneys and to the conference about the intentions of the Fourteenth Amendment and its framers, namely whether or not they intended for the amendment to outlaw school desegregation. An affirmative answer would have been painful; it would indicate that the various states and locales had carried out one of the most important public functions in contravention of the amendment's framers. A no answer also had its drawbacks as it would apparently weaken the Court's hand if it were to void school segregation. In the end, the answer was an open one; not enough evidence existed to justify one conclusion or the other. Such an open declaration that the historical record seemed inconclusive would hardly, once the Court offered its opinion, help placate those who hoped to see segregated schooling survive.

Even though the evidence from the past did not seem to support the outcome that many of the justices wanted, by April 1954 all of the justices, except Stanley Reed, had committed to ruling school segregation unconstitutional. Justice Reed came around, due in no small part to the personal pleas of Chief Justice Warren.[53] While a unanimous decision, *Brown* still represented a bundle of compromises. Compromises became necessary in order to bring along the presumably hostile members of the American populace and the jurists unsure about to go about ordering desegregation of the schools involved in the litigation.

The Court announced its highly anticipated opinion on May 17, 1954. The brief, Warren-authored opinion in *Brown v. Board of Education* contained many of the hallmarks that circulated in decisions over the next fifteen years, decisions that attracted the scrutiny of the academic community and the ire of the Court's many non-academic foes. Nevertheless, as the chief justice explained in communication to the other justices: "the opinion should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory."[54] At least in *Brown* the Court did not employ history in a dubious manner—as it would in the apportionment cases nearly a decade later. The opinion indicated that the Court had been unable to make a clear determination of the intent of Congress in fashioning the Fourteenth Amendment. Absent such historical direction, the Court could not deny that since the adoption of the amendment that public education had become increasingly significant as a state and local endeavor. Warren's opinion confidently declared: "[W]e cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We

[53] Powe, *supra* note 13, at 28.
[54] Earl Warren to the Conference, May 7, 1954, RHJP, Box 184, Folder 5.

must consider public education in the light of its full development and its present place in American life throughout the nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."[55]

Those who might wonder about the relevance of public education and its role in American society as a relevant legal factor should not overlook that such an emphasis paralleled the ideals espoused in the American Federation of Teacher's *amicus* briefs. Those who argued for a static, unchanging understanding of the Constitution surely would have a hard time overlooking that, since 1868, public education had become arguably the most important public function in state and local affairs. The Court held that segregation, by its very existence, robbed pupils of the opportunities of an equal education. No attempts at resource equalization between schools, the Court reasoned, could overcome the harm segregated schooling caused. Hence the Court ruled "that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[56]

Segregation, by its very existence, involved an inequality that the Court no longer found consonant with the Constitutional demands of equal protection under the law. Whether or not the opinion had adequately grounded its holding in the law, instead of the justice's views on right and wrong, remains one of the frustrating problems of *Brown*. Yet, unlike some other changes in the Warren Court era, the least that can be said is that the opinion contained an honest, if indirect, denunciation of past legal precedent.

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[55] *Brown v. Board of Education*, 347 U.S. 483 at 492-493 (1954).

[56] *Id*. at 495. The Court also announced *Bolling v. Sharpe* on the same day as *Brown*, ruling that segregation in the nation's capital violated the Fifth Amendment. The "reverse incorporation" rationale in *Bolling* essentially held that the federal government could not be held to a lower standard than the states were subjected to because of the Equal Protection Clause. Since the Fifth Amendment does not contain an Equal Protection Clause, the reverse incorporation rationale remains one of the oddest jurisprudential rationales, along with the penumbras and privacy rights ideas from *Griswold v. Connecticut*, of the entire Warren Court era.

Although the Court did not rule "separate but equal" invalid in all its contexts, in the operation of public schools at least the Court had put legally enforced segregation on a clear path to extinction. Following the announcement of the opinion some compliance occurred in the Border States. Deep South states, on the other hand, had no inclination to heed the Court's message

Substantial portent existed in Senator Eastland's reactions that the opponents of the initial ruling would "take whatever steps are necessary to retain segregation in education."[57] Outrage over the decision, though expected, existed as far more than just ephemeral, headline grabbing rhetoric. All throughout the South, civic groups, leaders and media responded with an array of denunciations. One year after the initial *Brown* ruling, the Virginia Society, Sons of the American Revolution unanimously approved a resolution that condemned the Supreme Court's recent unprecedented actions. The resolution mentioned an unnamed decision from May 17, 1954 that confirmed the Court's unwillingness to respect the sovereign states. Ominous trends had confirmed a supposed disrespect for state sovereignty for some time, but *Brown* had confirmed that "the Supreme Court has tended to disregard the rights reserved to the states under the Tenth Amendment." The organization's secretary, Kenneth Patty sent the resolution to each Warren Court justice.[58] Such grassroots feedback, while not unexpected, only increased throughout the Warren Court era. *Brown* provided a clear precedent that Court foes would follow for the next fifteen years.

A more immediate problem existed for the Court: how to go about implementing the desegregation decree. Compromise within the Court had much to do with what

[57] *Washington Post*, May 18, 1954, 1.
[58] Kenneth Patty to Harold Burton, September 22, 1955, HBP, Box 104, Folder 5.

mattered outside of it. Putting off resolution of the questions over implementing school desegregation represented the Court's awareness that it had to move carefully. Aware of the limits to its own power, the limits to the power of the federal courts and the aftershocks the ruling would cause, the Court did not match its ruling with an enforceable decree for bringing about school desegregation. The problems were immense. As Justice Frankfurter had put it to his colleagues even before the original announcement in *Brown*, a "declaration of unconstitutionality is not a wand by which these transformations can be accomplished."[59] Frankfurter's caution and the understandable unease of the justices had an important role in the Court's deliberative path. The Court held over that concern for additional arguments for the next term. Calling the original *Brown* decision "a major battle won, not a campaign concluded" *Crisis*, the magazine of the NAACP, got it right in celebrating the result with a necessary dose of realism and in encouraging its readers to remain vigilant and aggressive.[60]

Unfortunately, as the Court encountered a serious limitation it may have only compounded it. Ending segregated schooling, even in the few school districts involved in the litigation, clearly posed tremendous challenges; the appropriate remedy would have seemed to have been a requirement that called for the immediate end to such schools, at least in the districts involved if not nationwide. Simple logistics surely meant that any call for immediate desegregation would have been impossible. Nevertheless, the Court had recognized that even a slower implementation would be met with reticence if not resistance. That the entire re-hearing was about enforcement and a proper decree for enforcement reminds us just how important compliance was to the Court.

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[59] Felix Frankfurter Memorandum to the Conference, January 15, 1954, RHJP, Box 184, Folder 5.
[60] *Crisis*, "Editorials: Segregation Decision," June/July 1954, 352.

Justice Harlan joined the Court to give the body, once again following Justice Jackson's death, a full court of nine justices. Once the Court again had its full complement of justices it entertained oral arguments from April 11-14, 1955. Its May 31, 1955 opinion in *Brown* II, however, encouraged rather than demanded desegregation of public schools.[61] The "all deliberate speed" formula held out promise but also considerable peril. The Court, sensitive to its own top-down role or at least the perception that it had served as the final and most important cause of a radical break, tried to fashion a relief decree that put the power in the hands of schools and local officials. Nonetheless, the Warren opinion could not escape that the federal courts would still have to carry a burden in reviewing compliance efforts and would have to continue to do so with subsequent lawsuits over other school districts.[62]

Brown II seemed to promise that local conditions would matter in any determinations of compliance, but otherwise the opinion offered little in the way of guidance for what "all deliberate speed" even meant. Even without the benefit of hindsight, it is not difficult to recognize the continued peculiarity in what the Court had done. It had overturned, at least for the involved litigants, perhaps the most vital element of Jim Crow in the South, only to then send out less than forceful signals on compliance both for the litigants involved and as part of the broader litigation effort to force compliance. Reform would truly have to come about as the result of further litigation or because of Southern officials who accepted that legally sanctioned school segregation could no longer pass the scrutiny of the Court. Whatever the state of public opinion throughout the country, the Court had decided, both for its own internal comity and

[61] *Brown*, *supra* note 54, at 294. Hugo Black in particular urged the Court not to issue a ruling that it could not enforce. He urged moderation, and argued that the Court could only encourage the South to comply.
[62] *Id*. at 299.

because of concerns of compliance in the affected areas, that an invitation to delay was better than an invitation to a constitutional disaster that might result from whole-scale unwillingness to abide by a decision that demanded immediate desegregation.

At the time, *Crisis* recognized the good in the implementation decision, but lauded the ruling first and foremost because it had re-affirmed the ruling from the previous spring. The NAACP Board of Directors and Officers also expressed support for the ruling, locating a more firm commandment to desegregate schools in the opinion than actually resided there.[63] The Emergency Southwide NAACP, which represented 16 Southern states and the District of Columbia, conference pledged that it would urge member branches "to take whatever action is necessary" to ensure compliance the following school year. It sent a clear directive to its affiliates, encouraging them to make sure the school board members knew of the decision. Further, the affiliates were to check in on the schools, keep the NAACP informed, and with little hint of how upsetting this could be, make sure all knew just how much desegregation's pace ultimately rested "in the hands of the federal courts." *Brown II*, the group contended, "places a challenge on the good faith of the public officials, on the militancy of Negroes and on the integrity of the federal courts."[64] Surely the NAACP would have preferred to praise a ruling that had called for affirmative compliance with school desegregation, but it hardly considered *Brown II* a setback. The NAACP had already grown comfortable with reform by court decree. Yet, even the NAACP recognized the limits to court action. The ruling had put the matter of implementing change in the hands of those officials who had maintained the

[63] "Statement of NAACP Board of Directors and Officers on Supreme Court Decision Rendered May 31, 1955" *Crisis*, June/July 1965, 335.
[64] "Statement of the Emergency Southwide NAACP Conference, Atlanta, Georgia, June 4, 1955" *Crisis*, June/July 1955, 337-340.

segregated schools, a move that could have hardly seemed attractive to the organization that had spent years fighting these same interests. What is important to note is that even the NAACP recognized *Brown II* as an opportunity not an unworkable setback.[65]

Plenty of hostile editorialists from Southern newspapers, while still clinging to outrage over the 1954 ruling, took solace in the *Brown II* decree. From the *Mobile Register* to the *Macon Telegraph*, numerous publications recognized the decision as anything but a victory for the desegregation cause and that the Court had not commanded immediate consent.[66] Compromise on the Court and the moderation of *Brown II* only seemed to embolden the proponents of segregated schooling. Whether a more forceful decree from the Court would have accomplished anything differently is among one of the great, but ultimately unanswerable, counterfactuals in the history of American Constitutional law. Whatever hopes existed on the Court that *Brown II* might help temper public reactions, influential condemnation of the Court and encouragement of resistance came from national political leaders. Senator Eastland fulminated:

> To resist . . . is the only answer. We must resist them in the courts, in our legislative halls, and by the ballots of the people. I know that the southern people will not surrender their dual school system and their racial heritage at the command of this crowd of racial politicians in judicial robes.[67]

Delay had earned the Supreme Court's tacit favor. Those pledged to resist the Court thus had an opportunity to stay on the offensive, and yet still argue that compliance was a long-term goal. This proved disastrous for those who sought swift change. As Bernard Schwartz put it, the formula "ensured flexibility by providing time for enforcement; but it also countenanced delay in vindicating constitutional rights. 'All

[65] Thurgood Marshall and Roy Wilkins, "Interpretation of the Supreme Court Decision and the NAACP Program," *Crisis*, June/July 1955, 329-333.
[66] "Editorial Comment on High Court Ruling," *Crisis*, August/September 1955, 426-427.
[67] *Congressional Record*, May 31, 1955, 7285.

deliberate speed' may never have been intended to mean infinite delay. Yet that is just what it did mean in much of the South."[68]

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In advising Justice Jackson before the initial *Brown* decision, E. Barrett Prettyman, who at the time served as the justice's law clerk, aptly wrote:

> the single most important thing about the Court's decision—perhaps more important than what it holds—is that the country as a whole accept it. I don't mean accept it in the sense that the mass of people will immediately put it into practice; I'm not that unrealistic. I mean that they should be made to feel that the decision is honestly arrived at, confidently espoused and basically sound. They should feel that it expresses certain truths, even if they aren't quite prepared fully to accept those truths themselves or to practice them. And they should be made to feel, as far as possible, that it is a decision based on law. If they receive the decision in this way, segregation should die in relatively short order, no matter how many legal skirmishes ensue. On the other hand, if the country feels that a bunch of liberals in Washington have finally foisted off their social views on the public, it will not only tolerate but aid circumvention of the decision.[69]

Conveying mild credulity, the young clerk, who would also later work for Frankfurter and Harlan following Jackson's untimely death, still had done a splendid job in communicating how careful the Court needed to be in ending school segregation. Unfortunately, many Americans in the South, from members of the Harry Byrd political machine in Virginia to those individuals who signed up as devoted members of a local Citizens' Councils, did not respond to the moderation of *Brown II*. Those who resisted the desegregation of schools consistently thought "that a bunch of liberals in Washington [had] . . . foisted off their social views on the public." They also had countless other objections, many of which would appear not only during the school desegregation battles

[68] Bernard Schwartz, *Decision: How the Supreme Court Decides Cases*, (New York: Oxford University Press, 1996), 103.
[69] E. Barrett Prettyman to Robert Jackson, (no date, but most likely spring 1954), RHJP, Box 184, Folder 5.

but also in the fallout over the Warren Court's work in other areas. The Court had been aware of the public; indeed, the expected reaction to a desegregation mandate hung over everything the Court did in the *Brown* rulings. Even with all of the attention and its gradual implementation order, resistance followed. The sheer magnitude and scope of the resistance to desegregation represented a challenge to the authority of the Supreme Court, which had put its prestige on the line with desegregation effort. Every single attempt to weaken the organizations and arguments that sought brisk compliance presented an even better way to strike back at the Warren Court.

Massive resistance though not inevitable was hardly surprising. At its core, the entire effort involved a clear rejection of the Supreme Court, and at least for the Warren Court the most violent, sustained and long-lasting component of the critique that developed over its role in American law, society and politics in the 1950s and 1960s. It too cast a long shadow over the era. States that sought to defend segregation remained willing to challenge the NAACP in litigation whenever that organization pressed for compliance or fought against pupil placement measures or freedom of choice plans. The NAACP encountered threats and so did those it had valiantly fought to defend and promote. African-American parents had every reason to fear for the safety of their children. Sending their children to schools attempting or forced to comply with desegregation often resulted in harassment, even violence. The images from Little Rock in 1957 were only the more notable.

Delay could become as much of a victory for the resisters as vanquishing the entire desegregation mandate. Segregationist voices still had motives and influences that could vary; assuredly not everything at stake just involved a Supreme Court decision and

the future of public schools, but in meeting some of the individuals and organizations that waged this battle, surveying some of what motivated them and recognizing how this effort set the tone for the whole Warren Court era, we in turn can appreciate how the least dangerous branch of government became in the 1950s and 1960s the most dangerous one.

Reactions, at least initially, to the original 1954 ruling were swift but not always so severe that outright resistance seemed the only logical next step. Border-states often found room to negotiate, change and, in turn, comply with the school desegregation imperative. Elsewhere, however, initial outrage became reluctance that soon turned into resistance. From Birmingham, Alabama to Richmond, Virginia, organizations, political leaders, writers and workaday citizens gathered arguments about the Court, its malfeasance and the reasons to avoid compliance. In tandem with the mixed but hardly compliant popular and political reactions, other desegregation rulings came from lower federal courts. These rulings both involved education and the broader public sphere. In one of the most famous examples, the Supreme Court, in November 1956, affirmed a lower court ruling that outlawed segregated bus travel in Montgomery, Alabama. Rosa Parks and those who stood with her in the bus boycott had a victory. Rigid opponents of the Court thus had even more evidence to sustain their dire predictions. Desegregated schooling thus only represented one of many unwanted prospective changes. To gird support for non-compliance, the segregationists denounced liberal associations, took to a reading of the cold war and national security opposite to the Truman and Eisenhower administrations, and openly argued that the country's educational apartheid served just ends. More specific to the Court's work, the segregationists objected to the Court's reading of history, the justifications in Warren's opinion, how the ruling had amended the

Constitution and, above all else, how the Court had struck a fatal blow to federalism and state's rights. All of the resistance represented an unprecedented challenge, in persistence alone, to the Supreme Court.

Developments in Virginia proved emblematic and the state served, in many ways, as the epicenter for top-down resistance. The commonwealth's proximity to the nation's capital made it even more symbolic and worthy of attention. Leaders of the resistance effort frequently stressed the importance of the efforts in Virginia to the cause of resistance throughout the South. Yet, even in Virginia some of those who would later become devoted leaders of the resistance campaign at first expressed disappointment but not outright rejection of the original 1954 decision. Later observers, whether critics of the Court or not, took the initial moderation of some Virginia leaders to mean insincerity on the part of Democrats such as Governor Thomas Stanley, who served from 1954-1958, and Attorney General James Lindsay Almond, Jr. The initial reluctance or indecisiveness, more likely, gave way to the powerful Byrd machine and Harry Byrd's disapproval of *Brown*. School board members and office-holders throughout the state who spoke of moderation or compliance plans could just as easily get forced out for this apostasy.

Governor Stanley and Attorney General, later Governor, Almond could hardly escape the same pressures. Byrd's domination of Virginia politics ensured that political leaders stayed in line. Others Virginia political figures such as A. Willis Robertson in the U.S. Senate, and Watkins Abbitt, Burr Harrison, Wiliam Tuck and Howard Smith in the U.S. House, all Byrd machine members, participated in the formulation of massive resistance. While the Byrd machine kept political leaders in line, newspaper editor James

Kilpatrick provided in his columns and books what amounted to the misguided legal and historical arguments that would often influence Byrd's rhetoric and that of the entire machine.

Born in Oklahoma City in 1920, Kilpatrick grew up during the desperate times of the Great Depression. His roots extended back in the American South, which has much to do with the unmistakable support for racism that appeared throughout most of his life. Amidst the disastrous socio-economic climate of his youth, he still found work as a copy boy for the *Oklahoma City Times* in the early 1930s. Unable to escape the pull of journalism, he started journalism school in 1936 at the age of 16. As a graduate of the University of Missouri in 1941 he had the good fortune not to serve in the war because of asthmatic conditions. As far as his racial and conservative views were concerned, he also had the fortune of attending schooling in a segregated environment. (In fact, we would have been in attendance at the University of Missouri at the same time that the Hughes Court handed down *Gaines*.) Not long after graduation he began work at the *Richmond News-Leader*. In short order, by 1949 he had become editor of that publication.

Kilpatrick secured a place of journalistic, if not national, importance with his staunch defense of the South in the wake of the *Brown* decision. His cutting editorials in the *Richmond News-Leader* earned him the attention of Virginian politicians and those who followed the events of the day. Virginia's important role in the entire effort to resist desegregation ensured that Kilpatrick's contacts, particularly with Byrd and Byrd machine leaders, and his ideas influenced a broader resistance to the Court. As he would say time and again, his goal was not integration or moderate change but "how best to prevent it." He told Byrd, following one of their intimate discussions over resistance and

the Court, "your distrust for this Court is only exceeded by my own."[70] While the Warren Court acquired many enemies across its lifespan, Byrd and Kilpatrick were pioneering critics. Kilpatrick's criticisms of the Court did not scare off the *National Review* as did the actions of the John Birch Society. The notoriety he gained in providing the case against the Court earned him the chance to cover the Court periodically for the *National Review*, a publication replete with obvious appeals to intellectually defensible positions and, at the same time, despicable and overtly racist denunciations of civil rights reform.

Mendacity, racism and pseudo-intellectualism infused Kilpatrick's writing. At every turn, not unlike other defenders of segregation, he relayed that the states could handle any reform and that only radicals hoped to see the entire system of segregated schooling uprooted. What is more, he appealed to conventional fears over the power of the federal government. In so doing, he rummaged through the past, gathering help from heroic Southerners who had stood up to the federal government. The Warren Court had already become a visible symbol for the power of the federal government. Time and again, therefore, Kilpatrick advanced the objection that the Court in its *Brown* decisions had impermissibly amended the Constitution. As Kilpatrick put it in an editorial from November 23, 1955, "nine men arrogated unto themselves powers vested by the Constitution in the people of not fewer than 36 states."[71] Amending the Constitution was not supposed to be the work of judges, but to charge the Court with this offense simply ignored the settled role the Court had assumed in interpreting the constitutional text in light of the cases and controversies brought before it. Kilpatrick though argued that such

[70] James Kilpatrick to Harry Byrd, November 26, 1957, HBYP, Box 5.
[71] "Nine Men, or 36 States?" in *Interposition: Editorials and Editorial page Presentations,The Richmond News Leader* (Richmond: Editorial Offices, Richmond News Leader), 11.

a settled role for the Court could be overturned if segregationist forces returned to the wisdom of the Founding Fathers, and later 19th century debates over where power resided. The Court had conceded that the past did not provide unambiguous support for its 1954 ruling. Unwilling to accept such complexity in the past, conservatives such as Kilpatrick thus rummaged through the past to find support for an updated campaign of interposition. Accordingly, he encouraged states to ignore rules and laws from the federal government that disturbed state laws and practices.

His book 1957 book *The Sovereign States: Notes of a Citizen of Virginia*, published by Henry Regnery Company, drew upon his earlier writings, contacts with those in the Virginia resistance leadership and own research to support the case for state's rights and interposition. If the Southern Manifesto served as the succinct, yet exhaustive, rhetorical attack on the Court, Kilpatrick's book was the pre-eminent textual exegesis. As much as he attempted to broaden the objection as a defense of all states, anyone would have to know that opposition to *Brown* mattered first and last, as did his appeals to the past that could best unite the South. He argued correctly, and as the Warren Court justices realized, that any acceptance of desegregation would have to come about because of what happened in the states. But this was not just a reminder about the complexity of compliance with the law; Kilpatrick did not just offer the empirical judgment that the people and leaders of the Southern states would have to change their behaviors to permit school desegregation. What Kilpatrick cared most about was the source of such reform. In a nutshell, since the Court, as an agent of the federal government, had decreed school desegregation, the entire effort was invalid. Everything he contributed about desegregation had one unmistakable premise: ensuring non-compliance.

While Byrd machine politicians and Kilpatrick busied themselves denouncing the Court and desegregation, organizations developed throughout the South to provide grassroots opposition to the Court's work. Pure racial hatred girded much of the opposition to desegregation and thus to the Court. Some of the opponents were just more honest than others. The grassroots publications, while they still attempted to capture much of the pseudo-intellectualism of Kilpatrick, unmistakably represented the racism that provided the glue that sustained massive resistance. No national advocate or regional advocate of massive resistance, in print or before a legislative chamber, could honestly pretend that a defense of segregated schooling was not about race. Far too many open declarations of racism existed at the grassroots for any national leader to miss out on the real reasons for the cause they supported.

For instance, the *States' Rights Advocate*, the publication of the Montgomery County Alabama Citizens Council, rejected all of the talk of liberty and rights for African-Americans since it was the white race that had its liberties and rights trampled upon. It expressed its racist outrage in saying that "The blacks can get just as wet in their own pools, they can eat as much in their own restaurants, they can ride just as far, they can breathe as much air, they can see the same pictures, and they can form similar groups for enjoyment." The paper continued, "All of these things they can do within their own group and be happy in so doing if these communist agitators will leave them alone."[72]

Tremendous grassroots opposition flourished in the aftermath of *Brown*. White resistance and massive resistance, though not just the creation of political leaders and elites, often featured those leaders shamelessly exploiting the fears and anxieties of

[72] *States' Rights Advocate*, July 28, 1956 in Papers of the NAACP, Part 20, Reel 13, Library of Congress, Washington, DC (hereinafter NAACP).

ordinary citizens. Undoubtedly the culture and racist practices of the region hardly made joining these efforts a predicament for the hundreds of thousands who joined. The summer after the *Brown* ruling the White Citizens' Council (WCC) started up in Indianola, Mississippi.[73] The growth of this group through local affiliates took off thereafter. Citizens' Councils, by some estimates, came to have 250,000 active members, many in the Deep South, by 1957.

Wherever the efforts and whatever the membership of local councils, the overall goal involved preserving segregated schooling in particular and segregation in general. In instructions for forming local councils to those who read about the movement, Council publications spoke in often idealistic terms of developing citizen leaders, sharing information, grassroots importance and keeping opposition local. They also made frequent historical parallels, referring to the effort, for instance, as an updated version of citizen soldiers from the Revolutionary War.[74] These and other appeals to the past and the virtues of citizen participation did not conceal sinister motives. As David Halberstam put it, "Councils have an almost self-conscious desire for respectability."[75] The efforts to evince even a modicum of respectability would persistently compete with the more open declarations of racism.

WCC groups encouraged the same pressures—from legal to private sources of discrimination—that had often helped keep African-Americans in their place, notably depriving African-Americans of credit, continued employment and any stable place in the

[73] George Lewis, *Massive Resistance: The White Response to the Civil Rights Movement* (London: Hodder Arnold, 2006), 39-47.
[74] *The Councilor Newsletter*, April 1957, in NAACP, Part 20, Reel 13.
[75] David Halberstam, "The White Citizens Councils," *Commentary*, October 1956, NAACP, Part 20, Reel 13.

white-dominated economic system.[76] Pressures also appeared in the form of a deluge of print and media. Propaganda and shoring up support for resistance emerged as the group's overall mandate as it expanded in the coming years. The organization deftly employed the relatively new information medium of television to shore up resistance and turn over any wavering minds. Citizens' Council Forum Films (CCFF) ran on television, for instance, throughout Mississippi and in other Southern states.[77] CCFF featured interviews of conservatives and those who counseled opposition to desegregation. Appearances by Strom Thurmond, John Stennis (D-MS) and others featured the typical template of complaints.[78]

At the time the Council movement seemed to some observers like an updated version of the Klan, even with its apparent rejection of violent ends to preserve some Southern way of life. Yet, as labor organizer Harry Leland Mitchell put it, just because the WCC "does not operate behind hoods" perhaps that made the effort more acceptable and thus dangerous.[79] WCC groups might not have operated behind hoods, but the Council movement featured the conspiratorial pastiche as indictment of the desegregation cause. As has often been the case in American history, the conspiratorial arrangement of the world un-complicated the complicated and helped re-affirm the distrust for some causes and groups that already had enemies. Thus, the Anti-Defamation League, NAACP, communists, ACLU, the Urban League and liberal publications marched in lock step with the Court. Vindication of liberal causes of desegregation, integration, inter-

[76] Elizabeth Geyer, "The New Ku Klux Klan," *Crisis*, March 1956, 139-148.
[77] See Fred Powledge, *Free at Last? The Civil Rights Movement and the People Who Made It* (Boston: Little, Brown and Company, 1991), 182.
[78] Steven D. Classen, *Watching Jim Crow: The Struggles over Mississippi TV, 1955-1969* (Durham: Duke University Press, 2004), 37-38.
[79] Harry Mitchell, "A Preliminary Report: On the Rise of the White Citizens Council and its Ties with Anti-Labor Forces in the South," January 30, 1956, NAACP, Part 20, Reel 13.

marriage, and bringing racial discrimination to an end only proved the influence of such groups.

Other WCC allies also spread throughout the South, leaving a trail of propaganda and denunciation. Prominent public figures made sure to support this grassroots anger through appearances and direct participation. The Federation of Constitutional Government (FCG), headquartered in New Orleans, put out its own newspaper and contributed to the campaign to mold true-believers in resistance. Gathering speeches from the likes of Senator Eastland, the FCG made sure to communicate to its readers and members that national political figures cared about the concerns at the grassroots. Familiar themes of judicial tyranny, a judiciary that engaged in legislative activity and a Court that turned its back on the idea of precedent appeared throughout. As well, this group frequently argued that the Court had become an enemy of liberty and that the Bill of Rights, voting and others individual liberties were under threat.[80] Elsewhere, the Defenders of State Sovereignty and Individual Liberties, founded less than six months after *Brown*, brought together Virginians in a quest to ensure that segregation did not disappear. Within a year of its founding, the group had over 10,000 members. Political elites, however, directly managed an overall effort to perpetuate segregated schools. The directives from the Byrd machine in Virginia helped shutter some schools, ensured that letters to local newspapers repeated charges and guaranteed that Virginia continued to exist on the front lines of the anti-segregation crusade.

Propaganda and organizational work also meshed with state action. One of the more prominent gambits involved attacking and limiting the work of the NAACP. What

[80] Federation for Constitutional Government, "The Road to Tyranny: An Uncontrolled Supreme Court," (no date, most likely 1957), Brown University Library, Hall-Hoag Collection, Box 76.5.

may have seemed like mere retaliation also presented a method for keeping the NAACP from concentrating on bringing about school desegregation, not to mention fighting for other civil rights improvements. It also presented an indirect, but quite accurate, weapon for attacking the Court. Throughout the South, municipalities and states issued new rules or interpreted old ones so as to stifle the NAACP. Notable examples involved restricting the NAACP's membership solicitation efforts, requiring the group to register its members and proposing to restrict state employees, such as teachers, from belonging to the NAACP. In Georgia, for instance, the state revenue agency attempted to collect state taxes from the NAACP, an organization that theretofore had a viable exemption as a non-profit enterprise.[81] Georgia's retaliatory move had an analogue even at the federal level. In 1957, under pressure from certain members of Congress, the Eisenhower administration and the Internal Revenue Service required that the NAACP spin off its Legal Defense Fund.[82] Such pressures only continued. Harry Byrd did not give up, admitting clearly to Howard Smith that Byrd had pressured the IRS to revoke the NAACP's tax-exempt status. For Byrd there was nothing non-profit about an organization, as he put it to Smith, "destroying our educational system."[83] Even a mildly successful effort to enjoin the NAACP's operation could then stanch the flow of information from a temporarily defunct state branch, its members and the national office, precisely a situation that Executive Secretary Roy Wilkins, for instance, complained about in 1957 to one Texan friend of the organization.[84] Weakening the NAACP,

[81] *Crisis*, January 1957, 45.
[82] Gilbert Jonas, *Freedom's Sword: The NAACP and the Struggle Against Racism in America 1909-1969* (New York: Routledge, 2005), 74.
[83] Harry Byrd to Howard Smith, August 7, 1958, Howard Smith Papers, Box, 108, University of Virginia, Small Special Collections Library.
[84] Roy Wilkins to Mrs. C.V. Adair, March 27, 1957, NAACP, Part 20, Reel 12.

however temporarily, represented one of the most effective tactics for striking back at the Supreme Court.

Elsewhere, the familiar bugbear of associating the NAACP with Communism took on enhanced importance. The Warren Court developed an inconsistent record on domestic subversion in the 1950s. Enough diversity existed in its rulings to leave both the ACLU and the right-wing *Dan Smoot Report* dissatisfied.[85] But the cold war, particularly with Senator Eastland's constant reminders of the connections between subversion and civil rights advocacy, provided little middle ground. In other words, during the 1950s and 1960s those on the political scene recognized communism and anti-communism. Those who participated in public life, in any meaningful way, had to choose. Grassroots groups, pre-existing civic organizations and Southern newspapers often repeated the charge that desegregation supporters and civil rights groups had made their choice one of pro-communism.

In the U.S. Senate, James Eastland championed, as much as anyone, the putative connection between what the Court had done in *Brown* to the false ideology of communism and its patron, the NAACP. Others at the state level followed the same script. Attorney General Eugene Cook of Georgia, speaking before the annual convention of the Peace Officers Association of Georgia addressed "the communist inspired doctrine of racial integration and amalgamation" and the NAACP as an undeniable subversive agent. Racial improvements, so the argument suggested, were nothing more than a ruse for a larger subversive agenda. Confirmation of these subversive connections, however infrequent, only ended up making it more difficult for

[85] For instance "Impeaching Earl Warren, Part I," *The Dan Smoot Report*, January 30, 1961, Right Wing Literature Collection, Cornell University Library.

desegregation specifically and civil rights improvements broadly.[86] Certainly, so the charges alleged, the sociological and psychological evidence on which the Court had supposedly relied had communist sources of inspiration. *Brown* was thus updated sedition.[87] Moreover, segregationists in the South had a veritable history of associating any calls for racial change with outside agitation. *Brown* intensified a connection at least as old as the Stono Rebellion. Court critics too took the unusual position of arguing about state's rights but also the sanctity of national security in exposing these inordinately false charges.[88] Merely by associating the group with communism, requiring it to register and defend itself in Court, diverted the NAACP's attention from bringing about desegregated schooling.

Aside from targeting the NAACP as an indirect but powerful way to perpetuate desegregated schooling, state and local efforts directly evaded the desegregation mandate. Pupil placement and freedom of choice laws mainly worked against any real compliance. In a state like Virginia all options of resistance seemed on the table. Everything from closing schools to changing the state constitution so as to allow public funds to go to private, segregated, schools earned discussion and experimentation. All deliberate speed had to be met with all deliberate resistance; even token desegregation could lead to victories for moderation if not liberalism. Throughout the 1950s the Virginia Assembly put up barriers even as court decrees often got in the way. Byrd machine supporters voiced the virtues of federalism and local predilections—a persistent line of criticism throughout the era on controversial jurisprudence. Yet, the resisters in Virginia often

[86] Eugene Cook, "The Ugly Truth about the NAACP," NAACP, Part 20, Reel 13.
[87] See Eastland speaking of these connections *Congressional Record*, May 26, 1955, 7119-7124.
[88] Jeff Woods makes this point in his splendid *Black Struggle, Red Scare: Segregation and Anti-Communism in the South, 1948-1968* (Baton Rouge: Louisiana State University Press, 2004), in particular 49-84.

could only let this respect for autonomy go so far; those who might have at least embraced desegregation, if only to keep schools in Charlottesville or Norfolk from closing in 1958, also had to be resisted. Byrd and his partisans could not accept deviations. Segregationists conveniently embraced, and sometimes scorned, local choice.

Slippery slope thinking abounded. Just as 19th century proponents of slavery thought the Tallmadge Amendment from 1819 or Wilmot Proviso from 1846, if approved, would represent the first step in the destruction of slavery, segregationists from the mid-twentieth century argued that any one instance of integration would only then spread elsewhere. School board officials, newspapers, unknown politicians, mothers and fathers all had to remain devoted to the cause. Accepting the Court's rulings simply remained unpalatable. Token acceptance of segregation, even in a distant school district across the state, could presage greater integration. Harry Byrd represented this form of thinking well. Writing to his ally Kilpatrick, Byrd complained precisely of recent developments in North Carolina. He expressed disappointment in Sam Ervin (D-NC), wondering if that state had "fallen into the trap of beginning integration."[89] Though the preferences for segregated schooling ran deep in the American South and conceding the merits of understanding the American past from the bottom up, the political leaders in the American South provided detestable leadership in the 1950s and 1960s.

The country did not know much about the 47 year-old governor of Arkansas, Orval Faubus. Yet, as the one of the greatest constitutional conflicts of the 20th century unfolded in 1957 and 1958, Faubus became both notorious and famous, not only throughout the country but the entire world. Charitably, one might describe Faubus as merely opportunistic but his actions made an already tense situation a disaster. Writing

[89] Harry Byrd to James Kilpatrick, July 2, 1957, HBYP, Box 245.

just before the Warren Court entertained arguments in 1958 about delays in desegregation in Arkansas, the *New York Times* wrote of Faubus, "school desegregation in the South far transcends in importance the influence of any one man; but if one man can be selected for the dubious honor of the being the evil genius . . . that man is the Governor of Arkansas."[90] Partially to aid his political prospects and in response to the Little Rock branch of the WCC, the Capital Citizens' Council, Faubus willingly became the face of bigotry in America. The battle that took place in Little Rock, in turn, provided the most severe test yet of the will of the Warren Court and the extent to which the federal government would enforce the desegregation mandate.

The local NAACP originally had reason to believe that moderate Little Rock would seek to hasten desegregation even before *Brown II*. The legislature in Arkansas, in the spring of 1955, did not put into law a pupil assignment law that some had proposed. In Hoxie, Arkansas, segregationist groups attempted to inhibit the desegregation of schools, but after some delay the school board proceeded with its plans in October 1955.[91] Following the apparent confirmation of Arkansas' moderation, segregationist groups redoubled their efforts. Nonetheless, after *Brown II* the Little Rock School Board adopted a plan that had much caution and little haste, as only Central High School would begin the process in 1957. Later desegregation in other schools would have begun in the early 1960s. The local NAACP, through litigation beginning in 1956, sought to hasten the school desegregation.[92] Over two dozen local African-American students had attempted to enroll at various Little Rock public schools in January 1956. Rebuffed by

[90] "A Historic Court Session," *New York Times*, August 27, 1958, 28.
[91] See Neil R. McMillen, "The White Citizen's Council and Resistance to School Desegregation in Arkansas," in John A. Kirk, ed. *An Epitaph for Little Rock: A Fiftieth Anniversary Retrospective on the Central High Crisis* (Fayetteville: The University of Arkansas Press, 2008), 12-14.
[92] Freyer, *supra* note 25, at 13-31.

school authorities, many of these students and their parents joined the local NAACP efforts to force integration through federal court action. These initial legal challenges met with dismissals. Later school board plans for the gradual desegregation of Little Rock schools met with the endorsement of the federal judiciary. At the start of the 1957-1958 school year, Little Rock prepared to enroll ten African-American students at Central High School.

With a last minute injunction turned aside, the school board prepared to comply and even predicted a calm compliance. Unfortunately, the situation got out of control—again revealing the importance of key political and organizational elites spurring opposition. Faubus, a governor with a moderate record, had increasingly recognized that his political fate would rise and fall with the cause of resistance.[93] In late August 1957, numerous local officials, including those from law enforcement, expressed open doubt that disorder would attend to the opening of the school to blacks. The governor, however, had made up his mind.[94]

Citing the desire to avoid violence but in fact only helping cause it, Faubus went about putting up roadblocks to the integration of Central High School under the pretense of preserving order. On September 2, 1957 Faubus declared, in a television address, that he would employ the Arkansas National Guard to ensure that desegregation did not take place. By his twisted justification, he said that the troops would be there "to maintain order." Further, he declared that the militia would "not act as segregationists or integrationists but as soldiers."[95] Arkansas, its legislature and its citizens, had forced his hand, so he argued, by engaging in varied tactics that unsettled the state. As so many

[93] *Id*. at 95.
[94] *Id*. at 105.
[95] "Militia Sent to Little Rock; School Integration Put Off," *New York Times*, September 3, 1957, 1

political leaders in the South chose to do, resistance had to attend to token accommodation. He claimed that to ignore signs of danger would entail ignoring the will of the people and their representatives; Faubus though caused this danger far more than he sought to forestall it. Faubus may not have been responsible for every single incident of coercion and violence, but his role in encouraging resistance must never allow future re-interpretation of the past to grant an agency at the grassroots that overlooks the unmistakable influence of political elites. One of the African-American students who became part of the Little Rock Nine, Melba Beals, remembered that "the phone didn't stop ringing." Threats came directly to her family, including one individual who promised to blow up their home. Faubus did not make these calls but his essential role in the Little Rock nightmare only made these threats more likely and more sinister. Private grievances always take on greater significance when state action provides sustenance and cover.[96]

A tense standoff followed. Ten African-American students attempted to attend the school at the start of the school year in September only to be turned away. The angry mob that met the heroic students and their parents on September 4, 1957 received assistance from the National Guard troops. The same troops stood passively as the crowd shouted epithets. Fifteen year-old Elizabeth Eckford, who did not go along in the larger group of students and parents organized by Daisy Bates of the Arkansas NAACP, traveled to Central High School only to face off against verbal threats of lynching and the

[96] Freyer, *supra* note 25, at 113. For the threats to Beals see Melba Pattillo Beals, *Warriors Don't Cry: A Searing Memoir of the Battle to Integrate Little Rock's Central High School* (New York: Pocket Books, 1994), 39.

hardened rebuke of the National Guard troops who refused to let her enter the school.[97] The setback and anger directed at defenseless African-American students at the beginning of the school year revealed that segregated schooling would not just go away.

Later that month, nine students, the so-called Little Rock Nine, attempted to attend Central High School on September 23 only to meet another mob. The Little Rock Nine obviously had been placed in even greater danger. By lunch time that day the students had left for home. Negotiations and confrontation between Faubus, the NAACP, the federal courts, the U.S. Justice Department and the White House followed, all while the nine African-American students who hoped to attend Central High School became the national and international symbols for this crisis. On September 24th, President Eisenhower, with some caution and guarded justifications, sent in 1,000 troops and federalized 10,000 Arkansas National Guard troops to protect the students. The following day the nine students attended school under armed protection. They would attend the rest of the school 1957-1958 school year—except for sixteen year-old Minniejean Brown who encountered an unjust suspension and then expulsion because of her understandable reaction to the many white students who had harassed her throughout the term.[98]

The protection of troops at the school only provided some illusion of protection; the African-American students still faced off against harassment, threats and intimidation. With a ratio of white students to African-American students in the school almost difficult to comprehend, the nine, and eventually eight, African-American students attended a school that effectively remained segregated with its nearly 2000 white pupils. The entire

[97] On Eckford's heroic first attempt to attend Central High School see Elizabeth Jacoway, *Turn Away Thy Son: Little Rock, The Crisis That Shocked the Nation* (New York; Free Press, 2007), 1-6.
[98] Freyer, *supra* note 25, at 139.

school existed in a surreal state throughout the school year, both to those who attended it and to those who read about the circumstances there. Virgil Blossom, the school Superintendent, even had to report to the authorities the threat posed by reports of dynamite found in a student locker. The threat, while obviously also about theatrics, did turn out to be real when on January 20, 1958 law enforcement and guard personnel located the explosives.[99] As a continued sign of the international attention bestowed upon the controversy, even the Soviet media took to the airwaves to report, falsely, that one of the African-American students, Elizabeth Eckford, had been murdered.[100] Until the end of the year, the students attended Central High School under the wavering protection of the federal government and the National Guard troops that had been placed in Little Rock.

The Supreme Court eventually entered the fray to re-assert its desegregation mandate. In 1958 the federal courts inconsistently accepted and denied the requests from Little Rock officials to put a 2 ½ year delay on any further desegregation and turn back what little progress had already occurred at Central High School. Such inconsistency only emboldened resisters in Arkansas and elsewhere in the South, particularly in Virginia. Inconsistency also only heightened the chances that the Supreme Court would have to join in, offering some further support for *Brown* and perhaps even improving upon the ruling in *Brown II* that, arguably at least, helped explain the inconsistent lower court jurisprudence.

Appeal to the Supreme Court for reconsideration of delays to integration in Little Rock did not result in immediate action from the full court on June 30, 1958, but by the

[99] "Dynamite Cache Stirs Little Rock," *New York Times*, January 21, 1958, 22.
[100] "Soviet Radio Kills a Little Rock Negro," *New York Times*, February 1, 1958, 3.

early fall all nine justices entertained the controversy in Arkansas.[101] An early August hearing before the Eighth Circuit Court of Appeals, however, provided the competing sides an opportunity to present arguments, before reaching the Supreme Court, on whether or not integration would cease for the 2 ½ years originally requested. That court overruled the prior judicial validation of delay. Nearly five years had passed since the Supreme Court had first entertained oral arguments in *Brown*. The importance of the situation in Little Rock, however, prompted the justices to cut short their time away from the Court. As such, the justices convened on August 28, 1958 to rule on the requests for delayed segregation in Arkansas. Yet again, as with the unique developments in 1954 and 1955 with extended oral arguments and delayed decisions, the Court took novel action to deal with an obvious crisis, possibly before the upcoming school year began in Little Rock.[102]

The power of the Court to enunciate the law had been subject to overwhelming denunciation and denial since May 1954. The opportunity to rule upon the controversy in Arkansas clearly put the Court up against a defiant governor and those both in Arkansas and elsewhere who supported the segregationist cause. Thurgood Marshall appeared before the Court as did the solicitor general, Lee Rankin; Richard Butler appeared for the school board in Little Rock, and in essence all of those who hoped for delay. The arguments for both sides, however, had narrowed somewhat. With previous vindication as a backdrop, Marshall pushed for the Court to continue this vindication; Butler, on the other hand, had to argue for more delay, though ostensibly about order and settling larger questions about "all deliberate speed," in order to provide delay for the sake of delay.

[101] Anthony Lewis, "Little Rock Ruling Blow to Integration," *New York Times*, June 29, 1958, E10.
[102] Freyer, s*upra* note 25, at 151-152

Following the original hearing, the Court again visited the circumstances in Little Rock on September 11, 1958. During the early September oral arguments the Court set out to consider the Eighth Circuit Court of Appeals' unwillingness to allow for the 2 ½ year delay in desegregation. It ended up confirming the Eighth Circuit the following day, and announcing the opinion later in the month.

In another entirely unprecedented action, the Court, in announcing its opinion in the Little Rock case of *Cooper v. Aaron*, offered a written opinion signed by every justice. Justice Brennan, though still relatively new to the Court, had Warren's confidence so he sent the new justice to work on the opinion. Brennan did not disappoint. His opinion represented the huge stakes in the controversy rather than playing them down—a move that only confirmed again the Court's awareness of its detractors. He also effectively solicited input from his colleagues and responded to their concerns over what the opinion should say and how to say it. The opinion recounted the facts that had already been established in lower court findings before getting to the thrust of the analysis. Brennan's opinion argued that court-ordered delays in de-segregation sought to counteract not natural and expected problems of compliance but the problems local officials and segregationist citizens created. All of the delays and request for delays, on the other hand, sought only validation of non-compliance. In an opinion that read at times more like an indictment, Brennan put considerable blame on the elected officials and others who failed to serve the public in Little Rock and in Arkansas. Accordingly, and with unmistakable clarity, the opinion announced that "constitutional rights . . . are not to be sacrificed or yielded to the violence and disorder which have

followed upon the actions of the Governor and Legislature."[103] While the primary responsibilities of public education remained a state function, no state could carry out that function in such a way that deprived African-American students of their right to attend a school not-segregated by the force of law.

Yet, even the *Cooper* decisions did not bring about compliance. Faubus and the school board closed the schools in Little Rock, attempting the popular gambit of then re-opening them as private schools. Organizations and voters soon turned against the extreme measures.[104] Faubus won a third-term as governor but a changeover in a few school board seats and pressures from local organizations changed the dynamic.[105] In the end, segregationists faced off not just against those who supported desegregation; they also faced off against forces of moderation, parents and politicians unwilling to close down public schools and deprive pupils of an education. Shuttering schools, dangerous propaganda, ignoring court orders and making claims that segregated schools would last forever did have paradoxical effects. As historian Jason Sokol argues, "the polarizing experience of school desegregation created bevies of accidental sympathizers." He prominently cites the emergence of the Women's Emergency Committee to Open Our Schools in Little Rock, Arkansas, a group that successfully led a recall effort to oust three of the school board members who had supported closing the schools. "When the very survival of public education was at stake," Sokol writes, "whites in Little Rock chose their public schools over the dogmas of their heritage."[106] Local action paired with a firm

[103] *Cooper v. Aaron*, 358 U.S. 1, 15-16 (1958).
[104] For a memoir of one of the participants in this effort see Sara Murphy, ed. Patrick Murphy, *Breaking the Silence: Little Rock Women's Emergency Committee to Open Our Schools* (Fayetteville: University of Arkansas Press, 1997).
[105] Freyer, *supra* note 25, at 205.
[106] Jason Sokol, *There Goes my Everything: White Southerners in the Age of Civil Rights, 1945-1975* (New York: Knopf, 2006), 117-118.

stand from the Warren Court, over time, helped Arkansas move past its infatuation with outright defiance.

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Brown, *Brown* II, *Cooper* and the resistance efforts the desegregation imperative created are inseparable from the entire Warren Court era. The inseparability is a good, but still frustrating, problem to have. One of the essential facets of this problem involves sorting out how and when broader opposition to the Warren Court, throughout its lifespan, involved race directly and when it involved race less directly. We do not need a history of the opponents to the Warren Court with *Brown* left out; we need a history, however, in which the massive resistance effort and opposition to school desegregation is not the best reason to discount all of the Court's critics. *Brown*, its progeny and the opposition to school desegregation confirm the importance of race in American history. More broadly, these important developments at the outset of the Warren Court era only ensured that those who preferred racial injustice would bestow attention on the Supreme Court. Civil rights rulings assuredly would earn the watchful eye of the Court's critics. However, so much animosity developed for the Court over the initial years of school desegregation that later, seemingly unrelated, developments in jurisprudence almost had to be contested. Separating out the genuine, and sometimes meritorious, criticism of those developments from the criticism that came from segregationists remains difficult. That so many segregationist voices continued to attack the Court, for other developments in constitutional law, makes it difficult if not impossible to put aside their sordid charges when evaluating others.

Unfortunately, reasonable objections or at least nuanced insights about the problems in other prominent developments of constitutional law could all too easily earn dismissal. *Brown* had immediately made Court critics guilty until proven otherwise. Of course many of them were guilty of an inability to get over *Brown* and the threats to the practices so many attempted to defend. A previous generation had already learned that a Court during the initial New Deal years could get in the way; now others learned to distrust the Court even more for getting in the way of the commitment to America's regional educational apartheid. The Court had been forced to involve itself with something much larger than just law and politics. With so many of the other areas of concern, from those involving faith to personal safety, that attracted criticism in the Warren Court era, these were not just unexciting episodes of constitutional interpretation. Like no other era in American history, the Supreme Court during the Earl Warren's tenure had a presumed influence often as real as its actual influence. That it attracted so many critics confirms this influence.

Resistance revealed that the Court had been correct to worry about the problems its ruling would create. In a vital way, the desegregation decisions from the 1950s rendered common cause with the Warren Court nearly impossible for many of the Court's critics. In querying Harry Byrd about what candidate to support in the Virginia Attorney General's race in 1957, James Kilpatrick asked unsurprisingly only about the "segregation question" and whether or not a popular candidate to replace Lindsey Almond was "a one hundred per center."[107] Kilpatrick undoubtedly meant it. When Byrd instructed, the previous year, William Tuck of the "imperative that we hold our

[107] James Kilpatrick to Harry Byrd, February 26, 1957, HBYP, Box 245.

lines on the integration question," he undoubtedly meant it also.[108] But both Kilpatrick and Byrd might have indicated that it would become imperative to hold the line on anything the Warren Court did that seemed to disturb the status quo and upset conceptions of the law that not just Southerners but many conservatives recognized as settled and important. Aside from the obvious influence that *Brown* had on political loyalties in the South, it nearly guaranteed that the Warren Court earned conservative opposition through its entire lifespan.

What is more, *Brown* opponents lived off a myth, which they created and eventually lent credibility, of Court power. Even as the Court barely spoke on the desegregation of schools in the 1950s after *Brown and Brown II* and even as the opponents labored to undercut the Court's authority, the presumption remained that the Court had to have contributed to radical change. Those who still sat in segregated classrooms or lived in segregated neighborhoods years later could of course disagree, but legal change simply had to have been abrupt and immediately consequential. Otherwise, segregationists might have had to recognize that broader forces, even more consequential than the Court, were at work to undermine the validity of legalized racism in the United States.

Parallel to the presumptions of Court power, the judgment only grew over time that the presence of one man on the Court, Earl Warren, explained much of the desegregation mandate and, later, other mischievous work. Illustrative of this point, during the 1957 gubernatorial contest in Virginia the Byrd machine constantly relied upon Virginia's importance for the entire resistance effort, the problems at Little Rock and the role the Court had in causing so much difficulty. But, with at least some measure

[108] Harry Byrd to William Tuck, December 17, 1956, HBYP, Box 239.

of sincerity, Harry Byrd expressed "confidence that if Chief Justice Warren were absent from the Supreme Court, this decision would be reversed."[109] Such a ploy made little sense with the unanimous Court commitment thus far expressed, but in addition to the myths of Court power there also a lingered a myth of Warren's influence that only helped ensure that he became the center of much individual excoriation. Retiring the term the Warren Court only makes sense when we silence all of the Court's opponents who needed a visage to rally against.

Finally, evidence and insight from the entire Warren Court era reinforce the notion that the Court does care about the public, and in sometimes not too subtle ways at least responds to the public and shapes opinions around it. The Warren liberals, even with the changeover in justices and addition to the camp by the early 1960s, hardly seemed as moderate or as willing to capitulate to its opponents. In other high profile cases, particularly those involving apportionment, school prayer and crime, the liberals, one could argue, hoped to make amends for "all deliberate speed." Later liberal additions such as Brennan, Goldberg, Fortas and Marshall helped, but all in all the liberals whether as participants in *Brown* or judges caught up in its lengthened shadow, wanted to eschew the moderation that had only compounded a tense, arguably no-win situation. Apportionment could thus became about near population equality between districts; school prayer, even in its most stripped down secular template, offended the Constitution; its criminal procedure rulings endlessly made it more difficult for the state to punish potential wrongdoers. Thus, the Warren Court era, in many ways, ended up being a dialogue between the Court and its opponents. *Brown* and its progeny made sure of it.

[109] Harry Byrd, "Speech before the Henrico County Democratic Banquet," October 11, 1957, HBYP, Box 1.

III.
The Warren Court as "National School Board": Taking God out of the Classroom in *Engel v. Vitale* and *Abington School District v. Schempp*[1]

[T]he Supreme Court's ideological fanaticism is making it increasingly difficult for our society to breathe normally: to govern itself through established traditions and authority; to rule by the local consensus; to deal effectively with its domestic enemies; to carry forward its implicit commitment to the faith of its fathers.[2]

All should be alerted to the dangers inherent in removing from our formative years the recognition of God and our Christian heritage taught in the public schools.[3]

Citizens who pay soaring taxes with currency marked 'In God we trust' have every right to deplore any education premised on God we ignore.[4]

We are not much concerned about what the Supreme Court has ruled.[5]

In a television interview with Eric Sevareid of CBS News, peerless Harvard University legal scholar Paul Freund provided his thoughtful reactions to yet another Warren Court decision that had provided a target for many of the Court's critics. While primarily about a signal decision, Freund's comments broadly involved the nearly insurmountable burdens placed upon the Supreme Court in its attempts to settle the legal landscape. In late June 1962 the Court had issued its ruling in *Engel v. Vitale*, a 6-1 ruling in which neither Justice Frankfurter nor Justice White participated. *Engel*, in a nutshell, declared New York's twenty-two word school prayer an unconstitutional fusion

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[1] The title draws inspiration from noted constitutional scholar Edwin Corwin's 1949 article on *McCollum v. Board of Education of Champaign County*. See Edwin S. Corwin, "The Supreme Court as National School Board," *Law and Contemporary Problems*, winter 1949, 3-22.

[2] William F. Buckley, Jr., "Mr. Warren's Destructive Court," June 27, 1964, Buckley Online, Hillsdale College Collection, <http://cumulus.hillsdale.edu/buckley/Standard/index.html> (hereinafter HC).

[3] Barry Goldwater, December 1963 letter to Central Massachusetts Citizens for Public Prayer, cited in "On Bible Reading in Public Schools," 1964 Goldwater Campaign Question/Answer Page, Series II, Box 135, Folder 8, The Personal and Political Papers of Senator Barry M. Goldwater, Arizona Historical Foundation, Tempe, Arizona. Goldwater had signed up as a supporter for the efforts to amend the Constitution to allow for prayer in public schools.

[4] 'Religion in the Public Schools," *Christianity Today*, August 30, 1963, 30.

[5] South Carolina Attorney General Daniel McLeod cited in "Nation Chooses Sides in Fight Over Prayer," *U.S. News and World Report*, May 18, 1964, 64.

of church and state, violating the First Amendment's Establishment Clause as made applicable to the states via the Fourteenth Amendment only fifteen years before in *Everson v. Board of Education of Ewing Township*.

Sevareid asked Freund to explain what, in a democratic republic, made school prayer inappropriate if an apparent majority will endorsed the practice. The question was far more than just a law school classroom hypothetical; polling data at the time, and the sustained and sometimes manufactured outcry over the decision thereafter, revealed that far more than a fringe group of Americans preferred that prayer remain in public schools. While not a purely constitutional objection but one more about the consent of the governed, a majority rule objection offered up one of the most potent arguments that often circulated about the Warren Court's more controversial rulings. Majority rule, stripped of the negative connotations Americans so easily forget about from one generation to the next, stood for something easy to ground in the country's democratic creeds. With the frustrations over the *Engel* ruling, counting heads alone, while important, hardly revealed the depth of the country's devotion to Protestant Christianity. What is more, increasingly active, concerned and conservative forces fought for control of Protestantism in the United States. From Carl McIntire's American Council of Churches to the National Association of Evangelicals, an increasingly active force decried developments in American politics, culture, and social thought.[6] Commitments to pluralism notwithstanding, the United States came into the 1960s devoted to Protestant

[6] For background see Sydney Ahlstrom, *A Religious History of the American People*, Second Edition, (New Haven: Yale University Press, 2004), 958-960.

Christianity. Sevareid had provided television's approval to the objection that the tyranny of the majority might have become the tyranny of the minority.[7]

The particular prayer the Court had reviewed did not have a long history; the debates over the relationship between church and state did. The prayer had come about as a result of a 1951 New York Board of Regents decision. Fittingly, the prayer came to be known as the Regents' Prayer. Rather than fashion a mandatory prayer for all New York public schools, the Board of Regents had made the prayer an optional exercise. Not all school districts followed the option. The prayer's appearance in some districts, and in Herricks School District on Long Island in particular, invigorated a sharp contest over the meaning of the First Amendment's Establishment and Free Exercise Clause. While the contest started as a local grievance that became a legal dispute, following the Supreme Court's decision the contest affected the entire country, and further exposed the Warren Court to nationwide attention. Prior lower court rulings had permitted the particular prayer to survive judicial scrutiny. As the case went before the Supreme Court, the justices received "friend of the court" briefs in favor of allowing the prayer's continuance from nearly half of the states. Although many of the states that submitted briefs were from the South and West, states such as New Hampshire, New Jersey, Pennsylvania and Rhode Island also joined in. Clearly the stakes were high and the controversies involved more than regionalized differences over the interpretation of the United States Constitution. The Warren Court, nevertheless, sided with the few parents who had

[7] Many influential and thoughtful Christian commentators welcomed the Court's doings. Later in this chapter I will introduce some of their ideas. Nevertheless, in an era of renewed religiosity and in a country of an undoubted Christian preponderance, to speak of a majoritarian will for the preservation of Christian emphasis in public life is indeed warranted.

carried their lawsuit to the Court under the hope of reversal.[8] Public school prayer had ostensibly met its demise.[9]

Reacting to the contentious ruling and its adversaries, Freund chided those who proposed simple solutions. Far too many people, he suggested, misunderstood and exaggerated the June 25, 1962 *Engel* ruling. Had he elaborated, Freund could have cited the frequent exaggeration from those critics who contended that the ruling portended the expulsion of religion from public life. As so many of the professoriate did, Freund encouraged the Court's critics to read the opinions thoroughly before deciding upon a course of action or persisting in their contempt for the Court. Presuming that careful contemplation of the Court's opinions would produce a better dialogue over the Court was a debatable proposition. Aside from this moment of professorial credulity, Freund's comments about the Court's difficulties—otherwise forgotten in this splendid Peabody Award-winning, three-part television series on the Court—should interest anyone who seeks to understand the United States Supreme Court and its place in American law and politics.

As yet another observer who had come of age during the New Deal era and had studied under Felix Frankfurter at Harvard, Freund could be expected to have particular interest in the limits to judicial power. Freund intoned that the Supreme Court never had to have the last word; as such, he thought the public and political discussions of *Engel* were proper and healthy. Freund nonetheless lamented that, as with the school desegregation problems, justifiable disagreements over fusions of church and state had

[8] Nevertheless, it is worth noting that some states had already stricken public school prayer from the menu. Numerous state courts had interpreted parallel provisions in their own constitutions as prohibitive of government sponsored prayer.

[9] *Presbyterian Life*, January 15, 1962, 29. *Presbyterian Life* and *Christian Century* are two good contemporary sources that have helped in this chapter.

collided with a dogged preference for the status quo. With the political system at loggerheads, it escaped tough choices.[10] Instead of problems earning solutions from the political system, these problems had been put upon the Supreme Court to decide, yet again, in the role of America's philosopher-kings.

Echoing Alexis de Tocqueville, Freund essentially contended that political problems had become legal problems. Yet, in expecting the Court to resolve these problems a paradox soon followed. Americans, and some groups and interests in particular, looked to the Court to make these decisions only to then witness others blame the Court for doing so. Freund seemed to think of this problem as an intractable one; the Court would persist in its availability as a venue to work out these problems, only to earn rebuke, from some circles, for its role.[11] The Court provided Americans an opportunity to relinquish their own responsibilities for these problems of public life. However, their own disagreements, not just the Court, caused many of the problems to persist; the Court then became the last, but not the best, hope for resolution. Americans attempted to settle many debates via legal dispute, but in the process set up the Court to fail, and seemed to want it that way.

In the 1960s the more liberal Warren Court continued to issue rulings that influenced the policies and practices of public schools. While its desegregation rulings of *Brown* and *Cooper* had done more to unsettle the status quo and animated the Court's

[10] One might continue to question the wisdom of the debates and deference to the political system. The non-judicial, political system had, after all, fashioned contemporary prayer requirements in New York and elsewhere precisely to allay contemporary worries over faith, communism, juvenile delinquency and various other woes. Moreover, the political system did not react to the Court's decision with anything near equanimity.

[11] "CBS Reports, Storm Over the Supreme Court, Part Two: The School Prayer Case," air date: March 13, 1963 CBS re-aired the special that summer after the *Abington* decision. Viewing these episodes is both informative for the historian Court-watcher and a difficult experience. The special episodes are, in part, a reminder that television could have been something far superior to its more recent manifestations.

most vile critics, much of the resistance arrived in the form of regionalized grievances. The same sort of unmistakable regional disagreement with the Court did not occur with the Court's rulings on prayer and Bible readings in public schools. Though these rulings did not produce the same level of disquiet that followed many of those involving civil rights and the rights of the accused, judicial repudiation of school prayer and Bible readings represented, for many Americans in many places, a landmark High Court misdeed. These rulings served as one vital piece of evidence of the contested and influential 1960s, a time one historian of American religion noted for its "fundamental shift in American moral and religious attitudes."[12] Protestant America seemed to be losing its hold.

Predicating its decisions upon the adopted idea of a wall of separation between church and state and in the shadow of long-standing legal debates over aid to parochial schools and released time programs, the Court, first in the June 1962 decision of *Engel* and then in the June 1963 decision in *Abington Township v. Schempp*, denied a place for government-directed school prayer and Bible readings, respectively, in public school classrooms.[13] Unlike other more passive or indirect episodes of government aid to religion, public school prayers and Bible reading involved what could be seen as the apex of government promotion of religion. The Court disapproved of those practices, and the whole country took notice.

Vital contemporary evidence attests to the ruling's salience. Newspapers, political journals and Christian and Jewish publications took frequent notice. Even television joined the parade. The documentary series *CBS Reports* devoted two of its

[12] Ahlstrom, *supra* note 6, at 1080.
[13] *Engel v. Vitale* 370 U.S. 421 (1962); *Abbington v. Schempp*, 374 U.S. 203 (1963).

three special reports on the Warren Court, "Storm over the Supreme Court," to the controversial prayer and Bible reading decisions. The third part of this series aired on Wednesday, June 19, 1963, only two short days after the announcement of the *Abington* ruling. Paul Freund, others from the legal academy and direct participants in the prayer and Bible readings litigation provided cool recitation of the facts and calm analysis to CBS; the rest of the country, citizens, religious and political leaders were often far more divided in their reactions.

On another front, some of the Warren Court justices even made a rare choice in publicly defending the rulings. Reading their comments, even passively, it is impossible to overlook that the justices had taken notice of the fallout over the decisions and some of the public discussion. In an August 1962 appearance at the Commonwealth Club in San Francisco, Justice Clark cautioned that the critics of *Engel* missed out on how the Court had only applied the language of the First Amendment. To ignore the clear language, he remarked, would permit the establishment of religion. Further, all the foreboding signs were misread; the Court was not on the march to remove religion from the country.[14]

After the storm had settled somewhat, the irascible and outspoken Justice Douglas contributed to the wider debate. Douglas had no problem allowing his ideas to reach a public unwilling to allow the Court's opinions to do all the work. With the controversial school prayer and Bible reading decisions, Douglas defended the Court's doings (or un-doings as many would have argued) in his 1966 book, *The Bible and the Schools*. Rather than allowing his devoted partisan, Yale scholar Fred Rodell, to do the work for him, Douglas sought out the controversy, engaging the public directly in an attempt to validate the Warren Court's work. There is neither much that was remarkable in Douglas's

[14] "High Court's Ruling on Prayer Defended," *New York Times*, August 4, 1962, 9.

musings, nor much that would have been expected to mollify the Court's critics. What is noteworthy is that Douglas attempted at all.[15] Justices, most often, stick to the notion that the Court's members should allow the opinions they produce to explain and justify the developments in constitutional law. *Engel* and *Abington* were not humdrum developments.

To this day one can scoff at the citations of the divine origins of the United States, but must not ignore that prayer and the Bible had a long-standing schoolroom presence, for educational, moral, secular, religious and coercive reasons. Depending upon the era one consults, the fusion of religiosity and public schooling has had more than the mere support of a minority of Americans. Its presence though has often been misunderstood, over-emphasized and idealized, as has the nation's actual commitment to separation of church and state. The complicated American past reveals that Protestant Christianity has had a remarkably resilient hold on public life. In the 19th century some locales and states emphasized a separation of sorts though religious activities still occurred as an obvious, often customary, part of government. This often appeared as part of the assimilationist, anti-Catholic efforts that employed public schools as vehicles to bring about social, political and Protestant conformity.[16] Farther back, we must keep in mind that colonial era and later American governments fashioned all kinds of laws, from those involving blasphemy to blue laws, with more than just superficial connections to piety.[17] Nonetheless, James Madison, Thomas Jefferson and other important voices from the early Republic had advocated some form of the separation of church and state even as

[15] William O. Douglas, *The Bible and the Schools* (Boston, Little, Brown & Company, 1966).
[16] Bruce Dierenfield, *The Battle Over School Prayer: How Engel v. Vitale Changed America* (Lawrence, Kansas: The University Press of Kansas, 2007), 16-19.
[17] The Warren Court offered an updated validation of blue laws in its 1961 ruling in *McGowan v. Maryland*, 366 U.S. 420 (1961).

that era was one of religion becoming more and more stateless. States were free to establish religion if they wanted, though many refused and the law ended the practice by the 1830s. Because the separation of church and state was an ideal far more than a reality in the American past, the Warren Court competed with ingrained public habits that Court decrees could not eradicate with one or two decisions. What is more, the Supreme Court did not spend the initial one hundred and fifty years of its existence policing the states to ensure that this ideal had a judicial ally in Washington, D.C. The frequent charge of a Supreme Court turning its back on traditions would thus appear as part of the dialogue over the school prayer and Bible reading rulings.

The prayer and Bible reading decisions have materialized as a lodestar in the culture wars ever since. Part of this has been about opposition to the growth of federal power, something to which the Warren Court had served as an able ally. Modern American conservatism's patron cultural warrior, Barry Goldwater, may have been slow to recognize the political gains of criticizing the Court, but he eventually questioned the propriety "for our federal government to ban God almighty from our school rooms." Goldwater, as his fateful 1964 campaign drew to a close, connected the Court to the despised federalization of so much that should have remained in local and state hands. The Court had not done this horrible misdeed alone; the federal government had.[18]

Others had made this connection before and would continue to do so long after the Arizonan did. Yet the post-World War II era was an important one for public schools and how the country set education policy. American public primary and secondary education, as a traditionally local and state affair, began to benefit (or suffer, as some believed) like never before in the 1960s from the involvement of the federal

[18] "Barry Warns of Decaying Moral Fiber," *Chicago Tribune*, October 11, 1964, 1.

government. That decade, with the Court's decrees and the Great Society's educational initiatives like the Elementary and Secondary Education Act, represented a watershed.[19] Conservatives reacted then, and have since, with considerable worry over any diminishment of state and local control of education. Generally, the federal leviathan's encroachment on public education represented one more example of the growth of federal power in play at least since the New Deal era.

Inasmuch as the specifics of the ruling are involved, for nearly fifty years, conservative politicians and commentators, some for political gain and others out of sincere aspirations to change the law, have periodically attempted to bring about some type of reversal of the Court's work. One of the more popular means to this end has involved efforts to amend the U.S. Constitution. More broadly, what goes on, alleged or otherwise, in public schools has often contributed to cultural shouting matches in the American past. To this day, some vocal critics of educational malaise in the United States would even go so far as to regard 1962 as the year the blackboards cracked beyond repair; removing God from the classroom thus supposedly caused a long-term educational decline that many policy initiatives about educational standards have sought to correct.[20] These come together. Nearly twenty years after *Engel*, for instance,

[19] Parochial schools were nothing new, but what with the promises of federal money in the air former University of Chicago President Robert M. Hutchins added to the debate about the separation of church and state and the argument for such money to go to parochial schools also with a June 8, 1963 article in the *Saturday Evening Post*. Hutchins dismissed the notion that one could contest the argument on constitutional grounds, but since America works this way, everything involves the Constitution at some point. He had reacted, in many respects to both long-standing objections and recent ones, including the February 1961 National Council of Churches February 1961 policy announcement that came out squarely against federal monies for parochial schools. Debate over the correctness of money going to aid parochial schools stood at the center of the separation debates in the post-war years. The Court's actions in 1962 and 1963 shifted, at least temporarily, this debate to prayer and Bible readings. The National Council of Churches position is cited in George LaNoue, *Public Funds for Parochial Schools?* (New York: Office of Publication and Distribution, National Council of Churches of Christ, 1963).

[20] Clearly, removing God from public life rankled many observers, but removing God from the schools touched off a much greater concern. Public outrage hardly followed the Warren Court's lesser known

President Ronald Reagan proposed, in May 1982, that Congress enact an amendment that would permit prayer in public schools. Twenty years might have passed but the archetypal conservative Reagan sought to undo a legal ruling, and thus help the country return to a better time when public schools worked well and Christian piety assisted American educational success.[21]

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Like many of the cases that reach the United States Supreme Court, *Engel v. Vitale* had been in the judicial pipeline for some time before its ultimate judicial resolution. In 1958, the Herricks School District adopted, after previous failures to do so, the New York Regent's Prayer. The Regent's Prayer read: "Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our teachers, and our country." Twenty-two, largely lifeless, words attracted not only localized legal scrutiny but eventually caused widespread contempt for a Supreme Court more than willing to stifle one of the most solemn reminders of the country's religious commitments. Mild confusion already existed over religious influences, public schools and the constitutionality of such influences. Just as a leading contemporary example, before Earl Warren's arrival, the Court had weighed in on the constitutionality of religious instruction programs, known as released time, for school-aged students that seemed to involve the state directly.

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ruling in *Torcaso v. Watkins*. The unanimous 1961 *Torcaso* opinion invalidated religious tests for someone to qualify for public office. For *Torcaso* see *Torasco v. Watkins* 367 U.S. 488 (1961).

[21] See broadly and for analysis, Bruce Dierenfield, "Somebody is Tampering with America's Soul: Congress and the School Prayer Debate," *Congress and the Presidency*, August 1997, Volume 24, Issue 2, 167-204.

Decisions on released time programs accounted for some of the confusion. The Supreme Court had most recently affirmed a New York released time program in the 1952 decision in *Zorach v. Clauson*. Students could leave their public schools, during the regular school day, to attend religious instruction proceedings elsewhere. But, that the instruction took place off the school property emerged as one of the determinate factors in the Court's judgment. Writing for a majority of six justices in *Zorach*, Justice Douglas contended that the involvement of the state was minimal. Because the New York program did not allow state funds or resources to support, in a direct manner, the religious instruction efforts, the program passed constitutional muster.[22]

The *Zorach* decision differed in its holding from another recent ruling. Four years before, the Court turned aside a released time program from Illinois, which had analogues in over half of the forty-eight states. The Champaign, Illinois mother, Vashti McCollum, who brought the lawsuit, argued that the released time activities violated the Establishment Clause of the U.S. Constitution. In the Illinois program featured in the 1948 ruling of *McCollum v. Board of Education*, the Court had recognized the state was far more involved. Illinois permitted its released time program instruction to occur on school property. This proved controlling; because the school officials assisted in carrying out the released time program the Court found the program unconstitutional. As Justice Black's majority opinion concluded in *McCollum*:

> Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through

[22] *Zorach v. Clauson*, 343 U.S. 306 (1952). The Supreme Court had first applied the Free Exercise Clause to the states in the 1940 ruling in *Cantwell v. Connecticut* and the Establishment Clause likewise in its 1947 ruling in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947). *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Only two Justices, Black and Douglas, who had participated in *Everson* and *McCollum* still sat on the Court by the time the Court issued its opinion in the Regent's Prayer case.

> use of the state's compulsory public school machinery. This is not separation of Church and State.[23]

Many observers understandably wondered what made the location of these programs so determinative of the Court's outlook. *McCollum* produced considerable angst, some of which resided even in liberal theological circles. Reinhold Niebuhr and a handful of other prominent liberal Protestants issued a carefully worded objection to the absolute or even nearly absolute separation of church and state. One of the drawbacks, the signatories believed, of a rigid emphasis upon such separation would be to "greatly accelerate the trend toward the secularization of our culture."[24] Niebuhr's apparent lament was hardly an unconsidered reaction. Even before the Court handed down *McCollum*, *Christianity and Crisis* issued a similar lament—almost a warning—in openly counseling against any trend to rigid separation of church and state and wondering about the motives of Protestants and Other Americans United for the Separation of Church and State.[25] *McCollum*, immediately after the war and with a country now on edge with a new kind of global war, had produced worry even before it came down. If the liberal sources had doubts it is little surprise that more conservative sources feared the eradication of God from public life.

In fact, the Court's ruling in *Zorach* may have involved the Court backtracking, as it prudently lowered the wall that language from a 1947 ruling in *Everson v. Board of Education* and *McCollum* had seemed to establish. Indeed, Justice Black had written in *Everson* about the Constitution establishing a near absolute separation of church and state. Relying upon the wall metaphor, Black relayed in *Everson* that "the wall must be

[23] *McCollum v. Board of Education*, 333 U.S. 203, at 212 (1948)
[24] *Christianity and Crisis*, March 29, 1948, 90.
[25] *Christianity and Crisis*, February 2, 1948, 2

high and impregnable." Such absolutist terms still did not inhibit the Court from issuing a 5-4 opinion in *Everson* that affirmed a New Jersey practice of using tax dollars to support the routine transportation of parochial school students.[26] The Court and the language of majority opinions seemed to want to ward off the fusion of religion and government without turning aside contemporary examples of that fusion. *Zorach*, every bit as much as *Everson*, seemed to indicate that the wall could, in fact, be breached without the Court's absolute disfavor. The original opinion in the *Engel* case, issued by the Supreme Court of Nassau County, New York, partially relied on *Zorach* in validating the practice of school prayer. The language from *Zorach* would reappear in the 1960s as the Court's critics wondered what had happened to the Court's recognition of this country, as Justice Douglas had put it, as one with "a religious people whose institutions presuppose a Supreme Being."[27] Regardless, released time programs as well as other signs of governmental involvement such as closing laws and aid to parochial schools had ensured that the Court had recent, though unsettled, Establishment Clause jurisprudence prior to the Warren Court's rulings on school prayer and Bible reading.

The Court was in flux by the time it entertained arguments and issued its ruling in *Engel*.[28] Increasingly the more liberal Warren Court of the 1960s had started to appear,

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[26] *Everson v. Board of Education*, 330 U.S. 1 (1947). In *Everson* the Court validated the practice of allowing public monies to support the busing of parochial school students.

[27] *Zorach*, *supra* note 22, at 313.

[28] For *Engel* see Dierenfield, *supra* note 16. Dierenfield's book is the best work on the legal history of the controversy. For Congressional and public reaction see Robert S. Alley, *School Prayer: The Court, the Congress and the First Amendment* (Buffalo, NY: Prometheus Books, 1994), in particular 107-126. For contemporary reactions from scholars see Dallin H. Oaks, ed. *The Wall Between Church and State* (Chicago: The University of Chicago Press, 1963). Though the text, itself a collection of ruminations from a University of Chicago conference on church and state, represented viewpoints pro and con on the pressing issues, such as school prayer, many of the arguments still reflected an abiding faith in reason and calm deliberation to reach a *modus vivendi*. Supreme Court rulings that prompted disagreements of such magnitude though hardly seemed susceptible to such academic suggestions of moderation. Academics who often pleaded for moderation made contributions often as naïve as those who called for the Court's critics to read the Court's opinions.

and as such the school prayer ruling and *Baker v. Carr*, every bit as much as Arthur Goldberg taking over Frankfurter's seat and providing a consistent liberal vote, marked the onset of the new era. Even amidst personnel change continuity mattered. The *Engel* opinion came down the same day that Justice Black earned commendation from the Court and those in attendance for his completion of twenty-five years of service. Fittingly, Black penned the Court's majority opinion. The Establishment Clause provided protection not just for religion but for government since Black contended that "a union of government and religion tends to destroy government and degrade religion."[29] The majority opinion thus exercised no hesitation in labeling the New York Regent's school prayer an impermissible state sponsored "religious activity."[30] Those who defended the Regent's Prayer cited the "spiritual heritage" of the country and the particular prayer. But the secular cover of a "spiritual heritage" could not, in the majority opinion, hide the religious nature of the prayer act. Nor, for that matter, could the denominationally indeterminate language of the official prayer. Justice Black had not quite yet come to display some of his pronounced deviations from the Warren liberals. He provided a trademark Hugo Black opinion, bound up in the certainties that he, and, at least in this opinion, much of the rest of the Warren Court thought existed in the First Amendment.

Supporters of the New York state law providing for the daily prayer could not, Black asserted more than proved, cloak the essence of the activity to guarantee lesser Court scrutiny. Even if pupils did not have to participate, the activity remained a religious one. The opinion stated clearly that "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part

[29] *Engel*, *supra* note 13, at 431
[30] *Id.* at 425.

of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[31] Neither did the voluntary nature of the Regent's Prayer persuade the justices that the practice should survive. Government still remained as an active agent in carrying out a decisively religious activity; the numbers who participated or whether or not stigma attached to those who opted out in that activity had little relevance. After a cursory, though often one-sided, survey of the dangers of state-sponsored religion, Black's opinion seemed to suggest that even in that present era much discord, perhaps even that to parallel the discord of the 18th and 19th century in the United States, awaited if the state and religion came together.[32] Further, he rejected the argument that the Court, in relying upon Establishment Clause ideals, threatened the Free Exercise rights of those who supported the law.[33]

Consistent with an overarching theme of the Warren Court era, the rights of minority interests required sacrificing majoritarian ones, however noble they may have been. [34] Religious practices were to remain an individual choice, free from coercion bound up in state action, such as an official prayer composed by government. Five other justices joined in Black's opinion that, at times, read every bit as much as pronouncement as reasoned analysis from settled principles. Be that as it may, Black's opinion was devoid of a pronounced test for determinations of constitutionality and clear indications

[31] *Id.* at 426.
[32] *Id.* at 430-432.
[33] *Id.* at 431.
[34] Supporter and critics of the decision did not miss this point. As one Episcopalian Bishop, John P. Craine,of Indianapolis put it: "The Supreme Court and such groups as the Civil Liberties Union ought soon to realize that religious groups have rights also which are being denied them by such decisions." Bishop John Craine cited in "Flare-Up Over Court Decisions," *The Christian Century*, August 1, 1962, 945.

of where the Court would draw the line over the relationship between church and state. Contemporary observers from the professoriate did not miss out on these shortcomings. Scholar Alexander Bickel, for instance, expressed criticism over the Court reaching out to invalidate a school prayer at once bland and arguably more secular than sectarian as it appealed to some "vacuous common denominator." Bickel worried, correctly, that the Court had merely set itself up for failure since it could not just force this development on the country.[35] For others, a more reasoned appeal from Black might have accomplished little. *Abington*, both the majority opinion and the concurrences, at least attempted to compensate for the direct, stubborn refusal in *Engel* for the majority to present a more nuanced justification for banishing school prayer.[36]

Only Justice Potter Stewart filed a dissent in *Engel*. Stewart's crisp dissent would have only provided a successful rebuttal to those readers who already shared his views; his dissent neither voiced all of the rationales, constitutional and otherwise, that school prayer proponents entertained nor did it have much chance of appealing to moderates. The succinct opinion built its objections upon tradition, history and even contemporary practice to reject the holding that the Regent's Prayer constituted an establishment of religion. Stewart thought that "to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our nation."[37] In short, so much tradition and history seemed to counsel the allowance of such practices. A far better explication of objections, from the bench at

[35] Alexander Bickel, *The Politics of the Warren Court* (New York: Harper& Row, Publishers, 1965), 206-207 (quote at 206).
[36] Readers of the Court opinion box-scores should reconsider *Brown* and the frequent doubts about its assertiveness, tone and uniqueness in light of *Engel*. Similarities exist between the two written opinions, merely on the level of how their brevity, style and assertiveness make the opinions not only unique but have opened them to proper criticism.
[37] *Engel*, *supra* note 13, at 445.

least, would have to wait until the following summer when Stewart again filed the lone dissent in the Pennsylvania Bible reading and Baltimore Lord's Prayer cases from June 1963.

Engel produced the expected consternation. Indeed, some of the themes advanced in criticism of the Court in July 1962 maintained their relevance over the next few years, even as attention to the issue waxed and waned in Washington, D.C. As a case in point, *National Review* had a predictably sour reaction to *Engel*, sounding off on one of the more frequent complaints about the ramifications of increased secularism. It put the ruling fully in line with other rulings that sought, in its view, to introduce radical change that deviated from prevailing customs. The Warren Court had, yet again, "act[ed] as a revolutionary rather than [as a] constitutional tribunal." Troubling also, the Court had taken a selective view of the nation's heritage and ignored Justice Douglas's own language from *Zorach* that had seemingly settled that government did not have to deter religion. Though often confusing in its critique and prescription, the flagship conservative publication hinted already at a position that encouraged disobedience to those who prayed for a continuation of school prayer.[38] Later in July 1962, in expressing approval for Californian Episcopalian Bishop James A. Pike's criticisms of the decision in *Engel*, the *National Review* pressed on with the worries over increased secularism. The leading journal of conservative thought could only predict a dim future of further lawsuits and inevitable challenges to the place of God in public life.[39] Secularism was well on its way, soon becoming a convenient shorthand term for assailing the Warren Court.

[38] "God Save this Honorable Court," *National Review*, July 17, 1962, 10-11.
[39] "Thou Shall Not Pray," *National Review* July 31, 1962, 51-52.

The June 17, 1963 Court announcement in the *Abington* case featured the results to a protracted challenge to a Pennsylvania state law that had mandated the public school reading of a specified number of verses from the Bible. In the Pennsylvania case, Edward Schempp brought suit on behalf of his three children, one of whom had since graduated, who attended Abington School in Abington, Pennsylvania. At Abington High School the students participated in morning exercises that combined classroom observance, recital and certain students reading selected Bible verses over the school's announcement system. Other schools in Pennsylvania apparently conducted the daily exercises somewhat differently, some for instance involving more direct teacher participation than others, but the law remained on the books and allowed countless Pennsylvanian public school students to have, at minimum, five weekly interactions with God and state.

The Schempp family belonged to the Unitarian Church, a branch of Christianity notable for its liberal concepts of divinity. The family had sought out a legal ruling originally in 1958 when the Pennsylvania law on Bible reading did not provide an opportunity for students to excuse themselves from participation. A favorable lower court ruling on that aspect of their complaint had led to modification of the law to allow for those who chose not to participate to do so; nevertheless, the Schempps pressed on to test even the modified law, from which they again gained a favorable ruling from a federal District Court panel in Pennsylvania.[40] Thus by the time the Warren Court entertained the final appeal involving the Pennsylvania statute, the law, much like the Regent's Prayer provision in New York, allowed children, with the consent of their parents or guardians, to opt out of the daily Bible readings.

[40] *Presbyterian Life*, April 1, 1962, 34

As is often the custom when the Court seeks to clarify the law, *Abington* came to the Court in combination with another appeal (*Murray v. Curtlett*) from a suit involving Baltimore city schools. In the Baltimore case, Madalyn Murray and her son William had sought to end a policy, first instituted over five decades before, that mandated that the start of the school day feature Bible readings and/or the recital of the Lord's Prayer. Previously an original trial court and then, in April 1962, the Maryland Court of Appeals had validated the practice. Accepting the Maryland case for review had much to recommend it. A decision on the case's merits from the Warren Court would allow the Court to clear up the confusion caused by a ruling at odds with *Engel*. Putting the two together thus provided the Court the opportunity to either extend or distinguish *Engel* in some way.

The conventional wisdom at the time had little doubt how the Court would rule at the end of its term in 1963. The professoriate had largely expected the ruling in *Engel*; few from that group could have expected the Court to chart another direction.[41] Outside of the academy, most expected a ruling in line with *Engel*. As a case in point, *The Christian Century*, a supporter of *Engel*, predicted the Court would not retreat from the course the 1962 ruling established. Still, the liberal theological and political journal was on to something quite practical in suggesting that were the Court to deviate, its approbation for the Bible reading would only cause greater controversies as a gaggle of voices would soon debate what passages should be read and from what version of the Bible. Those from other religious worldviews, though the journal ignored non-believers, would have little choice but silent acceptance or, presumably worse, coerced

[41] On the reaction from the legal academy see Phillip B. Kurland, "The Regent's Prayer Case: 'Full of Sound and Fury, Signifying . . .'" *The Supreme Court Review*, 1962, 1-33.

endorsement. As *Christian Century*, and some other thoughtful supporters of the decision writing from a liberal, Protestant perspective counseled, the Court could best serve religion by disallowing government directed prayers, Bible readings and other obvious sectarian practices in the nation's public schools.[42]

For these supporters of the Court, *Engel* had only confirmed the liberal Warren Court's commitments to granting greater meaning to the Bill of Rights. Nevertheless, the Court had retreated before. Anyone who had recognized and remembered the Court's actions from 1948 and 1951 in the released time cases, not to mention the *Gobitis* and *Barnette* flag saluting decisions from the early 1940s, might have not had as much confidence in the conventional wisdom.[43]

As it had in *Engel*, the majority opinion in *Abington* seemed to say that no other conclusion could come about. Simply put, the laws in Pennsylvania and Baltimore served religious ends and maintained religious motivations—even if the motivations were supposedly less important in Establishment Clause jurisprudence. The Bible reading and Lord's Prayer activity could not continue. No citation of the moral or secular benefits of either practice obscured what the Court recognized as sectarian.

Tom Clark wrote for the majority of eight justices. (It is worth noting that three separate concurrences, which at times seemed to respond to some of the worries *Engel* provoked, also appeared in *Abington*.) The majority opinion recognized the religious nature of the American people and their past but likewise accorded great significance to the country's commitment to an ideal of religious freedom free from government

[42] "Prayers, Bibles and Schools," *The Christian Century*, October 24, 1962, 1279-1280.
[43] *Minersville School District v. Gobitis*, 310 U.S. 586 (1940); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Briefly, in *Minersville* the Court had validated the practice of public schools compelling students to say the Pledge of Allegiance and participate in saluting the American flag. Three years later in the *Barnette* ruling the Court reversed course in invalidating the practice.

coercion. He carefully rooted the Court's work in recent precedent that had applied the Establishment Clause to the states and even featured past dissenting language that shared in the precepts of preventing the state from favoring any religion.[44] As with *Engel*, the apparently non-coercive nature of both practices did not help them survive Court scrutiny.[45]

Warding off the deprivation of the rights of identifiable minorities (non-believers, non-Christians and those Christians who objected to the practices) had to trump any majoritarian preferences. Clark at least confined that ingredient of the ruling to the case at hand; there could be cases, the Court admitted, in which the free exercise requirements could outweigh the constitutional mandate against established religion.[46] Neutrality had to serve as the standard for acceptable government interaction with religion; promoting or inhibiting religion was no business of government. Writing for the Court and to send a clear directive, Justice Clark concluded:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.[47]

Justice Stewart provided a better dissent this time around. While he hardly doubted the incorporation of the Establishment Clause through the Equal Protection Clause, Stewart roundly rejected the thrust of the majority's holding. First and foremost, Stewart hoped to see the cases returned to lower courts for further determinations of fact.

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[44] *Abington, supra* note 13, at 215-218.
[45] *Id*. at 224-225.
[46] *Id*. at 225-226.
[47] *Id*. at 227.

Principally, he thought it highly likely that greater variation existed in how these Bible readings and prayer recitations occurred and that the apparent absence of coercion should have carried more weight. He pilloried the majority view for relying upon such an absolutist reading of the First Amendment's putative wall of separation. The absolutist test for determinations of Establishment Clause violations, he essentially argued, turned out to be no test at all. The dissent, as well, came to an entirely different view of the clash between the Establishment and Free Exercise clauses, with Stewart recognizing what he called "a substantial free exercise claim" in the cases before them, a claim that the majority had dismissed out of hand.[48] He even voiced the idea that the Court had granted ascendance to "a religion of secularism."[49] Stewart's dissent still rested, for the most part, on the language of rights and legal arguments. The commitments to Protestant Christianity in the United States ensured that critics would not have the same fidelity to legalisms.

Outside of the Court, particularly from the announcement of *Engel* through the following year and broadly during the rest of the Warren Court era, many critics contended that the Court had done more than just ruin their own freedoms of religious expression. The critics expressed their ideas at times in constitutional terms, arguing for instance that the First Amendment, as created and understood in the past, only denied the establishment of a state religion or religions. They did not, however, overwhelmingly position their opposition in the language of constitutional rights. What they did cling to were ideas beyond the constitutional text, arguing for instance that secularism represented

[48] *Id.* at 312.
[49] *Id*. at 313.

an un-American path and that the cold war demanded that the United States needed to keep God on its side as it battled the Soviet Union.

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The reactions outside of the Court from June 1962 through June 1963, and after *Abington* through the rest of the Warren Court era had a vital influence on the perceptions of the Court, compliance with its decrees and the politics of the era. Groups like the ACLU, the American Jewish Congress and the Protestants and other Americans United for Separation of Church and State welcomed the rulings as vindication of a battle they had waged, some more wholeheartedly than others, at least since *Everson*.[50] It is relevant though that the ACLU had not positioned itself as an overwhelming force for change. The ACLU, much as it did with the apportionment rulings, hardly embraced an absolute separatist position throughout the organization's lifespan, even up to the early 1960s. Its Church-State Committee, set up to counsel the ACLU on national policy, had advocated accommodation. Many of the members of this group were prominent theologians, like liberal Protestant John C. Bennett of Union Theological Seminary, who counseled the ACLU to positions of moderation consistent with the unease many had felt in particular following the aftermath of *McCollum*. Yet, around the same time as the Court's actions in *Engel* and *Abington* the ACLU scuttled these positions in favor of a more absolutist effort.[51] The ACLU's hesitancy both tells us about that organization's history but also

[50] See Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), 219. Walker's work on the ACLU contends that more absolutist, assertive ACLU policy often came from the bottom up. The national ACLU often responded to pressures from its affiliates to become more aggressive in pursuing rights-friendly positions. The same phenomenon occurred with the organization's outlook on apportionment discussed in chapter four.
[51] *Id*. at 222-223.

the limits to liberalism that have existed even in a very different age in which liberalism supposedly set the parameters of important national debates.

Others protested, and they often seemed to have the headlines and the momentum. Fiercest criticism occurred in the wake of *Engel*, increased moderation occurred after *Abington* and the best chances for decisive congressional action to counteract the decisions, during the Warren Court era at least, occurred in 1964 and 1966.[52] All throughout the era, school districts, local governments and state authorities struggled, many deliberately, to come to terms with the Court's actions. Congress served as a frequent battleground for attempts to restore public school prayer. Religious voices though served as natural authorities for counseling what had happened to the country and what would happen to its sectarian commitments now that the Supreme Court had apparently deprived public school children of their Christian piety.

Christian voices had mixed reactions to the Court's rulings. Again, however, that these voices ended up as so important confirms the mythical separation ideal. In other words, the opponents had to be in public life in order to escape it or get pushed out of it. Those who opposed the decisions almost had to decry any hint of growing irreligion. For many of these individuals, religiosity, indeed their own personal salvation, demanded a public sphere infused with Christianity. Publications from various Christian sects thus revealed subtlety, conventionality, sincere worry over secularism and occasionally misguided citations of pluralism. Many liberal Protestant leaders and organizations, in

[52] The House and Senate have voted on school prayer amendments at various times since *Engel*. Only the Senate, in 1966, voted on an amendment during the Warren Court era. Also, during the Warren Court era, the Senate Judiciary Committee held hearings in 1962, not long after *Engel*, and again in 1966; the House Judiciary Committee held hearings in 1964. Congress has also periodically considered restricting the jurisdiction of the federal courts to entertain suits over school prayer and voted on Sense-of-the-Congress resolutions. The congressional attention did not end with Earl Warren's retirement.

fact, supported *Engel* and *Abington*, even with past dalliances with the merits of a fusion of church and state. American Catholics, on the other hands, routinely disliked the Court's doings, as did evangelical organizations. Evangelical Protestant organizations increasingly discovered a heightened interest in politics, in no small part because of the Warren Court. Groups such as the National Association of Evangelicals (NAE), in particular its leadership, wholeheartedly joined the fight to get prayer back in the schoolroom.[53] The NAE's December 1963 resolution on the debate over prayer and Bible reading labeled the developments as irreligious forces that threatened the country. Accordingly the organization supported a broader amendment push to provide for not only invoking God in schools but also in the broader public sphere without fear of Supreme Court condemnation.[54]

Catholic leaders and sources of opinion often took a skeptical to negative view of the rulings. The Jesuit publication *America* put the twenty-two word prayer on the cover of its July 7, 1962 edition, saying that the ruling "deserves to be known as the Black Monday decision." *Engel* only continued the secularization problem in the United States. The ruling represented "quite literally, a stupid decision, a doctrinaire decision, an unrealistic decision, a decision that spits in the face of our history, our tradition, and our heritage as a religious people."[55] *America* could not let go of the issue in 1962 and 1963, though it later softened its criticisms. Were it not for the publication's ugly anti-Semitism, and accusations that Jewish organizations had far too much influence in bringing about the developments, its criticisms would have sounded remarkably

[53] Jonathan Zimmerman, *Whose America: Culture Wars in the Public Schools*, (Cambridge: Harvard University Press, 2002), 174-175 and 177.
[54] See *School Prayers: Hearings Before the Committee on the Judiciary, House of Representatives 82nd Congress, 2nd Session* (Washington, D.C.: U.S. Government Printing Office, 1964), 971-972.
[55] *America*, July 7, 1962, 456.

mainstream—even in a country unsure if it could handle a Catholic in the White House in January 1961.

More moderate views came from *Commonweal*. It did not regard the rulings as an undoubted victory for religious freedom since, as did so many of the Christian critics, *Commonweal* recognized the apparent victory of minority privilege over the wishes of a majority. The Court, in its interest in protecting minority rights, had ignored other sundry considerations, some of which involved tradition and the place of religion in American life. Rather than just object for that reason, a greater appreciation for balance, consensus and pluralism undergirded the objection. Unlike countless other commentators, the publication recognized just how absolutist the decision seemed to be. *Commonweal* expressed frustration by saying, "What is . . . most objectionable about the decision is its lack of subtlety and sensibility. It follows one line of constitutional thought out to its remotest extreme." It compared the decision unfavorably to *Brown*. *Brown* had a "rich-textured awareness of the interplay between constitutional rights and social realities. By comparison, the prayer decision is crude, legalistic and naïve."[56] Even the liberal Catholic viewpoint scarcely could be recognized as an endorsement for the Court's work. Clearly, American Catholics were among the most frequent critics of the school prayer and Bible reading decisions.

Liberal Presbyterian voices, on the other hand, most often doubted that the Court stood poised to remove Christianity from public life. Besides, as a leading Presbyterian journal put it, with the *Brown* ruling as a guide, the citizenry might end up just ignoring the ruling anyway, a move that some critics actually encouraged.[57] That these liberal

[56] "The Court on Prayer," *The Commonweal*, July 13, 1962.
[57] "Supreme Court Prayer Decision—What Does it Mean?" *Presbyterian Life*, August 1, 1962, 16-17.

Protestants and other liberal religious groups supported the Court would later prove instrumental in weakening the congressional efforts to strike back at the Court. *Christian Century*, for instance, routinely defended, one might even say celebrated, the Court's decisions.

While Catholic leaders and publications were some of the most critical of the Court, Father Robert F. Drinan, who was at the time Dean of the Boston College Law School and later became a congressman from Massachusetts, provided one of the more spirited defenses of both the controversial rulings and the Court.[58] In September 1964 at the Red Mass at St. Augustine's Cathedral in Bridgeport, Connecticut, Drinan called for "a Table of Ten Commandments for Christian Jurists." The Warren Court's often tepid defenders on the political scene could have improved their performance had they worked from Drinan's script. He reminds us that some diversity of opinion existed from important Catholics, even if the majority disliked *Engel* and *Abington*. Specific to the rulings, he positioned majoritarian religious tyranny as a far greater danger than the myriad complaints about the Court's work then circulating. More broadly, spiritual and ethical misgivings with the Court and its rulings should not, according to his counsel, lead to misguided attempts to change the Constitution or outlandish criticism of the institution itself. He left room for disagreement with the Court but counseled such tactics as prayer, penitence and patience. Support for the Court, even coming from those in

[58] Interestingly, Drinan had previously been critical of the ACLU, its absolutist positions on the First Amendment and for the organization's paucity of leaders who were Catholic. See Walker, *supra* note 50, 222.

theological and legal circles, though, hardly appealed to many of those dismayed over the school prayer decisions.[59]

A moderate Christian position in support of the Court seemed easy to counsel but quite difficult to obtain. President John F. Kennedy encouraged respect for the decisions, revealing a capstone moderate position. Kennedy, the nation's first Catholic president, encouraged Americans to pray more, not less, and to realize that nothing that the Court had said discouraged Americans from attending church services, making their home a place of piety and re-affirming their own personal religious commitments. He had to be careful in his endorsements but even his diplomatic tone represented a far greater support for the Court's work than President Eisenhower had provided with his public comments about desegregation.[60] While school desegregation and school prayer hardly presented analogous developments, both had huge stakes over compliance. That the moderate Kennedy had such a thoughtful endorsement of the Court's work should remain an important point of comparison for the standard, but no less true, criticism of Eisenhower for his lack of strong support for desegregation. In the checklist of presidential errors and achievements for Kennedy, his support for the Court's work merits greater acclaim or, at least, attention. Responding to a question about the tempest over the Regent's Prayer decision at the end of the 1961 term, John F. Kennedy exclaimed:

> The Supreme Court has made its judgment. A good many people obviously will disagree with it; others will agree with it. But I think that it is important for us, if we are going to maintain our constitutional principle, that we support Supreme Court decisions even when we may not agree with them.[61]

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[59] Reverend Robert Drinan, "Ten Commandments for Christian Jurists," Sermon, Wednesday, September 9, 1964, St. Augustine's Cathedral, Bridgeport, Connecticut, Princeton University, Seeley G. Mudd Library, American Civil Liberties Union Papers, Box 808, Folder 3 (hereinafter ACLU).
[60] "President Urges Court be Backed on Prayer Issue," *New York Times*, June 28, 1962, 1.
[61] *New York Times*, June 28, 1962, 12.

Numerous sources of liberal Protestantism echoed Kennedy. C. Emanuel Carlson, the Executive Director of the Baptist Joint Committee on Public Affairs, representing an overwhelming number of Baptist denominations, endorsed a similar view that private prayer had hardly been ruled unconstitutional.[62] *Christian Century* proposed likewise, encouraging people to realize that the Court had not outlawed prayer. Private prayer remained an option for all Americans, as the publication contended that "the Supreme Court has rendered a service of the greatest importance to true religion as well as to the integrity of a democratic state."[63] The National Conference of Christians and Jews agreed that "the decision challenges the parents and religious leaders to shape and strengthen spiritual commitment by reliance on voluntary means and to resist the temptation to rely on governmental institutions to create religious conviction."[64]

Prominent religious leaders who criticized the rulings chose to remain on the defensive against any perceived gains for irreligion. This is one compelling reason why the argument President Kennedy and others advanced failed to persuade. Accordingly, they often derided the perceived tide of secularism that *National Review* had also lamented. That these citations permeated the broader political discourse only confirms precisely that separation between church and state had stakes far more important than what was and was not permissible in the public sphere, if only narrowly defined as what the state does. They knew that secularization had troubled the country because of developments in science, the pluralism of the country and those who actually welcomed the developments helped encourage other secular trends. The negative reactions to the

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[62] See Carlson's testimony, *supra* note 54, at 105.
[63] "Prayer Still Legal in Public Schools," *Christian Century*, July 4, 1962, 832-833.
[64] National Conference of Christians and Jews Statement cited in "The Court Decides Wisely," *Christian Century*, July 3, 1963, 851.

Court's decisions were not just about what the state did but rather about the spiritual commitments offered in a broader public sphere. Holding on to the fusions of Protestant Christianity and the public sphere, in some respects, served as part of the Free Exercise rights of those dismayed over the Court's rulings. In short, bringing one's faith to bear on others and with others, even outside of the local church, confirmed piety. Continued losses in the public sphere, so the thinking proceeded, could make it even more difficult to ensure salvation in those areas that would remain sectarian and protected.

Sincerity thus abounded over secularism, but so too did political calculation. As long as there existed a chance for political gain from the fusion of church and state, politicians could decry secularism. Whether or not conservative Protestants and conservative Christians lost control of something in this era is tough to say. Since at least the Gilded Age and Progressive era, liberal and conservative theology had dealt with economic injustice and the role of libertarian free market ideology. Yet, opposition to big government has often had its limits. A government that composed prayers could serve cherished sectarian ends. In this instance, state sanctioned activity seemed a blessing not one small step to despised government regulation.

The Reverend Billy Graham accordingly worried in the wake of *Engel* that the United States had taken "another step towards secularism."[65] Dr. Robert Cook reacted harshly to *Abington*, calling it "a sad departure from the nation's heritage under God." Further, he lamented that the decision "opens the door for the full establishment of secularism as a negative form of religion."[66] Catholic leaders and publications also often cited the damages from secularist tendencies. Those religious leaders who complained

[65] Billy Graham cited in Religious News Service, *The Week in Religion*, July 24, 1962, ACLUP, Box 1365.
[66] "Clergyman Are Divided by Court's Prayer Ruling," *Baltimore Sun*, June 18. 1963, 6.

about the Court serving as an accessory to anti-religious secularism clearly disagreed about what the Constitution demanded and with the ends that public schools should serve.

Had these critics stepped back they might even have lamented the very prayer in *Engel* that they chose to defend. Some of the defenders of the Court made this point. Indeed, Edward Miller, writing in *The Christian Century*, chided Billy Graham and others Court critics for not recognizing that the Regent's Prayer was barren of real piety, "routine" and "nationalistic." Miller argued that the Regent's Prayer itself represented the very secularism that the Court's critics seemed to recognize at the heart of the Court's rejection of the prayer. In a sense the Court's critics were defending a prayer not worth defending.[67] Other thoughtful guardians of Christian piety offered similar observations about the evident dullness of the Regent's Prayer.

In all fairness, one could go too far in tying the critics too closely to the prayer in *Engel*. Undoubtedly, many would have preferred language far different from that of the denominationally blasé Regent's Prayer. Besides, one might be excused in thinking that secularism had already largely won out, considering that the Regent's Prayer was an optional exercise and that the prayer's language, as much as Black's in his *Engel* opinion, could have just as easily offended a devout parishioner. The prayer in question, the Court's ruling and even what happened in public schools brought into focus larger concerns about the preservation of Christianity as the *de facto* national faith. The Court's critics knew, however, that the Court, at minimum, set out national constitutional expectations. Finality of judgment, though illusory, only ensured that those worried about rising secularism would respond to the Court's national edict. The critics could

[67] See, Edward O. Miller, "True Piety and the Regent's Prayer," *The Christian Century*, August 1, 1962, 934.

appear justified in their scorn, for if the Court turned aside such a generic template for supplication it seemed almost fair to wonder what would happen to more clear fusions of church and state.

Many of the Court's critics thus reacted unfavorably not merely because of what *Engel* and *Abington* disavowed but because of what the rulings seemed to portend. Rituals and symbols that fused piety and the public, such as the "Star Spangled Banner" and the Pledge of Allegiance, might suffer radical revision. More broadly, public ceremonies that featured reference to God might become a thing of the past. Schools mattered, but so did the broader public sphere. These worries connected the slippery-slope thinking that seemed to ensnare the Court's critics, but in their advocacy the appeal of the slippery slope was too great to discredit its guidance. Carl McIntire, the founder of the American Council of Christian Churches in 1941, voicing an opinion common amongst conservatives, suggested that attempts to override such decisions had not only bible reading in public schools at stake but "whether or not the United States may continue to give honor and respect to God."[68]

U.S. Senator Everett Dirksen (R-IL) often couched his support for a constitutional amendment to allow for school prayer precisely on these terms. He asked pointedly as he pushed forward his 1966 effort to amend the Constitution: "Shall the people be afforded an opportunity to act on language which will clarify this vexing problem before it is carried to ridiculous extremes by other suits which may be filed?"[69] The "vexing problem" Dirksen worried about involved the removal of God from public

[68] Carl Thomas McIntire, "Is God Unconstitutional," *New Guard*, March 1964, 10 and 15.
[69] March 22, 1966, Senator Everett McKinley Dirksen Press Release, "Constitutional Amendment to Permit Voluntary Prayer in Public Schools," The Dirksen Congressional Center, Working Papers, Everett M. Dirksen Papers, Folder 2157 (hereinafter EMDP).

life. In a sense, combating the Court had both a retaliatory and preventive side. In amending the Constitution the Court's congressional critics could hope to forestall other despised developments.

Dirksen stuck to the argument when he presented his concerns to his senatorial colleagues. As a member of the minority party he had to pull out whatever might help ensure that his amendment could garner hearings and the attention of the Senate. As a case in point, in writing to Birch Bayh (D-Indiana), the chairman of the Senate Judiciary Committee's Subcommittee on Constitutional Amendments, Dirksen complained precisely of this problem. He lamented that the Court's rulings had led school officials to cut back on Christmas programs in particular. Even those schools that might engage in such activities had to be too careful. Dirksen admitted, with no hint of hyperbole, that he could "think of no real opposition" to his proposal for an amendment to permit voluntary school prayer. Evidently, restoring school prayer could help curtail these other worries about a clear assault on religion in American public life.[70] He warned Bayh that prolonged hearings were unwelcome, further suggesting in April 1966, if not before, that he would resort to substituting his amendment for any bill or resolution that came to the floor if cooperation did not soon appear.[71]

The concern over an even greater expulsion of Christianity from public life indicated that many had concerns not just over what the Court had done or might do in the future; many critics of the Warren Court era had little doubt that the Court's rulings influenced social, political and cultural trends. While they may not deserve credit as soothsayers, their fears were not totally unfounded.

[70] Everett Dirksen to Birch Bayh, March 21, 1966, Working Papers, EMDP, Folder 2157.
[71] Everett Dirksen to Birch Bayh, April 7, 1966, Working Papers, EMDP, Folder 2157.

The concurring opinions in *Abington* had, among other things, addressed these concerns directly. Justice Brennan wrote separately; Justice Goldberg also wrote a concurrence, which Justice Harlan joined.[72] Read in tandem, the opinions serve as credible evidence that at least some of the Court's members were, yet again, sensitive to the fallout from a prior decision—in this case *Engel*. The Court's members knew that American concerns over secularism were not exactly foolish; the jurists also knew about the country's commitments to Protestantism. The Brennan and Goldberg opinions raised the same point for clarification, i.e., that the Court had not validated secularism, set the country on a path to the enshrinement of secularism as the national faith or would go about getting rid of religion in public life. Whatever the signals sent from the language of these concurrences, outside of the Court many people worried over the slippery slope that would eventually allow, if not force, God to disappear from public life.

Contemporary analysis, from mainstream and liberal sources of opinion, also granted credence to the idea that God would soon disappear from any governmental ceremony or operation. Some welcomed it; many regretted it; even more predicted it. Before deriding the critics for sloppy "slippery slope" thinking, we might profit from recognizing the huge stakes in this entire debate that prompted such ominous thinking. On another front, even liberal sources of opinion often worked the slippery slope in the other direction. Were the court to validate school prayer or Bible reading, some liberals feared that such validation would only be the first step to a greater fusion of public life and religious activity. What one can reliably say is that both the supporters and foes of

[72] For Brennan's comments upon what *Abington* portended see 294-296; Goldberg's concurrence is at 305-308.

the Warren Court's Establishment Clause work had difficulty escaping the slippery slope mindset.

Even by the end of the Warren era, while perhaps not as stunned or angry as before, many Americans kept the school prayer and Bible reading decisions in mind as part of a familiar litany of complaints about the Court. The unwanted rise of secularism persisted as a primary talking point. In 1968, Representative John Ashbrook objected strenuously to the limitations placed upon Christian activities in public schools. Writing to constituents who complained about the Court, Ashbrook harkened back to the language from the Clark opinion. In a typical response, he contended:

> [T]he Supreme Court's refusal to permit religious exercise is not the realization of neutrality between church and state, but rather as government support of those who believe that religious exercises should be conducted only in private. In bending over backwards to follow the doctrine of freedom of religion, they (sic) succeeded only in supporting that small minority of American whose religion is secularism.[73]

What is clear is that the Warren Court had updated the worries over secularism stamping out Christianity in a country that had never quite decided on its own how far it would go to separate church and state. The concerns over secularism, however, connected to one of the era's other pressing worries: defending the United States and its allies against the formidable foe of communism.

Immediately after *Engel* and then beyond, Court critics did not miss out on the cold war connection. Senator James Eastland, an avid anti-communist, had already ensured, along with his Southern allies, that liberal advocacy on civil rights and race

[73] Congressman John M. Ashbrook to Mrs. Robert Fulke, August 12, 1968, John Ashbrook Collection, Box 2, Folder 18. Ashbrook expressed the same views consistently to interested parties and constituents. His constituent correspondence contains numerous letters urging him to support the efforts to amend the U.S. Constitution so as to overturn the school prayer rulings. He routinely derided the rulings as validation of a state religion of secularism.

relations served as prima facie evidence of communist leanings. Civil rights agitation served as evidence of domestic subversion, possibly induced by foreign enemies. The tide of secularism further confirmed that communism threatened the country.

Illustrations from the era reveal hyperbole and sincerity. Cardinal James McIntyre, Los Angeles Archbishop, said that the Court's ruling in *Engel* had "forced [the United States] to emulate Mr. Khrushchev."[74] He asserted nearly a year later in response to *Abington*, in the confusing cold war pathos, that: "The effect of the decision can only mean that our American heritage of philosophy, of religion and of freedom are being abandoned in imitation of Soviet philosophy of Soviet materialism and Soviet regimented liberty."[75] McIntyre, as well as Cardinal Francis Spellman and Cardinal Richard Cushing of Boston, repeated these warnings time and again.[76]

Tough-minded conservatives while interested in tradition, morality, problems of juvenile delinquency and other reasons perhaps knew that cold war citations could carry the most influence. Conservative columnist David Lawrence argued that the decisions did not even make sense to the "average man." The "average man" after all could not appreciate the necessity of overturning a practice that had so much to recommend it. But even more than these populist complaints, Lawrence contended that the opinions weakened the country and made the United States imitate its atheistic enemy in Moscow. Without its spiritual commitments the United States had just as much to fret over in its cultural war with the Soviet Union as recent national security setbacks and the

[74] The Los Angeles Archbishop cited in Religious News Service, *The Week in Religion*, July 24, 1962, ACLU, Box 1365.
[75] "U.S. Cardinals in Rome Decry Court's Bible Ruling," *Baltimore Sun*, June 19, 1963, 19. From Rome, there to help select a new Pope in the summer of 1963, Cardinal Spellman reacted to the *Abington* ruling by saying: "I deplore it. I think that says enough."
[76] See "Religion in the Court," *Commonweal*, July 5, 1963, 391.

development of an unfriendly regime in Cuba revealed in the more direct confrontations of the cold war.[77] In order to defeat the Soviet Union the United States had to be unlike the Soviet Union. Hence, in lamenting threats to American values and security, the Young Americans for Freedom's publication, *The New Guard*, compared the extirpation of religious freedoms in the Soviet Union with what seemed to be under way in the United States.[78] To see these claims as hyperbolic is scarcely difficult; yet, to expect infrequent citations of cold war imperatives, amidst an era of when few dared question them, would ignore the necessity of continued toughness vis-à-vis the Soviet Union.

For some time any decision that apparently weakened the national and domestic security strength of the U.S. had actuated ridiculous charges of communist influences on the Warren Court. From the John Birch Society to Senator Eastland, numerous groups and individuals pressed these complaints about the Court. Others, however, did so more carefully but to the same end. *Engel* and *Abington*, so the argument proceeded, merely weakened the country differently than had any ruling that made prosecuting, identifying or exposing supposed domestic subversives. House member Bob Sikes (D-FL) would have made his fellow Southerner Eastland proud. Sikes, on the heels of the *Engel* announcement, derided the Court in saying:

> This is a nation founded on spiritual concepts. It is a nation which has repeatedly affirmed and reaffirmed its belief in eternal God and its adherence to religious precepts. Almost everywhere we turn in virtually every act of Government there is reference to Deity. Now the Supreme Court strikes a deep and serious blow at this historic concept by ruling that prayer may not legally be offered in the public schools. I find it difficult to choose the adjectives which properly describe this latest bid for infamy by the nation's highest court. But, I must say that if the

[77] David Lawrence, "How Can Prayer Ruling Be Explained to People," David Lawrence Papers, Box 170.
[78] Carl Thomas McIntire, "Is God Unconstitutional," *The New Guard*, March 1964, 10 and 15. Also see "The Prayer Amendment," *The New Guard*, June 1964, 5. On the Young Americans for Freedom see Gregory L. Schneider, *Cadres for Conservatism: Young Americans for Freedom and the Rise of the Contemporary Right*, (New York: New York University Press, 1999).

> Supreme Court were openly in league with the cause of Communism, they (sic) could scarcely advance it more than they are doing now.[79]

Making the cold war connection had everything to recommend it. In an era in which dissent from the cold war mindset carried disastrous political consequences, the critics of the Court's work in *Engel* and *Abington* did not have to appear to be Christian zealots who trampled on the sensibilities of non-Christian minorities when they could argue that they merely had concerns about the country's domestic and internal security. Faith, Christian faith anyway, could serve as a powerful ally in the war against the godless Soviet Union; the Warren Court had gotten in the way.

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Congressional supporters of the Warren Court did not always perform admirably in their defense of the Court. Yet, with the school prayer and Bible reading rulings the Court's legislative allies did a better job than they did when the Court came under vigorous attack for its criminal procedure jurisprudence, particularly as the 1960s progressed. Some of these individuals recognized that this nation's population would remain predominantly Christian, and hardly wanted to be on the record as a proponent of removing God from the classroom. Nevertheless, they did not seem to yield as much ground as they did with the fallout surrounding other areas of constitutional law.

For instance, Emanuel Celler (D-NY), the powerful head of the House Judiciary Committee, effectively maneuvered to restrain most of the efforts to engineer an amendment to allow for school prayer. He eventually consented to congressional hearings in 1964. Senator Philip Hart (D-MI), a liberal stalwart, also did an excellent job

[79] *Congressional Record*, June 26, 1962, 1134.

defending *Engel* during the Senate's 1962 hearings. Hart pointed out to the many senators who had lined up to excoriate the Warren Court that the decision was in many respects predictable, that the country needed to be careful in respecting the beliefs of all of its citizens and that prayer could certainly remain a private activity.[80] None of this suggests that Celler and Hart had many vocal allies in Congress. Opposing the Court has always been easier than sticking up for it.[81]

Congressional action in the wake of *Engel* and *Abington* took to the popular tactic of amending the Constitution. The proposals included some diversity of language but had as their chief objective the legalization of public school prayer and Bible reading. Many of the later resolutions often had predecessors or were in fact reintroduced versions from the congressional session during which *Engel* had come down.[82] And, if the volume of constituent mail served as a reliable indicator, many House and Senate members of the era would have had us believe that no Constitutional issue spurred more interest and notable discontent. Congressman Morris K. Udall (D-AZ), no conservative and an opponent of the efforts in the House, indicated that the volume of letters about the topic eclipsed anything his office had encountered in his two terms. In an astute observation, Udall expressed some dismay over the apparent contradiction in play with some of the amendment supporters. Many of these supporters expressed libertarian sentiments in some contexts but here "seem to believe that home and church can no longer be depended

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[80] See *Prayers in Public Schools and Other Matters: Hearings before the Senate Committee on the Judiciary*, 87th Congress, 2d Session, July 26 and August 2, 1962, (Washington, DC: U.S. Government Printing Office, 1963), 25-27 and 47.

[81] As Peter Irons aptly puts it in describing how George Wallace's actions in opposing desegregation earned him votes: "Politicians are more often rewarded than punished for defying the Supreme Court." Peter Irons, *A People's History of the Supreme Court* (New York: Viking, 1999), 408.

[82] For background see *Staff Study for the House Committee on Judiciary: Proposed Amendments to the Constitution Relating to School Prayers, Bible Reading, Etc.*, (Washington, DC: Government Printing Office, March 24, 1964).

on, and that government must save religion by compulsory instruction." [83] The battles over school prayer and Court bashing thus revealed one of the constant tensions in conservative thinking.

In the Senate, Republican minority leader Everett Dirksen became the central figure in the school prayer aftermath. Though initially cool to the prospects of an amendment to counter the Court, Dirksen became, as he did with the apportionment battles, the top advocate in the Senate for restoring prayer in some capacity, ideally through a constitutional amendment. The cunning and skillful legislator, Dirksen hewed to the right on some legislative matters. He claimed that someone visited his office, bringing along over 50,000 letters expressing outrage on the matter.[84] He had, throughout his career, supported various amendment efforts. In the 1950s, for instance, Dirksen supported the final charge of the congressional non-interventionists: the Bricker Amendment. John Bricker (R-OH) had put forth an amendment that, in its various forms, would have undercut the power of the White House, granted Congress a supervisory role over executive agreements with foreign governments and sought to ensure that foreign agreements did not supersede the U.S. Constitution. Dirksen had little hesitation, in his earlier years, about going after the White House so going after the Court in the 1960s was hardly an unexpected move.[85]

In his efforts to restore school prayer he could be sure to enlist the help of Southern Democrats. He kept up the effort long enough, and in September 1966 managed to bring an amendment to a vote, though the effort failed by twelve votes. Even

[83] Morris K. Udall's Congressman's Report, May 22, 1964, available from the University of Arizona Library Special Collections <http://www.library.arizona.edu/exhibits/udall/congrept/index.html>.
[84] *Congressional Record*, March 22, 1966, 6177.
[85] See David Kyvig, "Everett Dirksen's Constitutional Crusades," *Journal of the Illinois State Historical Society* (Spring 2002), 72-73

the setback in 1966 did not deter Dirksen as he restarted it before his death in 1969. Just as would be the case with the problem over the Warren Court and crime, the seemingly collegial and dignified Senate at least rivaled the House as a site for withering attacks on a Supreme Court that had solidified the wall of separation between church and state.

Countless resolutions appeared in the House following *Engel* but efforts there by the fall of 1963, if not earlier, coalesced around the leadership of Frank Becker (R-NY), an otherwise obscure representative from the same district from which *Engel* had arisen.[86] Becker's amendment efforts faced off against the opposition of Celler, liberal theological voices, the ACLU, and the Protestants and Other Americans United for Separation of Church and State. Becker's efforts increasingly drew support throughout 1963 and 1964 from members of Congress and from petition drives facilitated by groups like the International Council of Christian Churches. In its most common iteration the Becker Amendment not only restored prayer in the public school but also sought to ward off any further removal of Christianity from public life by permitting the citation of God in public ceremonies and in other governmental actions. In 1964 enough attention had come to Becker's amendment that, with the help of a threat of a discharge petition, the House Judiciary Committee held hearings on the matter. Even before the end of the committee hearings Becker renewed his effort for a discharge petition in the hopes of forcing a floor vote.

Even the ACLU recognized that the Becker drive constituted more than an ephemeral, political posturing effort; accordingly, the ACLU worked tirelessly to combat it.[87] Leo Pfeffer, an important player in the controversy, also acknowledged Becker's

[86] "Amendment Sought on School Prayers," *New York Times*, September 11, 1963, 26.
[87] Leanne Golden to ACLU Affiliates, March 12, 1964, ACLU, Box 808, Folder 17.

importance. Pfeffer, of the American Jewish Congress, put it clearly: "But for the singular persistence of Congressman Becker, it is quite likely that these many proposals and the entire effort would have been forgotten."[88] Ultimately the Becker effort failed to get to the floor for a vote. Like so many other amendment efforts it remains difficult to separate hullabaloo from sincerity. Nevertheless, the chatter about a discharge petition, the possibility of that move and the discussions in Congress still had an important effect in encouraging non-compliance. Dirksen's Senate efforts had a similar influence. Representative Becker did not seek re-election in 1964. His seat ended up in the hands of the Democratic Party, with Herbert Tenzer winning the first of his two terms. By the start of that historic 89th Congress (1965-1967) the Democratic Party had built on its already impressive majorities, controlling nearly 70% of the seats in the House and Senate. That Congress remained in confrontation with the Warren Court during the 89th and later 90th Congress only confirmed the continued power of the Southern Democrats, the importance of Court opposition for the Republican Party and an issue that could bring these two parties together.

Dirksen and Becker both called the Republican Party home. The Republican Party recognized the political benefits it might accrue from putting God back in the classroom. The House Republican Policy Committee, under the leadership of John Byrnes (R-WI) endorsed Becker's amendment in February 1964.[89] The GOP Platform in

[88] Leo Pfeffer, "The Becker Amendment," *The Journal of Church and State*, 1964, 344-349 (quote at 344). Pfeiffer objected to the amendment, for among many reasons, because it could open the flood gates for other efforts. He suffered from the same slippery slope logic of the amendment effort's friends who warned of a country in which the Christian God would be stricken from all public life. He also thought that rather than quiet the strife, the fusion of church and state through this amendment would actually promote conflict.

[89] "Hose G.O.P. Backs Bible Amendment," *New York Times*, February 19, 1964, 21.

1964 included language that satisfied Dirksen, who had played an important role in the platform.[90] The platform indicated that the GOP:

> support[ed] . . . a Constitutional amendment permitting those individuals and groups who choose to do so to exercise their religion freely in public places, provided religious exercises are not prepared or prescribed by the state or political subdivision thereof and no person's participation therein is coerced, thus preserving the traditional separation of church and state.[91]

And while the Democratic Party did not have a similar commitment in its 1964 party platform, numerous Democrats from the South joined in the rhetoric of denunciation and the efforts to counteract the Court through amending the Constitution. Important members of the Senate Judiciary Committee such as Chairman James Eastland, John McClellan and Olin Johnston, all Southern Democrats and veterans of the efforts to defeat desegregation and civil rights changes, signed up as early proponents of an amendment to counter the ruling.

Elected officials in Congress did not need to engage the language of the Court's opinions on the basis of history and law. Some attempted to do so. The two raw days of hearings conducted by the Senate Judiciary Committee in late July and August 1962 featured myriad complaints. In many respects the 1962 hearings represented nothing more than a session devoted to bashing the Court masquerading as hearings. Representative Becker, who had already rapidly staked out a prominent position in assessing the fallout and thus appeared before the Senate committee, asserted plainly that the Founding Fathers and those responsible for drafting the Constitution surely knew the dangers of an established Church. Senator Willis Robertson (D-Virginia), father of evangelist Pat Robertson, offered his own history lesson to his senatorial colleagues.

[90] See Kyvig, *supra* note 85, at 75.
[91] "1964 Republican Party Platform," Marta Long Presidential Memorabilia Collection, Special Collections Research Center, The George Washington University, Gelman Library.

Robertson complained that whatever Madison and Jefferson had advocated they certainly had not called for hostility and antagonism between government and religion.[92] Never, in the opinion of these two conservatives from different political parties, did these guiding figures from the past set the country on the path of separating religion and government (or for that matter religion and public life).[93] They contended that the Founding Fathers had been misunderstood, and, in a familiar complaint about the Warren Court, that history simply did not support the results that the Warren Court had reached.

While attacking the Court carried the potential for political reward, it also had perilous consequences as encouragement for non-compliance. Opposition to the Court's work at the grassroots had motivations both consonant with the overall concerns about secularism, the ideal of local control over education, an odd statism for those on the right and the maintenance of Christian commitments in the public sphere. Some of the more important developments occurred in local communities and schools that sought to challenge, ignore or comply with the rulings. The national debates only encouraged local non-compliance. The grassroots activity here served as a sign of discontent as important as the letter-writing campaigns to support Becker and Dirksen's amendments. Massive resistance to desegregation had, in some respects, an analogue with the fallout to *Engel* and *Abington*.

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At his yearly orchard picnic on August 25, 1962 Virginia's powerful Senator Harry Byrd, Sr. gathered those in attendance for political theatre. The thousands on hand

[92] See, *supra* note 80, at 29-37.
[93] *Id*. at 37 and 70-73.

knew Byrd as a staunch opponent of the Court and powerful voice in the effort to delay, if not defeat, desegregation. He was about to encourage civil disobedience of another kind. That day he led his guest in reciting the exact prayer that the Court had ruled unconstitutional in the Regent's Prayer case. The avowed conservative had not alerted those in attendance before this move, nor would they have expected Byrd to lead them in a prayer since this was not a customary practice at this staple event of Virginia politics. He had people repeat the prayer at his Berryville farm precisely, as he put it, so they could be just as guilty as those pupils and teachers who had spoken the same words. It mattered little that the Supreme Court had hardly outlawed public prayer in Byrd's apple orchard. For the disgusted Byrd, the Warren Court had, yet again, introduced unwanted change to the country.[94] Byrd's stunt, along with the countless voices of frustration following *Engel*, proved an able accessory to the efforts then afoot to skirt the Court's apparent mandate. Here was the better standard in judging all the amendment efforts, angry invective and disrespect for the Court's rulings. Many could draw inspiration for their efforts of delayed compliance.

Perhaps even more than with the crime issue, local activists attempted to combat these despised constitutional developments that had made the sectarian schoolroom an outlaw. Unlike the many diverse rulings on the rights of the accused, some of the more notable that had yet to occur, the school prayer and bible reading judgments presented a discrete couplet that could be reduced to an easily derided denial of religious worship in a symbolic, public venue. Christian Americans in places like Leyden, Massachusetts joined together to petition the Court to change course or for elected legislatures to

[94] "Byrd Tells 3500 at Picnic of Tiffs with Presidents," *Washington Post*, August 26, 1962, A7.

intervene.[95] Other local efforts occurred across the country, spearheaded often by forceful mothers, fathers and citizens. National groups such as the Constitutional Prayer Foundation, with its cast of supporters including former President Dwight D. Eisenhower and Cardinal Spellman, Francis Burch's Constitutional Prayer Amendment, Inc. and Project America joined in on the charge to amend the Constitution.[96] Burch, the former Baltimore solicitor, had argued for the city in the *Murray* case. After the June 1963 result in *Abington*, Burch and the Superintendent George Brain of Baltimore city schools started the group to help unify forces in support of the efforts to undo the Court's rulings.[97]

Such activities require that we resist any attempt to label any of the opposition to the decisions as regional phenomenon, or as merely the outrage from Americans uncomfortable with the sensibilities of non-Christians. Alabama's state legislature might have wasted little time in declaring the ruling "diabolical" and endorsing an amendment that restored this trampled right to pray in public schools, but recommendations for amendments to counter the Court's work were not confined to the South.[98] The City Council in Yonkers, New York, for instance, called for a similar amendment.[99] In fact, not long after *Engel*, at the July 1962 Governor's Conference meeting in Hershey, Pennsylvania, every single governor, except Nelson Rockefeller of New York, endorsed a resolution that called for Congress to restore prayer. The amendment the governors proposed would have allowed "the free and voluntary participation in prayer in . . . public

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[95] "The Leyden Crusade: Crusade to Reverse Supreme Court Decision and Return Prayer to Public Schools," (Undated), Right-Wing Collection Cornell University Library, Box 5.
[96] Bruce Dierenfield, "The Most Hated Woman in America: Madalyn Murray and the Crusade Against School Prayer," *The Journal of Supreme Court History*, Volume 32, Issue 1, 78.
[97] "Leader Asks for Unity in School Prayer Drive," *Washington Post*, October 8, 1963, B3.
[98] "Spellman Renews Attack on Court's Decision," *New York Times*, June 28, 1962, 17.
[99] See, *supra* note 80, at 15.

schools."[100] Local struggles over compliance with the Court's decisions took place from Pennsylvania to California.

Civil disobedience, lest we forget, thus was not the sole property of the left and civil rights activists. Opposition to the Supreme Court led some conservatives on a path of working against the law; it represented a substantial contradiction at the heart of a political ideal that prized order and respect for institutions. Raw local reactions had an able accessory through intellectual justification. Sometimes explicitly, many writers for *National Review* encouraged disobedience. They failed, however, to justify the dissonance that existed as they otherwise railed against alleged subversives, civil rights agitators and those who protested the war in Vietnam. Will Herberg, for example, firmly rejected Reverend Martin Luther King, Jr., and his calls for disobedience. Yet, when it came to the school prayer and Bible reading decisions of the Court, the one-time leftist Herberg called for an outright civil disobedience every bit as real as that practiced by civil rights agitators, freedom riders and conscientious objectors.[101] William F. Buckley, Jr. also counseled resistance to rulings that disavowed prayer in public schools; no amount of respect for the Supreme Court as an institution, his publication argued, could permit rulings that destroyed American values.[102]

However conservatives attempted to spin and differentiate their suggested methods, the entire project of opposing the Court paralleled a philosophy of disobedience to the law. They could object—as some did—that the Court should not even make law, but so much of that fight was a veritable lost cause. The essential disagreement had more to do with the law as it had become, not that the Warren Court had suddenly broken with

[100] "Governors Seek Prayer Measure," *New York Times*, July 4, 1962, 1.
[101] Will Herberg, "A Religious Right to Violate the Law," *National Review*, July 14, 1964, 579-580.
[102] William F. Buckley, Jr., "God Go Home," *National Review*, July 2, 1963, 521.

the past and actually began the process of interpreting the Constitution. Conservatives of the *Lochner* era had, after all, hardly discouraged the Court's readings of the Due Process Clause in order to facilitate free enterprise, capitalism and the economic assumptions of the era. In the end, the results still mattered first and foremost. The school prayer and Bible reading rulings represented unwelcome results. Massive resistance to desegregation, while much more explicit and sinister, did not represent the only effort at counteracting the Court through local endeavor. But with important sources of conservative opinion already counseling opposition to civil rights, the willingness to counteract the Court would only persist with school prayer and even with the Court's criminal procedure rulings.

Numerous state and local episodes revealed this tangible disobedience. Even after *Engel* and *Abington*, Delaware had a state law that required daily Bible readings, and pupils had the option to participate in the Lord's Prayer. David Buckson, Delaware's Republican attorney general at the time, provided direct encouragement for the schools to follow the law of the state, not mandates from the U.S. Supreme Court. Attorneys General in Arkansas and Mississippi encouraged schools to do likewise.[103] In Lockland, Ohio, a small suburb of Cincinnati, the school board instituted a policy of having its teachers lead the class in reciting the Lord's Prayer. Though the policy had been approved shortly before the *Engel* ruling, the school district recognized no need to modify the policy for the 1962-1963 school year.[104] Defiance continued elsewhere. The school board in Milford, Connecticut chose to continue customary daily reading of the Lord's Prayer. The board members who did not support the re-affirmation explicitly

[103] "Nation Chooses Sides in Fight Over Prayer," *U.S. News and World Report*, May 18, 1964, 64.
[104] "School Plans Use of Lord's Prayer," *New York Times*, August 23, 1962, 31.

chided those in the majority for snubbing their noses at the Supreme Court.[105] North Brookfield, Massachusetts's public schools chose not to comply either. The school board there voted to re-affirm the school policy of Bible reading and prayer at the outset of the school day. The school committee chairman indicated that North Brookfield would continue in its practice "until we are definitely told to stop."[106] Other communities in the northeast, from Maine to Rhode Island, at the start of the 1962-63 school year persisted in their practices of having students recite the Lord's Prayer or listen to scripture readings. Immediate compliance was far from the order of the day.[107]

Even after the June 1963 ruling in *Abington*, compliance still was far from standard. Some claimed confusion as to what was and was not in line with the Court's decrees, but many had to have recognized that they were clearly attempting to carry on as before. School boards in Pennsylvania allowed the continuation of religious exercises. Idaho continued to allow state directed Bible reading. State and local leaders elsewhere encouraged everything from cautious to outright defiance. Some states even defended their defiance under the notion that the Court's decrees only applied to Maryland, New York and Pennsylvania—a form of updated interposition. Nearly three years after *Engel*, a National Association of Secondary School Principals survey of 16,000 principals revealed that nearly two-thirds of the principals opposed the rulings and a sizable portion (about one-fourth) of schools still had religious observances of some kind—presumably prayer and/or Bible readings.[108]

[105] "Votes to Keep Lord's Prayer," *Chicago Daily Tribune*, August 9, 1962, 1.
[106] "Schools Defy Bible Reading Ban by Court," *Chicago Tribune*, October 15, 1963, 5.
[107] "Prayer Said, Bible Read in Many of U.S. Schools, *Chicago Tribune*, September 6, 1962, 1.
[108] "Prayers Continue in Schools," *Washington Post*, April 3, 1965, A16.

Others took less obstructive measures. In Harrisburg, Pennsylvania, for instance, the president of the United Churches of Greater Harrisburg merely encouraged schools to leave one evening free from school events every week. With the night free from school activities, school children could attend services and programs at their local church. Public schools could thus continue to accommodate, if not promote, religion.[109] In another example, numerous towns in New Jersey (on government property no less) began hanging banners declaring "One Nation Under God" on flag poles. The American Civil Liberties Union of New Jersey protested the hanging of the banners as "an action which is motivated largely to demonstrate defiance and contempt for a ruling of the United States Supreme Court."[110] The fight to preserve the fusion of Christian faith and public life spilled out beyond the classrooms.

Recalcitrance should not have surprised anyone. Disagreement even came directly from state courts. The Florida Supreme Court, for instance, rebuffed the Warren Court. Following the June 1963 *Abington* ruling, the U.S. Supreme Court directed the Florida Supreme Court to reconsider its previous decision that had accepted the state's 1925 Bible-reading law. Florida's law directed public school teachers to have once-a-day readings from the Holy Bible. But in January 1964, the Florida Supreme Court stood its ground, arguing that the Florida law was not about religion but instead primarily about morals, which allowed the Florida court to distinguish the state laws from those scrutinized in *Abington* and *Murray*. The majority opinion, written by Millard Caldwell, a former governor of Florida, said that too many views prevailed in the Warren Court's

[109] "Church Night," *Christianity Today*, August 30, 1963, 47.
[110] See Emil Oxfeld, New Jersey ACLU President, Letter to Mayor and Council, January 28, 1965, ACLU, Box 812, Folder 8.

opinions, and without a precise direction the Florida jurists could just leave "the responsibility for any enlargement . . . to that [referring to the Warren Court] court."[111]

Battles over compliance could even have local electoral consequences. School board members in La Mesa, California, a suburb of San Diego, felt the scorn of upset parents and teachers caught up in the controversy.[112] Throughout 1964 and 1965 the La Mesa-Spring Valley school district and its school board attempted to fashion a policy on school prayer. The group Parents for Prayer, led by local resident John Stennet, led a recall effort in 1964 to oust school board members who had failed to endorse classroom prayer. In late January of that year, by a vote of 3-2, the school board at La Mesa-Spring Valley School District had given in to pressures from the ACLU, some parental discomfort over grace being said in area kindergarten classrooms, and the holdings of the Warren Court from eighteen months before. The board's resolution that followed, put forth by member Robert E. Andreen, allowed for students to say voluntary prayer as a "result of their [referring to the children] own volition." What is more, no prayers were to henceforth exist as part of any school programs. Previously the board had rejected a resolution that, in convoluted language, would have still permitted prayer on a voluntary basis but seemed to provide enough room for the school teachers and workers themselves to lead prayer. Legal counsel had indicated that the defeated resolution would have not met constitutional muster.[113]

Concurrent with these attempts to comply with the changes in the school district, the San Diego chapter of the ACLU made a concerted effort to ensure San Diego City

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[111] "Florida Court Insists Bible Law is Legal," *Tallahassee Democrat*, January 30, 1964, 19.
[112] I learned of this series of events from a letter from Dagmar Hamilton to Justice Douglas sent along to assist Douglas as he prepared his 1966 book on school prayer. Dagmar Hamilton to William Douglas, October 1, 1964, William Douglas Papers, Box 966.
[113] "Prayer Called Unlikely in Classrooms," *San Diego Union*, January 30, 1964, 23.

schools complied with *Engel* and *Abington*.[114] Yet, not everyone in the community thought compliance desirable. Accordingly, the La Mesa-Spring Valley School Board's policy of compliance met with a grassroots recall effort. The three board members who voted to approve the January 1964 policy of apparent compliance (Robert Andreen, Margaret Burnett and William Johnston) had their public service cut short.[115] Stennet's Parents for Prayer, after encountering mild difficulty in obtaining the necessary signatures for the recall effort, managed to have its own trio of candidates, Geraldine Gill, Rev. Lewis Ginn and William McCandless elected on September 22, 1964 to replace the three sitting members. The successful effort not only resulted in ousting those responsible for the compliance policy it also ensured a policy reversal. In October 1964, the re-constituted school board voted unanimously to rescind the previous policy and to adopt a new policy requiring non-coercive, non-denominational prayer at the start of the school day.[116] Parents for Prayer had apparently won the short-term battle over school prayer.

Tension existed between the possible constitutional reasons to support different outcomes and the broader rationales. Some of this was nearly inevitable. Even critics trained in the law could not be expected to root all of their objections to the Court in the text of the Constitution or in contrary language from previous rulings. Some tried, but with so much of the larger dialogue in the Warren Court era, the commentary spilled out beyond the text and the law. What can be said is that the importance of Christianity, both as an ideal and reality, persistent fears over secularism, cold war priorities and the often valid worry over too much change coming from Washington, D.C. all mattered to the

[114] Charles Davis, "Liberties Group Hits School Guide," *San Diego Union*, January 30, 1964, 21.
[115] "Recall Petition Short of Names," *Los Angeles Times*, June 13, 1964, B8.
[116] "New Trustees Restore Prayer in Classroom," *Los Angeles Times*, October 15, 1964, 1.

Court's foes. Paul Freund once wrote that the *Engel* and *Abington* "decisions are more important for the doors they leave open than for those they shut."[117] For the Court's manifold critics, however, the Court had closed an important door, and even if they could not pry that door open completely, it was just as important to make sure that the country would not soon forget the nation's top legal tribunal did not have to have the final word.

[117] Paul Freund and Robert Ulich, *Religion and the Public Schools* (Cambridge: Harvard University Press, 1965), 18.

IV.
The Warren Court Enters the Thicket: The Apportionment Revolution and its Enemies

If the Supreme Court functions as a third house of Congress, unchecked and uncheckable, the Liberal is not dismayed: it is only the Constitution that is being amended, and the Constitution is outmoded.[1]

It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.[2]

This unfortunate decision does not arise out of any issue dividing the north and south. It must prove as obnoxious to Michigan as to Louisiana; to California as to Virginia.[3]

If there is no concern for consent, the governed will be merely governed.[4]

In his private thoughts from May 1969, Barry Goldwater described the influences of the Warren Court, then presumptively in its waning days. Goldwater wrote of a "disastrous time in American history because these nine men were guided, not all of them, but most of them, by what they would like to see happen in the United States, what they would like to see the United States be, rather than what the Constitution says that the United States should be."[5] Like so many others who shared in his dislike for the Warren Court, he looked forward to the day, rapidly approaching, when Earl Warren would step aside for good. Others justices in advancing age, such as Hugo Black or William Douglas would soon, some hoped, follow.

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[1] James Kilpatrick, "A Conservative Examines the Liberal," *The Rotarian*, December 1965, 20, University of Virginia, Small Special Collections Library, James Kilpatrick Papers, MSS6626-C, Box 6.
[2] Justice Felix Frankfurter, Majority Opinion, *Colegrove v. Green*, 328 U.S. 549, 553-554 (1946).
[3] William H. Tuck, *Congressional Record*, March 29, 1962, 5497.
[4] Committee for the Government of the People, Press Release of Statement by Senator Everett Dirksen, January 19, 1966, The Dirksen Congressional Center, Working Papers, Everett M. Dirksen Papers, Working Papers, Folder 2274 (hereinafter EMDP).
[5] May 17, 1969, Notes on Richard M. Nixon, Box 15, Folder 14, FM, MSS#1, The Personal and Political Papers of Senator Barry M. Goldwater, Arizona Historical Foundation, Tempe, Arizona (hereinafter BMG).

Although not a fan of the Warren Court for its rulings on desegregation, criminal procedure and domestic subversion, then Senator Goldwater, in the spring of 1962, spoke out in support of what the Court had done in taking a first clear step in carrying out a substantial overhaul in the apportionment of legislative districts. In April of that year, the Warren Court had issued a decision in the Tennessee apportionment case *Baker v. Carr*.[6] The majority opinion in *Baker* established that the Court, together with the federal courts, would henceforth review legal challenges over the constitutionality of the construction of legislative districts, many of which maintained substantial population disparities.

While seemingly an unexciting development, the willingness of federal courts to entertain such lawsuits represented a departure from past practice and portended potential changes in political power. *Gomillion v. Lightfoot*, a 1960 ruling, had already indicated a potential swing.[7] In *Gomillion*, a decision that rested on the Fifteenth Amendment, the Court had overturned lower court decisions that had accepted the municipal borders of Tuskegee, Alabama—borders that excluded African-American neighborhoods. Invidious discrimination in *Gomillion* triggered the Warren Court's willingness to turn aside lower court rulings that had, in effect, relied upon the very signals the Supreme Court had sent about avoiding involvement in districts and apportionment. Mal-apportionment, at least as some outdated, often Southern, districts were concerned, also involved elements of racial discrimination, but a wider and national problem existed.

Goldwater, however, initially contended that conservatives had little to fear, even in the short term, in more political clout going to those areas of greater population. The deal-maker that Goldwater could be, perhaps he was thinking not just about conservatives

[6] *Baker v. Carr*, 369 U.S. 186, (1962).
[7] *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Justice Douglas, in particular, thought that *Gomillion* ensured that the Court had jurisdiction over apportionment matters.

but about the entire Republican Party. But he put forth his reactions apparently because of principle not politics. Publicly, he contended that districts fashioned and maintained with little regard to population violated the provisions of many state constitutions and applicable statutes.[8] The Warren Court had merely nudged the country forward to its own ideals and encouraged some states to live up to their own legal standards. [9] Goldwater, had he investigated the matter more thoroughly, could have also commented that some state courts had already commanded apportionment changes in light of state statutes and constitutions. For whatever reason, however, the Arizonan had not at first picked up on the mischief that *Baker v. Carr* seemingly portended.

A supporter of the *Baker* ruling such as Senator Kenneth Keating (R-New York) could also laud the decision for how it might help the country live up to its republican ambitions. Yet, in saying that "we are dealing with the rights of American citizens, not with the interests of political parties," Keating spoke of an ideal, not a reality; many could legitimately fear tremendous shifts in and loss of political power—though this could by no means be guaranteed to affect the major political parties disproportionately.[10] In particular, the primary legal question henceforth would involve whether legislative districts, both in states and possibly in the United States House of Representatives, should be drawn up to reflect population and how courts could monitor that standard. If that situation came to pass, many urban districts that had been under-represented would likely obtain more representation at the expense of rural areas. Incumbents could suffer but either party might encounter losses. Goldwater, nonetheless, had spoken not in broad

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[8] "Goldwater Upholds Districting Decision," *New York Times*, March 29, 1962, 17.
[9] Though here, as did many others, Goldwater perhaps misunderstood and exaggerated the situation. Unambiguous state constitutional language calling for population standards in both legislative chambers existed in well under half of the state constitutions.
[10] *Congressional Record*, March 27, 1962, 5107.

terms but had offered specific praise for the apparent gains for democratic representation that the decision apparently augured.

While the majority opinion in *Baker* did not spell out precise standards for legal review of legislative districts, disquiet rapidly attended to a ruling that portended change and upset an established tradition, with detractors arguing that such concerns were not fit for judicial scrutiny. William Tuck (D-Virginia), who would lead a serious charge in the U.S. House to strip the federal courts of jurisdiction over apportionment matters, provided the typical denunciation. The former governor of Virginia and member of the Byrd machine, Tuck reacted immediately to what he labeled "a new and shocking interference by the federal judiciary with the right of the sovereign States to conduct their domestic affairs."[11] Others in the United States House of Representatives could have hardly escaped notice that their own positions might soon be threatened. State legislators also took notice that changes were afoot.

Something happened between 1962 and the presidential election year of 1964. Goldwater not only captured the presidential nomination of the Republican Party but opposition to the Court had also continued to grow, an opposition that the apportionment rulings only encouraged. On September 11, 1964—the same day that William F. Buckley Jr. predicted a Goldwater loss in Buckley's appearance before the Young Americans for Freedom national convention—Goldwater appeared before the American Political Science Association at its annual meeting in Chicago, Illinois at the historic Pick-Congress Hotel. Though he predictably censured the Court for many of its doings, Goldwater's dithyrambic address reasoned that the apportionment developments belonged on that list as one more example of a Court exercising "raw and naked

[11] *Congressional Record*, March 29, 1962, 5497.

power."[12] However hyperbolic much of his rhetoric, his complaint that worthy ends should not extend from unpalatable means echoed a common complaint about the Supreme Court. In short, the Court and the federal courts were not the proper arenas for bringing about reform. Worthy change did not necessitate a Court that overstepped its own historic commitment to the separation of powers. In the case of apportionment, its own self-enforced reticence previously had much to do with not overstepping its role in governance.[13]

Goldwater did not attack the Court as forcefully, frequently or cunningly on the 1964 campaign trail as some contemporary, and even later, observers would have us believe. In his appearances in the South when he spoke about the Court, law and order themes or the Constitution, many undoubtedly (and properly) reasoned that Goldwater firmly opposed many of the changes involved with civil rights. Be that as it may, Goldwater's address in Chicago, less than two months from the election, was his first directly about the Court during the election cycle. The Chicago speech hardly proved evanescent; he repeated some of these charges ten days later in Charlotte, North Carolina. In North Carolina he even took cover under vague, yet still generally accurate, citations of the opinions of the knowledge class as critical of the Court. He mixed together that

[12] Henry Jaffa, a noted conservative academic, helped Goldwater in his address to an academic audience; he drafted much of this speech for Goldwater. Goldwater probably did not take the time to read the *Supreme Court Review*; Jaffa most likely did, proving once again that even the discussions in the law reviews could permeate public discourse. On Jaffa's role in this speech see Stephen Shadegg, *What Happened to Goldwater? The Inside Story of the 1964 Republican Campaign* (New York: Holt, Rinehart and Winston, 1965), 213, quotes hereafter at 274. Shadegg indicated that Goldwater, Karl Hess or someone else in the speech-writing effort had edited the Jaffa speech so that it more directly attacked the Court—something Jaffa apparently did not think prudent. Other than the one instance in the speech when Goldwater attacked the Court as "the least faithful [branch] to the constitutional traditions of limited government" the speech represented, in Shadegg's view, a superb critique. The Goldwater confidante said that "Goldwater spoke of painful things. To reform society it was necessary for him to attack society." Richard Nixon would, four years later, perfect the campaign against the Court.

[13] "High Court Hit by Barry," *Chicago Tribune*, September 12, 1964, 1. Goldwater speech writer Karl Hess, who most likely had at least a hand in the creation of this speech, called the Chicago address a "major" one. See BMG, Box 121, Folder 3.

citation with other Court transgressions and general complaints of too much power resting in the hands of the Court in saying:

> We hear it said by the political scientists, by lawyers, yes, even by the exalted class known as the opinion-makers—that the Supreme Court had to act because the states wouldn't reapportion themselves, or because the school boards just weren't being fair to atheists. If this is true, then it must be that all legislative power is held at the pleasure of the Supreme Court. The Court just steps in and exercises power when the legislative body, which has it under the Constitution, doesn't do what the Court wants. I do not doubt for one minute the law must keep up with the changing times. But the job of keeping the law up to date . . . should not be solely in the hands of nine appointed justices of the Supreme Court.[14]

School prayer and apportionment had come together to warrant inclusion in the rhetoric of Goldwater's fateful campaign for the presidency. Given the Warren Court's unpopularity in some circles, we might even express some surprise that Goldwater's criticisms of the Warren Court were not more numerous.

Election year politics and Goldwater's shift make this seem little more than politics at work. Few could doubt that political dividends could be gained by scolding the Court. Contemporary observers had little doubt. Representative Emanuel Celler (D-NY), speaking for the Democratic Party, certainly thought such a motivation explained Goldwater's public position. Celler accused Goldwater of treating "the United States Supreme Court as a political football." Not content with scolding the Republican presidential nominee for the about-face from his public comments from 1962, Celler made comparisons from history and brought in references to communism and totalitarianism as the type of systems that took away the independence of courts. Celler

[14] Barry Goldwater, speech in Charlotte, North Carolina, September 21, 1964, BMG, Box 134, Folder 21.

had made exaggerations of his own, but then again the 1964 election cycle was notable for its extremism in the defense of political victory.[15]

Chief Justice Warren retrospectively attributed much significance to *Baker v. Carr* and by extension the Court's apportionment jurisprudence. In his memoirs he labeled these cases the most important of his tenure, doing so not only because *Baker* and its progeny nudged the country along the path to a more just representational scheme, but also because the High Court had overcome the reticence that for so long had led the federal courts to avoid participation in apportionment matters.[16] Like countless other constitutional controversies of the era, the apportionment decisions involved the competing, difficult to define, though still useful categories of judicial restraint and activism. Judicial restraint and the "political questions" doctrine had in the past led the Court to turn away apportionment suits. The Court had to get past this doctrine in order to participate in the apportionment reform effort.

It was not easy. Justice William Douglas, in his autobiographical musings published after he left the Court, labeled the battle over the "political questions" doctrine as one that represented "the deepest division in the Court in my time."[17] Other justices spoke of the apportionment decisions as perhaps the most wrenching of the Warren era. Warren's remark startles less when we think about the debates both on the Court and

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[15] Democratic National Committee, "Celler Defends Supreme Court Against Goldwater Charges," Release #162, September 13, 1964, Library of Congress, Manuscript Divisions, Emanuel Celler Papers, Box 298.

[16] Earl Warren, *The Memoirs of Earl Warren* (New York: Doubleday, 1977), 177. Legal scholar Philip Kurland, never one to fold his best cards, called Warren's memoirs "a dull book on an important subject." We will encounter Kurland's ideas directly in a later chapter on Alexander Bickel of Yale Law School. Philip Kurland, "Self-Portrait of a Jurist Without Warts," *The Yale Law Journal*, Volume 87, No. 1 (November 1977), 225-233 (quote at 225). On these cases see Gordon Baker, *The Reapportionment Revolution* (New York: Random House, 1965); Richard Cortner, *The Apportionment Cases* (Knoxville: The University of Tennessee Press, 1970).

[17] William O. Douglas, *The Court Years 1939-1975: The Autobiography of William Douglas* (New York: Random House, 1980), 133.

external to it. For our purposes here, key decisions in 1963 and 1964 confirmed what many expected to happen, as the Supreme Court insisted that a near population equality should exist among state legislative districts and among United States House of Representatives legislative districts.

Warren's esteem for the apportionment rulings would not have found favor with many observers of the legal and political scene, and not just because of the potential shifts in political power.[18] Beyond much doubt, these rulings truly revealed the Warren Court's rapidly evolving commitment to democratic ideals and its willingness to use legal rulings to promote those ideals—a path many thought beyond the province of the Court.[19] Apportionment jurisprudence and the "one-person, one-vote" principle thus confirmed for many an unmistakable pattern of Court meddling in the political affairs of federal and state legislatures. Since few could disagree that this intrusiveness had occurred, the arguments often took place over whether the battle against mal-apportioned legislatures justified such Court-led reform.

Apportionment jurisprudence, then, arguably provided the capstone example of judicial un-restraint. After all, the issue only involved legislative districts, vote dilution and how many people in turn chose some easily unresponsive legislator. If the Court had to participate on this issue, which had hardly captivated the country before *Baker*, the

[18] As the reputable Court critic Phillip Kurland aptly put it: "It is not possible to measure the contribution of the reapportionment decisions to the decline of the Court's popularity recorded by the Gallup and Harris polls. One is inclined to believe that this fall from grace is attributable more to the Court's decisions in the areas of criminal procedure, obscenity regulation, and school prayers. But the reapportionment decisions may have provided one more straw to the burden of opprobrium that the Court now carries." Phillip B. Kurland, *Mr. Justice Frankfurter and the Constitution*, (Chicago: The University of Chicago Press, 1971), 65.

[19] Scholars of the Warren Court makes this very point time and again. For one of the more recent see Michal R. Belknap, *The Supreme Court Under Earl Warren, 1953-1969* (Columbia, South Carolina: University of South Carolina Press, 2005), 109-129, in particular 109. I benefit immensely from Belknap's chapter on the apportionment jurisprudence of the Warren era.

entire idea of judicial restraint seemed to have lost much of its meaning. What is more, the typical complaints over federalism, the Court exercising too much power, and ignoring past precedent, featured in the fallout. Criticism of the Court's apportionment revolution may not have impacted people as directly as did the criminal procedure decisions, but even the apparently mundane issue of constructing legislative districts carried immense political consequences for the perceptions of the Court.[20]

Even years later, the apportionment revolution still reveals the Warren majority at it best and worst. The future may have very well vindicated its actions but in its present the Warren Court did not always do an adequate job of at least considering the drawbacks to its work, and had put the country on a path that unsettled the status quo, something that only further contributed to the most dangerous branch's unpopularity. Even when the Court did something so obviously for the "people" it ran into trouble. Backlash did not follow this decision at the grassroots anywhere nearly as severely as it did with other high profile decisions, but neither had grassroots activity excessively pushed for apportionment reform before the decisions. The Court had intruded on settled ground.

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At its core, the mild controversy at mid-century into the 1960s around legislative apportionment involved the question of whether districts had to be drawn up to reflect population or should be permitted to reflect other factors of which population could be one of many (or little to no factor whatsoever). Most districts, state and local, had some tangible relationship to total population or the number of eligible voters, but

[20] See, for instance, L.C. Waddington, "Congress and the Court," *New Age*, May 1965, 6-9; J.L. Martin, "The Quid Pro Quo of Reapportionment," *The Intercollegiate Review*, Volume 1 (January 1965), 1-2.

proportionality was another matter. Hence, if population were to determine the construction of districts, a parallel question came into play. That question involved the extent to which legislative districts, state and federal, had to contain roughly the same number of people within them. If population equality were to become a standard, one vital consideration thus became how much deviation would be permissible from one district to another since exact population equality would be nearly impossible to achieve. Numerous state constitutions already established that districts for at least one legislative chamber were to be drawn up according to population; yet, many of these states failed to follow their own specified guidelines for constructing districts. Other states had clear practices, consistent with law and custom, of allowing political/administrative boundaries (counties, for instance), to serve as district markers.

As it stood, however, the chances for reform seemed bleak. Aside from the improbability of elected officials insisting on a reform that might lead to their own loss of political power, another important roadblock existed since the federal courts, traditionally and arguably on cue from the Supreme Court, often refused to consider challenges to apportionment procedures on the grounds that such suits involved so-called "political questions" unfit for judicial scrutiny.[21] Furthermore, the Court had clung to the notion that it stood ill-equipped to offer any means of relief for those who prayed for judicial resolution. Hence, the threat of lawsuits, or assuredly the suits themselves, could hardly serve to compel reticent legislators to reform the construction of legislative districts.

[21] Despite the charges that he wrote most often as a Felix Frankfurter crony, Anthony Lewis called for the federal courts to entertain apportionment lawsuits and he took it as beyond doubt that legislators would not fix the problem on their own. His 1958 essay proved valuable in this chapter. See Anthony Lewis, "Legislative Apportionment and the Federal Courts," *Harvard Law Review*, Volume 71, April 1958, 1057-1098.

Later this would change, but lawsuit threats, at least in the federal courts, seemed largely hollow until *Baker* changed the game in 1962.

As political scientist Walter Dean Burnham described the problem, "Legislative malapportionment ha[d] been as much a part of the traditional American way of life as the Fourth of July."[22] Examples of population discrepancies between legislative districts provide unambiguous evidence of mal-apportionment (a term that almost presumes population as the proper standard) that existed by the mid-20th century in the United States.

Alabama had, by 1960, an unmistakably disproportionate relationship between county residents and the number of Alabama House representatives from those counties. For instance, Calhoun County with a 1960 population of 95,878 had two representatives, but Bullock County with a population of 13,462 also had two representatives. Effectively, each resident of Bullock County garnered greater representation in the Alabama House. Calhoun and Bullock hardly represented the worst disparities. Mobile County with a 1960 population of 314,301 had only one more representative to bring its total to three.[23] Yet, perhaps Alabama was just behind the times.

Surely the post-war boom and peculiarity of California would have made it live up to the tenets of democracy, that is unless apportionment disparities were a national phenomenon. The California Senate featured an apportionment setting entirely out of touch with population realities. A 1927 measure had set the standard that the California State Senate had to seat one senator from each county. Demographic changes, however, did not lead to changes in the electoral map. By 1958, Los Angeles County, with over

[22] Walter Dean Burnham, "One Man, One Vote?" *Commonweal*, May 4, 1962, 145.
[23] The Alabama examples come from Cortner, *supra* note 16, at 275-276.

40% of the state's population, maintained only 2.5% of the State Senate seats. Two districts in particular reveal that little had changed by the mid-1960s. California Senate district four, of Mendocino County in Northern California, had slightly over 200,000 residents as of May 1965. Senate district thirty-five of San Diego County had nearly five times as many people. Even with these population differences, San Diego County sent two senators on its behalf whereas district four sent one senator. In contrast to the California State Senate, the California House featured an apportionment arrangement that relied on population; the composition of that body was far more in line with the population predominance of Los Angeles County.

In countless states a situation prevailed in which varying percentages of the population— often well below 50%—elected the majority of the legislators that served in one or more of the bodies in the bicameral setup. In Vermont, for instance, not much more than 10% of the state's residents had the voting power to elect a controlling majority of the representatives in the Vermont House of Representatives. While the political happenings in Montpelier undoubtedly did not interest the rest of the nation, one thing that could be said is that Montpelier replicated a pattern of mal-apportionment that existed in numerous states.[24]

State legislatures did not have a monopoly on mal-apportionment. The districts for the United States House of Representatives did not reflect a situation as disproportionate as that which existed in state districts in Alabama, California, Vermont and many other states; nevertheless, even those who went to Washington, D.C. as U.S.

[24] The Vermont example is cited in Arthur Goldberg, "The Statistics of Malapportionment," *The Yale Law Journal*, Volume 72, (November 1962), 91-106, at 91.

House members tended to come from districts with widely disparate numbers of residents.

The fundamental objection, purely on a level of governance philosophy, identified these population differences between and among districts as a betrayal of democratic ideals. Those residents of districts with less people but an equal or greater number of representatives than a district with more residents had, in essence, undue say in the legislative process. In other words, their votes counted more. Residents from districts with more people but disproportionately fewer representatives, on the other hand, had their votes diluted. Presumably what could follow represented the rotten policy of a broken, under-representative system. Areas in which residents had their votes diluted by this under-representation would suffer not merely at the ballot box, as their voting rights were impaired, but in the creation of public policy, the allocation of tax dollars and the overall attentiveness of legislative institutions.

The popular press termed this "rank discrimination." During his re-election effort in 1958, Senator John F. Kennedy contended that mal-apportioned districts negatively influenced public policy. Kennedy was undoubtedly correct. Meanwhile, a vocal but small minority of civic groups, political actors and commentators had an interest in reform.[25] All the same, liberal voices did not complain about mal-apportionment with anything near universality. Nor, for that matter, did recognition of the problem only come from staunchly liberal sources. For instance, Dwight D. Eisenhower's Commission on Intergovernmental Relations, in its 1955 report, recognized that representational inequalities at least had something to do with poor public policy options for cities and at

[25] On John F. Kennedy see, for instance, John F. Kennedy, "Shame of the States," *New York Times*, May 18, 1958, 12, 37-38 and 40; the "rank discrimination" quote is from "Momentous Decision," *Washington Post-Times Herald*, March 27, 1962, A14.

some levels of government.[26] Recognizing the problem did not mean that the political process alone could fix the problem. What can be said is that those who advocated for change gathered the impetus for their efforts from the United States Constitution, from practical policy concerns, and from the ideals of democratic governance.

Those organizations that did carry on a conversation about the need for apportionment reform just as frequently entertained the policy implications of a denied franchise right, not the injury to citizens resulting from the depravation of the right alone. The language of rights, discussions of voting as a right or even citation of the Equal Protection Clause hardly predominated. A case in point is the Montgomery County Committee for Fair Representation (MCCFR). This group pushed an agenda of population-based apportionment through petitions, lawsuits, briefs, meetings and newsletters, in the media and before local politicians and the courts. Heavily populated with members and officials from the suburban communities around Washington D.C., the MCCFR gained help from other local civic groups, including the help of the League of Women Voters, a group with a long-standing interest in apportionment reform.

In January 1961 the MCCFR presented Maryland Governor J. Millard Tawes (D) with a petition bearing the names of over 60,000 Montgomery County voters. Neighboring Prince George's County provided a petition with an equally impressive 20,000 signatories. These numbers may not have had much to do with defending cherished rights; far more significantly, the group lamented the bad policy and inattention that seemed to extend from legislative bodies that were not inclined to address urban or even suburban problems. Hence, insufficient mass-transit, waste, crowded conditions,

[26] See generally *The Commission on Intergovernmental Relations: A Report to the President for Transmittal to Congress* (Washington, DC: Government Printing Office, 1955). President Eisenhower transmitted this report to Congress in June 1955.

and poor services for urban areas all seemed to be explainable through vote dilution. The MCCFR's policy complaints would have sounded familiar to those who complained of urban woes across the country.

Maryland legislators and Governor Tawes refused to endorse whole-scale changes, leading to MCCFR frustration.[27] Even the valuable policy arguments failed to persuade reticent Maryland elected officials. Legal briefs of the MCCFR, however, unsurprisingly told another story, as in that context the organization had to play by the rules and ground its arguments in legal opinion, legal argument and with reference to the state and federal constitutional provisions. Nonetheless, the MCCFR set out its interests in reform as consonant with the presumed implications of voting far more than with voting as a right *per se*.

The MCCFR had analogues elsewhere, one of which, the New Jersey Committee for Fair Representation (NJCFR), took the constitutional questions much more seriously, though the heavy involvement of members of the professoriate helps explain such interests. The NJCFR, with the participation of Princeton University scholar Alpheus Mason and civic-minded attorneys in the Princeton, New Jersey area, used its participants' knowledge of the law to push for compliance once the Warren Court had put the country on the path to population equality between districts.

Importantly, these two lesser-known organizational partners in the apportionment reform effort had to work with less than the wholehearted support of the country's

[27] Montgomery County for Fair Representation Newsletter, June 6, 1961. The Montgomery County Committee for Fair Representation, 1960-1968, 74-7, Box 1, University of Maryland Archives, College Park, Maryland (hereinafter MCCFR). Records for this organization, however far from exhaustive, provide a helpful starting point for understanding the motivations of a civic group that participated in the apportionment revolution. Though I cite them sparingly, the few tidbits there proved, generally, of immeasurable value.

premier civil liberties organization. The American Civil Liberties Union (ACLU) more often took cues from the Warren Court liberal majority and its own affiliates rather than blaze a trail of legal liberalism. Apportionment and other debates of the post-war era reveal the moderation of the ACLU. National ACLU policy and activities had a decisive lack of interest in vote dilution as violation of a right or as an issue of overwhelming importance. The ACLU's tardiness remains as telling an example as any that the political and legal issue of mal-apportionment *did not* dominate the headlines until the Supreme Court helped it do so. Evidence of this tardiness even reveals a national ACLU policy position that continued to accept non-population factors in state legislative districting until it became clear that such a districting scheme had been put on a clear path to retirement. The tardiness of the ACLU and its mild unwillingness to elevate vote dilution to the level of an individual right makes the Warren Court's jurisprudential developments seem far more novel and disruptive.

As a case in point, Grover C. Bagby, of a California-based organization known as the Board of Christian Social Relations, requested clarification of the national ACLU policy in a 1960 communication to its Executive Director, Patrick Malin. Bagby made precisely the general complaint that would, presumptively at least, appeal to the ACLU. Making population the predominant factor in state legislative districting, he lamented, would create situations in which "minority groups will suffer from hasty decisions by majority will." In a numerically tenable but odd argument, Bagby's version of minority rights did not feature African-Americans, the impoverished, non-believers or dissenters, but rather those from legislative districts with less people. Without knowing the official ACLU policy at the time, Bagby chided the ACLU for its "uncritical" look at state

districting.[28] The ACLU's response, however, explained that the national policy, while under review at that time, actually concurred with Bagby's respect for non-population factors in creating legislative districts. Rather than some nod to moderation, the national ACLU policy, by the organization's acknowledgement, rested on the very protection of minority interests that Bagby had identified. In other words, the ACLU thought that rural voters and/or those from areas with fewer people but greater representation actually existed as an identifiable minority deserving of protection from a potentially tyrannical majority.[29]

Many would later say that the extent to which some states went about re-apportioning, by submitting plans to voters or at least studying changes—sometimes not even by direct judicial coercion—provided evidence that the Court had done something popular or least not objectionable. Indeed, in well over half of the states appreciable changes seemed on the horizon not even a year after the 1962 ruling in *Baker v. Carr*. Conceding that point, we might also consider that the opposition to the rulings did not just feature a duel between the ardent forces of the status quo and the liberal voices of reform. Even though the ACLU, the supposed organizational paragon of legal liberalism, eventually embraced the concept of vote dilution as a violation of an individual right and would fight the efforts to counteract the Court's apportionment revolution, its relative tardiness is at least suggestive. Apportionment reform existed as part of policy concerns and in some discussions of individual liberty, but it was not too high on the to-do list for mid-century American liberals.

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[28] Grover Bagby, Staff Representative, Board of Christian Social Relations, to Patrick Malin, April 25, 1960, Princeton University, Seeley G. Mudd Library, Papers of the American Civil Liberties Union, Box 1139, Folder 17 (hereinafter ACLU).

[29] Patrick Malin, Executive Director ACLU, to Grover Bagby, May 6, 1960, ACLUP Box 1139, Folder 17.

Meanwhile, just as organizational liberals like those at the ACLU busied themselves with other matters, intellectuals and social commentators from the 1950s such as C. Wright Mills and William H. Whyte had all kinds of observations about power, the myths of where power resided and the sinister side of the conformity of the age.[30] These intellectual investigations hardly involved denunciations of an American, 20th century version of England's 19th century rotten boroughs. Apportionment reform was not an absolute priority.

The federal courts and the United States Supreme Court shared in the hesitancy of the ACLU. But to say that the hesitancy of the federal courts caused a similar hesitancy within the ACLU would challenge much of the ACLU's own received history, in which it waged unpopular battles against tough odds to vindicate the broad cause of individual liberty. The ACLU had chosen its own moderate course in the apportionment debate. Other liberals too had accepted the truth of the complaints about mal-apportionment but had hardly devoted themselves to ensuring that these complaints became a top reform concern.

Be that as it may, for some time the federal courts had refused to pass judgment on lawsuits involving vote dilution and legislative apportionment, claiming that such legal complaints remained unfit for judicial scrutiny with no manner of relief. Abstaining from participation, the courts relied upon the "political questions" doctrine, itself a manufactured, loose amalgam of principles that stipulated that federal courts would not decide the merits of those lawsuits that were inextricably bound to the political process or involved questions in which the Constitution assigned a pre-eminent role to either

[30] On C. Wright Mills see Richard Pells, *The Liberal Mind in a Conservative Age: American Intellectuals in the 1940s and 1950s*, second edition, (Middletown, CT: Wesleyan University Press, 1989), 249-261.

Congress or the Executive Branch. As far back as *Marbury v. Madison*, Chief Justice Marshall had recognized that the Court would properly refuse to decide these political questions.[31] Classical citations of the doctrine reserved a special place for legal controversies over apportionment, to the extent that one could say that these concerns were the paradigmatic political question—though matters of war powers and foreign affairs exist as possible rivals.[32] Debate over its meaning and even its prudence, in the past to the present, hardly challenges Justices Brennan's 1962 acknowledgment that the doctrine existed "essentially [as] a function of the separation of powers."[33] On the Warren Court, Justices Frankfurter and Harlan stood prepared to defend the traditional refusal of the Supreme Court to violate its own self-enforced refusal, as Frankfurter famously put it, to enter the messy "political thicket."

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Just as the released time decisions of the immediate post-war era served as a backdrop for the Warren Court's school prayer and Bible reading decisions, a case from the same era had considerable relevance for the controversy over legislative apportionment. Yet, unlike the Court's Establishment Clause jurisprudence, the situation with apportionment seemed more settled by 1962. In 1946 the Supreme Court had issued a 4-3 ruling, under a Frankfurter-written opinion, in *Colegrove v. Green*. Justice Robert Jackson could not participate since he was in Nuremberg working as the chief counsel for the United States at the war crimes trials; Chief Justice Stone had sat for the oral

[31] See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164, (1803).
[32] On war powers see generally Louis Fisher, *Presidential War Power* (Lawrence, Kansas: The University Press of Kansas, 2004, Second Edition).
[33] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

arguments but died unexpectedly before the opinion came down that summer. Hence, only seven members of the Court figured in the opinion's final tally.

Colegrove featured a challenge by Illinois residents, including a Northwestern University professor named Ken Colegrove, to the system of apportionment then extant in the state for creating U.S. House districts. They argued that the system violated federal legislation, the United States Constitution and state law. A federal district court had dismissed the original complaint. The majority opinion of the Supreme Court confirmed that dismissal. Justice Frankfurter wrote in the undeniable language of a jurist committed to judicial restraint:

> We are of the opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature, and therefore not meant for judicial determination.[34]

Justice Wiley Rutledge's concurrence held that even if an apportionment complaint were to come up for review, it almost had to be an absolute last resort for the Court to take cognizance of the suit. He doubted that the Court could fix the problem that existed anyway.[35] Still, only four members, including Rutledge, had signed on as supporters of the denial of jurisdiction. Without a commanding majority opinion the language of the dissenting opinion took on even greater importance. A can often be the case, a dissenting opinion existed both as a response to Frankfurter and as an appeal to the future. Justice Douglas's dissenting opinion, in which Hugo Black and Frank Murphy joined, spoke clearly of a right to vote that could not simply be waved away, and

[34] *Colegrove v. Green*, 328 U.S. 549, 552 (1946)
[35] *Id.* at 564-565.

of violations of the Equal Protection Clause. Douglas argued extensively and often effectively by analogy that parallel situations in which vote denial or vote dilution occurred would most certainly not earn such stern dismissal, so the ruling in *Colegrove*, Douglas effectively argued, represented a contradiction in the least, if not an outright deception.[36]

Thereafter, lower federal courts persisted in relying upon *Colegrove* to dismiss similar challenges. The Supreme Court, even by the rule by which four justices had to concur in accepting a case for review, refused to re-visit *Colegrove*.[37] Those who followed the issue knew of the roadblock the decision (and those like it) created. However, reliance on *Colegrove* as precedent could hardly be guaranteed, particularly since the opinion did not even feature a majority of the nine justices confidently rejecting apportionment suits as beyond the purview of the Court. In the post-war years, through the consolidation of the New Deal state during the Eisenhower years, the belated discovery of organized crime and the apparent consensus society of the 1950s, mal-apportionment still animated lawsuits, attention from columnists and even some hope for reform. The ultimate source of that reform would come from a place that the *Colegrove* standard made seem less likely, but the changes in membership and outlook on the Court provided for a new opportunity by the early 1960s.

The 1960 and 1961 Supreme Court terms proved to be monumental in the debates over apportionment. These terms involved round one in three rounds of cases that constitute the seminal apportionment developments. These cases begin with *Baker v.*

[36] *Id*. at 566-569 and 571-572.
[37] See, for instance, *Kidd v. McCanless*, 352 U.S. 920 (1956), a precursor to *Baker* that also came from a challenge to Tennessee's districting.

Carr, then the county-unit ruling in *Gray v. Sanders*, the U.S. House apportionment ruling in *Wesberry v. Sanders* and finally *Reynolds v. Sanders* from June 15, 1964.[38]

During two different oral arguments, one in the spring of 1961 and one more in the following term in October 1962, the Warren Court entertained a challenge to Tennessee's apportionment practices. That case, *Baker v. Carr*, grew out of an engineered effort to unite citizens from four major urban areas in Tennessee in a 1959 lawsuit.[39] Charles Baker, an elected official in Shelby County, Tennessee, and other Tennessee residents brought suit in a federal district court.[40] Joseph Carr, who at the time served as the secretary of state for Tennessee and would serve in that position longer than any other individual in the history of the office, existed as the nominal opponent though the real adversary was the Tennessee General Assembly for its unwillingness to reapportion. The failure to reapportion, so the argument developed, offended not only the United States Constitution but the Tennessee state constitution, a document which called for population equality among legislative districts. Undeniable population differences across districts existed. All legislative efforts to reapportion within Tennessee had come up short since 1901, having met the stubborn refusal of the General Assembly.[41]

Charles Baker and his allies contended that the disparities between legislative districts amounted to a denial of their rights under the Equal Protection Clause of the Fourteenth Amendment. The legal complaint not only asked for the district court to take

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[38] Justice Harlan refers to the developments in the same manner, calling the 1964 ruling in *Reynolds* as part of the "third round" of rulings descending from *Baker*. The Court's apportionment adventures did not end in 1964, but for the purposes of revealing the Court's unpopularity I will primarily confine this chapter's discussion of the case law to these three rounds. For Justice Harlan dissenting, see *Reynolds v. Sims*, 377 U.S. 533 at 624.

[39] Cortner, *supra* note 16, at 56.

[40] Gene Graham, *One Man, One Vote: Baker v. Carr and the American Levellers* (Boston: Little, Brown and Company, 1972), 17.

[41] *Baker*, *supra* note 6, at 186 and 191.

cognizance of the suit but also asked for the abrogation of the 1901 Tennessee apportionment statute and, unless the Tennessee General Assembly fixed the problem, to have the court itself administer a reapportionment of the districts. Predictably enough, however, the original suit earned dismissal from a federal district court in Tennessee both because of precedent and the difficulties in fashioning a suitable remedy for those who complained of vote dilution and discrimination.

Despite the dismissal, the Tennessean challengers to the status quo pressed on. History, precedent and the problem over what remedy, if any, the Court could offer stood in the way of the legal cause of apportionment reform. History, precedent and questions over suitable remedy had hardly stood on the side of the NAACP either, and it had at least scored a major triumph less than a decade before with *Brown v. Board of Education*. But the desegregation decisions at least built on earlier desegregation rulings that made *Brown* seem less of a departure. *Colegrove* and fifteen years of dismissals of similar complaints seemed to present a substantial barrier. Still, much had changed on the Court since 1954, let alone 1946. Douglas's *Colegrove* appeal could plausibly be expected to earn the support of some of the jurists who had joined the Court since the fateful year that Winston Churchill had identified that an Iron Curtain had fallen over Eastern Europe and the Republican Party had earned enough seats in the mid-term elections to gain control of Congress for the first time since 1931.

The Warren Court, perhaps in a sign of things to come, accepted the case for review. Skilled legal counsel had also signed up for the *Baker* appellants. Charles Rhyne, a Washington D.C. attorney and Duke Law School classmate of Richard Nixon, had come on board to argue the case, at least in part, for the appellants. Kennedy

Administration's solicitor general, Archibald Cox, also appeared to lay out the administration's position that the Supreme Court should decide the case on its merits.

The stakes in the *Baker* ruling were tremendous. Justice Frankfurter and Justice Harlan recognized the significance of the case. Opinions, precedent, the oral arguments and predispositions matter on the Court but so do personal pleas. Frankfurter and Harlan were not prepared to scuttle what they saw as the Court's duty not to become involved in apportionment matters. Justices Clark, Stewart and Whittaker perhaps represented allies of that general view. These justices had to face off with the constant lobbying from their colleagues. As an example, shortly after the re-argument on October 9, 1961, Harlan reached out to possible judicial allies. In lobbying two of the other justices, Stewart and Whitaker, Harlan explicitly spoke of the negative consequences that he thought would stem from a Court that participated too frequently in the political process. On October 11, 1961, Harlan wrote to his colleagues:

> I need hardly argue to you that the independence of the Court, and its aloofness from political vicissitudes, have always been the mainspring of its stability and vitality. Those attributes have been assured not alone by the constitutional and statutory safeguard which surrounded the Court, but also to a large extent, I believe, by the wise restraint which, by and large, has characterized the Court's handling of emotionally-charged popular causes. I believe that what we are being asked to do in this case threatens the preservation of these attributes.[42]

Frankfurter and Harlan staged a two-character play that many conservatives and foes of the Court would have applauded, but which their fellow Warren Court Justices refused to attend. Clark and Stewart ultimately ended up concurring in the liberal majority's judgment; Whittaker retired, possibly because of the stress of deciding how to vote in *Baker*, even before the opinion came down in March 1962. *Baker v. Carr* would

[42] Memorandum from John Marshall Harlan to Potter Stewart and Charles Whitaker, October 11, 1961, Princeton University, Seeley G. Mudd Library, John Marshall Harlan Papers, Box 587, Folder Reapportionment, 1962-1971.

represent Frankfurter's final battle on the Court, and he would end up writing an appeal to the future, if only for vindication, just as Douglas had back in 1946.

When the Court announced its judgment in March 1962, Associate Justice William Brennan provided an opinion in which five other justices joined. (Since Whittaker had left the Court before the decision came down, another apportionment decision, much like *Colegrove*, did not benefit from the vote of all nine justices.) The ostensibly narrow ruling in actuality represented a tremendous change in the Court's outlook. Devoid of announced standards of review or avenues for relief, the opinion nevertheless acknowledged that the Court, and by extension lower federal courts, would henceforth pass judgment on apportionment suits that met other case and controversy requirements. Most importantly, the Court largely retired the political questions exception, at least inasmuch as apportionment complaints were involved. The majority opinion directed the district court to hear the arguments that it had previously refused to entertain. What is more, the majority expressed confided that the district court could find proper and effective means of redress.[43]

Those who would later argue that the Warren Court belonged to William Brennan, as much as to Warren, can look to the *Baker* opinion for evidence of Brennan's crucial importance.[44] He had the task of holding together the shaky coalition. Some of the justices, notably Black and Douglas, hoped to see the Court not only take jurisdiction but reach the merits of the case. The cobbled together 6-2 majority had been originally

[43] *Baker*, *supra* note 6, at 186, 197-198.

[44] Michal Belknap, for instance, makes this point about Brennan. Brennan's responsibility for the opinion, Earl Warren believed, could help ensure that Potter Stewart voted with the majority. Though Stewart thought the case suitable for review and hardly seemed as willing to go as far as the other liberals in viewing mal-apportionment as inherently suspect and in violation of the Equal Protection Clause. See, Belknap *supra* note 19, at 116-117.

only a 5-4 majority. Eventually Justice Clark came over to the majority side. But holding together the six justices required the delay in reaching the merits. Justice Stewart, in particular, would go that far but no farther. Larger questions about standards of review and the legality of mal-apportioned districts would have to wait.

Trademark Warren Court misgivings also appeared in the majority opinion. Brennan's opinion dismissed Frankfurter's *Colegrove* opinion not as a legal authority to overrule or even as a ruling to distinguish, but as one that never really meant what it had seemed to say, namely that apportionment complaints did not evince a suitable case and controversy. The majority's willingness to dispense with the political-questions stranglehold served good ends, but one simply cannot overlook the disavowal, at times disingenuously, of *Colegrove.*[45] Even the ill-tempered Frankfurter would have justifiably reacted with scorn to such abuse.[46] Brennan's dismissal of *Colegrove* remains, even years later, a far too often overlooked example of the Warren liberals doing whatever necessary to reach the results they wanted. *Colegrove* may not have spoken as unambiguously of the non-justiciability of apportionment suits as some believed, but Brennan's opinion all but ignored the contention that inferior courts and the Supreme Court's own *per curiam* dismissals since 1946 did not just occur despite *Colegrove*. Brennan's opinion provided a thorough run-down of the different areas of complaint that had triggered reticence on the political question, but ultimately found the Equal Protection claim outside of the scope of any of those areas.[47]

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[45] *Id*. at 186 and 202. For a sound scholarly disavowal of *Colegrove* see Charles Black, "Inequities in Districting for Congress: *Baker v. Carr* and *Colegrove. v. Green*," *The Yale Law Journal*, Volume 72, (November 1962), 13-22.
[46] *Id*. at 277-278 for the rebuttal.
[47] *Id*. at 210-227; for Frankfurter's version of the reasons, 281-297

With *Colegrove* out of the way, the Brennan opinion recognized that the challenge depended on a viable Equal Protection Clause claim that would be up to the district court to decide during re-argument. Although the Brennan opinion had indicated that the suit deserved a hearing on its merits, his opinion at least had a tentative nod to restraint: it did not indicate whether the merits of the complaint indeed had support from the Fourteenth Amendment, or what other redress might be forthcoming. The nod to restraint, or at least the clear unwillingness to decide the merits at that juncture, might also have had much to do with attracting the votes of other justices, such as Justice Stewart.[48] Given the inclinations of Brennan, Black, Douglas and Warren, it is of little doubt what they thought on the question. Such moderation would scarcely re-appear as the Court built upon *Baker*. Even without a declared fix to the apportionment problem, liberal sources of opinion expressed approval. The *Nation*, for instance, did not even hesitate to praise the ruling since the Court had helped "transform" a problem rather than "solve" it right away. Mature democracies, the publication argued, would want to have it no other way.[49] One might have wondered, however, if mature democracies might have preferred to actuate such reform with the help but not the blunt directions of the judiciary.

Justice Douglas's concurrence did not indicate what remedy could follow either, but he hardly deviated from a course that one would have expected the robust liberal to follow, in contending the claims involved voting rights. The invocation of rights thus required the vigilance of the Court and only made the Equal Protection claim all the more proper.[50] If he were to have his way, the Court would have gone much further. Douglas

[48] On the efforts of Frankfurter and Harlan to appeal to Stewart and Whittaker see Belknap, *supra* note 19, at 115-116.
[49] "The Way of Democracy," *Nation*, April 7, 1962, 293-294.
[50] *Baker*, *supra* note 6, at 241-250

had the opportunity in 1961 and 1962 with his concurrence to exercise fidelity to the dissent he had filed years before in *Colegrove*.

The concurrences of Justices Clark and Stewart, too, hardly deviated from the general course. Though Clark's exhaustive citations of deviations in districts presaged his later difficulties with the Court's apportionment jurisprudence, he at first had hoped to file his own dissent. His March 7, 1962 letter to Felix Frankfurter revealed an important part of Clark's thinking. Originally Clark had hoped to frame his dissent around the options that remained open to Tennesseans to bring about apportionment reform without court action. Research on these options proved illuminating for Clark. He ended up indicating to Frankfurter that he had located no "practical course that the people could take in bringing this about except through the federal courts."[51] Accordingly, he felt that voting with those in the majority made more sense. Stewart seemed far more hesitant over the course he had tentatively joined, but his opinion seemed to chide Justice Harlan as much as it told the readers of the Supreme Court Reports that *Baker* had not settled the questions over redress, which it assuredly had not. His concurrence presaged later dissents in important apportionment rulings.

The dissenting opinions in *Baker* exhibit an opposition *par excellence* to the judicial liberalism of the Warren era. One can easily misread, misunderstand and fault the bitterness, and at times exaggeration, in Harlan and Frankfurter's individual dissents, which each justice joined. However, each opinion represented something different, and together they serve as more than just evidence of the losing side's unwillingness to get on the right side of history.

[51] Memorandum from Tom Clark to Felix Frankfurter, March 7, 1962, Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, < http://web4.cc.utexas.edu/clark/view_doc.php?id=a120-02-02>.

Frankfurter's opinion, which still suffers from his unmistakable badgering tone, held to his ideals. He sounded off on the unmistakable limits to judicial power, saying that "there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power."[52] That admission might not be enough to justify a refusal to correct wrongdoings but there still remains much from the legal past and present to support the notion that no amount of judicial action solves some of the more vexing legal and political controversies. In light of the majority's ruling, Frankfurter seemed to envision a future in which the federal courts were called upon to manage, pass judgment on and even create legislative districts.

In the end, the opinion represented as much a rejoinder to the majority holding as it did a response to the path that that holding apparently augured. However much the majority might pretend otherwise, Frankfurter saw the Court on a path that necessitated an eventual consideration of the questions involving vote dilution. Frankfurter continued to insist that the Court's persuasive capabilities suffered because of Supreme Court over-involvement. He wrote confidently both of the general limits to judicial power and of the virtues that sustained the political questions doctrine:

> The Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[53]

Not providing the lower courts guidance on remedial action or standards for their review of future cases was, Frankfurter believed, in effect not even defensible restraint but an illusory, token gesture by the majority.

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[52] *Baker*, *supra* note 6, at 270.
[53] *Id*. at 267.

Harlan's dissent, in which Frankfurter joined, argued that the complaint by the Tennessee citizens should have been dismissed for its failure to put forth any claim from which relief could follow. Frankfurter had argued for judicial reticence strictly because of the apportionment problem; Harlan concurred with that assessment before emphasizing that no suitable constitutional violation claim had even been made. He did not even think it was necessary to decide on the political questions doctrine, since it was not clear how the United States Constitution set parameters for how states constructed their own legislative districts.[54] Harlan, who would soon have to carry the cause alone, still supported abstention, just without clinging quite as explicitly to the doctrine. What is more, so much of the debate over apportionment seemed bound up in false arguments about the irrationality of non-population based districts—a theme that would reappear in later Harlan apportionment dissents. He summarized the problem with his trademark precision and awareness of the past:

> In the last analysis, what lies at the core of this controversy is a difference of opinion as to the function of representative government. It is surely beyond argument that those who have the responsibility for devising a system of representation may permissibly consider that factors other than bare numbers should be taken into account. The existence of the United States Senate is proof enough of that. To consider that we may ignore the Tennessee Legislature's judgment in this instance because that body was the product of an asymmetrical electoral apportionment would in effect be to assume the very conclusion here disputed. Hence we must accept the present form of the Tennessee Legislature as the embodiment of the State's choice, or, more realistically, its compromise, between competing political philosophies. The federal courts have not been empowered by the Equal Protection Clause to judge whether this resolution of the State's internal political conflict is desirable or undesirable, wise or unwise. [55]

He closed by predicting quite well the reactions of those outside the Court, lamenting that:

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[54] *Id*. at 331.
[55] *Id*. at 333.

> Those observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision and its break with the past. Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern.[56]

Baker came down not long before President Kennedy appointed Byron White to the Court to fill Whittaker's seat. White seemed assured of easy confirmation; indeed, only eight days elapsed between his nomination and confirmation. But on the same day that White earned the consent of the Senate, Senator Richard Russell (D-GA), who admitted that he had no intention of voting against the appointment, still chose to use the occasion to lament the lack of equal representation on the Supreme Court. Russell even calmly expressed his grievances. The popular president, not yet reeling from the Bay of Pigs in April 1961, would certainly get his appointment; opposing his nominee made little sense. Yet, Russell did not have to be equanimous. However much Russell praised a decision that nudged the country in the direction of living up to ideals of equal representation, he still lamented the presumptive imbalance on the Court. At least on the cusp of a Kennedy appointment that followed the momentous *Baker* ruling, Russell requested that the conservatives in the country deserved a greater voice, if not actual presence, on the High Court.[57]

The term that ended in the summer of 1962 was Frankfurter's last. Russell and others would have even greater reason to worry about an imbalance on the Court. On apportionment matters, however, the votes had already been counted. Frankfurter's presence on the Court would have made little difference in the next few years. Arthur Goldberg, who replaced Frankfurter for the 1962 term, would fill Frankfurter's seat but

[56] *Id*. at 339-340.
[57] *Congressional Record*, April 11, 1962, 6331.

hardly fill the shoes of one who danced to the tune of judicial restraint. In any case, the two general sides on the Court seemed to have decided just to talk past one another, with confident, often dogmatic, assertions that history did or did not support one view or the other on vote dilution and whether the Court had violated sacred ground. Developments not long after *Baker* confirmed that the Warren majority had sent a signal to recalcitrant legislators that they could either institute change on their own or expect change via lawsuit to transpire. Only Justice Harlan remained to carry on. But even without hindsight as an ally, the historian can hardly miss that the opponents of apportionment reform knew that *Baker* had changed the game.

Following *Baker* the federal courts dealt with the new setting. Numerous cases reached the Warren Court over the next few terms. The Warren Court went about vacating judgments, instructing lower courts to issue rulings under the *Baker* holding that such claims were not to be presumed unfit for judicial examination. The ultimate questions would be whether the Court would view mal-apportionment as a violation of the Equal Protection Clause and what sort of relief it could fashion to those who had suffered. A series of cases in 1963 and then in 1964 confirmed the path the Warren Court had apparently set and bequeathed a new term to American's constitutional vocabulary: "one-person, one-vote."

Gray v. Sanders did not involve legislative apportionment, but in the 1963 ruling the Court turned aside Georgia's county-unit system, providing a preview of what would soon follow in apportionment cases. The county-unit system attracted attention as arguably one of the worst examples of preserving rural control of political power in the United States. The system also portrayed stark racial vote dilution since many African-

Americans resided in underrepresented yet more populated urban areas.[58] Georgia's Democratic primary elections, by state law, involved an arrangement whereby the number of residents in any county broadly accounted for the number of units for that county, with those units, rather than the individual votes of the primary voters, accounting for the actual final primary vote tally. The plurality winner of any county in a primary received all of that county's unit votes. Georgia's Democratic state elected officials and United State senators had this primary system serve as the clear path to election. In a sense, the system worked in a manner analogous to the federal Electoral College system, with an important difference in the county-unit system's wavering respect for matching units to residents in a proportionate manner. Though the units for each county generally increased with the county's number of residents, the units became sparse beyond a certain number of residents. Counties with even tiny populations had, even after changes to the law, a minimum of two units, while counties with much larger populations, such as Fulton County (Atlanta), having a number of units that was larger but not in any way proportionally larger. Rural counties in Georgia, with about 1/3 of the state's population, in effect had control over the primary voting system, which meant that these counties had a key role in perpetuating Georgia as a *de facto* one party state. One party domination of Georgia, like in other Southern states, only helped prevent improvements in civil rights for African-Americans.

Justice Douglas's majority opinion in *Gray* had no difficulty recognizing a primary election as state action, hardly a Warren Court era innovation given *Smith v.*

[58] See William G. Cornelius, "The County Unit System in Georgia: Facts and Prospects," *The Western Political Quarterly*, Volume 14, (December 1961), 942-960.

Allwright from nearly two decades before.[59] But the opinion rejected the district court's reliance on the Electoral College analogy to sustain the disparities between the counties and accept the system. Douglas, in speaking of the Court's acknowledgments of a right to vote, recognized that such a right was not absolute, but he also said that a "conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[60] Equal voting mattered. Vote dilution, in effect, hurt a cherished right whose symbol was one of the most important examples of the country's democratic heritage: a citizen at the ballot box. The majority, relying upon the Equal Protection Clause to command this "one-person, one-vote" principle, returned *Gray* to the lower court expecting a new ruling consistent with majority opinion. Eventually Georgia scrapped the county-unit system entirely.

Harlan, in *Gray*, was left to complain alone that the Court's willingness to join these essentially political controversies had now produced the flood of lawsuits that he had predicted. What is more, he accused the majority opinion of inventing and distorting history. Also troubling, he asserted that the majority opinion had decided, though not proven, that the Equal Protection Clause required these standards, and wrote that he could not judge the county-unit system patently "irrational" and out-of-line with the Constitution.[61] The Court, however, had made sure to indicate that *Gray* did not spell out the implications of *Baker* and the standards it directed for such districts. Nevertheless, the opinion still seemed to confirm the Court's interest in ensuring that voters not encounter state-sanctioned vote dilution. Harlan and Frankfurter had predicted that the Court would

[59] *Smith v. Allwright*, 321 U.S. 649 (1944).
[60] *Gray v. Sanders*, 372 U.S. 368, 380 (1963).
[61] *Id*. at 384-388.

become ensnared in these apportionment and vote dilution battles; *Gray* represented only the first of many.

The opinion in *Wesberry v. Sanders* in 1964 set out an ideal of population equality between U.S. congressional districts. States and their legislators had long maintained control over the construction of districts for the United States House of Representatives. With the 435 seats that have made up the U.S. House for nearly the last century, the once a decade census has shifted up or down the number of representatives in any one state. The districts from which those representatives are drawn can and have changed in shape, size and population. Historically, these districts also represented frequent population disparities. Just as Georgia served as the setting for *Gray*, voters from Georgia's Fifth Congressional district had brought suit, after *Baker* came down, alleging vote dilution in Georgia's U.S. House districts. Georgia's Fifth Congressional district maintained a population far in excess of that of other districts in the state but still only had one representative. Because of that disparity, the elected representative from the Fifth District represented anywhere from two to three times as many people as other representatives. The District Court had originally dismissed the suit, an action that the Warren Court majority, under a Hugo Black opinion, judged a failure to follow the *Baker* ruling.

Black's opinion, speaking for five other justices, relied not upon the Equal Protection Clause but instead looked to Article I, Section 2 of the United States Constitution to indicate that vote dilution did offend the Constitution. The lower court had erred, in the Court's judgment, in relying upon the political questions doctrine. The majority opinion proclaimed: "We hold that, construed in its historical context, the

command of Art. I, 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[62] The opinion at least recognized the tension inherent in calling for population equality while noting that ensuring such an arrangement would be nearly impossible. Black closed by saying:

> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.[63]

To reach such a point, the opinion entirely relied upon the past. The entire idea of a House of Representatives, as construed by the Founding Fathers, the Framers of the Constitution, the federal census and the Great Compromise that paved the way for an Upper House from which two senators represented each state and a Lower House from which population determined representatives, presumed population as the basis of the lower body. To think otherwise, Black asserted, ran in the face of historical evidence. Be that as it may, Black overlooked much of the tradition—from well beyond the founding era—that ran precisely in the other direction. The Court's critics—of whom we should count Justice Harlan—would make sure to identify this credible critique.

Harlan cautioned that the composition of the entire House of Representatives could be in doubt. In a response to the majority opinion, Harlan's dissent found no basis in either Article 1, Section 2 of the Constitution or in history to support the reliance upon the "one-person, one-vote" standard for the U.S. House. In short, the people still voted, as the Constitution seemingly demanded for the seating of House members, even if they

[62] *Wesberry v. Saunders*, 376 U.S. 1, 7-8 (1964)
[63] *Id*. at 18.

did not all vote in districts with equal populations. Any change of these districts, Harlan declared, had to come from the states or from the supervisory power of Congress, which Article 1, Section 4 provided. The Black opinion had looked to history but found there only what the Warren liberals wanted to find, the dissent alleged. Harlan looked to the Great Compromise for answers about representation between the states, not as an indicator of how districts would be constructed within them. The notion that the founding generation intended to have the House exist as a voice of the people did not mean that every representative, even those within each state, would hail from districts of the same number of residents or voters. In describing the Founding Fathers he said that although "many, perhaps most, of them also believed generally—but assuredly not in the precise, formalistic way of the majority of the Court—that within the States representation should be based on population, they did not surreptitiously slip their belief into the Constitution in the phrase "by the People," to be discovered 175 years later like a Shakespearian anagram."[64] Harlan could only stand up to what he recognized as abuses of history and legal reasoning. As much as any area of Warren Court jurisprudence, the cause of judicial restraint met its demise as the Court waded into the "political thicket."

That June the Court finally spelled out the standards that *Baker*, *Gray* and *Wesberry* had portended. *Reynolds v. Sims*, its companion cases and various *per curiam* opinions at the end of June brought the "one-person, one-vote" principle to the districting of both state legislative chambers. In *Reynolds*, M.O. Sims and thirteen other Alabama citizens brought suit against the secretary of state, attorney general and the chairmen of both the Democratic and the Republican Parties in Alabama. These Alabama voters prevailed upon the courts to rule that the Alabama districting practices violated the state

[64] *Id*. at 27.

constitution and the Equal Protection Clause of the U.S. Constitution. Companion cases from Delaware, Maryland, New York and Virginia featured similar complaints. The Court's ruling in *Reynolds* took notice of how the situation on the ground in Alabama so remarkably displayed the problem of mal-apportionment and ran parallel to the situation in so many states. In Alabama the State Senate had thirty-five members, while the lower house had one hundred and six. The Alabama constitution called for these districts to be based upon population, and for such districts to be remade with every federal census. Nonetheless, nothing had been done to follow that mandate since the turn of the century. Legal action as part of *Reynolds* and the pressure of the federal courts had prompted the Alabama legislature to consider a constitutional amendment or legislation to remake the state's districts largely on a county basis, with left-over seats handed out on a population basis. The district court had looked upon the Alabaman setup as a violation of the Equal Protection Clause because of the disparities between the districts. It also, in a seeming advisory opinion, disapproved the possible actions of the Alabama legislature to reform the system.

Relying on the Equal Protection Clause, the Earl Warren majority opinion went through the normal citations of a cherished and protected right to vote, identified the mandate of *Baker*, turned aside any reliance on the so-called federal analogy and sought to articulate the standards that would guide future review of constitutionally suspect districts.[65] The disavowal of the "federal analogy" represented a crucial defeat for those

[65] The federal analogy was one of the more popular weapons in the arsenal of those who fought for the status quo. Essentially, the argument proceeded to say that since the United States Senate had been organized and continued to operate in seating two senators from each state, irrespective of population, that the states should be able to follow that model. In January 1965 Senator Dirksen introduced an amendment that would have permitted states to apportion one of their legislative chambers on a basis other than population. Hearings followed that spring, but even with the changes made to the amendment's language

who did not welcome the Court's innovations. One of the strongest arguments for preserving at least one state legislative body that apportioned on basis other than population was that the United States Senate did so. The Court though dismissed that argument, ruling that the peculiar set of historical circumstances during the 18th century negotiations over the shape and function of the federal government had allowed for every state, regardless of population, to send two senators. Warren's opinion in *Reynolds* stated explicitly that states would get more latitude in fashioning their own legislative districts than they would with fashioning districts for the federal Congress.[66] After noting the Court's recent attempts in this broad area, Warren famously commented that this estimable franchise right demanded a situation in which:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable.[67]

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the essential idea of preserving the possibility for states to apportion one chamber without strict reliance on population. An August 1965 vote on the amendment left it seven votes shy of passage in the Senate.

[66] *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).

[67] *Id*. at 562.

Earl Warren even went so far as to compare vote dilution in situations of geography to those in terms of discrimination by race—a debatable but by no means shocking admission from a Court that had already made civil rights improvements and protecting the rights of minorities a vital part of its jurisprudence.[68] Vote dilution had become something that violated an individual right; accordingly, the opinion held that the Equal Protection Clause required both the upper and lower house of any state legislature to follow population in creating districts. The opinion left room for disagreement and variation in implementation when it said states would need to show "an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."[69] One scholarly supporter of the apportionment changes lauded *Reynolds* for its "exquisite simplicity."[70] But such praise only seems defensible because the Court had done something that seemed to benefit, at least in the long-run, the popular will. *Reynolds* truly kicked off the fiercest and most consequential political criticism of any of the apportionment decisions.

The Court again would be forced to determine compliance, developing standards of judgment as cases arrived for resolution. Just as the Court had seemingly invited reform by lawsuit in its "all deliberate speed" contribution, the practical recognition that "one-person, one-vote" would never provide a workable standard seemed to demand that

[68] *Id*. at 566.
[69] *Id*. at 577.
[70] Robert B. McKay, "Reapportionment: Success Story of the Warren Court," *Michigan Law Review*, Volume 67, December 1968, 223-236 (quote at 227).

either compliance would occur or courts would be forced to wage a losing battle to ensure compliance. One might reasonably wonder if the Court had again committed itself to the same failures that attended to desegregation, arguably because of the Court's apparent moderation. Deviations would be permitted but how far those deviations could go would presumably be left up to further litigation. Likewise, what remedies could follow, the Court could not predict or command. Inviting courts to figure out standards would be one of the primary points of criticism Justice Harlan ventured in his dissent. Regardless, the entire accommodation reveals, yet again, the cognizance that the Warren Court justices had off their opponents and the importance of public complaisance in making the law function.

Justice Harlan's dissent from *Reynolds* and the companion cases firmly rejected the nexus between the principles of equal protection and the "one-person, one-vote" ideal. He had already registered some of the same ideas in *Baker* and *Gray*, but here again he protested the majority's inadequate attention to the history of the Fourteenth Amendment and the prevailing practices from the past. Harlan still would have protested, but one wonders if he might have toned down his protest somewhat if the majorities in *Baker, Gray, Wesberry* and *Reynolds* had merely admitted the novelty of the developments. In the end, Harlan had identified, put on display and duly criticized quite possibly the most stunning examples of the imperial judiciary. His lonely voice on the Court from 1962 through 1964 would have innumerable allies outside of the Court's conference room. Had they imitated his tone and respect for the past, their arguments against the Court's might have been far more appealing.

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Determining the shapes and sizes of legislative districts, not to mention the number of people who made up those districts, did not have the visceral, emotional appeal of the private choices of faith involved with school prayer or the unquestioned allegiance to America's caste system that the Court challenged in *Brown*. Simply put: the fallout over apportionment never seemed as intense as that with civil rights, school prayer, or criminal procedure. Be that as it may, those waging the battle in opposition to the Court's doings had a few sound objections. While other important apportionment rulings followed *Reynolds*, rulings in which the Court sought to sort out how strictly to interpret the "one-person, one-vote" standard and to decide whether or not this standard applied to other legislative or quasi-legislative bodies, the fallout from apportionment developments, for the most part, was a reaction to the three rounds of decisions in 1962, 1963 and 1964. In particular, the fallout seemed most intense in 1964 and 1965 following *Reynolds*.[71]

While the Americans for Democratic Action, three years after *Reynolds*, held that there could be no "justification within a democracy to support any dilution of the right to equal representation," the Court's manifold critics recoiled at the rulings. The critics devoted much attention in the years following *Baker* to finding "justification" for vote dilution, or at least opposition to the source for the apportionment revolution.[72] They drew upon rationales both familiar and powerful. Preserving political power and scolding the Warren Court whenever it made the headlines represented the predictable reasons. But with the apportionment jurisprudence, the manner by which the Court had

[71] For instance the Court expanded "one-man, one-vote" so that it applied to local government bodies with legislative functions. See *Avery v. Midland County*, 390 U.S. 474 (1968).
[72] The Americans for Democratic Action, *Program for Americans '67*, 5.

established itself as the superintendent of apportionment standards remained a sound reason for the criticisms. Popular commentary and political action all provide an opportunity to understand the enemies of the apportionment revolution.

Politics unmistakably stood behind much of the criticism of *Baker* and its descendants. Political gain might attend to scolding the Court and, even with the divided opinion over the impact of re-apportionment, there was certainly the threat of elected officials losing power. U.S. Senate minority leader Everett Dirksen, who eventually carried the torch in the Senate for those seeking to re-direct or stop the apportionment changes, recognized that the Warren Court's rulings could help the Republican Party in the 1964 elections. Dirksen told his fellow Republican congressman as such not long after the June 1964 *Reynolds* ruling, a development that had ensured that federal courts would be involved in ensuring some level of population equality between state legislative districts.[73] On the national political scene, the 1964 Republican Platform called for a constitutional amendment challenging the apportionment developments; the Democrats debated, but did not support, an endorsement of the Court in their platform.[74]

Political success—preserving it, that is—might have been the *raison d'être,* but unwelcome, albeit distant, policy changes also mattered.[75] Identifiable groups and organizations had good reason to lament the apportionment developments and what they portended for future state and federal legislatures. Just as the MCCFR, organized labor and other pro-reform groups looked to mal-apportionment as a cause of policy lag for

[73] For Dirksen's frank recognition of the political benefit that could follow from opposing the Court, see Byron C. Husley, *Everett Dirksen and His Presidents: How a Senate Giant Shaped American Politics* (Lawrence, KS: University Press of Kansas, 2006), 202.
[74] "Democrats to Support Court on Redistricting," *New York Times*, August 22, 1964, 1.
[75] Committee for Government of the People, "Reapportionment Fact Sheet," (no date); Committee for Government of the People News Release; Everett Dirksen, "The Question Before Us," January 19, 1966, Working Papers, Subject R, Folder 2274, EMDP.

urban and suburban areas, the reverse could be true for small business and those in smaller population centers. Critics worried that future policy, if the apportionment revolution succeeded, would increasingly respond to metropolitan interests and their presumptive liberalism. Fears abounded that tax policy would only benefit urban interests; organized labor, the ever-present demon in the conservative mind, might gain even further clout; investments in urban transportation networks and improvement would leave rural and henceforward underrepresented areas behind. Along this front, members of the Western Growers Association, a group for Arizonan and Californian produce interests, expressed concerns over an ascendancy of urban representation that would neither understand nor care about the agricultural issues important to its membership.[76] In another example, the Independent Bankers Association of America worried that increased political power in urban areas could, among other things, increase the call for centralized and branch-banking.[77]

Hyperbole abounded in the pages of *National Review* and from the usual suspects of the conservative revival. Editor-in-chief, William F. Buckley, Jr., with his trademark bluster, asserted that the apportionment rulings were "probably" the Warren Court's "pre-eminent venture in ideological fanaticism."[78] *Baker*, so the thinking proceeded, represented an updated, perhaps even more disastrous, version of government by

[76] Frank W. Castiglione, Executive Vice President of the Western Growers Association, to Congressman Morris K. Udall, April 19, 1965, Special Collections, University of Arizona Library, Morris K. Udall Papers, Box 104, Folder 14.
[77] Howard Bell, President of the Independent Bankers Association of America, to Emanuel Celler, December 9, 1965, ECP, Box 293.
[78] "Ideological fanaticism" quote taken from William F. Buckley, Jr., 'The Fight to Amend the Warren Court," *Washington Star*, May 27, 1965. See, also, William F. Buckley, Jr., "The Warren Court's New Constitution," June 20, 1964, Buckley Online, Hillsdale College Collection, <http://cumulus.hillsdale.edu/buckley/Standard/index.html> (hereinafter HC). The entire article was a pastiche of quotes from dissenting opinions. Buckley continued to cite Tom Clark, John Marshall Harlan and Potter Stewart as the few critics of the Court's excesses. Unfortunately, in Buckley's opinion, the putative nexus between extremism and court criticism deterred a wider discussion of the Court's errors. Another relevant piece on apportionment is his "Mr. Warren's Destructive Court," June 27, 1964, (HC).

judiciary that had up until then found its preeminent example in *Brown* and the desegregation rulings. However, Buckley got it right in recognizing that *Baker* represented a beginning, not an end. In addition to wondering how the Court could have turned its back on precedent and how it had found the constitutional language to support what all seemed to know would happen, *National Review* worried about political realignment, power going to urban areas and, what it thought would happen, more votes and influence going to the Democratic Party.[79]

Many of the Court's foes questioned the propriety of the federal courts even passing legal judgments on apportionment matters, let alone judgments seemingly out of touch with past precedent. Likewise, the doubts about the courts as a source of reform persisted. As *New Guard*, the publication of the Young Americans for Freedom put it, "not every evil which afflicts democracy is entitled to a judicial panacea."[80] Frankfurter and Harlan assuredly would have agreed with the sentiment and language *New Guard* employed. The dissenting opinions from outside of the Court benefited from those registered by the Court members. Critics could relay the words of Justice Frankfurter, Justice Harlan or both to the readers of conservative columns and editorials. Columnist David Lawrence made precisely that complaint about the Supreme Court as the source of reform, but in so doing employed the popular gambit of borrowing from Justice Harlan's opinions.[81]

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[79] "Toward the Total State," *National Review*, April 10, 1962, 234-235. Of course, the continuing realignment in the South would make much of this fear unfounded. Democrats would lose their control over the South for reasons far removed from the apportionment revolution.

[80] "Congress and the Court," *The New Guard*, May 1965, 6-9 (quote at 9).

[81] David Lawrence, "Congress and the Supreme Court," *The Evening Star*, February 19, 1964, Princeton University, Seeley G. Mudd Library, David Lawrence Papers, Box 171.

Elsewhere on the conservative front, L. Brent Bozell Jr. furnished similar reactions in his chaotic screed, *The Warren Revolution: Reflections on the Consensus Society*.[82] Bozell's tome, while not nearly as successful in its historical footwork as Justice Harlan's dissenting opinions, nonetheless featured the same negative view of the Court as the source of reform. Praise for the tome, unsurprisingly, surfaced from his former colleague and brother-in-law, William F. Buckley, Jr. Buckley even claimed that he could not resist sending a copy along to Chief Justice Warren.[83] With the apportionment rulings, Bozell argued, the Court had put its "clumsy, imperious hand . . . into the most intimate political concerns of every community in the land."[84] While allowing legislators to fashion their own districts has always had something peculiar about it, the critics of the decisions could easily contend that there was nothing abnormal or even venal about this arrangement. Bozell, for instance, thought along these lines, viewing this practice as not only sensible but also in line with "the premises of republican government." In his view, legislators had to be responsible to voters, so if the legislators drew districts in mischievous ways the voters could hold them accountable. Such faith in the process ignored larger questions and normative judgments about how the process should work. Much like Harlan and Frankfurter's dissents, this view that the court-led reform should come from elsewhere tended to overlook that the political system had become bound up in not serving majoritarian interests. Conservatives could just as often as liberals avoid unhelpful empirical evidence.

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[82] L. Brent Bozell, Jr., *The Warren Revolution: Refletions on the Consensus Society* (New Rochelle, New York: Arlington House, 1966), 80.
[83] William F. Buckley, Jr. "The Warren Revolution," December 27, 1966, HC.
[84] Bozell, *supra* note 82, at 110.

Lost on Buckley, Lawrence, Bozell and others who shared this view was that in the long-term courts did not have to become overseers of every change to every district across the country. While the Warren Court had essentially invited further apportionment reform by lawsuit it also knew that compliance would eventually either result or not as the political system worked out many of the details. As with *Brown II*, the Court's slight moderation invited as much possibility for trouble as it extended hope for compliance.[85] When the Court had to revisit Florida's attempts to bring its state legislature in line with the seemingly moderate "substantial population equality" standard enunciated in *Reynolds*, the critics who did take notice recognized that their predictions of supervision run amok had come true.[86] Still, the degree of intervention was often overstated. Setting standards for acceptable deviation hardly involved the judiciary in actually approving boundaries, drawing boundaries or otherwise stamping out all the sanctioned gerrymandering that could continue.

One of the explicit arguments employed in support of the Court's rulings recognized that many states had done little or nothing to make changes on their own; hence, the Court had to nudge them in that direction. Supporters of the Warren Court did not even disavow that it "had used the judicial-policy making power" and could just as easily laud the Court for what it had done, not how it had gone about doing it.[87] But this too connected to the disagreement over the role of courts and the Warren Court in particular. The mal-apportionment problem, while not fictitious, hardly animated a

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[85] *Id*. at 81.
[86] See *Reynolds*, *supra* note 66, 579. Originally the situation in Florida had led the Court, one week after *Reynolds*, to reverse a lower court decision involving the Florida legislature. Then, three years later, the complaint had returned so that the Court could go about determining just how much deviation was acceptable from the ideals of population equality. See *Swann v. Adams*, 378 U.S 553 (1964); *Swann v. Adams*, 385 U.S. 440 (1967).
[87] Robert S. Hirschfield, "The Warren Court," *The Nation*, May 25, 1964, 527-528.

legion of supporters; as far as contested rights go, the history of this one did not rank high for its combativeness and pervasiveness. Britain's rotten boroughs of the 19th century and the debates there, it bears repeating, had assuredly *not* found a historical analogue in the United States. Thus the lack of popular urgency around mal-apportionment prior to *Baker* tells us that the Court's critics were indeed on to something, particularly in lamenting that the Court was a prevailing source for the reform. In some respects the Supreme Court created a controversy as much as it responded to one.

Baker, *Gray*, *Wesberry* and *Reynolds* also unleashed the conventional complaints involving separation of powers and federalism. The *Wesberry* decision most directly involved separation of powers. At the federal level, Congress, in Section Four of the Constitution, had been granted the duty of determining who could take congressional seats. With such textual guidance seemingly trumped, the *Chicago Tribune*, a persistent Warren Court foe, wondered "what happens to the doctrine of separation of powers, which used to be considered the foundation of the Republic?"[88] Frank Meyer, writing for the *National Review*, also located in *Wesberry* a severe affront to Congress and the balance of powers.[89] Reading the U.S. Constitution in a literal fashion, he recognized textual support only for congressional power over determining the districts. Meyer, the apostle of conservative fusionism, encouraged Congress to continue in the effort to win enough support for restricting the jurisdiction of the federal courts over apportionment questions.

Surely it is to this day difficult to accept such citations as sincere by-products of those devoted to a view on how government should work, given the many improvements

[88] "Out of the Thicket," *Chicago Tribune*, March 8, 1964, 20.
[89] Frank S. Meyer, "Principles and Heresies: The Court Challenges the Congress," *National Review*, March 24, 1964, 233.

in race relations and protections for individual liberty arrived at via blunt, purportedly undemocratic judicial edict. Separation of powers, therefore, could exist as just one more excuse for those who preferred to stand in the way of change. With so much opposition to the Warren Court, on so many fronts, it is nearly impossible to give serious critics their due because of the gimmicks and sordid motives of countless Court foes. The separation of powers, however, has always been an evolving concept. Indeed, the timeless conflict between branches of the federal government further complicates any appreciation of the motives behind those who cling to the ideal. Battles over their boundaries thus were nothing new in 1964, but nor were these citations of the concept intrinsically sinister. Justice Harlan certainly did not discredit himself or one of the founding principles of the American Constitution when he argued that *Wesberry* and those who sought the intervention of the courts presented a "claim for judicial relief in this case [that] strikes at one of the fundamental doctrines of our system of government, the separation of powers." Harlan left no doubt in his dissents precisely what he thought about the decision and how it fundamentally weakened the power of Congress.[90] If there is any one area of dissent over the Court that featured so much consonance between dissenting legal opinion and extra-legal commentary, the objections over separation of powers from *Wesberry* deserve more than mere dismissal.

Academic Court-watchers also worried, though not universally, that the Court was undercutting legislative power. Alexander Bickel, Yale professor and arguably the nation's premier Court-watcher public intellectual, thought the apportionment developments were a misadventure from the outset. He argued that legislatures, however constituted, were the branch that could best experiment, decide questions of social policy

[90] *Wesberry*, *supra* note 62, at 48.

and represent the wisdom (or lack thereof) of popular solutions. Legislatures as well had the experience necessary to handle apportionment.[91] Bickel's musings on the apportionment developments, expressed in his articles in the *New Republic* and in his book *Politics and the Warren Court*, even reached the citizenry. For a scholar who had concern over how the public received his writing, one particular example of reaction from the grassroots reveals that even those without scholarly credentials could appreciate the parameters of the debate.

C.D. Gray had a negative reaction to the principles Bickel espoused and empirical indifference that seemed to gird the scholar's apparent devotion to legislative supremacy. Gray wrote to Bickel, sharing his criticisms of Bickel's thinking with Chief Justice Warren. Writing in 1966 to Bickel, Gray scolded the out-of-touch Bickel whose preference for legislative action meant that the Yale scholar "prefer[red] theory to reality." Further, Gray sensibly observed that the institutions Bickel venerated, as so many other judicial restraint champions did, "are not representative and do not deserve to be called as such. . . . To expect these institutions to purge and cleanse themselves of the power and the privilege they have so long enjoyed is the very height of naiveté."[92] Bickel, nonetheless, remained committed to his views on *Baker* and its progeny, deeming the entire effort not just a misadventure but one in which the Court, already running ahead of the rest of the country, threatened to impair its own future effectiveness in ensuring legal stability.

To its varied critics, Warren Court decisions involving desegregation, civil rights and subversive activities, had seemed to ensure that the cherished ideal of federalism had

[91] Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, Publishers, 1970), 23-39.
[92] C.D. Gray to Alexander Bickel, January 24, 1966, included in EWP, Box 107.

died a new death by the end of every Court term. Federalism had countless fans as an excuse for the preservation of legalized racism. It too appeared to aid the anti-apportionment efforts. Federalism concerns predominated in the debate over the so-called Tuck Bill (named after its champion, William Tuck of Virginia). Tuck's measure, which Walter Reuther of the AFL-CIO labeled "an outright attack on our judicial system," had been around since *Baker*.[93] It fit well with the measures Tuck often supported, measures that confirmed his conservatism and fondness for the status quo. As his biographer explains, Tuck's "record in Congress was one of virtually unrelieved negativism, one of constant warring against ideas and programs whose time had come."[94]

In short, Tuck's bill stripped the federal courts of any jurisdiction over apportionment matters, relying upon Article III, section 2 of the Constitution that permits Congress to regulate the appellate jurisdiction of the federal courts. Such a constitutional provision exists as a classic reminder of checks and balances principles. No one branch could have complete control over its own affairs. Congress, for instance, has always had an important role in setting evidence, procedural and appellate rules for the federal judiciary. Explicit constitutional language about the direct power over appellate jurisdiction, however, hardly had motivated Congress to exercise the power frequently. But the Warren Court managed to convince its opponents in Washington, D.C. to attempt various measures, even if those measures were unlikely to be adopted or mildly unprecedented. Adopting a jurisdiction-stripping measure would help delay if not end the progress to "one-person, one-vote" districts in the states, and the debate over it featured not only the concerns over federalism but the nearly timeless tussle over those

[93] Walter Reuther to Emanuel Celler, August 18, 1964, ECP, Box 293.
[94] William Bryan Crawley, Jr. *Bill Tuck: A Political Life in Harry Byrd's Virginia* (Charlottesville: University Press of Virginia, 1978), 267.

provisions in the Constitution that guaranteed one branch of government would contest another. Even its introduction helped ensure that the dialogue over the Warren Court continued. [95]

Tuck first introduced the measure immediately after *Baker*. Predictably enough, he expressed frustration over the losses that states had encountered because of the incursions of the federal judiciary. None of what he originally proposed attempted to keep states from changing their apportionment standards or to limit suits before state courts. Emanuel Celler and others had successfully bottled up the measure since its original introduction. *Reynolds*, however, promoted so much consternation that Tuck's bill would see its fortunes rise. Hearings for the "Tuck Bill" occurred in July and August 1964, but the chances that the bill would make it to floor for a vote seemed dim. Wily Howard Smith, the chairman of the Rules Committee who had used his powers on that committee to cause endless delays for any civil rights legislation, managed to get Tuck's bill moved over from the Judiciary Committee to his Rules Committee so that it could come to the House floor. During Smith's floor remarks defending the gambit, in which he essentially called on Congress to defend the Constitution from the Court, he actually earned loud applause from the House floor.[96] Taking the Tuck provision from the original committee was a strange, but eventually authorized, move that made sure the bill received a vote on August 19, 1964.

William Tuck's jurisdiction-stripping measure did pass the House by a 218-175 vote. The 122 Republicans and 96 Democrats who made up the winning coalition revealed the future every bit as much as they revealed the widespread discomfort that

[95] For the floor debate see *Congressional Record*, August 19, 1964, 20212- 20300.
[96] "House Rejects Court Remap," *Chicago Tribune*, August 20, 1964, 1.

existed with the Court over the apportionment rulings. Republicans from across the country voted for the measure, with the likes of Ohioan John Ashbrook and Wisconsin's Melvin Laird supporting the bill. Democrat supporters, on the other hand, uniformly came from that South, where resistance to the desegregation imperative and civil rights change had already ensured automatic antipathy for the Court. Republicans who voted against the bill hailed from states like California, New York, Michigan and Ohio.

Though there had been an effort to substitute Everett Dirksen's parallel Senate moratorium provision, the substitution effort failed. The House members who supported the Tuck Bill clearly wanted a more drastic measure. The chances for the Tuck measure to receive consideration from the Senate were never great. Sen. Strom Thurmond (R-SC) attached the Tuck measure as a rider to the Foreign Assistance Act, but this gambit quickly failed. The Tuck measure went un-reconciled with a Senate measure during the 88th Congress (January 1963-1965). Thereafter, the better chances to countermand or at least weaken the "one-person, one-vote" mandate came from the Senate and Everett Dirksen.

The defense of federalism did not just result in close but ultimately unsuccessful attempts to curb the courts. Tuck and the over two hundred representatives who supported his measure had vocal allies outside the halls of Congress. Columnist and editorial champion of massive resistance James Kilpatrick and the Virginia Commission on Constitutional Government (VCCG) provide one example. There are few better sources of Court criticism so dedicated to fighting the same political battles that had been settled in 1865. Steadfastly in opposition to the Court's civil rights rulings, the group expressed alarm over the apportionment jurisprudence. With participants like these,

however, it had become far too easy then to dismiss the opponents of the apportionment rulings as nothing but the enemies of *Brown*. The VCCG outlook directed state and local government not to resist pressure or requirements to apportion via population equality, but protested that these pressures and requirements should not have come from a Supreme Court decree specifically or the federal government generally.[97] But such talk of grudging compliance paralleled the organizational hope that Congress, in its 87th, 88th and later sessions could produce some sort of palliative to these apparent assaults on federalism. *Baker* and its progeny provided these foes of desegregation and civil rights with an easier target. Bringing more political power to urban areas already threatened to create greater support for civil rights, a clearly unpopular outcome for the VCCG and those who subscribed to its viewpoints. As with so much of the Warren era, decisions not directly involving desegregation or civil rights provided the Court's foes reason to keep on the attack, even if their main concern remained resistance to civil rights changes.

Federalism did not only appear as cover for racism. Other interests recognized the gains a weak federal government and diverse practices among states helped provide. The conservative National Association of Manufacturers (NAM) provides a strong example of the interests of business and industry. Founded in 1895 on the cusp of the progressive era, the NAM existed principally to fight for the interests of business and industry. Low taxes, favorable anti-trust policy and management-friendly public policy earned persistent NAM support. So too did federalism. Echoing other critics who seemed to offer moderation, not stridency, the NAM agreed that the federal government should set standards of "one-person, one vote" for the U.S. House of Representatives, but

[97] See, for instance, Virginia Commission on Constitutional Government, *One-Man One Vote: A Presentation of Comments and Documentary Material Relating to the Supreme Court's Reapportionment Decision of June 15, 1964* (Richmond, VA: The Commission on Constitutional Government, 1965).

drew the line at the same requirements for the states. Writing to Representative Emmanuel Celler, in support of congressional action to curb or at least delay the implementation of the "one-person, one vote" right, the NAM spoke of "a delicate balance of power in federal-state relations [that] was seriously upset," and a judicial supervision of state actions that "has been considered repugnant to the proper concept of a federal union of sovereign states."[98] The NAM opposition fit well with an organization that valued rare political change and regulatory minimalism.

Voting on the Tuck Bill revealed that opposition to the Court, at least in Congress, could come from different regions of the country. One can confirm the lack of regionalized hostility, however, with other sources. For instance, prior to *Reynolds*, the Council of State Governments had encouraged states to encourage Congress to adopt three constitutional amendments. The amendments featured one that called for changes to the Article V process by which states could initiate amendments; adoption of a national Court of the Union that would have had the power to overrule the U.S. Supreme Court; and the complete elimination of jurisdiction for the federal courts on matters involving apportionment in states. As of March 1963 the proposal to restrict the federal courts' jurisdiction over apportionment had earned the greatest and broadest support from states. Endorsement for the Court of the Union concept arrived mostly from legislatures in the South; the sixteen states that had offered support for the removal of jurisdiction, however, included California, New Jersey, states from the Midwest and others—not just the Southern contingent that always opposed the Court.[99]

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[98] The August 1964 letter to House Judiciary Chairman Emmanuel Celler is re-printed in "Apportionment Letter Goes to Rep. Celler," *NAM Reports*, August 10, 1964, 1.
[99] Council of State Governments, *State Government News*, March 1963.

Efforts in Congress, notably those of Illinois Senator Everett Dirksen, to countermand or weaken the rulings benefited from support across the country. Dirksen introduced various measures that either sough to delay the impact of the rulings or to allow for states to apportion one of their legislative chambers on a non-population basis. Dirksen took on a lead role in a pressure group known as the Committee for Government of the People (CFGP) to lobby for a constitutional change to prevent the requirement that states had to apportion both of their bicameral legislative bodies according to "one-person, one vote" ideals.[100] The group sought to make citizens aware of what it labeled "the full import of the gravest Constitutional question to confront this country – the necessity to let the people of each state decide the manner of apportionment of their state legislature in the way that best meets the diverse needs of their states."[101] The CFGP had participants from across the country, including Senators Hugh Scott (R-PA) and Frank Lausche (D-OH). Other national politicians who joined came from California, New York, and Idaho as well as the normal batch from the South. State representatives, business and industry figures and even academics signed on from every state in the country. To label the group as grassroots endeavor might go too far, but it assuredly belied any obvious sectional identifications.

The CFGP, in support of efforts to preserve for states the right to apportion their legislatures free from judicial mandates, sought to position its criticisms beyond a mere defense of the states. In a direct response to the Warren Court's apparent reasoning, this group declared that what it fought to defend involved the same democratic values the

[100] Everett Dirksen to H. Gardner Symonds, Chairman Tennessee Gas Transmission, October 1, 1965, EMDP, Working Papers, Folder 2266.
[101] Committee for the Government of the People, Press Release of Statement by Senator Everett Dirksen, January 19, 1966, EMPD, Working Papers, Folder 2274.

Warren Court supposedly sought to safeguard in promoting population-based districting. When the citizenry lost its right to determine its own legislative setup, whether through direct democracy or through the actions of state legislatures, the CFGP recognized the derogation, not protection, of democratic values. The Court had failed to recognize that in promoting one democratic value it had in turn derided another.[102]

Deciding whether the Warren Court or some of its opponents had a superior argument from democracy, let alone majoritarianism, remains possibly the crucial question about many of the contested developments of the Warren Court era. Apportionment merely presents the most obvious. The Court had taken refuge in an imagined past to enshrine "one-person, one-vote" as constitutional principle, but just as well seemed willing to rescue the people from themselves. The Court's handiwork in *Lucas v. Forty-Forth General Assembly of Colorado*, a case that came down the same day as *Reynolds*, reveals this well.[103] Colorado had allowed its citizens to vote on two separate constitutional amendments. One amendment proposed that both houses of the Colorado legislature work under a "one-person, one-vote" standard; the other proposed that only the lower house would be elected under such a basis. The voters approved the proposal that preserved apportionment on a non-population basis for the upper house. Yet, the Warren Court ruled the setup unconstitutional. One could clearly argue that the Court was hardly sticking up for voters to make choices. In response, the CGFP sought to rally support for amendment efforts to preserve precisely what Colorado had been denied. The CGFP waged its campaign under the democratic clarion call to "Let the

[102] Committee for Government of the People Apportionment Fact Sheet (no date), EMDP, Working Papers, Folder 2274,
[103] *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964).

People Decide."[104] However easy it might be to dismiss the CGFP argument as propaganda scarcely interested in protecting majoritarian will, we might pause before just accepting the merit in the Warren Court's attempts to promote majoritarian preferences.

The majority opinions in the apportionment cases seemed to use history as a grab-bag to be consulted primarily when it supported the results that the Warren Court liberals welcomed. On this front, a minority of the Court's opponents had considerable merit to their argument. Citing the Declaration of Independence, the Gettysburg Address and other texts that seemingly confirmed the country's democratic tenets, as the Court had done first in invalidating Georgia's county-unit system and then again in *Reynolds*, did not close off debate as neatly as the Warren majority claimed. For some time the country had existed with mal-apportioned legislatures, with few overwhelming and persistent protests over these violations of a "one-person, one vote" principle. The Court majority, instead of facing up to its creation of this standard, had tried to collect from history whatever supported the legal reform and dismiss those experiences that did not. All of this thus fit in neatly with a Court uninterested in exercising self- limitation. As Justice Harlan declared in his *Reynolds* dissent:

> these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.[105]

The mainstream nature of much of the critique clearly helped the Court's critics hide other motives, notably the fear over loss of political power, interest in preserving

[104] CFGP, Advisory Bulletin #2, March 19, 1966, ECP, Box 292.
[105] *Reynolds*, *supra* note 66, at 624-625.

racial inequality, and the reflexive dislike for the Warren Court that had become standard by the time the liberal Warren Court existed. Undoubtedly, cries over federalism, separation of powers and over-involvement of the Court, in the final analysis, connected to dislike for the rulings plain and simple. Had they done a better job of avoiding slogans and relying upon the some of the tired excuses employed to aid massive resistance, the Court's apportionment foes might at least earn better treatment in the history books—even if they most likely could have not forestalled the changes.

Some of the sound objections of the opponents of the apportionment revolution, ironically, could not compete with the pace of compliance. States did not simply stonewall in the immediate aftermath of the seminal 1964 rulings. From Alabama to Wyoming, states, their governors, special commissions and legislative committees sought to understand the rulings and how to comply with the one-person, one vote principle. New York state governor Nelson Rockefeller, for example, benefited from the counsel of a Citizen's Committee on Reapportionment. Rockefeller, the presumptive leader of the moderate wing of the Republican Party, recognized no advantage in vitriolic attacks on the Court or even encouraging some delay. The Committee's findings were all about methods, timing, whether or not the state would have to carry out a new census and where to vest the authority of redrawing districts; the findings did not quibble with the principle of population equality, however inexact, in fashioning districts.[106] Critics often missed the fact that while this was a Court-directed project, the federal courts and the Supreme Court still left much for the legislative and executive branches in states to perform.

[106] See "Report to Governor Nelson A. Rockefeller by the Citizens' Committee on Reapportionment," December 1, 1964.

Even without the purest motivations, the critics of the apportionment developments participated in a healthy criticism over the methods of achieving reform. The very idea of "one-person, one-vote" was about the Court venerating the ideal of public participation all while making the bargain that the public would appreciate such generosity. At least in the short term, political leaders, some organizational interests, grassroots voices and even some academics most certainly did not appreciate the Court's commitments to expanding representative democracy. Messy considerations of whether or not the Court had justified such an innovation were not then just ephemeral questions that rightfully disappeared after observers later realize that the Court did a good thing or, for that matter, after its opponents moved on to other concerns. Aiding the popular will, however desirable, only further displayed a Court cognizant of its need to compete with the other branches in the efforts to contribute to history and contribute to the country's democratic ideals. Many could share the premise that legislative districts should share equal populations. Even presidential candidate Goldwater would have thought so. But whether or not the Court should have existed as the source of that change and whether or not it had satisfactorily justified its role and its decisions is not, nor should it ever be, a closed question.

V.
War on Crime, War on the Warren Court

We would get along just as well if we repealed the Fifth Amendment. We should require everyone to answer authorized questions. If he doesn't testify, then the judge and the court should comment on it.[1]

To be sure, much of the trouble in bringing criminals to justice can be traced to decisions of the United States Supreme Court—for instance in the Mallory, Mapp, Escobedo cases—which, if indeed they extend the implicit rights of the accused as guaranteed by the Constitution, then they raise the questions, to which our judges have not addressed themselves, where the Bill of Rights, as presently interpreted, sufficiently provides for the effective maintenance of law and order.[2]

I believe in the last analysis it will be an aroused citizenry which will be the controlling factor in attempting to restrain the Supreme Court. Therefore, I think that you and other responsible Americans should make your views heard in order that a clear-cut national consensus will be known on these vital issues.[3]

If Earl Warren were half the man and American that some of these folks would hold him out to be, he would realize that every night millions of men and women are going to bed frightened to death and having had crimes of violence committed against them and which they are afraid to report, all though his "ordered freedom" decisions.[4]

At a September 9, 1965 conference in Atlantic City, New Jersey, former New York City Police Commissioner Michael J. Murphy stood before an audience of federal judges. During his remarks he offered up an indictment of the United States Supreme Court. Over the last few years, Murphy fulminated, the Warren Court had been "hampering" law enforcement efforts. Numerous Court decisions had made prosecutions of criminals entirely too difficult. Confidently, Murphy proclaimed that empirical

[1] Thomas Dewey quoted in "A Proposal to Repeal the Fifth," *US News & World Report*, December 9, 1968, 14.
[2] William F. Buckley, October 13, 1965 Press Release, Position Paper, "Crime: In New York it Pays," University of Virginia, Small Special Collections Library, James Kilpatrick Papers, MSS6626-e Box 1, 1965-1967
[3] Everett Dirksen to Mrs. George Cribbs, February 15, 1968, The Dirksen Congressional Center, Working Papers, Everett M. Dirksen Papers, Box 17, Folder 1270 (hereinafter EMDP).
[4] Congressman John R. Rarick to Mr. B.E. Reid, February 15, 1967, John Rarick Collection, Center for Southeast Louisiana Studies, Hammond, Louisiana.

evidence from New York City had made clear "that if suspects are told of their rights, they will not confess." Confessions, after all, helped immeasurably in gaining convictions, providing a version of justice that sought to protect the law-abiding majority of citizens from criminals. Murphy's ideal society, one that protected the law-abiding and punished the criminal, hardly seemed, then or now, senseless. The collective opinion of those listening to Murphy's speech is something that one could only guess; two particular listeners, Chief Justice Earl Warren and Associate Justice William Brennan, might have understandably felt some unease from their seats.[5]

Supreme Court justices in the Warren Court era had become subject to direct, not just distant, ridicule. Murphy's discourtesy was not unprecedented. Barry Goldwater, for example, had joked around at the Court's expense in the presence of chief justice at the 1962 Alfafa dinner. The Arizonan offered the witticism that he would soon propose legislation requiring the Court's decisions to make sense. Commenting on the Alfafa dinner incident he had witnessed, segregationist champion James Kilpatrick complained to Harry Byrd, Sr., that Warren sat there through Goldwater's jibes without even showing a smile. Kilpatrick had found one more reason to detest Warren, who apparently lacked a sense of humor.[6]

The dialogue between the Court and it critics had become even more direct by the 1960s. Normally the justices remained insulated; their lack of electioneering, presumably, rendered them less susceptible, let alone responsible, to the public. Yet, the Warren liberals had chosen to interpret the Constitution to benefit the people, most notably in its apportionment decisions. Aiding majoritarianism in one area, the Court worked against it

[5] Sidney Zion, "Attack on Court Heard by Warren," *New York Times*, September 10, 1965, 1.
[6] James Kilpatrick to Harry Byrd, January 22, 1962, University of Virginia, Small Special Collections Library, Harry Byrd, Sr. Papers, Box 245 (hereinafter HBYP).

in another. The Court helped out suspected or actual criminals in its varied capstone criminal procedure rulings. Whatever could be said about the supporters of the status quo on apportionment or those who hoped to see school prayer continue, they just did not have the numbers. Crime, however, featured an undisputed majority: the law-abiding. In the running national seminar on the Warren Court, no issue seemed to animate as much discussion as the Court and the problem of crime. That Murphy and Goldwater had no hesitation in upbraiding the Court's members, in their presence, only revealed that a time was soon approaching in which the entire country would have the opportunity to participate in a referendum on the Warren Court.

The evidence of the concerns over crime remains astonishing. American Bar Association President Lewis Powell, for instance, censured the Court earlier in 1965 as he spoke before the New York State Bar Association. As much as he counseled against rendering attacks against the Court, the important figure in the national legal community and future Supreme Court justice argued that the Court had made it all the more difficult to combat crime.[7] State jurists could be the harshest in their denunciations. Chief Justice of the Supreme Court of Pennsylvania, John C. Bell Jr., though unwilling to fasten blame entirely upon the Warren Court, advised an audience at a 1968 meeting of the District Attorney's Association of Pennsylvania to recognize the Court's important role in creating "the turmoil and the near revolutionary conditions which prevail in our country, and especially in Washington."[8] With such a description one wonders why Bell even pretended to have an interest in putting blame anywhere but on the Court.

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[7] Edith Evans Asbury, "Bar Leader Finds Court too Lenient in Criminal Cases," *New York Times*, January 30, 1965, 1.

[8] "Law, Order and the High Court—A State Chief Justice Speaks Out," *US News and World Report*, July 22, 1968, 45-46. This speech came to the attention of the Richard Nixon 1968 campaign through Martin

In front of audience of Pennsylvania chiefs of police, Bell's colleague Justice Michael Musamanno, one of the most cited Court critics of the day, complained of the 1966 ruling that had come to acquire shorthand status as the derogation of the Court: *Miranda v. Arizona*. Labeling "the *Miranda* decision . . . not an adjudication . . . [but] an indictment of the police of the United States," Musamanno posited that the decision "accuses the police of trickery, coercion and 'third degree' methods, and then lays down rules for the police which are straight jackets." Accordingly, he suggested, "the fantastic *Miranda* decision . . . should be repudiated by the Supreme Court as soon as there can be obtained five justices who are as concerned about the rights of the people as they are about those who are involved in crime."[9] Pennsylvania did not have a monopoly on unhappy state Supreme Court judges. Judges from state courts often served as reliable critics of the Warren Court and the presumed mess it had made of the process by which criminals encountered prosecution and punishment.

The concerns over the Court paralleled real, if not always valid or understood, concerns over rising crime. Statistical evidence from the *Uniform Crime Reports* (*UCR)* helps reveal the seriousness of the concerns. With the help of the International Association of Chiefs of Police and local law enforcement, the FBI had engaged in crime data gathering since 1930. *UCR* made the results of this activity available. Criminality was and will remain difficult to measure. Nonetheless, even with the limitations and

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Pollner. Martin Pollner, Memorandum to Patrick Buchanan, September 19, 1968, Pre-Presidential Materials, Campaign Research Files, Box 21 Crime, Administration Folder, Campaign 1968, Richard Nixon Library and Birthplace Foundation, Yorba Linda, California. Justice Bell and his criticisms of the Supreme Court earned the praise of Strom Thurmond from the floor of the US Senate. See *Congressional Record*, July 12, 1968, 21084.

[9] "From State Judges: Growing Attacks on the Supreme Court," *US News & World Report*, September 2, 1968, 71. Musamanno, in addition to becoming one of the era's go-to Court critics, had served as a defense attorney for Sacco and Vanzetti and labored as a judge at the Nuremberg trials following the Second World War.

questions over the data, such information still enables us to realize that not all of the concern over crime involved callous authority figures manipulating the fears of the law-abiding. The *UCR* information for 1966 arrived from law enforcement agencies representing over ninety percent of the country's population. Some general impressions about reported crimes in 1966 and 1967 are illuminating.[10]

UCR collections revealed that reported crimes in 1966 represented slightly over a ten percent increase from 1965. Even more troubling, crime in 1966 only continued trends already under way; since 1960 all kinds of criminal activity had increased. Even after controlling for population growth, reported crime activity since 1960s had risen. Alarmingly, the *UCR* in 1966 revealed a sixty-two percent increase in crime since 1960. Pernicious crimes such as murder, rape, robbery and assault had increased by nearly fifty percent since 1960. In 1966 over three million of these most violent crimes occurred.[11] What is more, a host of crimes against property, including burglary of residential and non-residential property, had increased over the same six year period.[12] The next year the alarming growth in crime had not abated. Using 1960 again as a baseline, the evidence pointed to percentage increases across the board. Crime had even increased sixteen percent since 1966, helping to account for a starling increase since 1960 of eighty-nine percent.[13]

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[10] *Crime in the United States: Uniform Crime Reports – 1966* (Washington, DC: GPO, 1967), 52. For a review of the debates between conservatives and liberals over the validity and accuracy of these and other statistics see Michael Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* (New York: Columbia University Press, 2005), 125-129. One of the soundest objections to the entire project of collecting and comparing these statistics involved the sources of the data.
[11] *Id*. at 59.
[12] *Id*. at 18-20.
[13] *Crime in the United States: Uniform Crime Reports – 1967* (Washington D.C.: Government Printing Office, 1968), 61.

The trends were enough to worry people, even if they did not consult the published reports. Newspaper and media reports of rising crime rates, together with the general unease over a war in Vietnam, protests over that war and riots from Watts to Milwaukee led many Americans to wonder if the country was coming apart. Elected official and public figures did the rest to ensure that such concerns remained high. Blaming an entire branch of the federal government for the crime rate had much to recommend it, even if doing so did not have much in the way of evidence or logic to sustain the charge. Indeed, the 1960s featured an illuminating debate over of the causes of crime both divisive and in some ways unifying. With so many stresses in the era, liberals found it increasingly difficult to keep the essential conservatism of the country at bay. Talk of environmental, economic and racial dimensions to crime, over time, could not compete with the powerful appeal of charges of permissiveness, declining responsibility and a Court that coddled criminals.

Many came to believe that the Warren Court had thus picked an unfortunate time to engage in an expansion of rights for the accused. A perception developed that the Warren Court's rulings might have had more than a coincidental relationship to the crime problem. With the trends in crime as *prima facie* evidence, the Court earned much disfavor for its instrumental, some even argued causal, role in making crime an attractive option for those who chose to engage in criminal activity. During the Warren Court era, particularly as the 1960s progressed and as the true Warren Court existed, incessant public and political discussions occurred over the crime problem. Presidential candidates in 1964 and 1968 both created the concerns and responded to them. Congressman chastised the Court at any opportunity. Congress held hearings to consider what could be

done to eradicate this scourge. Media reports and editorial commentary time and again returned to crime.[14]

Social commentators and conservative spokespersons weighed in but so too did important organizations with conservative inclinations and an obvious interest in the debates over crime. Law enforcement groups served as one of the most vocal. Ordinary Americans at the grassroots likewise responded to and prompted the fears over crime and disorder. From the national convention of the American Legion to the floor of the United States Senate, crime and the role that Court had in fostering crime became one of the signal domestic political concerns of the day.[15] In conjunction with civil rights battles, the alarming nationwide crime statistics, civil disobedience in protesting the Vietnam War and even the earlier, post-war worries over juvenile delinquency, attended increasing doubts over the virtues of enlightened treatment of suspected offenders.

Key decisions of the era attracted explicit rebuke and often served as significant causal moments in inciting heightened interest in the Court's work. While a ruling such as *Gideon v. Wainwright*, which had expanded the right to counsel, had notable supporters—with nearly half the state Attorney Generals submitting briefs in support of Clarence Gideon's claims of a right to counsel for indigent defendants—many of the

[14] Commentators on the American conservative side simply could not let go of this issue in the 1960s. Crime often presented the one issue from which it remains so difficult to separate out the more strident critics from those who had some sensible objections. David Lawrence, arguably one of the more widely read of the era, had countless readers and numerous important admirers. Though often polite by our modern standards for widely published editorial pundits, Lawrence frequently wrote derisively about the Court. One important reader took the time to praise Lawrence's writings on the Court as important for revealing all of the mistakes of the Warren era. Such praise came directly from the future Chief Justice of the United States, Warren E. Burger. Burger's few missives to Lawrence made it quite clear that the ambitious Burger, ever noting his own judicial worldview and credentials, sought to get his name out there as a viable candidate for bigger things. See Warren Burger to David Lawrence, September 21, 1966, Princeton University, Seeley G. Mudd Library, David Lawrence Papers, Box 18.

[15] On the American Legion, see "The Legion and Law and Order," *Chicago Tribune*, September 10, 1967, 28.

other criminal procedure decisions attracted considerable comment and opposition.[16] *Mallory v. United States*, the 1957 ruling on the delayed arraignment of Andrew Mallory that resulted in the Court's disavowal of his confession to a rape charge, earned much rebuke, and essentially kicked off the era of broad criticism of the Court and crime. As one example of the fallout from *Mallory*, one could look to North Carolina Senator Sam Ervin (D-NC), a legal expert and former judge, who persistently attempted to have Congress overturn the decision's principal contribution that the exclusion of confessions would occur if the confession had occurred during an unreasonable time span that separated an original arrest and a formal hearing on the charges. Ervin's legislative efforts to undo *Mallory* continued well beyond the immediate aftermath of the late 1950s ruling.[17]

Mapp v. Ohio, a ruling from the more liberal Warren era of the 1960s, produced dismay over the extension of the exclusionary rule to the states. Worries over the admissibility of evidence, the Court's critics maintained, would henceforth dominate the minds of law enforcement officers, thus preventing officers from their primary duty: getting criminals off the streets. Excluding evidence that had bearing upon guilt or innocence revealed one more liberal fantasy. The fantasy involved the idea that law enforcement cheated, bent rules and would do whatever necessary to apprehend someone, regardless of actual guilt. The Court exercised its judgment that evidence seized improperly had to be excluded. That the federal courts would have to continue to decide

[16] Yale Kamisar makes this very point in arguing for the crucial importance of *Miranda* in securing the Warren Court its opponents a capstone ruling to oppose. See Yale Kamisar, "The Warren Court and Criminal Justice," in Bernard Schwartz, ed. *The Warren Court: A Retrospective* (New York: Oxford University Press, 1996), 119 and 139. Kamisar does note that the general principle of *Gideon*, that of expanding the right to counsel, while at first popular did attract more criticism as the Court extended the principle to more and more contexts.

[17] Karl E. Campbell, *Senator Sam Ervin, Last of the Founding Fathers* (Chapel Hill: The University of North Carolina Press, 2007), 186.

what was and was not improperly seized evidence only continued a problem that the Court had often seemed to create. When it identified problems that absolute rulings or even near absolute rulings could not solve, the Court guaranteed that judges would have to continue to update and mold its rules. While a nearly inescapable part of a common law system, such open invitations to work out the details only seemed to guarantee the animus of the Court's critics who had already tired of the Warren Court's over-involvement.

Miranda v. Arizona (1966) unsurprisingly emerged as the most frequently denunciated decision. Indeed, the name *Miranda* acquired shorthand status in the era and beyond as a paradigm of the Court's misdeeds. The decision famously required police officers to inform anyone taken into custody that he or she had the right to remain silent, to have legal counsel and to have these rights explained to them before police questioning. Complaints about *Miranda* registered time and again in the pages of *National Review*. It offered the orthodox complaint that the Court majority valued the rights of criminals over the rights of the innocent and the rest of society—one of these positions scarcely reconcilable with that fear of government that many conservatives would elsewhere cite with equal fervor. *Miranda* did, in a more stinging and relevant rebuke, seem at odds with how the world worked—or at least how the critics thought the world worked. Conservative critics of the Court could just not imagine that requiring more from law enforcement officers who were already overworked, underpaid and expected to do too much, could in turn help the cause of securing society. *National Review* wondered how the Court could support desegregation because of the harms that would be undone and good that could be served in ending segregated schools, but not

stop to consider the presumed harm of its decision in *Miranda*. Desegregation critics made too much out of the Court's presumed reliance upon Kenneth Clark's studies and sociological evidence in supporting the desegregation ruling, but the decision that cast a shadow over the entire era could be put to use against the Court for apparent inconsistencies. Nevertheless, the complaint had some merit in wondering how the Court seemed to engage the world and how it worked in one area but overlook it in another.[18]

With so many other stresses existing in an era that continues to resonate even today in American intellectual and political debates, we might understand why one scholar of the Court and the larger political scene has charitably suggested that "the 1960s appear[ed] to many Americans to be a peculiar time for the Court to be strengthening the rights of criminal defendants."[19] Yet, as much as the more despised work of the Warren Court occurred in the 1960s, we would be wrong to root objections to its work on criminal procedure solely in that decade and its peculiar stresses. Concerns about crime and disorder have existed throughout U.S. history, often becoming more intense in those periods in which the country concurrently experienced more abrupt and

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[18] "Don't Say a Word Mac," *National Review*, June 28, 1966, 606-608.

[19] See Richard Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties*, (Madison: The University of Wisconsin Press, 1981), 263. Also see, for instance on the issue of retroactivity and how it further rankled Court opponents, G. Gregory Fahlund, "Retroactivity and the Warren Court: The Strategy of a Revolution," *The Journal of Politics*, Volume 35, No.3, (August 1973), 570-593. Fahlund argues that the decisions involving the retroactivity of Warren Court criminal process decisions had an inextricable link to the waning popularity of the Court. Yet, on the general issue of the Court following public opinion, see Robert Dahl and David G. Barnum, "The Supreme Court and Public Opinion: Judicial Decision Making and the Post-New Deal Period," *The Journal of Politics*, (June 1985), 652-666. Dahl and Barnum argue that the Warren Court, on varied civil liberty fronts, trailed or barely charged ahead of public opinion. There were exceptions, such as the school prayer jurisprudence. An excellent introduction to *Mapp* and the application of the exclusionary rule to the states is Carolyn N. Long, *Mapp v. Ohio: Guarding Against Unreasonable Searches and Seizures* (Lawrence, KS: University Press of Kansas, 2006), in particular 150-151 and 155-165 on the fallout from *Mapp* and the criminal procedure revolution. Long notes the importance of this opposition to Richard Nixon's campaign and victory in 1968, an issue I explore in chapter seven. One should recognizes that the concerns over crime served as not only the most frequent point of concern but also the area in which it often became difficult to distinguish between the often excommunicated and by no means mainstream conservative groups and the generally more accepted advocacy of politicians, conservative spokespersons and groups.

noticeable political, legal, economic and social upheaval. What is more, some Americans could never support expanding the rights of the accused. Accordingly, unlike most of the signal complaints about the Court's rulings, including those directly involving civil rights, the complaints about crime and the Warren Court appealed to those Americans with conservative inclinations even if they did not consider themselves conservatives. Caustic and polite critics sometimes even sounded sensible in pointing out what increasingly became closer and closer to the accepted wisdom: Court decisions had invariably made the work of law enforcement more difficult.

While much consensus did develop that crime was indeed a significant national problem, important areas of disagreement persisted. The Court's role in explaining the crime problem became increasingly part of the conservative gospel; liberals, however, often did a poor job of rebutting these charges, even as they found the charges unsupportable. Reviewing some of the more important and controversial criminal procedure rulings will provide a foundation. The rulings highlighted will not represent an exhaustive presentation but will veer in the direction of those cases that attracted the most attention and criticism. Thereafter we will consider, broadly, the important differences of thinking on crime, its occurrence and the Court's role, between those of liberal and conservative persuasions. Finally we will return to the more detailed evidence of the criticisms of the Court and the country's crime problems.

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The Warren Court came to have an unmistakable commitment to federalizing (and thus standardizing) criminal law and procedure. While this project began in earnest

even before Warren's arrival, it accelerated in the 1960s. Prior to the Court's rulings, protections for the accused assuredly existed. Yet, the due process model of criminal justice and making it more, not less, difficult for the state to find a citizen guilty of a crime existed as an ideal not a reality. The Fourteenth Amendment and the Due Process Clause had come to place some limits on the state and local law enforcement efforts. Piecemeal incorporation had occurred regarding a right to counsel and limits on blatantly coercive techniques, but the Bill of Rights had only slowly come to apply to the states, many of which had constitutions that contained under-enforced restrictions on governmental power. Since so much of the dispensation of criminal justice took place then—as now—both through pleading or state/local courts, these cases mattered. But a narrow sense of what should and should not apply to the states continued to hold sway until the 1960s. The adversarial ideal became a reality though during the Warren Court years—particularly the later ones.[20] During the years of the true liberal Warren Court, years which run parallel with many of the Court's most important criminal procedure rulings, the Court frequently sided with the accused to the obviously guilty, all in a clear commitment to nationalizing key components of the Bill of Rights.

The 1961 ruling in *Mapp v. Ohio* represented one of many important examples of the Court's commitment to ensuring protections for the accused. It also is frequently cited as the starting point for the more liberal Warren Court era. *Mapp* reaffirmed and clarified the application of the exclusionary rule of the Fourth Amendment to the states.[21]

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[20] On the Warren Court and its involvement with a criminal procedure revolution I draw liberally upon Lucas Powe, Jr. *The Warren Court and American Politics* (Cambridge: Harvard University Press, 2000), 379-444. Powe's book remains, without question, the best one volume work on the Warren Court. For an argument that the framers of the Fourteenth Amendment intended for the Bill of Rights to apply to the states one might consult, generally, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998).

[21] See, generally, Long, *supra* note 19.

Cleveland law enforcement officers had burst into Dolree Mapp's home, even after she had denied them entrance for their failure to produce a search warrant. They had entered her home under the pretense of locating an individual, thought to be hiding there, who was a suspect in a bombing. Though no bombing suspect turned up in Mapp's residence, the police did locate obscene literature and pictures. After law enforcement pressed charges against Mapp, a trial court found her guilty of violating an Ohio law pertaining to the possession of such illicit material. The court of first instance relied upon the obscene materials the police officers had found without having had a warrant to look for such materials. Subsequent appeals produced rulings that found no difficulty in accepting that the materials were in fact admissible evidence. The United States Supreme Court, in its June 1961 opinion, disagreed.

Originally, at conference, the Court seemed prepared to reverse Mapp's conviction with a unanimous decision. Such unanimity would have required a rationale far different from what eventually settled the outcome for the majority. The briefs and oral argument in the case had focused on the potential First Amendment violation of the Ohio provision under which Dolree Mapp had been prosecuted for possession of obscene material. In a move that would animate some of its critics, particularly thoughtful ones, the Court had heard about and discussed the First Amendment implications but ended up reaching out and overruling *Wolf v. Colorado* instead in incorporating the Fourth Amendment's rule against including unlawfully seized evidence.[22] *Wolf* had already breathed life into the rule barring the unlawful seizure of evidence by federal officials; incorporation ended up extending that rule to the states. As it had throughout the Warren Court era the Fourteenth Amendment had assisted in creating what amounted to a

[22] *Wolf v. Colorado*, 338 U.S. 25 (1949).

national rule, turning aside the practices within state and local government that violated such a national rule.

Justice Harlan's dissent in *Mapp*, like so many of his dissents, should remain required reading for anyone who might care to recognize that opponents of the Warren Court sometimes had sound reasons at their disposal—even if they rarely matched Harlan in carefully presenting those reasons. Harlan, in an opinion joined by his two colleagues who would soon leave the Court, Frankfurter and Whittaker, offered sundry objections to the Court's doings. Taking up the same dissenting role he soon took on in the apportionment rulings, he sounded the warning of welcoming results but overlooking the manner by which the Court achieved those results—a standard trope in scholarly circles. In essence, he charged that the Court had ignored precedent, decided upon an extraneous issue and essentially violated Court mores since the case had not come before the Court as an explicit opportunity to overrule past precedent.[23] Unnoticed then and easily overlooked now, Harlan also made sure to comment that what the Court had done in *Mapp* would not help it persuade the public of its decision.[24] Harlan noted, as had Frankfurter countless times before, that how the Court reasoned could have an important influence upon the willingness for the public to understand and accept the Court's work. Notions of judicial restraint, at least as articulated by Harlan, Frankfurter and at times other justices, could just as easily as the liberal majority's opinions be about ensuring that when the public had its say it would support the Court's contributions.

Another incorporation decision of the Warren Court involved the Eighth Amendment's ban on "cruel and unusual punishments." The 1962 ruling in *Robinson v.*

[23] The majority's possible overreach in *Mapp* seemed to have numerous analogues during the 1960s. Consider, for instance, the ruling in *Fay v. Noia*. 372 U.S. 391 (1963).
[24] *Mapp v. Ohio*, 367 U.S. 643 (1961).

California, which incorporated the Eighth Amendment, would have reverberations well beyond the Warren Court era, particularly as the Supreme Court entertained challenges to capital punishment in the 1970s.[25] In the particular case at hand, the Court encountered a California law that made narcotics addiction, not use, a crime. Lawrence Robinson had been placed under arrest by a Los Angeles policeman who noticed signs of possible drug use as revealed by the scars and other distinguish marks on Robinson. The Court, however, reversed Robinson's conviction and threw out the law. In a six to two opinion in which Justice Frankfurter did not participate, the Court held the California law in violation of the Eighth and Fourteenth Amendments. Likening addiction to drugs to an illness, Justice Potter Stewart's majority opinion held that the severity of the punishment could not be ignored. Punishments for drug addiction, by their very nature, offended the principle that a criminal offense had to involve a voluntary act. The opinion remarked that "Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold."[26] Whether or not the line between addiction and use was as clear as the Court stipulated, the law in California nevertheless had not made any distinction at all. Addiction had served as the act the state had proscribed, and the Court found such a position unacceptable.

Expanding a right to legal counsel, the Court in the 1963 decision of *Gideon v. Wainwright* elevated the Sixth Amendment to unprecedented importance in applying it to the states through the Fourteenth Amendment.[27] Clarence Gideon had appeared in a Florida courtroom in August 1961, charged with breaking and entering. Though an

[25] *Robinson v. California*, 370 U.S. 660 (1962).
[26] *Id*. at 667.
[27] *Gideon v. Wainwright*, 372 U.S. 335 (1963). See, also, Anthony Lewis, *Gideon's Trumpet* (New York: Random House, 1964).

indigent, Gideon did not meet the Florida threshold for eligibility for court-appointed counsel. At the time, Florida only appointed counsel in cases of a capital crime. (Many other states had already joined the growing list of states that provided counsel to all indigent defendants.) Denied an attorney-led defense, Gideon defended himself and lost the case, resulting unsurprisingly in his conviction. Future Supreme Court Justice Abe Fortas appeared before the Supreme Court in January 1963 on behalf of Gideon's cause. The Court's explicit task involved a determination of whether or not it should overrule a 1942 precedent that had denied that a fundamental right to counsel, in state court proceedings, existed.[28]

Clark, Douglas and Harlan wrote concurrences in *Gideon*, but all of the justices agreed on the Court's holding. Hugo Black's majority opinion did not cite changing circumstances or evolving concepts of fairness; the opinion simply and boldly held that the Court, two decades before, had ruled incorrectly. Unlike *Brown*, which cited the increasing importance of education and an inconclusive record on legislative intent, with *Gideon* the Court simply called a previous decision wrong on its merits.[29] Black's opinion held that "lawyers in criminal courts are necessities, not luxuries." Hence, equality before the law necessitated that all defendants, rich and poor, have counsel as a fundamental right.[30] Though the ruling in *Gideon* led Florida to apply this new standard to those who had, even before the ruling, been found guilty without the benefit of counsel, such retroactive application of the evolving Warren Court standards was an

[28] *Betts v. Brady*, 316 U.S. 455 (1942).
[29] *Gideon v. Wainwright*, 372 U.S. 335, 342-343.
[30] *Id*. at 335 and 345.

exception not the rule.[31] Though three separate concurring opinions attended to the ruling, *Gideon* represented a unanimous willingness to extend the right to counsel.

The Court broadened this right to counsel in later rulings. Critics of the Court expected nothing less. In one instance, the Court in 1967 even extended this protection to the police lineup in *United States v. Wade*.[32] *In re Gault*, from the same term as *Wade*, extended notable protections, including this right to counsel, to juveniles who stood before a juvenile court proceeding.[33] That more and more defendants at least stood to benefit from counsel, whatever its varying levels of effectiveness, would only contribute to the complaints from the Court's critics. Attorneys complicated matters the critics could unfailingly believe; the sooner attorneys became involved in the process the more adversarial that process became and the greater the chance that punishing even the obviously guilty became a delayed outcome.

The Court's ruling in *Malloy v. Hogan* incorporated the Fifth Amendment's guarantee that defendants need not incriminate themselves.[34] This 1964 decision, in which the likable William Brennan wrote for the Court, only managed to feature a five to four majority—a problem since a fractured Court could always serve as a portent that the Court's critics would feel emboldened. Nevertheless, the majority's primary holding, i.e., that the Fourteenth Amendment incorporated the constitutional ban on requiring a defendant to provide inculpatory testimony against their will, had seven Justice who

[31] Powe, Jr., *supra* note 20, at 425-429. He argues persuasively, though more on a hunch than evidence it appears, that the Warren Court liberals who did not support retroactive application of new rules—Warren, Goldberg, Brennan and Fortas—did so, in part, to lessen the criticism of the Court. Black and Douglas did support retroactive application.
[32] *United States v. Wade*, 388 U.S. 218 (1967)
[33] *In re Gault*, 387 U.S. 1 (1967)
[34] *Malloy v. Hogan*, 378 U.S. 1 (1964)

agreed. Justices Harlan and Clark, however, wanted to stick with an ad hoc, more flexible approach—thus prompting their eventual dissents.

As it had with the right to counsel, the Court strengthened the *Malloy* rule in subsequent cases. For example, in *Griffin v. California* the Court ruled in a six-two opinion that a prosecutor could not comment during a trial on a defendant's unwillingness to testify in court. A prosecutor who did so violated the self-incrimination ban contained in the Fifth Amendment.[35] In 1964 the Court also ruled in *Escobedo v. Illinois*. *Escobedo* involved the incriminatory interrogation statement of Danny Escobedo, who had, under questioning without his attorney present, provided information later used against him at his trial.[36] Though he frequently requested to speak with his attorney during the interrogation, the police officers refused to permit access to his attorney. Attempts at the trial stage to suppress the incriminatory statements met with the denial of the original court. Though the case and its holding later would be superseded by *Miranda*, the Court in *Escobedo*, with the paradigmatic liberal Arthur Goldberg for the six-three majority, held that interrogations that had moved past a stage of general inquiry to focus on a specific suspect had to allow the suspect access to counsel. Goldberg explicitly relied upon the precedent in *Gideon* to support the result in *Escobedo*.[37]

Perhaps no ruling though came to represent Warren Court criminal procedure excess more than *Miranda v. Arizona*. Scholar Lucas Powe, Jr. regards the *Miranda* ruling as—in a nod to the conventional wisdom—the biggest target for the Supreme Court's critics. *Miranda* set out a seismic shift in how all state and local law enforcement

[35] *Griffin v. California*, 380 U.S. 609 (1965).
[36] *Escobedo v. Illinois*, 378 U.S. 478 (1964).
[37] *Id*. at 491-492.

personnel informed suspects of their constitutional rights.[38] *Miranda* featured a Court even further from the unanimity that had existed in some of the other signal criminal procedure cases. Chief Justice Earl Warren's majority opinion only garnered four allies; thus, one more controversial decision could earn public and political skepticism, at least in part, as a result of a divided Court.

This 1966 case featured the consolidation of *Miranda*, a case involving Ernesto Miranda of Arizona, with three other cases from the Supreme Court of California, the Court of Appeals of New York and United States Court of Appeals for the Ninth Circuit. Warren's admission that "We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings," did not ring true for many Court watchers.[39]

The key proposition of the ruling held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[40] Famously Warren's opinion listed the language that would become repeated time and again by law enforcement personnel and an ingrained part of the American mindset. Warren wrote: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[41] The Court had, again, located facts that seemed to support its ruling, relying upon details of police interrogation tactics and suggested

[38] Powe, Jr., *supra* note 20, at 394.
[39] *Miranda v. Arizona*, 384 U.S. 436, 443 (1966).
[40] *Id*. at 445.
[41] *Id*. at 445.

stratagems from police texts, all the while overlooking the reasonable supposition that its holding might have baleful consequences on law enforcement practices. Without condemning the contemporary practices outright, the Warren opinion nevertheless recognized that the tactics, even their threat, put individual liberty in clear peril. In the cases before the Court in *Miranda* Warren's opinion noticed "menacing police interrogation procedures" that offended the Fifth Amendment.[42] Judicial line-drawing in *Miranda*, for the majority at least, meant that rights of the accused outweighed the rights, or at least interests, of the broader community in ensuring that suspects encountered effective and swift police interrogation practices.

Specific practices thus identified had permitted the Warren majority to reach a broader, general ruling that could understandably cause concern. No Warren Court public relations crony, academic Court-watcher Philip Kurland even recognized that "the rigidities of the *Miranda* rules derive in no small measure from a history of futility in attempting to restrain third-degree tactics."[43] Whereas *Escobedo* had played up the importance of counsel to ensure that one did not unknowingly or knowingly self-incriminate; *Miranda* both continued that notion and further sought to safeguard the right against self-incrimination rooted in the Fifth Amendment. The majority ruled:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.[44]

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[42] *Id*. at 458.
[43] Philip Kurland, "The Supreme Court and the War Against Crime," (undated speech), University of Chicago Library, Modern Manuscript and Archival Collections, Phillip Kurland Papers, Box 69, Folder 6 (hereinafter PKP).
[44] *Miranda*, *supra* note 39, at 469.

In short, any suspect had a duty to know the law, but the duty had limits; ignorance of it could become an excuse. On the other hand, law enforcement personnel had an affirmative duty to inform any suspect of these rights. Such allowances and requirements frustrated many Americans inclined to show deference to the prerogatives of law enforcement and to recognize that prosecuting criminals remained the priority of the criminal justice process.

Justice Clark's dissenting opinion took issue with the majority's shaky empiricism and absolutist position. The majority opinion, in his reading, had relied upon incomplete, unworthy-of-generalization data about injurious custodial interrogation practices. *Escobedo* had added commandments, but most importantly the Court could continue a case-by-case Due Process analysis that would not have involved a blanket rule. Clark, in some respects, merely thought the Court had gone too far.

Clark could never provide poster board material for the critics quite like Harlan could. Dissent truly appeared in Harlan's *Miranda* opinion, in which Justices Stewart and Byron White joined. Harlan argued that confessions would henceforth be made nearly impossible. Those that did occur would have to spring, almost miraculously, from the conscience of the offender. He struck of the great line that: "The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance." [45] Left to carry on Frankfurter's cause, Harlan held that judicial reticence demanded that the still exacting past standard continue to exercise control, not these new barriers the majority had constructed. In the end, one of his better dissents argued that the Court just did not have precedent, policy and reason on its side—a holy trinity of complaints that many Court critics already recognized by 1966.

[45] *Id*. at 506.

The Warren Court did not stop with *Miranda*. Important incoporationist rulings on the Bill of Rights and the rights of the accused continued to come down. For instance, the year following *Miranda* the Court issued a ruling in *Klopfer v. North Carolina*. In *Klopfer,* Chief Justice Warren's opinion, for a unanimous Court, applied the Sixth Amendment's right to a speedy trial to state court proceedings.[46] In May 1968 in *Duncan v. Louisiana* the Court also incorporated the right to a jury trial of the Sixth Amendment.[47] It suffices to say, however, that following *Miranda*, and the criminal procedure hallmarks that preceded it, the Court's enemies needed little more evidence of that the Warren majority had placed upon law enforcement and society unbearable burdens. The apex of criticism over the Court and crime peaked in the years from *Miranda* through the presidential election in 1968. Indeed, it is those years that indispensably help explain the nomination battles, bitter politics and intense scrutiny put upon Court appointments for the last forty years.

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Detractors of the ongoing criminal rights revolution of the Warren era had little doubt that even a mildly tyrannical state, with rogue law enforcement personnel going to any lengths to secure confessions and convictions, did not exist in the United States. Accordingly, it became easy to mistrust the wisdom of the nation's preeminent judicial body because it often ruled as if such abuse existed in every police department across the country. With what they recognized as little apparent empirical evidence of law enforcement abuses—representing a frequent indifference to the country's past—these

[46] *Klopfer v. North Carolina*, 386 U.S. 213 (1967).
[47] *Duncan v. Louisiana*, 391 U.S. 145 (1968).

conservative Court critics wondered what, if any, benefits would stem from making it harder to punish wrongdoers.

For example, Walter L. Pope, Judge on the Ninth Circuit of Appeals, framed his criticisms of *Miranda* not for its novelty, departure from precedent or because the Court had made policy. Pope knew the Court had done these things before. He worried because the Court had seemed to rule with such callousness for empiricism, all while relying upon supposed empiricism to justify its conclusions.[48] This meritorious skepticism, however, had far too few analogues. Instead of actual recommendations for empirical study, the Court's critics relied upon their own myths, assumptions and anecdotes about some recidivist. Ultimately, the conception of law enforcement and prosecutorial misconduct in the United States, in a conservative's mindset, existed as little more than a liberal chimera. When they did turn to empiricism, the Court critics sought out evidence to validate the complaints about *Miranda* shackling the police not to investigate charges of law enforcement misconduct.

One can further see this objection in the reactions to civilian review boards, a policy fad of the era. Review boards peering over the shoulders of police officers, so a conservative could contend, did more harm than good. For example, William F. Buckley, Jr. when running for New York City Mayor in 1965, firmly resisted the call for looking over the shoulders of police officers in this manner.[49] Conservatives could turn on and off their preferences for citizen control of how government should carry out its functions. They could also turn on and off their respect for empiricism. Law enforcement, even if it

[48] Walter L. Pope, "*Escobedo*, then *Miranda*, and Now *Johnson v. United States*," Speech Before Ninth Circuit Judicial Conference, Newport Beach, California, July 14, 1966, Birch Bayh Papers, Box 160, Wells Library, Modern Political Papers Collection, Indiana University (hereinafter BBP).
[49] J.P. McFadden, "Who Will Protect the Police," *National Review*, April 5, 1966, 311-313.

did engage in tactics of which the citizenry might disapprove, could not be subject to the whims of those untutored in the methods of interrogation and police work. Aside from the foolishness of having the untrained monitor the police, they wondered what benefits stemmed from identifying the few isolated cases of police misconduct. Review boards, let alone mere common sense, could reveal police misconduct, but such misconduct was presumed to be an exception, never the rule. On the other hand, liberals usually thought that enough law enforcement transgressions had occurred, many rooted in race, class or ethnic-based maltreatment, to justify the commitment of the ACLU and its allies in the effort to federalize the constitutional expectations for law enforcement practices.[50]

Policy considerations and even broader debates over the crime problem featured much consensus; liberals and conservatives, while always careful to recognize the local and state role in combating crime, fell over one another attempting to figure out how the federal government could help. The two sides differed though in their ideals about the underlying causes of crime and the Warren Court's role in the crime problem of the era. Most conservatives lamented an environment in which procedures, as much as a defendant's actions, determined guilt or innocence. Responsibility for any crime remained something that an individual, not society, had to explain. Absolute protections for criminals and absolutist application of the Bill of Rights only presented contradictions, peril and the potential for unworkable mayhem. The conservative Court foes asked how an absolutist or near-absolutist application of the right against self-incrimination, for instance, could even work in a society that had a commitment to its

[50] *Firing Line*, program number 33, recorded November 7, 1966, Hoover Institute Archives, Firing Line Collection, Box 51, Folder 33 (hereinafter HIAFLC). Numerous *Firing Line* episodes, most of which I do not cite, have provided immeasurable benefit to my understanding of conservatives, the Court and its manifold critics.

own self-preservation. If, as the Warren Court's rulings seemed to portend, criminals would eventually take their lawyers along with them as crimes occurred, the adversarial system of justice would become unworkably inefficient except at exonerating the guilty. A criminal justice system, first and foremost in a conservative *weltanschauung*, existed to identify and punish offenders, segmenting them aside from the rest of society to keep that society safe. There was nothing peculiar or essentially American about such a view; yet, that society had to protect itself from criminals—even at the expense of individual rights—had a widespread and peculiar influence on American politics and social thought, particularly during the divisive 1960s.

Conservative viewpoints did not disavow proportionality and fairness in meting out punishment; but developments from the Enlightenment to the supposedly enlightened Warren Court had hardly made criminals more worthy of societal second and third chances. In large part, conservatives argued that the pendulum had just swung too far, too quickly in the direction of affording protections for the accused. Rather than accept these shifts, they contended that certain punishment, clearly and without question, remained the best guarantee of a better society. What is more, in the age-old tension between libertarianism and the value of securing communal good, that at times threatens and has threatened conservatism's coherence, those of the conservative persuasion routinely supported the state and its law enforcement powers.

Readers of *National Review*, often flush with complaints about the Court's criminal procedure handiwork, might not have noticed the dissonance but it existed in nearly every issue. Accused criminals should have forfeited their fears of government abuse, but government tyranny awaited citizens everywhere with the next Census or with

the general growth of government. Searching for a satisfactory explanation for this accepted dissonance might lead us in many directions; it suffices to say that conservatives and Court critics just did not have to account for a contradiction that did not seem to matter.

Above all else, conservatives recognized criminals as rational actors and fought not for the accused but for the victim and the rest of society. To support the argument about the Court's lead causal role in the crime problem, its critics often contended that the Court had both helped to ensure that the guilty went free and even worse sent signals to offenders who, with rationalism at their disposal, determined that they could get away with their misdeeds. One cannot overlook or make too little of this foundational assumption that the Court's critics maintained. Criminals had to have an awareness of the Court's doings and have the Court's jurisprudential developments trigger some sort of cool, cost-benefit analysis that crime could pay in order to sustain the charge that the Court caused crime to happen or increase.

The better argument however—as conservative publications and writings hinted at—was that criminals, regardless of their motivations, went free because even if they did not know of the changes in the law, their lawyers assuredly did. Moreover, even if the accused received substandard representation, we might consider the unremarkable but valid point: law enforcement and the criminal justice system did change its behaviors, at least in the short-term, in light of the decisions. American society, already under duress, had more to worry about with the crime problem. Time and again, individuals of national significance, from Senator John McClellan (D-AR) to FBI Director J. Edgar Hoover expressed this common worry. If the Court stood up for the liberties of the accused,

conservatives asked who stood up for the rest of society, the presumptive victims of crime and disorder.[51] The majoritarian argument remained simple and appealing.

Whether to prize the rights of individuals or society remained the fundamental area of dissonance for conservatives and crime. The Court's conservative opponents found more bothersome the idea that criminals, suspected and otherwise, existed as a collective responsibility of society. In the heyday of liberalism, the downtrodden and left behind seemed to exist primarily as candidates for government-led improvement. Many developments, from the Housing Act of 1949 to the War on Poverty in the 1960s featured liberalism's attempts to improve the lot of those on the margins of society. Criminals, even some of the harshest ones, also had a claim to make for such assistance. John Ashbrook, for instance, dismissed the argument that insufficient social programs could explain the crime, violence and troubles across the country. Efforts to expand such programs only represented "a turn towards socialism", he argued, that "will only weaken us."[52] Liberal fantasies, conservatives thus tended to believe, positioned criminals as a group to rescue from imperfect legal machinery and the unjust environmental and sociological determinants of crime. Most liberals would refuse to go so far, but conservatives had a convenient straw-man. If the Court coddled criminals, the liberal recognition that crime might involve more than just bad individual choices likewise only turned attention from tactics that could help cut down crime.

Aside from this supposedly misguided liberal fiction of criminals as the downtrodden, conservatives contended that the real goal of society should be to protect itself from criminals not to make it more difficult to target and punish them. Their goal,

[51] McClellan and Hoover are cited in "Rap Criminal Law Trend in High Court," *Chicago Tribune*, August 9, 1964, 1.
[52] Congressman John Ashbrook to Dwight E. Clossen, May 13, 1968, JAC, Box 2, Folder 16.

recognized or not, involved shifting the debate from any rights for the accused to the rights of the law-abiding to feel safe and free from criminal menace. Featured in the typical conservative prescriptions for dealing with the crime problem, courts of law thus needed to serve the interests of the public instead of just helping protect (or worse still, expand) the rights of the accused.

Whatever one's political guiding lights, keeping a society safe and secure hardly existed as a controversial proposition. Put differently, one did not need to be an avowed conservative to accept such a goal. As with so much of American history, an essential conservatism existed behind positions that few Americans would dare to reject outright—helping us again to understand the attractiveness of crime as a political and election concern. Talking tough on crime provided an undoubted political advantage in the era—as it would be in any.

Across the political spectrum, crime and disorder became such a concern that even those of less than conservative credentials expressed a get-tough approach, however much they may have struggled to get there. The Ripon Society, one of the most important voices of moderate Republican Party thinking, effectively reveals this struggle. The presumptive rightward shift of the Republican Party had led to the 1962 creation of the Ripon Society, a small group of moderate Republicans dedicated to getting out a different message. Parallel groups emerged elsewhere on college campuses and in the Northeast to combat conservatism. With Ripon affiliate groups that soon developed in the Northeast, Chicago, Los Angeles, and other cities, the Ripon network quickly expanded. The disastrous 1964 presidential election had only made the organization more self-aware of its perceived duty to rescue not just the Republican Party but the two-

party political system. Through research assistance, its publications, such as its newsletter that began in May 1965, and networks, Ripon hoped to rescue the Party from a rightward shift and perceived intellectual shortcomings.[53] Yet, the significance of the crime issue as the signal domestic worry by the mid-1960s ensured that Ripon could not remain silent. The group barely managed to weaken the conservative stranglehold over the debate; it may have even strengthened it.

In the organization's attempts to develop policy and political recommendations for Senator Howard Baker, Jr., (R-TN), the Ripon Society and its research team struggled with what to emphasize. On the one hand the organization recognized some social causes for crime, but it could not just let go of the seeming necessity to implement stern measures and empower law enforcement. Remarkably too, the group discouraged social welfare handouts that only bribed potential criminals into short-term good behavior. One important advisor for Ripon, while recognizing the social factors involved, emphasized that a seemingly moderate approach would counsel support for more resources to the states, increased police presence, and respectfully criticizing unwelcome Court decisions but not making them the essential element of a crime campaign either.[54]

In its October 1967 research work for Massachusetts Governor and future Nixon Administration Secretary of Transportation Republican John A. Volpe, Ripon continued to struggle with the trade-off between individual responsibility for crime and the possible sociological determinants for it. In advising Volpe, Ripon recognized that any complete approach had to hit on the social factors that spurred crime. Nevertheless, the

[53] For Ripon's initial history see "The Ripon Society: A History and Prospectus," Cornell University Library, Ripon Society Records (hereinafter RSR), Box 1, Folder 31. Also see "Gadfly of GOP: Ripon Society's Success Story," *The Milwaukee Journal*, May 21, 1967.
[54] Roger P. Craig to Robert D. Behn, Research Director of the Ripon Society, May 29, 1967, RSR, Box 1, Folder 14.

organization continued with its emphasis upon improving police work, professionalizing the police, raising salaries, diversifying police forces and even the radical idea of setting up compensation schemes for crime's victims. The group expressed frustration at the efforts to heap blame on the Court or at those efforts to seek a legislative reversal to some of the noteworthy Court decisions.[55] But even Ripon knew that there were few political points available for those who defended the Warren Court. Far better to remain silent than risk the backlash from those who had already decided that the Supreme Court caused the crime rate to spike. Regardless, the terms on which the law and order debates took take place drew upon themes and ideals that supported those who knew that to scorn the Court was to imperil liberalism.

Liberals generally embraced many of the federalized criminal procedure developments and the increased rights for the accused. However, their willingness to offer a robust defense of the Court did not always go as far. Developments from the social sciences to the increasing toleration in American society in the 20th century mattered. Everything from the photojournalism of Jacob Riis at the outset of the progressive era to the urban decay of the 1960s seemed to confirm that societal conditions could cultivate if not explain criminal behaviors. The archetypal liberal viewpoint often differed from what liberals would hold to when forced to defend less popular positions. As has often been the case in American history, presumptive liberals who had no responsibility to curry favor with voters had the better chance to stake out positions far more respectful of rights for the accused.

[55] "Crime: A Memo Prepared for Governor John A. Volpe by the Ripon Society," October, 1967, RSR, Box 1, Folder 18.

Federal jurist and friend of the Warren Court liberals David L. Bazelon illustrated well the archetypal, though increasingly untenable, liberal view that became more difficult to defend in the 1960s. Bazelon had earned an appointment to the federal bench in 1949, serving for many years on the Federal Circuit Court of Appeals for the District of Columbia. He eventually sat on the Court at the same time as future Supreme Court Chief Justice Warren Burger.

At a November 1966 speech at Colby College, Bazelon made sure to profile the criminal offenders who, in his thinking, most frightened law-abiding citizens. He portrayed these offenders as those who had known only poverty, discrimination and few opportunities to escape the pressures and limitations of their surroundings. American society and its credos had promised opportunities but in reality denied opportunities. While a rival view held that individual responsibility explained most criminal behavior, Bazelon held out that the "problem of crime in the streets . . . is basically a problem of the poor." Any remedy for this problem, he argued, "requires an improvement of the social conditions and the community facilities of our cities. We must have fewer slums, better schools, more job opportunities, and less discrimination against minorities." In short, Bazelon echoed a long-standing liberal viewpoint that social improvements, not guaranteed punishment, could best help remedy any crime problem. Bazelon, however, took things further; he argued that the criminal procedure changes themselves, even if judiciary-initiated, had an important role in improving society.

While not all liberals would have accepted the totality of Bazelon's evaluations, conservative viewpoints, even if willing to concede some small role for sociological determinants of crime, had no room for Bazelon's esteem for the Court's work and

recognition that a criminal justice system had to have ample safeguards for the accused.[56] Judge Bazelon, even in his position outside of the spotlight visited on Warren Court members, earned frequent denunciation for his views that could even trump the Warren liberals for devotion to the practice of judiciary-induced change.

Liberals generally held that society had to take even greater care in issuing punishment, which alone scarcely made them able defenders of the Court's rulings. The Warren Court ensured that the country did so—surely a welcome development in a society that had for so long seen those brought into the criminal justice system frequently come from disadvantaged and discriminated against groups. In lockstep with the Warren era, however, the "ideal-type" liberal worldview on crime came under attack. The perils of the 1960s put the liberal worldview on the run; so too did arguments from electoral necessity for those elected officials who would have, by any reasonable definition, counted as liberals. The Warren Court had already developed its reputation as a partner to liberalism. Deriding the Court presented a superb means of deriding the entire political philosophy of American liberalism arguably ascendant since the 1930s. Partially the liberal worldview was a victim of its own success. The Court's rulings garnered some liberal approval and, at the same time, further put liberals in a position in which

[56] David Bazelon, "Law and Order Without Justice," Speech at Colby College, November 3, 1966, University of Pennsylvania Biddle Law Library, David L. Bazelon Papers, Box 59, Folder 2. Even presumptive liberals disagreed over the age-old questions of the environmental causes of criminal behavior. Bazelon had a quite public spat with U.S. Attorney General Nicholas Katzenbach in 1965. LBJ's Attorney General did not dispute that social factors accounted for crime, but such an allowance did not, in his judgment, justify leniency. Discussion over a proposed American Law Institute model code for pre-arraignment procedures precipitated the debate. Katzenbach had to stop short of accepting Bazelon's chief premise that procedures should provide for enhanced protections for the impoverished and disadvantaged. He further lamented the seemingly inconsistent rulings that so often deprived law of one of its bedrock purposes: consistency. Both men, unsurprisingly, argued past one another. The whole debate revealed the essential conservatism that existed as a priority with criminal justice. Protections for the accused became tantamount to a despicable, difficult to defend on the political front, leniency. Their debate occurred in the pages of *US News and World Report*, the *Washington Star* and attracted the attention of commentators and citizens throughout the country. See "Courts too Soft on Criminals? A Warning by Attorney General," *US News and World Report*, August 16, 1965, 66-67.

they had to defend the changes that their philosophy seemingly supported. As the crime problem became more intense in the 1960s, liberals were slow to react, occasionally arguing that such a problem did not exist, was not as serious as many alleged or, paradoxically, that as much as large forces (economics and race discrimination) helped explain crime, local sources could best help curtail its prevalence. Later on in the era, particularly in 1966, 1967 and 1968 liberals in both major political parties assisted far more than they contested that crime had indeed become an overwhelming problem.[57]

Ultimately, the historical record reveals that conservatism and the Warren Court critics set the parameters of the debate over crime and crime and the Court in the 1960s. Agreements on expanding funding and training for law enforcement seemed easy. Since liberals, particularly elected officials, often would not complicate the debate too much by questioning statistics or exposing the racism that existed behind the calls for law and order, they often just fell in line with prevailing conservative dogma. With conservatism controlling so much of the debate, offering support for the criminal procedure jurisprudence of the Warren Court became even more difficult. Clearly, the opponents of the Court seemed to have the upper hand.

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Commentators, from professors to politicians, from respected judges to workaday citizens expressed alarm over the crime rate and a Supreme Court majority apparently unwilling to recognize its own damaging influences. In addition to responding to decisions in the headlines, some voices challenged the Court and its important guidelines,

[57] Here I borrow from Michael Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* (New York: Columbia University Press, 2005), 2.

many of which represented new departures. The challenge to the Court, particularly as part of the 1960s, became the most substantial since the still ongoing resistance effort to desegregation of public schools.

Nevertheless, it is not as if the Court, or even the federal courts, participated directly in most actions of the overall criminal justice system. Without exception most cases found resolution in local and state proceedings, many of which involved plea bargaining not drawn-out episodes in the adversarial process. Justices Black never won over enough votes for the total incorporation of the Bill of Rights, but the piecemeal yet influential method of applying standards of criminal procedure on the states mattered and set out overarching rules. And as one historian of the Court and the era has remarked correctly but incompletely: "Before Warren became chief justice, few politicians would have thought to blame the Supreme Court for the crime rate."[58]

Predictably, conservative Southern Democrats in Congress often competed for the prize of who could heap the most blame on the Court and the rising crime rate. Railing against the Court had already become the regional pastime for many from the South. By the time the Warren Court's contentious criminal procedure rulings came down, these politicians had fulminated and helped spur obstruction throughout the entirety of the Warren era over *Brown*, desegregation efforts and civil rights improvements, Court-led or otherwise. Their disreputable advocacy though found a more reputable ally with the crime problem, all the while still providing a vehicle for which they could attach or mask their denunciations of civil rights crusaders and civil rights reform.

[58] Michal Belknap, *The Supreme Court Under Earl Warren, 1953-1969* (Columbia, South Carolina: University of South Carolina Press, 2005), 218.

Congressman Watkins Abbitt (D-VA) provided one of the countless instances of these open complaints about crime. His very appearances and rhetoric, however genuine, just could not run away from his own past. The Lynchburg, Virginia native had served on the front lines of the massive resistance campaign in Virginia since the mid-1950s, serving as one more gear in Virginia Senator Harry Byrd's state political machine. Amidst debates in 1967 over what the federal government could do to alleviate the crime problem, Abbitt spoke of all other causes and measures as inadequate in their explanatory and curative power. Surely, as he contended, the Supreme Court had made it far too difficult to punish criminals and made leniency the order of the day; measures to free the police and protect society thus had to occur before any real improvements could occur.[59] The citation of the Court was not a mere afterthought or just a complaint to register as part of a conservative check-list; Abbitt, like so many others, undoubtedly recognized that the decade-long battle to forestall desegregation and prevent civil rights change could only help from associating the Court with coddling criminals.

Explicit denunciations of the Court, like Abbitt's, abounded in the era. At times the Senate floor far surpassed the House floor as a site for direct rebukes of the Court. Many of the frequent senatorial critics of the Court again hailed from the South or border-states. Though one would hope that perhaps their national stature prompted their worries, given that their states were not urban or possessing many areas of high population density, and that they were often after all undisputed racists and demagogues, it is little wonder that it has become almost the accepted wisdom that the complaints from

[59] "Watkins Abbitt Remarks before the United States House of Representatives, March 17, 1967," reprinted in *Anti-Crime Program, Hearings Before Subcommittee No. 5 of the Committee of the Judiciary, House of Representatives 90th Congress, First Session* (Washington, DC: U.S. Government Printing Office, 1967), 364-365.

Southern politicians about crime were actually more so about race and negative reactions to the societal changes of the post-World War II era. The crime problem of the era though could be as much about perception as reality, and as such even residents from Huntington, West Virginia to Huntington Beach, California could read their local newspapers, wondering when the discord would visit their community.

More often than many other senators, West Virginia's Robert Byrd, North Carolina's Sam Ervin and Arkansas's John McClellan raised their voices to the crime problem and the Court. Byrd sounded as if he read from Abbitt's cue cards when the young senator said: "We are not going to have a safer society by releasing known criminals from jails or by making it harder and harder to put these murderers, rapists, and robbers behind bars in the first place." There was, in Byrd's opinion, "no question . . . that this trend [of more crime] is in some measure due to the increasingly liberal attitude taken by the Supreme Court, making it more and more difficult for our police to carry out their already dangerous tasks."[60] Byrd unsurprisingly also put considerable blame upon those who sought to bring about improvements in civil rights. Their tactics, he complained, only furthered disrespect for the law.[61] Ervin and McClellan also could not participate in the debates over crime without commenting upon the Court and its role, making their contributions to the conservative echo chamber of the era in its denunciations of the Court. These explicit criticisms of the Court and crime, from congressional sources, reached their apex in 1967 and 1968.

National politicians campaign and shape policy, and as much as they often determine the initial headlines they do not alone guarantee that what is news remains

[60] *Congressional Record*, July 11, 1967, 18395.
[61] 'Rising Crime Rate Laid to Court Rulings," *Chicago Tribune*, August 11, 1966, 10.

news. American political discourse has influenced and drawn upon an era's social thought. Though numerous national political leaders of the era have earned (and deserved) scorn for failing to provide options—other than resistance—to the Court's desegregation rulings, these leaders followed as often as they led on the issue of crime and the Warren Court. Voices far from the nation's capital contributed to the debate over the crime problem. Even those individuals who probably belonged in the open camp of "vital center liberalism" targeted the Court. Polite reactions from Judge Walther V. Schaefer and law professor Phillip Kurland illustrate how remarkably mainstream the criticism of the Court and the crime problem could be during the Warren era.

Judge Schaefer, whom Adlai E. Stevenson first appointed to the Illinois Supreme Court in 1951, served on the body for nearly two decades. Schaefer had enough respect in the legal community, even with its Janus-faced tendencies of conservatism and liberalism, to earn the prestigious American Bar Association Medal shortly before he left the bench in 1970.[62] He rendered his verdict on the criminal rights revolution in his 1967 book *The Suspect and Society*. Schaefer wondered, perhaps not even in jest, if the eventual evolution of criminal procedure would go so far to protect the accused that prosecutions would become almost impossible. Police forces and the legal officers involved with prosecuting suspected criminals had an important task Shaefer argued: protecting the law-abiding majority. The Court had created impediments to this task that could be legitimately questioned; Schaefer thus spoke not as someone in touch with prosecutorial zeal, and by extension an indifference to individual rights, but as someone also genuinely inclined to recognize a prudential balancing of the rights of the accused

[62] *ABA News*, August 1969, 1.

with the good to society that came from forcefully going after criminals, suspected or otherwise.[63] He was not alone in his sensible criticisms.

University of Chicago Professor Philip Kurland sometimes expressed discomfort with the increasing identification of his scholarship and musings as critical of the Court. Nevertheless, he figured he might as well embrace his newfound acceptance that seemed to date from his 1964 *Harvard Law Review Forward*. Kurland lamented that a lack of respect for the law and responsibility seemed to exist—not that the Court had necessarily caused this. He knew that the Court could never please everyone all of the time, but its over-involvement damaged respect for the Court and the law. Absent a better public relations campaign, the Court had to explain better how and why past precedent no longer mattered, better handle counter-arguments and not just occasionally consider the consequences of its decisions.[64] In all fairness to Kurland, he made sure to remind those who might listen that the argument that the Court's decisions had caused an upsurge in crime was entirely without merit.[65] Even if the Court did not cause crime to rise, Kurland argued, it still contributed to ancillary stresses. Since the Court did such a bad job convincing others and persuading through the force of reason, it had contributed to the crime problem all the same.[66]

Kurland too expressed a common objection. Federalism, just as it had with the apportionment worries, did not always appear as a duplicitous justification for racism.

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[63] Walter Schaefer, *The Suspect and Society* (Evanston: Northwestern University Press, 1967).
[64] Philip Kurland, "Law and Order and the Supreme Court," speech delivered before the Dinner of Lawyer's Division of the Jewish Federation of Metropolitian Chicago, December 15, 1966, PKP, Box 68, Folder 3.
[65] Philip Kurland, "The Supreme Court," Speech at Temple Rodfei Zedek, January 4, 1970, PKP, Box 66, Folder 20. Scholars could be so critical, however, such caveats could sometimes seem empty. Kurland remarked after Warren had left the bench that "the Court can no more be blamed for the increase in crime than it can be blamed for the Vietnam War."
[66] Philip Kurland, "The Supreme Court," Speech at Temple Rodfei Zedek, January 4, 1970, PKP, Box 66, Folder 20

He worried in the immediate wake of *Miranda* and as a general response to the criminal procedure developments that the Court's constitutional holdings imposed on the states. He argued that the Court mandated safeguards would stifle effective efforts to accomplish perhaps the same ends—that is cutting back on investigatory and police misconduct. The broad, Court-announced principles left far too little room for innovation in the states and localities that carried out the brunt of the law enforcement work. More troubling he wondered if law enforcement would just ignore the new rules.[67] Enough evidence already existed from the experience of massive resistance and the willingness in some areas to flout the Court's rulings in *Engel* and *Abington*. Much of this could have been avoided if state law enforcement personnel had more training and resources and had reformed their own practices. But the early returns were inconclusive on *Miranda*. Kurland refused to make predictions; overall he just regretted, implicitly, that such a huge problem had to come to judicial resolution.

Kurland's respect for the prerogatives of state and local law enforcement had other vocal proponents. History was not often on their side, but with the federal government's own illiberal record on the treatment of criminal suspects, it was not a huge leap to question what made the federal government and its courts a better source for enlightened police practices. Whatever one might say of Schaefer and Kurland, their viewpoints seemed polite compared to the more strident criticism voiced elsewhere.

The diverse concerns attracting commentary from William F. Buckley, Jr. did not mean that he missed out on the crime problem and the Supreme Court. Buckley lamented the era's criminal procedure developments as any good conservative would; but he also expressed a more timeless disquiet with the adversarial system generally and the Court's

[67] Philip Kurland, "The Supreme Court and the War Against Crime," PKP, Box 69, Folder 6.

recent efforts to make the system work in favor of the accused.[68] One foundational opinion for Buckley remained undoubted: the Court had caused the crime rate to climb.[69]

A November 1966 episode of Buckley's *Firing Line* program illustrates his thinking on the Court, crime and the question over causation. Buckley traded ideas with Aryeh Neier, Executive Chairman of the New York chapter of the ACLU. Stock full of Buckley's sardonic commentary, the program nonetheless offered the standard talking points. Neither host nor guest could agree on what actually occurred across the country. Empirical data on law enforcement overreach and misconduct somehow supported both of their positions. Under no circumstances did Buckley concede that the Court's criminal procedure rulings made any sense as a response to significant law enforcement or prosecutorial misdeeds; unsurprisingly, Neier disagreed. Astonishingly, Buckley relied upon an unconventional conservative position that the Court just did not gather facts and evidence about the real problems out there. There was some truth to the complaint. The Court had bestowed attention upon police practices and data in explaining *Miranda*, but did not seem to have the same interest in considering the drawbacks to its rulings. If the Court had a limited empiricism in some areas, so too did conservatives. Buckley, as did many others, got by on the myth of scarce to non-existent police misconduct. In short, conservatives ignored the alarming causes for such judicial oversight while the Warren Court liberals tended to ignore the consequences. Regardless, the political process, directed by the United States Congress, would attempt to fill these empirical gaps, as much as politics might allow, over the next few years.

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[68] William F. Buckley, Jr., "The Court and the Criminal," Washington Star Syndicate, Inc., June 18, 1966, Buckley Online, Hillsdale College Collection, <http://cumulus.hillsdale.edu/buckley/Standard/index.html> (hereinafter HC).
[69] William F. Buckley, Jr. "Some Fresh Ideas on the Crime Rate," June 24, 1965, HC.

Buckley took cover under the popular tactic of reminding people that even justices filed dissents; citing their dissenting language only granted credence to the critique taking place beyond the keystrokes of dissenting justices and their law clerks. Frequently and unfortunately, highlighting a justice's dissent turned into a 1960s sound bite, as it did on *Firing Line*, not an opportunity for sustained analysis of what supported a dissenting opinion.[70] In the end, Buckley essentially contented that liberals (and the Court) accepted the age-old notion that it was better to release the guilty than to indict and convict even one innocent person. For those who would have followed this program or drawn inspiration from Buckley's columns, which echoed many of the same points, there was little doubt that a responsible conservative position held the Court responsible for making crime rates go up, apprehension of criminals more difficult and punishment less certain. Such a complaint though connected to a broader disquiet of the 1960s featuring the Court and the era's permissiveness.

Inimical cultural changes, some believed, also attended to and explained the Court's evolving criminal procedure jurisprudence. In this respect, the broader consequence of the Court and the crime problem paralleled the disquiet over similar consequences stemming from the removal of God from the public school classrooms. Notably, the Court seemed to communicate that responsibility was no longer a respected societal value. Voices from the Right sounded off on this theme time and again.

Though various elements featured in Max Rafferty's description of the "sick sixties," the indubitably conservative California Superintendent of Public Instruction and 1968 Republican Senate candidate made sure to weigh in with a complaint about how courts protected criminals instead of their prey. A simple solution presented itself to

[70] *Firing Line*, program number 33, recorded November 7, 1966, HIAFLC, Collection, Box 51, Folder 33.

those concerned citizens unable to walk on the streets or not worry about the safety of their loves ones: Rafferty counseled an unwavering insistence upon electing public officials who stood up for making crime a route to certain punishment (an electoral opportunity that the Presidential election in 1968 provided and Goldwater in 1964, despite some evaluations to the contrary, had missed). Rafferty had few doubts that the legal rulings were not just something to accept without a fight.[71] As such, the Court not only served as an emblem of such changes, but also the Court had caused them.

Legal scholar Charles Rice filed his own concurring opinion to Rafferty's in Rice's 1967 tome *The Vanishing Right to Live*. Principally concerned with visible signs of personal and societal irresponsibility—abortion prominent among them—the book detected a contributing cause in Supreme Court jurisprudence. Rice informed readers:

> In a series of eccentric interpretations, the rights of criminal defendants have been inflated to the point where the state is increasingly unable to perform its basic duty of protecting the lives and property of its citizens. Convicted defendants seem to be implicitly presumed by the Court majority to be the victims of official oppression. Strained legalisms are too often used with the effect of exonerating the criminal from the penalty for his crime.[72]

Rafferty and Rice had countless allies who also connected the Court to ominous trends such as a decline in responsibility. The Warren Court, however, had insisted on a greater responsibility for the state in identifying and prosecuting the accused. Conservative Court critics, yet again, had a predicament in explaining their normal distrust of any responsibility for government and preferences for individual freedom.

Northwestern University Professor Fred Inbau emerged as perhaps the era's most vociferous academic critic of the criminal rights revolution that the liberal Warren Court

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[71] Max Rafferty, "Non-Involvement: Curse of the Sixties," (1968), Pamphlet reprinted by Southern States Industrial Council, Right-Wing Collection, Cornell University Library.
[72] Charles E. Rice, *The Vanishing Right to Life: An Appeal for a Renewed Reverence for Life* (Garden City, New York: Doubleday & Company, 1969), 3.

majority and its allies such as the American Civil Liberties Union had led. Frequently his stern disapproval of the Court's work, from the exclusionary rule to other rulings, earned an appearance in the *Chicago Tribune, U.S. News and World Report* and other media.[73] He became a reliable source for those interested in waging a war on crime, including the 1967-1968 Republican Task Force on Crime.[74] He connected the seeming explosion of interest in protecting and cultivating new individual rights with "a philosophy of individual unrestraint"—paralleling the ideas of Rafferty and Rice. American society, in his denunciations, had increasingly turned away from punishment because of a liberal—but by no means new—ethos and its emphasis upon the sociological determinants of crime. Inbau derided the idea that those offenders who came from bad environments or impoverished backgrounds somehow deserved less punishment. Combating these ostensible determinants of criminal behavior made little sense when society should more properly punish its criminals.[75]

Even before some of the most seminal criminal rights developments in the mid-1960s, Inbau registered frequent criticisms of the Court for its rulings. For instance, in an appearance before the Annual Conference of National District Attorneys' Association in 1961, he registered scorn for a Court that imposed requirements upon the states and took what amounted to legislative actions—two of the more frequent critical bromides about the Court. He directed his ridicule in particular at *Mapp v. Ohio* and its nationalization of

[73] "Evidence Rule Forced Upon the Courts," *Chicago Tribune*, August 12, 1964, D15.
[74] For instance, Representative Richard Poff (R-VA), the chairman of the 1967 Republican Task Force on Crime, sought out Inbau's counsel on various contemporary questions about crime. Richard Poff to Fred Inbau, August 3, 1967, Richard Poff Papers, Box 223, University of Virginia, Small Special Collections Library (hereinafter RPP).
[75] Fred Inbau, "Lawlessness Galore: Why It's Come to the US," *US News and World Report*, September 13, 1965, 82.

the exclusionary rule.[76] As with so many critics of the Court, Inbau could wonder what had happened in the recent past that had suddenly made the settled become settled differently. How, he essentially asked, had the country existed for so long without a national exclusionary rule?[77] The country had apparently got along fine without it. Interrogation and confessions, Inbau thought, remained too valuable a tool; the Court had eviscerated the best method by which law enforcement could identify those who had committed crimes.

Later in the decade, Inbau wondered why the increasing professionalism of law enforcement, better training and education and, by his estimation, lessened evidence of police abuses still accompanied restrictive High Court rulings. His answer would have satisfied the sensibilities of many who, throughout the decade, came to think that the forces of disorder had more than a few allies. Inbau argued that law enforcement had become a symbol of the abuse put upon African-Americans and others who struggled for civil rights changes. Further, the strictures put upon law enforcement involved retroactive hostility to practices that law enforcement believed to be permissible and lawful. Though transgressions and improper practices had occurred, Inbau often argued, the contemporary reality did not lend itself to such severe limitations.[78]

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[76] Inbau's Address "Public Safety v. Individual Civil Liberties: The Prosecutor's Stand," is reprinted in *The Journal of Criminal Law, Criminology, and Political Science* (March 1962), 85-89. Yale Kamisar, in frequently bitter exchanges with Inbau in the same journal, did not question Inbau's criticisms of the Court but that Inbau often relied upon a denial of the Court's powers to render such decisions. In a sense, Kamisar wondered if Inbau, as had others presumably, "is petitioning for rehearing in *Marbury v. Madison* and *Fletcher v. Peck*?" The question asked revealed the absurdity of the idea. Yale Kamisar, "Some Reflections on Criticizing the Courts and Policing the Police," *The Journal of Criminal Law, Criminology, and Political Science* (December 1962), 453-462 (quote at 454).

[77] "Inbau Calls Court Rulings a Boon to Crime," *Chicago Tribune*, August 4, 1966, 8.

[78] Fred Inbau, "Democratic Restraints Upon the Police," Paper delivered at the April 1966 Conference "The Supreme Court and the Police: 1966" at Northwestern University, appeared in *The Journal of Criminal Law, Criminology, and Police Science*, (September 1966), 265-270.

During the 1968 election cycle, Inbau hardly softened his views. At an April 1968 conference at The Ohio State University on "Crime and the Supreme Court," Inbau pressed the idea that the Court merited more than its fair share of rebuke. While it did not bear primary responsibility for crime, he argued that it had made efforts to secure convictions far too difficult and weakened the deterrent effect of punishment through signaling to rational potential criminal actors that crime did not always lead to punishment. What is more, lower courts not only followed the rules but sought to imitate the nation's highest Court. If, in Inbau's opinion, the Warren Court had started a movement, less courageous liberal jurists in lower courts would draw inspiration for their own projects, namely affording unprecedented protections for the accused.

In the end, the new *Miranda* requirements frustrated what Inbau considered the best means to secure punishment of the criminals: their own confessions before law enforcement officers. Inbau connected these developments, involving the exclusion of evidence in particular, to a theme that Philip Kurland emphasized even more frequently in his own criticisms of the Warren Court: egalitarianism and equalization. One day, Inbau wondered—perhaps in jest—if the Supreme Court might decide that criminals who could prove their own stupidity would get special treatments not afforded to those criminals who might do a better job in concealing their crimes and involvement.[79] Professor Inbau, regardless of his iconoclasm in some areas, splendidly reveals that even academics could stand with the Court's most ardent foes. In a recurring theme

[79] Fred Inbau, "Crime and the Supreme Court," Address before the Symposium "Crime and the Supreme Court," at The Ohio State University, April 1968, Fred E. Inbau Papers, Nortwestern University Archives, Box 14, Folder 2. The address appeared later that year under the same title in *Criminologica*, August 1968, 29-38.

throughout the Warren Court era, the other sundry critics of the Court did not fail to take notice of such academic happenings.

He did not just contribute to academic journals and appear at conferences. He also took a lead role in founding, in 1966, an organization known as the Americans for Effective Law Enforcement (AELE). The AELE represented itself through its motto as a "spokesman for the law abiding in American society." As Inbau's hometown *Chicago Tribune* put it in endorsing the organization: "It is a sad commentary on our times that such an organization is needed."[80] In December 1972 *Newsweek* noted "the peace forces have an ACLU of their own" with the six-year old AELE.[81] From the floor of the U.S. House, Congressman Robert McClory (R-IL) lauded the organizations for standing up for "the vast law-abiding American public which appears to have been without adequate representation in some decisions of our courts."[82]

The AELE engaged in various activities to challenge the continued expansion of rights for the accused. It provided briefs to courts, encouraged others in the legal and academic communities to participate in a broader debate about the goals of the criminal justice system and fought the erosion of practices the law enforcement officers could employ to combat crime and secure evidence for convictions. Notably, and befitting an organization in which Inbau had influence, it sought to limit and weaken restrictions upon admissible evidence consistent with exclusionary rule jurisprudence. Advancing victim's rights also served as a top priority. Supreme Court critic Charles E. Rice of Fordham University recognized virtue in the AELE's efforts to combat the Supreme Court; so too

[80] "Law-Abiding Public Gets a Voice," *Chicago Tribune*, June 26, 1967, 20.
[81] "The Other Side," *Newsweek*, December 4, 1972.
[82] *Congressional Record*, June 28, 1967, 17798.

did John Ashbrook who hoped that the American Conservative Union, a group he chaired from 1965-1971, could help encourage a wider awareness of the AELE.

The AELE existed primarily for academics, attorneys and other legal system professionals; other organizations pressed the concerns of law enforcement personnel. Law enforcement officials from Boston to Los Angeles complained of *Miranda* and the rules the Court had put upon police officers. Much like the American military, law enforcement organizations and law enforcement officers, though not uniformly, presented a prevailing ethos and occupational obligations that complemented conservative crime policies and ideals. No better source existed for these polices and ideals than the police officers and the police chiefs who oversaw departments across the country. With so much litigation emphasis placed upon curbing any abuse of police power, and with change coming from narrowly decided Warren Court rulings, it is of little surprise that police officers and their leaders served as spokespersons against the Court and for the rights of the law-abiding. The leaders from this community represented a natural source for those who hoped to press for greater federal assistance for law enforcement, better training for state and local law enforcement and even the quixotic attempts to curb the Court. These interests also presented the best source for revealing the sentiment on compliance, already the true measure of grassroots thinking on the Warren Court.

One prominent organization featured frequently: the International Association of Chiefs of Police (IACP). Following the ruling in *Miranda v. Arizona* in 1966, the executive director for the IACP, Quinn Tamm, expressed predictable though significant alarm. Consistently the IACP urged law enforcement officials to comply with Court rulings but did not refrain from criticisms. Tamm wondered precisely what had

motivated jurists to create one "additional roadblock" for the police. He asked not for the Court alone to respond to the requests from law enforcement; citizens too had to question the burdens placed upon those people whose only mission was to protect society. Accordingly, Tamm urged the people to make their voices heard and to demand that Congress step in.[83]

Testifying before the Senate Judiciary Committee in March 1967, Tamm represented just one of many law enforcement voices for law and order. He spoke prominently of "an age of paradox." Lamenting that the too much power seemed to exist with the Court that worked on a project not to help law enforcement but imperil it, Tamm described the "confusion" of law enforcement personnel:

> We are confused because it seems that as greatly as the executive and legislative branches toil to help the police and to bring about a decrease in crime, the judicial branch (in the form of our U.S. Supreme Court) appears to be applying itself just as assiduously to stripping the police of their traditional, time-tested, and previously acceptable devices and techniques for combating crime.

Tamm's testimony before the Committee, particularly his interaction with Phillip Hart (D-MI), neatly revealed the differing philosophies of liberals and conservatives on the problem of crime. Time and again, Tamm informed Hart that while the Court's rulings had bound law enforcement personnel to follow new rules, such rules imperiled the overriding concern of law enforcement: keeping society safe.[84]

Other prominent law enforcement leaders added their voices. Superintendent of the Chicago Police and AELE associate, O.W. Wilson registered his stern disapproval of the Court's work. Though Wilson had the good fortune to escape supervision of the

[83] Quinn Tamm, "Whose Rights are Being Defended," *The Police Chief*, Volume 33 (July 1966), 6.
[84] *Controlling Crime Through More Effective Law Enforcement*, Hearings Before the Subcommittee on Criminal Laws and Procedures of Committee on the Judiciary of the United States Senate, 90th Congress, 1st Session, March 9, 1967, (Washington: U.S. Government Printing Office, 1967), 326.

Chicago Police force before the 1968 Democratic National Convention in Chicago, he had overseen that city's police department during a decade in which the city's violent crime rate had increased substantially. Expressing a conventional point, Wilson wondered how the Constitution had come to mean something that it previously had not. He asked what had made these few supposedly enlightened jurists so wise that they could discover constitutional meaning and require application of principles that heretofore had not bound the states. He did not openly counsel the officers under his supervision to disobey the new rules of procedure, as some did. The superintendent of the Rhode Island police, for instance, instructed officers to ignore *Escobedo* and *Miranda*, a risky but brave move that gained the endorsement of the Wilson's hometown *Chicago Tribune*.[85] Wilson might not have openly endorsed such a strategy but even his support for the rulings furtively counseled disobedience when he said, "I am following the guidelines of the Supreme Court because I have to but I don't like it. I must do it because it is the law of the land."[86] That compliance, much like it had with desegregation, school prayer and apportionment, even remained open for discussion confirmed the role that the citizenry plays in the evolving understanding of the Constitution.

Law enforcement officers stood up as the guardians of the citizenry, but they could never compete, in numbers alone, with the outcry from ordinary citizens. Citizens across the country responded to the charges of Court rulings making the crime rates go up and a Court that allowed criminals to go free on technicalities. Ordinary citizens registered their disapproval of the Court's work through relocating, joining groups,

[85] "Rhode Island vs. the Supreme Court," *Chicago Tribune*, June 24, 1967, 8. The *Tribune* thought that a Court so interested in responding to the conditions that prevailed in society should find it less difficult to consult public opinion and political pressure in reaching decisions.
[86] "Court Chasing Public Behind Bars—Wilson," *Chicago Tribune*, July 13, 1966, B24.

participating in opinion polls, voting and letter writing. The sheer magnitude of the citizenry's disquiet is unmistakable evidence of how important the Court and its work had become to the politics and domestic concerns of the age. One grassroots group might have put it best when it exclaimed that an engaged citizenry could help "end the absurd permissiveness and coddling, which protect the criminal from his just deserts." This form of popular uprising could ensure, as the group put it, "overwhelming collective pressure must be brought on the courts—from the Supreme Court on down—to back law enforcement and to hand down sentences that will deter crime."[87] Communication to congressional leaders and the Supreme Court justices provide a superb opportunity to follow to the grievances of ordinary citizens.

Anyone who might contest or downplay the relevance of the voluminous mail sent to individual justices should pause before making such judgments. Although the reliance upon any few missives could easily provide distorted perspective, common themes and objections yield useful insights. The merits of social history have, in the least, led historians to recognize that the voices from below do indeed matter. The letters from below did not just represent ephemera or the presumptive results of ordinary citizens manipulated by media reports, television images and cunning leaders who sought to whip up fears. The public knew about recidivism and it knew about guilt; whatever multiplicity of ways it pondered the consequences of repeat offenders or the drawbacks of the obviously guilty going free, it could see one of the fundamental tenets of the social contract violated. Generally, the Court seemed to expand rights but ignore

[87] Citizens Commission Against Crime, Undated Pamphlet, *Crime is Destroying America, It Must be Stopped!*, The University of Kansas Special Collections Library, Wilcox Collection.

responsibilities and the rights of the law-abiding. Specifically, it only seemed to let criminals go and allow future criminals to escape punishment.

Concerned citizens could not help but learn that the Ernesto Miranda, whose case before the Court had led to the *Miranda* ruling, eventually found his way to a jail cell anyway. Miranda faced off against a guilty conviction even after the Supreme Court had ordered a new trial for the accused rapist. After his time in prison and parole years later, Miranda returned to his wayward ways. Danny Escobedo also did not wait long to find trouble again; not even a year after the Court's ruling the police arrested Escobedo for selling narcotics.[88] The Court's citizen critics became aware that they seemed to have a better idea of what the social contract involved and had empirical insights that the Warren Court liberals did not. Technicalities, in the worldview of the citizen Court critics, could not justify letting the guilty free, possibly to commit crimes again in the future.

Letters sent to Congressman provide one useful way to gather the grievances of ordinary citizens. As one group from Savannah, Georgia encouraged its members, "We the People, by our letters can demand that Congress put the Supreme Court back into its intended function."[89] Aggrieved Ohioans, for example, fulminated in letter after letter of protest over the Court and its salient role in hastening criminal acts. In one of them sent to Representative John Ashbrook, an Ohioan worried that the law itself had become nothing but an enemy of police officers. She demanded that Congress use its law-making duties to counteract the Court's undermining of police officers.[90] I.G. Harman of Canton, Ohio, in another typical example, suggested that inquiries into the crime problem "start . .

[88] "Who's Lost in the Labyrinth," *Chicago Tribune*, April 23, 1965, 20.
[89] *The Bulletin Board of the Conservatives*, July 20, 1962, Hall-Hoag, Box 76.49-5.
[90] Mrs J.K. Matthews to John Ashbrook, May 14, 1968, JAC, 1968 Congressional Office Files, Box 6. The Ashbrook collection contains more than its fair share of letters encouraging measures to counteract the Supreme Court.

. with our Supreme Court."[91] Other Ohio citizens believed the Court as a primary reason not just for the crime problem but disorder, chaos and the credibility problems—the very big problems that academics such as Inbau and Rice and conservative spokesperson Rafferty had lamented.[92] Ashbrook did his part, barely encouraging his constituents and others to think otherwise. After all, time and again he blamed "liberal Supreme Court decisions" for the crime problem.[93] Countless politicians registered the same charge.

Congress existed ostensibly as the repository of the people's demands and grievances. Grassroots dismay would seem destined to manifest itself in appeals to elected legislators. Nevertheless, the communication to the justices, while often even more raw and emotional, expressed the same lament over the criminal procedure developments. Conjecture can only do so much; but even with many possible motivations explaining the behaviors of the justices, it is significant that the justices traded these letters, sometimes commented upon them and, that Justice Douglas even responded, with the help of clerks, to them. With the timeless question of judicial decision-making no more settled now than we might ever hope it might become, it suffices to say that the Warren Court justices at least listened to, if not the election returns, the disquiet from the citizenry.

Time and again the complaints to the justices asked about the rights of security and safety that the law-abiding could expect from their government. No amount of fairness to the accused, many believed, justified impairing these rights. The general manager of the short-lived National Basketball Association franchise in Cincinnati, for

[91] I.G. Harman to Congressman Frank T. Bow, June 7, 1968, (copy to Congressman John M. Ashbrook), JAC, 1968 Congressional Office Files, Box 2.
[92] Joyce Carter to John Ashbrook, September 3, 1968, JAC, 1968 Congressional Office Records, Box 6.
[93] John Asbrook to Mr. and Mrs. Frank Enlow, January 10, 1968, JAC, Congressonal Office Files 1968, Box 6.

instance, turned a colorful phrase in asking Justice Douglas: "Whose rights are you protecting when a murderer, a rapist or a robber are (sic) turned loose because they were arrested on St. Patrick's Day and the warrants were not made out in green ink?"[94] Chief Justice Warren, unsurprisingly, generated more than his fair share of derisive letters, particularly upon his announced intention to leave his post in the summer of 1968. Time and again those letters sent to that man who had got his start in California politics as a city attorney and later district attorney of Alameda County expressed regret that he had not left sooner. As one citizen put it, "the grave injustices you have done to our great country can never be undone. The lawlessness, rioting, looting and assassination can be laid directly on your door step."[95] Hyperbole put together with unfeigned reactions to his time as chief justice, led many to write that no man had done more damage to the Country, and that his Court had after all made sure that lawlessness and crime had skyrocketed.[96] Evan Baker of Laguna Hills, California captured the sentiment nicely when he said:

> Your decisions upon criminal matters have created happiness among thugs, gangsters, rapists, murderers and sex perverts. Our prisons are full of death-row inmates who have high hope of release, and the day after they are turned loose they will murder and rape again.[97]

Some of this represented anger and the undeniable human need to place blame somewhere for unwanted developments. But more importantly, the critical communication to the justices themselves confirmed and strengthened that presumptive influence that even the citizenry had over the interpretation of the Constitution.

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[94] Pepper Wilson to Justice William Douglas, April 24, 1968, William Douglas Papers, Box 1139.
[95] W.L. Earls to Chief Justice Earl Warren, (no date), Earl Warren Papers, Box 108 (hereinafter EWP).
[96] See, generally, EWP, Box 108 and Box 110.
[97] Evan Baker to Chief Justice Earl Warren, June 25, 1968, EWP, Box 108.

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Citizens though could look to elected officials for signals as to what did and did not seem reasonable public discourse. Both the Johnson White House and Congress responded to what became the signal domestic concern of the 1960s: crime and disorder. Yet, in these responses the Warren Court still came up for its share of the blame. Though some of these elected official critics exercised varying degrees of sophistication, most of them stumbled across subtlety and engaged in a criticism that has infected constitutional politics ever since the Warren Court era.

Remarkable consensus, again it bears a reminder, existed on crime as an acute problem and one that the federal government could help alleviate. LBJ's 1965 Commission on Law Enforcement and Administration of Justice, by its mere existence, confirmed and provides evidence of this consensus. Congressional establishment of the Office of Law Enforcement Assistance in the Department of Justice in 1965 and its successor in 1968 the Law Enforcement Assistance Administration provide further evidence of the federal efforts to provide tangible support, often in the form of monies, to local and state law enforcement. Congressional hearings throughout the 1960s provided considerable opportunity for the Court's assailants to continue their efforts.

The Johnson White House certainly took notice of the crime issue. In 1965 it established the President's Commission on Law Enforcement and the Administration of Justice, under the leadership of Attorney General Nicholas Katzenbach. The group's February 1967 report, *The Challenge of Crime in a Free Society*, illustrates much of the era's consensus. Yet, of all the areas of agreement in the report, one area of disagreement prompted a vigorous supplement from seven of the nineteen members of the commission.

These seven, who included Lewis Powell and future Watergate Special Prosecutor Leon Jaworski, offered an evaluation of "the difficult and perplexing problems arising from certain . . . constitutional limitations upon our system of criminal justice."[98] The dissenting views did not seek, as they contended, to criticize the Court or encourage opposition; nevertheless, the dissenters framed their concerns around the "delicate balance between the rights of the individual and those of society." Such discussion had invariably become, by the late 1960s, a contribution to the continuous referendum on the Warren Court.

Much of the criticism of the Court, the dissenters suggested in a veiled reference to the readers of the *Dan Smoot Report* or the followers of the John Birch Society, had come from unhelpful sources. Rational, even polite and helpful, criticism of the Court was possible. They did not put blame on the Court directly but through misdirection accomplished the same end. Though hardly full of invective, the dissenting views called for changes to occur. Since the Commission's Report recognized the agonizing crime problem, and since any real chance to cut back on crime required effective law enforcement, "the courts," in their proposal, had to "convict the guilty with promptness and certainty just as they must acquit the innocent. Society is not well served by limitations which frustrate reasonable attainment of this goal."[99] Above all else, Fifth and Sixth Amendment guarantees and the jurisprudence that attended to those guarantees warranted scrutiny. The dissenters feared a near future in which eliciting confessions would become a law enforcement relic—echoing Inbau, Schafer and so many others who thought that the Court had put confessions on path to extinction. They had a benign view

[98] *The Challenge of Crime in a Free Society* (Washington, D.C., United States Government Printing Office, 1967), 303
[99] *Id*. at 307

of interrogation, since it "benefits the innocent suspect as much as it aids in obtaining evidence to convict the guilty."[100] In a telling passage the dissenters said:

> There are some who argue that further experience is needed to determine whether police interrogation of suspects is necessary for effective law enforcement. Such experience would be helpful in defining the dimension of the problem. But few can doubt the adverse impact of *Miranda* upon the law enforcement process.[101]

The dissenting addendum though hardly satisfied the Court's enemies. Overall, the Crime Commission's report and its failure to offer frequent consideration of the Warren Court's guilt only provided more ammunition for the enemies of the Court, who welcomed every opportunity to tie the Court's work to the ostensibly dominant liberalism of the past three decades. Indeed, however inevitable a response from the Republican Party, its own Task Force on crime in 1967 and 1968, under the leadership of Representative Richard Poff, cited the Warren Court's work as one of the main reasons the group existed.[102] The Task Force would later assist Richard Nixon in his 1968 campaign.[103] Perhaps of little coincidence, the congressional crime hearings that occurred around the same time as the LBJ crime commission report and thereafter in the spring and summer of 1967 turned frequently to the Court's role in the crime problem.

The United States Senate Subcommittee on Constitutional Amendments conducted hearings the summer *Miranda* came down and into 1967, attempting most notably to determine the implications and early effects of the decision. Hearings occurred first in July 1966 in Washington and the next February the hearings even took place in Houston, Milwaukee and Omaha. Under the leadership of Indiana Senator, and presumptive friend of the Court, Birch Bayh (D-IN), and with the occasional participation

[100] *Id*. at 305.
[101] *Id*. at 305.
[102] Richard Poff to Chester Mize, May 22, 1967, RPP, Box 223.
[103] Richard Poff to Patrick Buchanan, April 22, 1968, RPP, Box 223.

of Roman Hruska (R-NE), the Subcommittee still existed as a lead agent in validating the already widespread criticism of the Court. Much of the testimony revealed mixed opinions about the consequences of *Miranda* in particular and the Court's work in general. That message, however, barely registered in the public debate. Bayh's efforts and rhetoric reveal just how confusing apparent liberals and moderates could seem on the broader crime issue and the more narrow charges often leveled against the Court. He could call for better education programs in a nod to preventing the conditions that gave rise to criminal activity but just as often remind Americans that little benefit could come from blaming law enforcement for the crime problem. In a statement at the outset of the February 1967 hearings in Houston Bayh put it bluntly:

> We are hearing too much these days about the plight of the robber, and not enough about the robbed; we are seeing too many tears shed for the murderer, and too few for the murdered; we are being inundated by wave after wave of compassion for the rapist, but hardly a ripple for the raped.

Whether Bayh, or his trusted aide Larry Conrad, came up with this exaggerated language is largely irrelevant. What matters is that the clamor over expanding the rights for the accused somehow still required amplification. Bayh might have asked who had actually spoken up for the rights of the accused other than liberal organizations like the ACLU and the Warren Court liberals. His hearings and the operating fact-finding premises all existed on a consensus ground in which the Court was guilty as charged of spreading what Bishop Fulton Sheen labeled "false compassion" for criminals.[104] Bayh's hearings, however unique, were a mere prelude to Senate hearings from March to July 1967.

Under the leadership of John McClellan (D-AR), the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedure investigated the crime

[104] Bishop Fulton Sheen quoted by Senator McClellan, *Congressional Record*, February 24, 1967, 4456.

problem. It considered questions over wiretapping, measures to weaken organized crime and federal grants for assisting law enforcement efforts nationwide. Yet, unlike previous congressional hearings on crime, the 1967 hearings featured incessant consideration of the Warren Court. Importantly, the hearings occurred also during the same time span of Justice Clark's retirement from the bench. With LBJ's June 13, 1967 appointment of Thurgood Marshall to replace Clark, the final hearings in July and the frequent discussion of the Court intruded on the five days of hearings the Judiciary Committee conducted on the appointment.

During the 1967 hearings, McClellan and his allies found all the evidence they needed in the newspaper headlines and stories that decried *Miranda* and the supposed decline in voluntary confessions. Senator Sam Ervin's long-standing bill to ensure the admissibility of voluntary confessions made its expected appearance. Already, earlier in the year, the National District Attorney's Association had endorsed Ervin's legislation. Subcommittee Chairmen McClellan unsurprisingly put Ervin's bill at the heart of the debate, admitting that he was not bound to any course of action provided "that something must be done to alleviate the baleful effects of the Supreme Court's 5-to-4 *Miranda* decision."[105] He speculated openly that one of the possible (and he would say desirable) outcomes of the bill's adoption, or just the debate over its adoption, would be to induce a change in one justice's views—presumptively all that it took to reverse these "baleful" rulings. McClellan hardly seemed foolish in registering such a hope what with so many of these controversial decisions held together via 5-4 votes.[106] Others voiced similar

[105] *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary United States Senate*, 90th Congress, 1st Session (Washington, DC: U.S. Government Printing Office, 1967), 3.
[106] *Id*. at 180.

hopes that the Court would pick up on the signals from Congress, and correspondingly correct itself.

Congress passed important crime legislation in 1968. The Omnibus Crime Control and Safe Streets Act of 1968, itself an outgrowth of legislation sent by the White House the previous year and congressional negotiations thereafter, fulfilled the consensus demands for federal assistance for state and local law enforcement. The legislation did not challenge the notion that crime remained a problem for local and state officials, but through federal disbursement of grants and the creation of the Law Enforcement Assistance Administration to administer the grants the legislation sought to provide assistance with minimal federal intrusiveness. Importantly, however, the best the foes of the Warren Court could muster was Title II of the act, which sought to restore a broader allowance for voluntary confessions. But the restoration only permitted federal judges to rule on voluntariness; the legislation hardly touched upon any parallel limitations put upon state courts. What is more, Title II merely re-affirmed a power that federal judges already had.

John Ashbrook and many other conservatives unsurprisingly took a dim view of congressional efforts to combat the Warren Court. They often worked for the measures but often discounted the chances for meaningful Court curbing measures. Congress had been at it for years. From Representative Howard Smith's long-standing state's rights bill to the more unrealistic legislative proposals to require super-majorities on the Court, most efforts merely became forgotten footnotes to the clash between rival branches. Congress had expressed displeasure over the Court for years but displeasure only could accomplish so much. With the 1968 crime legislation as a guide, skepticism about

congressional action made sense. One route, however, presented a sound and presumptively far less complicated opportunity for changes: electing a different occupant for the White House, who in turn could appoint new justices when age, poor health, death or other circumstances created vacancies. With law and order the order of the day in Congress, the citizenry and indeed everywhere across the country, it only remained necessary for a presidential election year to feature a candidate who would promise to restore some sanity to the Supreme Court.

VI.
Alexander Bickel: Principled Critic of the Warren Court

The root difficulty is that judicial review is a counter-majoritarian force in our system.[1]

Normally when the Court declines to say whether or not a given practice conforms to constitutional principle, the intended and actual effect is to allow free play of the political process.[2]

Law is a process. It is the process of establishing norms that will not need to be frequently enforced. It is necessarily gradual and slow. It aims at stability and values order. It can actually bear down on men and their behavior only episodically.[3]

We only wish we had nine like you on the Supreme Court.[4]

Academics could be among the fiercest critics of the Warren Court. Those who followed Constitutional law did not serve, for the most part, as opponents who challenged what the Warren Court did; they instead devoted most of their efforts to questioning how the Court justified and explained its rulings and whether or not the Court had used its limited powers wisely. Any effort to appreciate the importance of criticism of the Warren Court and to recognize the mainstream nature of some of this criticism requires an investigation into these attempts at higher criticism. Constitutional law scholarship did not cause dislike for the Court, but it could take on interesting, sometimes legitimizing, roles as a supplement to the broader critique.[5]

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[1] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, Indiana: Bobbs-Merrill, 1962), 16 (hereinafter Bickel, *LDB*, page number).
[2] Alexander Bickel, *Politics and the Warren Court* (New York: Harper & Row, Publishers, 1965), 176 (hereinafter Bickel, *PWC*, page number).
[3] Bickel, *PWC*, at 87.
[4] J.H. Meadows to Alexander Bickel, March 1970 (no day specified). Yale Sterling Library Special Collections Library, Alexander Bickel Papers (hereinafter ABP), Series I, Box 5. Meadows, a medical doctor from Wilson, North Carolina had responded favorably to a recent (March 9, 1970) piece in *Time* that Bickel had written. Meadows complained about school busing and lauded Bickel for, evidently, doing the same.
[5] See Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996), in particular 44-48.

Yale University scholar Alexander Bickel and his work provide an opportunity to encounter some of the best of that era's thinking about the Warren Court. Accordingly, we will review Bickel's background, his important connection to Justice Felix Frankfurter, the prevailing trends in legal thought of his era and his difficult-to-pigeonhole political loyalties. Thereafter we will explore Bickel's contributions, often aided by his own keen historical perspective, to the era's debates, particularly as he critiqued the Warren Court and responded to its opponents. We will also encounter his reactions to some of the Warren Court's hallmark rulings, particularly those involving segregation in public schools, school prayer and apportionment. Any understanding of Bickel must entertain his reverence for a less involved Court. In particular, his views on *Engel v. Vitale* and the apportionment cases reveal some of the virtues (and demerits) of a restrained judiciary; these views also illustrate his willingness to point out the misgivings of various liberal positions endorsing the Court's work. In seeking to understand Bickel, we will draw primarily from his thoughts upon the role of the Supreme Court in his correspondence, articles and books *The Least Dangerous Branch, Politics and the Warren Court* and *The Supreme Court and the Idea of Progress,* a book which had resulted from Bickel's October 1969 Oliver Wendell Holmes lectures at Harvard Law School.[6]

[6] As a telling sign of the times, Bickel had planned on delivering the Holmes Lectures in the spring of 1969. But, as he put it, "Harvard blew up" that spring, thus forcing a delay until that fall. Bickel's disenchantment with student protesters and problems at Yale, among the normal inducements offered to star academics, nearly led him to leave Yale for the University of Chicago in the mid-1960s and later the University of Pennsylvania. For moving the Holmes Lectures see Alexander Bickel to Robert Bork, April 28, 1969, ABP, Series I, Box 1. Bickel confessed to Ronald Dworkin, in early 1970, that the "chances are quite good that I will leave Yale for an institution where I can lead a more detached existence." Detachment for Bickel would have much to do with getting away from any campus in which the students seemed to have far too much power. For his dialogue with Dworkin I consulted Alexander Bickel to Ronald Dworkin, January 19, 1970, ABP, Series I, Box 2.

Constitutional theory and scholarship has featured a prominent dialogue with important Bickel ideas for the past two generations. As much as Bickel's leading contributions to constitutional theory and debate are undoubted, particularly that of the Court as a "counter-majoritarian force," discussion of Bickel through his papers and public role during the Warren Court era fits well in an effort to understand the contours of the debates over the Warren Court in the 1950s and 1960s. Academics asked vital questions that went directly to the Court's proper role in American governance. Of the questions Bickel contemplated, none emerged as more important than how to support judicial review and how that support might help a seemingly non-democratic Court justify its role in a representative democracy.

Bickel's work brilliantly exposed the Warren Court's ultimate struggle to reconcile its un-democratic trappings with its apparent contributions to democratic life. In these efforts he argued sometimes explicitly, often implicitly, that the legal action and judicial rulings generally did not represent the proper means to bring about those ends that liberals often welcomed. He also knew that the very limitations to the Court's power made it appeal to democracy and grant attention to its adversaries. The Court, however the justices go about their work, will always appear anti-democratic but it is the nature of an evolving legal system and its existence in a representative democracy that ends up subjecting the Court to public input and some measure of popular control—if only as a form of restraint on judicial behavior.

Disagreement over the Court only reminded scholars of their own self-recognized importance. As the Warren Court attempted to move the country in directions some Americans would resist, scholars could help the process by encouraging the Court to

perform its function of expounding the Constitution in a considerate, principled manner. If to understand the Warren Court requires a survey of its critics, then to illuminate further why the critics even matter we turn to Bickel for endless invitations to question what the Court did, how it did it, and, most importantly, how all of this relates to the public's acceptance of the Court's work. Debate over the public as an actor of judicial decision-making, which most often reveal the public as a minor factor, miss out on how much so a Supreme Court that did things differently, Bickel believed, would have had less enemies.

Bickel also reveals that one's political loyalties and policy ideals alone, expressed in a typical conservative-liberal binary, hardly explained how one approached the Warren Court. Avowed conservatives certainly positioned the Warren Court as an enemy; presumptive liberals, such as Bickel and his fellow academics, still could and did have qualms with the manner by which the Warren Court carried out its work, and in turn could even come to have disagreements with the actual outcomes. What they could not guarantee, however, was that their criticisms could not fall into the wrong hands or at least contribute to the overall debate in such a way that their ideas could have unforeseen consequences. Though the terms liberal and conservative still matter, and mattered, Bickel did not exactly commit academic or even liberal heresy in subjecting the Court to, at times, stern disapproval. This reminds us of the persistent and wide-ranging nature of Court criticism.

Like many others in the intellectual class, Bickel generally supported New Deal/Great Society liberalism and liberal policy goals; nevertheless, his discussions of constitutional theory, political philosophy, principled decisions and the Court's role

ensure that he defies easy categorization. Furthermore, his interests in process, prudential decision-making and principle often led Bickel to offer mild to biting criticisms of the Warren Court. As one broad example, Bickel placed much emphasis upon what he called the "passive virtues." Judges had the power not to decide. In some important instances the Supreme Court should refrain from issuing rulings, and when it did rule the Court had to vastly improve on its product. At its core, Bickel's encouragement for the Warren Court, indeed any Supreme Court, to do things differently had one clear desired outcome: compliance. The Court could never have the same contact with the democratic process that its rival branches supposedly maintained. Nevertheless, one of the general rules the Court should follow would be that it rarely move too far ahead or fall too far behind societal consensus.

Bickel's work enables us to appreciate that in a common law system the law, even the ultimate arbiter role of the Supreme Court, is an essentially conservative one. Judges could gather from the wisdom of the past and gather insights from collectively agreed upon principles. The change they could bring about would represent, in due course, slow change. Alexander Bickel called for judges to exercise their craft in this conservative manner. At the end of the Warren Court era, in describing the proper process of judging, he wrote:

> [N]o formal method of reasoning from axioms will answer questions of moral philosophy and political theory plainly and definitively, but it will help answer them differently than a process open to trials of strength, and to the free play of interest, predilections, and prejudice. And it will help test answers against analogues in the tradition of the society and its surrounding contemporary practice. Leaving some value choices to judges who rest decision on principle may meet a need for continuity and harmony in our values. Judicial supremacy is

> necessarily intended as a conservative device even when it serves as an instrument of change—particularly then, perhaps."[7]

The Warren Court had so much trouble because it pushed past this essential conservatism. Alexander Bickel was there to witness it.

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Born in 1924 in Romania, the Jewish Alexander Mordecai Bickel managed to escape the Holocaust and the horrors that came to Europe when he emigrated, along with his parents, to the United States in 1938. The young Bickel distinguished himself on varied educational and career fronts, earning an undergraduate degree in social science, following war-time service, from the City College of New York in 1947, and an LL.B from Harvard University two years later. After law school he first took an appointment as a law clerk for Calvert Magruder, a New Dealer who had become a U.S. Court of Appeals judge in 1939. Magruder had an important colleague and friend in Justice Felix Frankfurter, having both studied under the justice and worked with him at Harvard University. Bickel's Harvard pedigree, varied intellectual gifts and work experience with Magruder helped Bickel secure, during the 1952 term, an appointment as a clerk to Justice Felix Frankfurter.[8]

Bickel's time at the Court involved the opportunity to learn from the Court's scholar-in-residence Frankfurter. Bickel also had the chance to witness the first arguments in *Brown v. Board of Education*. Yet, he became more than just a forgotten clerk who witnessed history. Bickel's historical analysis made history. With *Brown* held

[7] Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, Publishers, 1970), 87 (hereinafter Bickel, *TSCIP*, page number).
[8] One bit of trivia that is far from trivial: Bickel served as Frankfurter's clerk at the same time another young lawyer, William Rehnquist, clerked for Justice Robert Jackson.

over for re-argument, Bickel busied himself preparing, at the behest of Justice Frankfurter, an analysis of the legislative history of the Fourteenth Amendment and its adoption. Justice Frankfurter later informed the other justices that he had told his clerk-pupil "to read afresh every word in the *Congressional Globe* bearing on what ultimately became the Fourteenth Amendment."[9] The final product, among other things, posited that the historical record revealed, at best, meager interest by the legislative framers on the question of segregation or segregated schools. The findings on the legislative debates over the Fourteenth Amendment's adoption later appeared as part of an important article in the 1955 *Harvard Law Review*. In fact, this article became one of the more widely cited and influential ever published in an American law review. None of this is to say that the article could not do work beyond scholarly circles, as former justice and Court foe James Byrnes later cited Bickel and his work as an authority on the question of original intent of the framers of the 14th amendment and the Civil Rights Act of 1866.[10] This would not be the first or last time during the Warren Court era that scholarly criticism of the Court fell into the hands of a Court critic. It would not be the first or last time either that Bickel brought the peculiar and useful sensibilities of the historian to bear on contemporary matters.

[9] Felix Frankfurter, Memorandum to the Conference, May 19, 1954, Robert H. Jackson Papers, Box 184. Bickel's article on the legislative history of the Fourteenth Amendment appeared as "The Original Understanding and the Segregation Decision" in the November 1955 *Harvard Law Review* and as an appendix to his 1965 book *Politics and the Warren Court*.

[10] In 1956, Byrnes asked how Bickel's argument that segregation was not meant to be outlawed in the 1860s could have escaped the justices of the *Brown* ruling who had thought the evidence insufficient to reach a conclusion one way or the other. Bickel found Byrnes's criticisms of the Court unsupportable, but even this one instance revealed the occasional dangers of presumptively sound, even detached, scholarly work serving unintended and less than ideal ends. See James Byrnes, "The Supreme Court Must Be Curbed" *US News and World Report*, May 18, 1956, 52.

Bickel's year spent as a law clerk for Frankfurter had an indelible impact on Bickel and his legal thinking.[11] Frankfurter's advocacy of judicial restraint, while assuredly not something Bickel adopted without modification, dovetailed neatly with Bickel's eventual contributions to American legal scholarship and political life. He spent his academic career, following a brief interlude at Harvard as a research associate in the mid 1950s, at Yale Law School—though he also earned a joint appointment in the Yale History Department in 1966. At Yale, Bickel associated with a diverse who's who of academics, from a young Robert Bork to historian-public intellectual C. Vann Woodward. From 1956, when he started at Yale, to his untimely death in 1974, Bickel produced invaluable scholarship and public commentary. Not only did he communicate to other legal scholars but his ideas also appeared in the pages of the *New Republic*, *Commentary*, the *New York Times* and other sources that involved larger, public audiences.

The legal professoriate Bickel joined did its part to widen the Warren Court's credibility gap, even as many of the same academics may have thought they were trying to close that gap. In due course, the legal academy both provided some cover for Court critics and featured ideas, however more sophisticated, that non-academics sometimes entertained and advocated.[12] Though the non-scholarly critics rarely provided the same subtlety, appreciation for history and the desire to protect the Court's influence that

[11] Alexander Bickel thought Frankfurter one of the most influential justices of the US Supreme Court to have ever served, suggesting Frankfurter "will be heard, and he will influence political thought so long as there is a Supreme Court and so long as men are concerned to make their actions fit the American Constitutional tradition." Alexander Bickel, "Felix Frankfurter: 1882-1965," *New Republic*, March 6, 1965, 7.

[12] Consider for instance conservative columnist David Lawrence citing Herbert Wechsler's criticism of the reasoning in *Brown v. Board of Education.* David Lawrence, "Supreme Court Rulings Criticized," *The Evening Star*, April 28, 1959, Seeley G. Mudd Manuscript Library, Princeton University, David Lawrence Papers, Box 171.

Bickel often did, their criticisms, on occasion, overlapped with his. Aiding the public's comprehension of the Court and in encouraging the Court to do a better job, Bickel seemed both critic and ally of the Court. To understand his existence in both camps we must have some overview of the larger scholarly terrain of the era.

Bickel came of age during the heyday of legal process jurisprudence and the era of "reasoned elaboration." This school of legal thinking dominated the 1940s through the 1960s. Professors such as Bickel and Harry Wellington, both of whom had attended Harvard, and leading voices in the yearly Foreword to the *Harvard Law Review* participated in a scholarly critique of the Supreme Court that featured many of the precepts of process thinking. Rather than comment solely on results and outcomes, legal process thinking evaluated the reasoning advanced in the Court's opinions. Subjecting legal reasoning to scrutiny was hardly new but scholars of the legal process school did so with relentlessness.

Process jurisprudence and its adherents often supported the ends but not the means of the Warren Court. According to one survey of American jurisprudence, process scholars often found "Warren Court decisions . . . to be morally correct yet jurisprudentially unsatisfactory."[13] Legal realists of the previous generation may have derided reasoning and process, but a newer generation of legal scholars thought process, reasoning, consensus and consistency, however difficult, could and should still animate judicial opinions. Increasingly, important voices in the legal academy expressed a renewed willingness to explore, rather than just dismiss as preferences or "hunches" the reasoning involved in judicial rulings.

[13] Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford University Press, 1995), 266.

Legal process thinking had prominent proponents such as Harvard Law School's Henry Hart (1904-1969) and Columbia Law School's Herbert Wechsler (1909-2000). Hart and Wechsler together produced arguably the casebook with a shelf-life like no another. Their 1953 casebook *The Federal Courts and the Federal System* remains in print and in renown.[14] These two stars of the legal professoriate emerged as two of the era's leading advocates of principled judicial decision-making; both produced essays in the November 1959 *Harvard Law Review* that remain seminal examples of legal process jurisprudence.

Henry Hart's famous 1959 foreword to the *Harvard Law Review*, though ostensibly a thought experiment on judicial administration, criticized the Court for sloppy to non-existent reasoning, trying to do too much and for outcome-driven work—not what the legal process school wanted to see. Hart's capstone language, in touch with the idea of ensuring respect for the Court, required principled decisions. He contended that:

> Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do. Only opinions of this kind can be worked with by other men who have to take a judgment rendered on one set of facts and decide how it should be applied to a cognate but still different set of facts. Only opinions of this kind can carry the weight which has to be carried by the opinions of a tribunal, which, after all, does not in the end have the power either in theory or in practice to ram its own personal preferences down other people's throats.[15]

[14] For criticism of the text and those who stay within its paradigm see Michael Wells, "Who's Afraid of Henry Hart ?" *Constitutional Commentary*, Spring 1997, 175-207.

[15] Henry Hart, "The Supreme Court, 1958 Term," *Harvard Law Review*, Volume 73, (Nov., 1959), 84-240 (quote at 99). With all of the antagonism between Frankfurter and the Warren camp, the gossip mill of the era indicated that Frankfurter stood behind Hart's work and that the University of Chicago's new *Supreme Court Review* came to exist as but one more way that Frankfurter sought to use sources exogenous to the Court to strike at Warren and his supporters. See Philip Kurland to Felix Frankfurter, July 18, 1960, University of Chicago Library, Modern Manuscript and Archival Collections, Phillip Kurland Papers, Box 15, Folder 6 (hereinafter PKP).

Hart ultimately contended that the Court needed to do less and in the process could do better.[16] Doing a better job could also help improve, so many scholars believed, the chances for public acceptance of the Court's more controversial rulings.

Into this environment we must also situate the search for usable legal principles. Herbert Wechsler did as much as anyone to make this search an important one. Wechsler and his views commanded much respect in the academic and legal community. His brother, the journalist James Wechsler, similarly had considerable influence on and respect from American liberals.[17] Herbert Wechsler had served as a law clerk for Justice Harlan Fiske Stone during the 1932 term. After his service as a clerk he went back to his alma mater Columbia to teach, remaining there for the rest of his long career.

Columbia University's Wechsler delivered the 1959 Oliver Wendell Holmes Lecture at Harvard University—ten years before Bickel did the same. In his 1959 lecture, reproduced later that year in the *Harvard Law Review*, Wechsler sought to elaborate upon the proper reasoning that warranted High Court activity. He wanted to restore reason to its rightful place as both guide for jurists, something of a benchmark for critics and a tool of public persuasion. Wechsler believed that courts could do better, arguing "that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is

[16] One can hear more than an echo of Hart in Philip Kurland's 1970 book on the Warren Court, in which one can only conclude that Hart's lament went unheeded by the Warren liberals. Therein Kurland said the Warren Court's "opinions have tended toward fiat rather than reason." See Philip Kurland, *Politics, the Constitution and the Warren Court* (Chicago: The University of Chicago Press, 1970), xxii.

[17] For James Wechsler see Kevin Mattson, *When America Was Great: The Fighting Faith of Postwar Liberalism* (New York: Routledge, 2004).

achieved."[18] The time had arrived for a full appreciation and application of what he termed "neutral principles." Absent such compelling "neutral principles," courts of law stood with much less justification for striking down laws and actions of any level of government.

"Neutral principles" demanded that jurists heed generalizable rules at nearly every stage of rendering decisions. The principles would not only help resolve legal cases and controversies in the present but decisively mattered as a portent (and guide) for future resolutions. Decisions properly grounded in "neutral principles" would in turn lead other jurists to reach the same decision in cases that presented similar situations. Wechsler argued that the Supreme Court had failed—and continued to fail—to offer decisions adequately grounded in these generalizable principles. Even celebrated (and derided) cases involving racial discrimination and the Fourteenth Amendment such as *Shelley v. Kramer* and *Brown v. Board of Education* earned Wechsler's combined admiration and criticism. These rulings, in his estimation, could improve society but did not represent judicial interventions grounded in "neutral principles." Herbert Wechsler had not envisioned "neutral principles" as first and foremost a device to control an out-of-control Supreme Court, but if that were the outcome that would have been a small expense.[19] Underappreciated even by those who called for "neutral principles" to guide

[18] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harvard Law Review* (November 1959), 1-35 (quote at 15). Wechsler argued against the constitutionality of libel claims in the famous case *New York Times Company v. Sullivan*; his credentials as a supporter of putatively liberal outcomes is difficult to question.

[19] This summary of Wechsler benefits immensely from the encomium piece by Kent Greenwalt, "The Enduring Significance of Enduring Principles," 78 *Columbia Law Review* (June 1978), 982-1021. I also draw upon G. Edward White's discussion of Reasoned Elaboration, a stand-in term for process thinking. See G. Edward White, "The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change," *Virginia Law Review*, Volume 59, (February 1973), 279-302, in particular 289-291. White made sure to remind us that those who shaped Reasoned Elaboration began the project in response to legal, intellectual, social and political forces at work before the Warren Court. The evolution of Reasoned

judicial decision-making was that all of this could better ensure that the political process and those who acted within it would not look upon the law as unsettled, disruptive and out of line with the presumptions of mild popular input.

Wechsler did not set up "neutral principles" as the sole, proper guiding force; they were to provide only the most indispensable ingredient to an estimable ruling, since other factors, such as fidelity to precedent and text or evolving social realities, also mattered. Nevertheless, some of the better contemporary criticism of his ideas still recognized that Wechsler's recommendations might have not done enough to contend with the lessons of the legal realists.[20] Years later, however, one can see that discussions and advocacy of "neutral principles" made sense in an age of putative consensus. The core ideas of legal realism had proved too unsettling. If such doubts for the judicial reasoning process were to become ubiquitous not only in the academy but also within the populace, the dispute resolution role of law and the judiciary would be dramatically undermined. "Neutral principles," even in an unapparent way, was about rescuing the judiciary from any chances of overreach and the presumptive damages that legal realism had inflicted upon the ideals of judicial reasoning.

Regardless, we must realize that even this lofty, scholarly criticism came down to important judgments on public acceptance of the Court's doings. "Neutral principles"

Elaboration though took place during the 1950s and 1960s. He argues: "In the world of the Reasoned Elaborationists judges neither found law in the old-fashioned sense nor made it in the sense of the Realists; they reasoned toward it and then articulated their reasoning processes." White wondered if the preference for consensus would even be possible with so many vocal minority interests coming before the Court (quote at 289).

[20] Yale Law School Dean Eugene Rostow's criticisms of Wechsler serve as a good case in point. Rostow pled that legal realists had forced upon those who cared about how the law worked the realization that reason and rules could not be everything. Wechsler's views, Rostow argued "would raise the elements of rules, of precedent, of what he calls "principle" or "reason" in the judicial process to a position of absolute primacy which all we know about law denies." In a nutshell, Wechsler asked for too much; the ideal jurisprudence was hopelessly idealistic. Eugene Rostow, "American Legal Realism and the Sense of the Profession," 34 *Rocky Mountain Law Review* (1962), 123-149 (quote at 138).

may have been a reaction to legal realism but they were a consequence of real concerns over compliance. That connection point between the professoriate and those outside of it made it all the more likely that other, less sophisticated Court critics could pick up on and abuse ideas that seemed to counsel judicial restraint. As the seeming battles over legal outcomes often revealed, not always with precision or clarity, the Court's critics often expected the Court to follow different principles, both of interpretation and foundational principles from which it would reason to its decisions. Nonetheless, expecting a broader public to read, let alone appreciate, the logic and rationales of a judicial opinion might have been too much to expect anyway. What one might say is that the legal process school held out hope that some sort of multiplier effect could kick in. Scholars, provided they approved of the Court's work, could help settle the public disquiet. Provided that scholars were satisfied, the public could rest assured that the Court had not done too much or done wrong.

In the end, the discussion of principled decision-making still came down to foundational questions over right and wrong. All of the talk about getting past the stale debate over outcomes might still have just come down to outcomes, partisanship, politics and differences of opinion over what the law should require. "Neutral principles" and even different expectations for the Court seemed to some observers to be naïve and too far removed from how the world had to work. Those who participated in the constitutional politics of the era, and supported the liberal rulings of the Court, could just look upon "neutral principles" as a force to weaken to judicial liberalism. We might keep no less an authority figure, if not an authority, than Earl Warren in mind on this point. Warren's memoirs seemed to misunderstand "neutral principles" but he might have been

on to something in suggesting that they were "a fantasy . . . used more to avoid responsibilities than to meet them."[21] With the responsibilities often put on the Court, let alone those it had yet to take on, countless critics would have rejoiced had the Court followed Wechsler's advice, which one way or the other could have led to a less involved Supreme Court.

Alexander Bickel decisively shared in Wechsler's and the era's clarion call for principles. Though scrutinizing Wechsler elsewhere, Bickel echoed Wechsler in contending:

> judicial review is the principled process of enunciating and applying certain enduring values of our society. These values must . . . have general significance and even-handed application. When values conflict—as they often will—the Court must proclaim one as overriding, or find an accommodation among them. The result is a principle, or a new value, if you will, or an amalgam of values, or a compromise of values; if must in any event also have general significance and even-handed application.

Bickel seemed to think such neutral principles might be too hard to find and follow. The varying interests in play in American society all seemed to minimize the chance that these "neutral principles" could be made all that often; compromise too still had to exist.[22] Generally, Bickel agreed that the justices needed to think and reason more, decide cases less and justify them better. He lamented the poor legal reasoning that attended to certain rulings, and as much as some legal scholars shared these lamentations, Bickel

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[21] Earl Warren, *The Memoirs of Chief Justice Earl Warren*, 332-333. Warren's dismissal of "neutral principles" did not do justice to the sound justification for the notion of predictability that stood as a cornerstone element of the judicial rule-making (and following) ideal. Warren equated the term with some sort of judicial objectivity, a part that in no way should have stood in as an able substitute for the term. His discussion of this reaction to realism and the Warren Court was in no way his finest hour. Also see James Skelly Wright, "Professor Bickel, the Scholarly Tradition, and the Supreme Court," (1971) *Harvard Law Review* 84, 777. Wright served as a federal judge for over thirty years, all of which included years that paralleled the Warren Court's existence. Wright complained that "neutral principles" hardly helped with the "protection of constitutional values." Scholarly criticism of the Court, at least the type Wechsler and Bickel seemed to practice, seemed unrealistic according to Wright.

[22] Bickel, *TLDB*, at 58.

wondered why there were not more scholars who joined the ranks. Foremost for Bickel, the Court had to do a better job.[23] Process, politics and principle existed throughout Bickel's work. What is more, to influence and persuade the public, the not-so-powerful Court, had to do these things.

Above all else, Bickel's encouragement of a less active Supreme Court remains, at first glance, important evidence of what served, in the Warren Court era at least, as conservative dogma. The details matter, but it hardly speaks to an intellectual arrogance to say that reaching the public often can come at a great cost, namely losing out on the details. Chief Justice Earl Warren and many "legal liberals" assuredly thought that the Supreme Court should decide cases brought before the Court—abstention doctrines notwithstanding.[24] Warren's language remains instructive as to the divide that separated his view (and presumptively that of many on the Court) from Bickel and an important segment of the legal academy—not to mention conservative politicians and commentators. In his memoirs Warren proclaimed: "The Court sits to decide cases, not to avoid decisions, and while it must recognize the constitutional powers of the branches of Government involved, it must also decide every issue properly placed before it."[25]

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[23] As a mature Alexander Bickel put it, the scholarly terrain featured complaints over "erratic subjectivity of judgment, for analytical laxness, for what amounts to intellectual incoherence in many opinions, and for imagining too much history." Bickel, *TSCIP*, at 45.

[24] The "legal liberal" term fits with Laura Kalman's study of legal liberalism, the academy, the judiciary and the efforts to justify an activist judiciary all while avoiding a return to an activist judiciary that could reach conservative positions. See Kalman, *supra* note 5.

[25] Earl Warren, *The Memoirs of Chief Justice Earl Warren*, 333. Also, consider the musings of Judge David L. Bazelon. In discussing the responsibilities of attorneys, Bazelon mused upon the all too frequent tendency of lawyers, and thus jurists, to evade decisions. He observed that: "Lawyers are particularly ingenious in developing reasons why they should not act—institutional competence, judicial restraint, separation of powers, the passive virtues. Of course these are factors which may be relevant and even controlling in some situations. But they do not automatically control; they must compete with other considerations." David Bazelon, Speech Before the Mid-Atlantic Region's Welfare Conference, May 10, 1968, DBP, Box 59, Folder 18.

Thoughtful critics, like Alexander Bickel, wholeheartedly disagreed with such a firm declaration of pseudo-principle.

What makes Bickel even more important, however, is that he did not criticize judicial power solely for the sake of criticism or because of rulings with which he disagreed; he issued his doubts over a far too consequential Court because of history and that what liberals might celebrate in one age could become problematical in another. (Here we encounter an essential insight that more recent conservative champions or liberal detractors of Bickel ignore.) In auditing the Warren Court's books, legal scholars did so to protect the Court's power as much as to lament the Warren Court's use of it.[26] Unlike many of the Warren Court's non-scholarly critics, Bickel hoped that his scholarly work could encourage the Court to use its powers prudently and to earn the respect of the public. If the Court were to do so, it would best ensure that when it did rule upon controversial matters, the disquiet could be kept to a minimum or at least more manageable quota in constitutional politics.

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Bickel's overwhelming scholarly focus involved the Court's power to not decide and to limit its intrusions into the political process when it did decide cases. "Neutral principles" were, in short, a necessary condition for estimable judicial work but some legal disputes did not present, or perhaps would never present, suitable controversies for

[26] I have pilfered the legal scholar as auditor line from University of Chicago law professor Philip Kurland. Kurland once said: "The Court is not responsible like other branches. Hence we have to survey its opinions. With few exceptions, the only auditors of its accounts have been the professors of law, of political science, and of history, who have appointed themselves to the job." Philip Kurland, "Toward a Responsible Supreme Court," June 19, 1965, Commencement Address at John Marshall Law School, PKP, Box 68, Folder 14.

judicial resolution. He thought deeply about more than just the staple case and controversy requirements. The Supreme Court was just one important agent in a national dialogue about the meaning of the Constitution. Just because a legal dispute made its way to the Court, even if the parties had standing, presented an issue ripe for resolution and had presented truly contested issues, the Court did not have to intervene. In no small part Bickel's considered interest in judicial restraint was a direct consequence of his legal education at Harvard, the influence of the New Deal era and the direct mentorship of Felix Frankfurter.

After he finished his clerkship and as he developed as a scholar and public intellectual, Bickel served as one of Frankfurter's voices off the Court. He provided a persistently thoughtful elaboration on the merits of a restrained judiciary; at the same time he aired many of those grievances that Frankfurter could not always do so openly. So could other Frankfurter acolytes; former students, law clerks and colleagues helped Frankfurter strike back at his judicial and legal foes.[27] Frankfurter did not deny any of this, and in varied instances none too subtly encouraged it. The distrust for a too consequential Supreme Court carried on with Bickel as much as it did with anyone of public importance during, and even slightly beyond, the Warren Court era. Frankfurter recognized huge stakes in the debates on the Court and off it, almost lamenting that he had his own freedom of expression circumscribed. With some exaggeration, Frankfurter described the limitations on the justices:

> Every American has a right freely to disapprove of decisions of the Supreme Court and an equal right freely to comment publicly on any decisions he doesn't

[27] William Wiecek too makes this point generally about Frankfurter's "proxies" and the influential pages of the *Harvard Law Review*. See William Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953* (New York: Cambridge University Press, 2006), 456-457.

> like, every American except a member of the Supreme Court. A member of the Supreme Court must let opinions speak for themselves.[28]

Yet he knew that the "opinions [would not] speak for themselves." His supporters away from the Court thus could ensure that the wider debate about the Court and its decisions still reflected the ideals Frankfurter cherished. Years after Bickel had left Frankfurter's side and taken up work as an academic, Frankfurter told Bickel precisely that his work sent a message to the Warren liberals (if not their cheerleaders outside of the Court). Writing to Bickel in 1963, the then retired Frankfurter confided "I can give you proof that if you would speak out, you would get under their skin, just as your praise in the various law reviews makes them feel vindicated."[29] Frankfurter, even with his penchant for smugness and presumption of the wisdom of his judicial worldview, may have been more right than wrong.

Bickel's commentary about the Court did not go unnoticed. One particular incident is illustrative of both Frankfurter's hopes and Bickel's influence. Justice Douglas, in writing to Gilbert Harrison of the *New Republic*, put his scorn for the Yale scholar on prominent display. Bickel had recently written a critical piece in Harrison's magazine about Justice Hugo Black. In the article from 1960 he took Black to task for his unworkable absolutism in interpreting the Constitution. Defending his colleague, Douglas labeled Bickel "a talented man . . . who will have contributions to make in many fields, except those that pertain to the Court."[30] Douglas's sensitivity to Bickel's musings became all the more understandable precisely because Bickel's work did more than become dust in the under-read pages of the law reviews. Bickel would have no doubt

[28] Felix Frankfurter to R.P. Burlingame, July 1, 1959, Felix Frankfurter Papers, Box 23 (hereinafter FFP).
[29] Felix Frankfurter to Alexander Bickel, March 18, 1963, FFP, Box 24, Reel 14.
[30] William Douglas to Gilbert Harrison, March 22, 1960, William Douglas Papers, Box 309.

considered his work far more than an effort to strike back at Frankfurter's enemies; nonetheless, Frankfurter may have been on to something.

Alexander Bickel became far more than a Frankfurter proxy. For one thing he earned considerable respect from his peers. Unabashed enemies, on the other hand, were rare. Diehard Warren Court cheerleader Fred Rodell would have been one of the few. The iconoclastic Rodell also served on the law faculty at Yale and frequently reached a larger readership with his writings. He took every occasion to needle Bickel, Frankfurter, *New York Times* writer Anthony Lewis and Phillip Kurland, both in public media and sometimes in correspondence. His relationship with Bickel deteriorated to such an extent that the Yale colleagues could barely speak to one another.

Rodell, as much as anyone, espoused a view that Frankfurter's friends away from the Court took marching orders from the justice—a partial truth that Rodell overplayed in calling out these individuals as Frankfurterian automatons. Bickel and others with similar views on a restrained judiciary were what Rodell sometimes called "bright conservatives." "Bright conservatives" defined those people who did not think they were conservatives but fought for judicial restraint and easily divorced the impact that judicial restraint would have.[31] Others of this era made similar, but hardly widespread, complaints about any presumptive liberal who called for some version of judicial

[31] Fred Rodell, "The Nixon-Burger Supreme Court: A Predictive Preview—As Seen Through a Somewhat Storm Clouded Crystal Ball," (1969), Haverford Special Collections Library, Fred Rodell Papers, Box7 (hereinafter FRP). For a direct view on Bickel separating the implications of judicial restraint, if followed, from its impact on the chances for meaningful and positive legal and political change see Fred Rodell Letter to *Time*, August 12, 1970, FRP, Box 6A. Rodell's scathing review of Philip Kurland's 1969 University of Michigan lectures, later published as *Politics, the Constitution and the Warren Court*, is almost comical in its denunciations of Kurland for his unwillingness to criticize Frankfurter all while damning the Warren Court.

restraint.[32] Bickel and others of his general legal worldview were only remembering and encouraging others to remember the lessons of the early New Deal era. A more involved judiciary did not have to serve liberal ends.

Rodell's thinking and professional feud with Bickel, however, cannot be separated from Rodell's fawning relationship with Justice William Douglas, who had known Rodell from Yale Law School.[33] Rodell and Douglas notwithstanding, most observers would have looked upon Bickel as a sensible, fair and accessible source for contemporary analysis of the Supreme Court and matters of American law and politics. Waging battles for Frankfurter was an unmistakable part of Bickel's contribution to American political life and the debates over the Warren Court.[34]

Varied contemporary sources confirm the respect that existed for Bickel. The respect for his work came from other scholars, politicians, editors and the public. Gilbert Harrison, the owner and Editor of the *New Republic* from 1953 to 1974, praised Bickel in 1957 as "an unusual combination of journalist and scholar."[35] Harrison's esteem for Bickel almost seems prescient since Bickel had just begun writing for the *New Republic*.

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[32] Thurmond Arnold, with the help of Charles Reich, prepared a reply to Henry Hart's well-known 1959 *Harvard Law Review* article on the Court's 1958 term. Arnold chided the Harvard professor for, much like with Rodell's thinking, disassociating results from reasoning, and enshrining judicial reasoning as too significant. According to Arnold's biographer, Arnold thought "Hart's critique was the musings of a detached academic who would prefer that Supreme Court opinions be pretty, rather than helpful in the real world." What is more, "Hart concealed a conservative philosophy under the guise of neutral principles and an affinity for legal reasoning." Spencer Weber Waller, *Thurmond Arnold: A Biography* (New York: New York University Press, 2005), 163. The Arnold article is "Professor Hart's Theology," Harvard Law Review, Vol. 73, No. 7 (May, 1960), 1298-1317.

[33] Even the untrained eye could detect, in their correspondence, the fawning manner by which Rodell related to Justice Douglas. Rodell's papers and work are splendid evidence of the gap that separated the Warren Court's foes from its friends. Few Warren Court friends could be as ruthless and, in turn, effective as Rodell. One of the reasons the foes often seemed to have the upper hand, I suspect, is that so few public intellectuals went to the same lengths to defend the Court's work as the enemies went to incriminate the Court.

[34] It must be observed that Bickel's initial musings about the Court and paths not taken in *The Supreme Court and the Idea of Progress* emerged as a none too subtle defense of Frankfurterian thinking. He hardly spent his career attempting to escape Frankfurter's shadow. Bickel, *TSCIP*, 29-39.

[35] Gilbert Harrison to Alexander Bickel, September 24, 1957, ABP, Box 18, Folder 2.

The Yale scholar rapidly became one of the leading public intellectuals on matters involving the Court and the Constitution, reaching a wider audience through both signed and unsigned articles in the pages of important media publications and through his numerous books. Harrison's plaudits would have found favor with many others, notably the professoriate. As Bickel's colleague and sometimes intellectual foe Charles Black put it in looking back on Bickel's career: "No one in our times, or perhaps in any times, so deeply, so broadly, so imaginatively explored the institutional place of the courts in shaping the world—and, even more widely than that, the place of constitutional law in political life."[36] Louis Henkin of Columbia too offered praise. A former law clerk to Felix Frankfurter, Henkin labeled Bickel "one of the most perceptive, sophisticated, articulate, sprightly . . . students of the Supreme Court in our day."[37] Well before the end of the Warren Court era, Bickel had come to occupy a position of peculiar public consequence—something that only further confirms his relevance to the Warren Court era.

Bickel's name, by the end of the Warren Court era, even circulated as a possible High Court nominee. Representative Richardson Preyer (R-NC), who had consulted with Bickel on desegregation policy, wrote to President Nixon directly to urge Bickel as a nominee. It is important to note that Preyer supported Bickel precisely, as he put it, because the scholar represented the Frankfurter tradition and, though not a Southerner, as someone who had earned the support of that region. Moreover, he thought Bickel "uniquely qualified to bring all sections of the country behind a sensible interpretation of

[36] Charles Black, "Alexander Bickel," *The Yale Law Journal*, Volume 84, December 1974, 199-204 (quote at 200). Black became the Sterling Professor of Law at Yale in 1975 not long after Bickel had earned that position the previous year.
[37] Louis Henkin, Review of *The Supreme Court and the Idea of Progress* in *Columbia Law Review*, Volume 70, Number 8 (December 1970), 1494.

the Constitution on the vital school questions that will be facing the Supreme Court in the years ahead."[38] Esteem for Bickel even came from the Court. Justice Byron White, in lauding Bickel's scholarship, lamented that Bickel's death had robbed President Gerald Ford of a chance to name an excellent man to the Court.[39] The talk of a Supreme Court spot only confirms what many of the era—Justice Douglas's quip aside—would have known: Alexander Bickel became the era's premier public intellectual, Court-watcher, particularly as the 1960s progressed.

Much like his mentor Justice Felix Frankfurter, Bickel reliably supported most liberal political outcomes, but rejected some of the methods followed to reach those outcomes. One of the more notable methods he doubted involved undue reliance upon the Supreme Court. Bickel's respect for process and his political views frustrate attempts to label his political views or decisively place him on the American political spectrum of his era.[40] From his significant esteem for Edmund Burke to his sour reactions to student discord at Yale, one can recognize a scholar bound to both the past and present. Bickel, particularly in correspondence and in his last book *Morality of Consent*, described

[38] Richardson Preyer to Richard M. Nixon, October 14, 1971, ABP, Series I, Box 7.
[39] Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (New York: The Free Press, 1998), 447. Justice Douglas's 1975 departure from the Court provided President Ford the opportunity to appoint John Paul Stevens.
[40] What is more, Bickel also reveals that even the American political spectrum can have surprises and some fluidity, even in the short-term. That aside, Bickel earned considerable acclaim and respect from the legal academy. For just one such argument about where to place Bickel see Anthony T. Kronman, "Alexander Bickel's Philosophy of Prudence," *The Yale Law Journal* Vol. 94, June 1985), 1567-1616. Kronman attempts to unify Bickel's seemingly disparate ideas. Having identified an overarching philosophy, Kronman rejects the notion of Bickel's change to more conservative positions in his later life. Prudence, in the Bickelian sense, was entirely about recognizing the tough task and complexity with decisions, but this scarcely, in Kronman's estimation, made Bickel a conservative. Kronman, it must not be overlooked, testified on behalf of Samuel Alito during his 2006 confirmation hearings for the Supreme Court. He cited Bickel as an important influence on Alito's legal worldview. Judge Alito also cited Bickel as an important influence on his legal worldview. Unfortunately, Patrick Leahy (D-VT) sullied Alexander Bickel's name in relying upon a crude reading of what the "passive virtues" involved and in arguing that Bickel existed as simple opponent of the Warren Court's work. Leahy relied upon this caricature to lend support for his vote against Alito.

himself as someone who hoped conservative methods could in turn produce liberal results. All the same, conservatives of a later era, whether they actually know something about Bickel's relationship with his colleague Robert Bork or who have perhaps read through Bickel's posthumous book, *Morality of Consent*, should take pause before claiming Bickel as one more of those intellectuals who came around as he matured and moved from left to right.

Nonetheless, liberals too might pause before thinking that the positions Bickel took in reaction to the Court's decisions made him a conservative seeking to use his academic credentials as a disguise, thus sneaking his ideas across in contemporary sources of liberal opinion such as the *New Republic* or *New York Times*. If anything, Bickel's constitutional scholarship, political commentary and ruminations on political theory reveal the complications of an individual who thought courts had an essential but limited role in governance. The Warren Court often went beyond that role, thus earning Bickel's criticism.

Bickel's thinking on many of the issues that involved the Warren Court superbly reveals his varied intellectual and political leanings. The indispensable element of the conservative critique of the Warren Court by the mid 1960s—its causal role in increasing crime and disorder—earned Bickel's derision. While aware of and concerned about the problems of rising crime, he never emerged as a diehard law and order advocate or as a silent, if not aggressive, accessory like so many political liberals. Instead of turning law officers loose, he recommended making police work more professional, more effective and less bureaucratic. The criminal process revolution led by the Warren Court, however problematical at its source, he argued could make police, in the short and long-term, work

better. Commenting in the pages of the *New Republic* on the heels of the *Escobedo* decision, Bickel, typical of his interests in process, declared:

> Police and prosecutors . . . are supposed to seek justice, of course, but we channel their zeal to the pursuit of evidence of guilt, and train them to rely on the defense to find and present to an impartial third party evidence of innocence. We rely on the collision between prosecution and defense to produce the just result.[41]

Furthermore, and most relevant to the controversies at hand, this "adversary system thus means that the state and the prisoner are each on their own, and that the state is not entitled to the prisoner's assistance in the process of bringing him to book."[42] Such a clear defense of the adversarial system positioned him as an unrepentant liberal more comfortable with the views of the ACLU than the members of the Ripon Society let alone members of the law enforcement community.

Bickel continued to hold such views throughout the 1960s. During the 1968 election cycle, in which law and order featured prominently and the battle lines over the Court were drawn to favor those on the attack, he routinely disparaged the get-tough-on-crime rhetoric and policy debates.[43] Commenting in May 1968 during a visit to California in which he nudged forward Robert F. Kennedy's nomination for the presidency, Bickel responded to the frequent blame put upon the Supreme Court for the problems with crime. While the Court had made mistakes, he argued that "in crime cases, the criticism is least justified." Furthermore, he seemed to share Judge Bazelon's staunchly liberal views on the causes of crime, lamenting that:

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[41] Alexander Bickel, "After the Arrest: Interrogation and the Right to Counsel," *The New Republic*, February 12, 1966, 15.
[42] *Id*. at 15.
[43] Alexander Bickel, "Fighting Crime," September 18, 1965, 11-12. See, "Yale Prof Says Harsh Method Can't Control Crimes and Riots," *Lincoln Evening Journal & Nebraska State Journal*, November 14, 1968, ABP, Box 35, Folder 4. Bickel had appeared at the University of Nebraska and delivered a speech at a Unitarian Church in Lincoln.

> Much of the criticism of the Supreme Court has been rooted in the opinion that you can control crime by court procedures and that law or loose court procedures breed crime. This is simply not true. Crime breeds on underlying conditions of poverty, miserable living conditions and lack of employment.[44]

Unsurprisingly, Bickel ridiculed the contemporary attempts, whether through constitutional amendments or legislation, to undo the Court's criminal process revolution. Some of this ridicule appeared in his writing, but came through also in the counsel he provided some of the era's political leaders from both sides of the aisle. In providing counsel to Senator Charles Percy (R-Illinois) on these very efforts during the consideration of the Safe Streets and Omnibus Crime Act of 1968, Bickel chided all of the attempts to nullify *Miranda* and *Escobedo*. However much he acknowledged the controversy of the case law developments and that as a matter of policy Congress could assuredly disagree, he did not support overruling cases that were not, as he termed them, "out of the ballpark."[45] The more Congress proposed to undo the Court's work, he argued, the more the law became unsettled.

The parade of provisions to weaken the Court in other areas and as a response to other developments also earned his rebuke. Whether attached to cold war efforts to expose/deport communists, school desegregation, religion in public schools, apportionment or the efforts from the 1960s to counteract the Court's supposedly pernicious criminal procedure rulings, these efforts earned Bickel's scrutiny and disapproval.[46] Most legal scholars of the era also chided the Court's opponents for these efforts. Though he counseled restraints on the Warren Court, Bickel never countenanced

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[44] May 21, 1968, *Fresno Bee*, "Yale Prof Calls California Primary Win RFK 'Must,'" ABP, Box 35, Folder 4. For Bazelon see chapter 4.
[45] Alexander Bickel to Senator Charles H. Percy, May 4, 1968, ABP, Box 35, Folder 2.
[46] Alexander Bickel, *National Review*, "The Court and Congress," July 21, 1958 and "Court-Curbing Time," *The New Republic*, *May* 25, 1959, 10-12.

any of the myriad proposals bandied about to curb the Court, restrict its jurisdiction or abrogate its decisions through constitutional amendments. He did not, however, just dismiss the efforts as the phony complaints of disgruntled, right-wing malcontents incapable of accepting legal change. But his cure for an over-involved judiciary still rested with the judiciary monitoring itself and with liberals recognizing that employing courts to achieve desired reforms could backfire. None of this, however, would seem to position Bickel as an indefatigable Court opponent let alone a conservative.

On the other hand, a sampling of some of his positions, private and public, render him as anything but a doctrinaire liberal, at least in the term's generally accepted meaning for the post- New Deal U.S. political spectrum. Examples from his correspondence and counsel with politicians and other Court-watchers reveal his deviations from any rigid defense of the Warren Court and its liberal members. He confided in Anthony Lewis, for instance, that the inevitability of Thurgood Marshall's appointment to the Court hardly made Marshall a good lawyer. The former NAACP attorney had done exemplary work on behalf of causes Bickel supported. Be that as it may, this hardly made Marshall, in Bickel's opinion, an exemplary choice for the High Court.[47]

Elsewhere, in offering counsel to Senator Edward M. Kennedy in 1969, Bickel defended Justice William Douglas from increasingly hostile congressional attacks (and the effort to impeach him), but hardly thought Douglas blameless for the scorn that often befell him.[48] During a time in which Chief Justice Earl Warren, earned plaudits, perhaps unjustifiably, as an important force in bringing the Court to unanimity in *Brown*, Bickel

[47] Alexander Bickel to Anthony Lewis, March 15, 1967, ABP, Series I, Box 9.
[48] Alexander Bickel to Edward M. Kennedy, June 12, 1969, ABP, Series I, Box 9.

expressed a view that scholars now would accept: the death of Chief Justice Fred Vinson as much as the presence of Warren made the chances of a united Court better.[49] Earl Warren, whatever his talents, had not brought about the momentous decision. If liberalism required a near reflexive defense of the Warren Court and its liberal jurists, Alexander Bickel was far from a liberal. Of course, liberalism did not provide the defense of the Warren Court that rivaled the intensity and influence of the criticism from the Court's foes. Bickel, however, provided an overall critique of the Court that only would have aided the wider criticism of the Court were his ideas to be misunderstood and misused.

Bickel's conception of the law, legal change and interpretation, while in no way easy to pigeonhole, also reminds us of his complicated leanings. In his most well-known, but not most important, book *The Least Dangerous Branch*, he wrote that lawgivers were "to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law."[50] The Court could seek to engineer a revolution of sorts, but the political system could only handle and, in turn, countenance so much change. On the level of results alone he could find much to laud in the Warren Court's actions, but the failure of principles and judicial overreach robbed the Court of its effectiveness, both in the present and possibly in the future. What is more, however much one could look upon results with favor, adopting a heightened respect for "principle" had long-term benefits that overmatched the gains from reaching

[49] Alexander Bickel to Phillip Kurland, September 29, 1967, ABP, Series I, Box 10. Bickel seemed to trust Frankfurter's judgments and innuendo without much hesitancy. In judgments on Earl Warren's talents, Bickel relied upon Frankfurter who had considerable dislike for Warren. Bickel relayed to Philip Kurland that Frankfurter had put no credit to the notion that Brown came about as "the product of some super-human skill of this master politician from the Golden West." Kurland, unsurprisingly, shared the doubts about Warren's role in *Brown* and, even more than Bickel, pressed the case of Warren's spartan judicial skills.

[50] Bickel, *LDB*, at 236.

liberal results.[51] In sum, the Court had to know its limits. The Warren majority came to disregard those limits, and did so increasingly throughout its lifespan.

On the level of constitutional interpretation, Bickel was neither a strict textualist, nor one who viewed the law as a static enterprise.[52] The law could change and the Court had a role in such change, but it was a lead actor in a dialogue with the public, the present and particularly the past. (Here one can recognize the echoes of Edmund Burke.) Constitutional or statutory text alone did not just present simple answers to tough questions. Whether Hugo Black's liberal literalism or those who thought the text alone could help ensure the Court did not overstep boundaries, Bickel rejected the rigid emphasis upon the constitutional text as a guide. Put another way, he recognized that interpretation attended to even the most clear constitutional language; those who pretended otherwise were engaged in a position both intellectually dishonest and dangerous. Moreover, he particularly disliked those who impishly clung to strict or absolutist positions in some contexts or with some language, but not in others. Hence his position could ridicule left and right; everything from Justice Black's absolutist veneration of the First Amendment to those who assigned a settled, often conservative-serving, meaning to the Constitution would run afoul of the flexibility, which did not mean absurdly open-ended, involved in expounding the Constitution.[53]

Part and parcel to such judgments, Bickel hardly accepted the idea of a static Constitution (or that the Framers had intended a static Constitution). In line with legal

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[51] Bickel, *TSCIP*, at 94-95 and 99.

[52] Textualists, Bickel believed, relied upon certainties that, for the most part, just did not prevail in the Constitution. Bickel, *LDB*, at 73-75.

[53] Alexander Bickel, March 14, 1960, "Mr. Justice Black: The Unobvious Meaning of Plain Words," *New Republic*, 13-15. Here Bickel's detailed and analyzed Hugo Black's ruminations and his opinions in a February 1960 lecture at NYU. Black's famous dedication to the literalness of the first amendment was but one such target for Bickel.

realism of the recent era, Bickel accepted that a judge's personal convictions and values weighed in on legal outcomes. Those who hid behind the Constitution—as many of the Warren Court's critics did— too often attempted to hide their extra-textual basis for their judgments. Such "illusions" as Bickel termed them, only made the judiciary more powerful, if only in the short-run, and less circumspect about its own abilities and limitations.

Aside from his general views on the interpretation of the Constitution, his specific reactions to the Court's more contentious rulings and the criticisms of those rulings reveal the true complications in Bickel's thinking. To begin with, any appreciation of a Warren Court scholar must include *Brown* and the reactions to that momentous ruling. Bickel like so many legal scholars of the era supported school desegregation and what the Court had done, not to mention improvements in civil rights, but had to reconcile this support with problems with the unorthodox opinion, the uproar the ruling provoked and the Court having to use so much of its limited power to bring about such needed change. Bickel's historical investigations at Frankfurter's behest did not lead him to doubt the virtue of the Court's action. Particularly in light of the moderation in the implementation decree from *Brown II*, Bickel argued in an April 1956 article that the "Court itself provided the lawful means for delayed and gradual implementation of its decision in wise deference to the age and tenacity of the custom which it must eventually displace."

Bickel supported the decisions in *Brown* and *Brown II* as a necessary jolt to help the country undermine its disreputable caste system. Whatever the travails, particularly with ensuring compliance and change, the Court had, as he argued in the same *New Republic* piece, "quicken[ed] the conscience of the nation" that had not yet taken

sufficient steps to overcome its active and passive commitments to segregation.[54] The other branches of government had done little, so the Court had intervened. He would be far less persuaded of this rationale on apportionment matters in the next decade, but his willingness to countenance judicial power, if not overreach, in this one instance is an important reminder of the salience of *Brown*. Bickel's views thus remind us that one could have complicated views on judicial power. Desegregation was vital to the country's future and a betrayal of its egalitarian ideals, and as such the lead role for the Court had much to recommend it. Perhaps, as Bickel suggested later in 1956, the Court had identified a problem without ready solution, but better to have the problem out in the open and on some course for resolution.[55] Also germane to our investigations, however, are Bickel's ruminations upon the opponents of the Court's desegregation decision and the demerits, if any, of the Court's role.

In the mid-1950s, following the desegregation rulings, the nascent public intellectual Alexander Bickel recognized the danger in the more aggressive attacks on the Court then circulating. As he described it in 1956 to Hellen Fuller of the *New Republic*, he wanted to defend "the poor, defenseless Court."[56] Even as a young scholar Bickel recognized the dangers involved with providing thoughtful criticism of the Court.

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[54] Alexander Bickel, "99 Congressman Versus the Nine Justices," *New Republic*, April 23, 1956, 11, ABP, Box 18, Folder 12.

[55] Alexander Bickel, "Integration: The Second Year in Perspective," *The New Republic*, October 8, 1956, 12, ABP, Series III, Box 18, Folder 13. Later on though he would be quite harsh on what he labeled a conservative critique of *Brown* and liberal judicial actors. These conservative critics, such as former Justice James Byrnes, really proposed that the Constitution provided clear guidance, as presumably did precedent. In turn they argued, incorrectly Bickel thought, that the Court as currently constituted had ignored that guidance and, in effect, amended the Constitution. Others seemed to share in this wrongheaded critique that still cared most about undesirable results not the process. Bickel, we must keep in mind however, thought Justice Black subject to the same criticism in his attempt to moor his judicial philosophy so definitively to the constitutional text and its absolutist commandments –an unworkable absolutism that even Black, Bickel argued, did not really believe in. Ultimately, rigid textualists could exist in both camps; each earned Bickel's criticism. On criticism of *Brown* see *LDB*, at 76-82; on Justice Black see *LDB*, at 86-98.

[56] Alexander Bickel to Hellen Fuller, March 29, 1956, ABP, Series III, Box 18, Folder 12.

Merely pointing out the obvious could, nonetheless, provide support for the massive resistance crowd. Minimal prescience would have led any observers to know that future enforcement of desegregation would prove difficult. Yet, just such an acknowledgement, when taken out of context, could seem like disparagement of the Court. Having trespassed on sacred ground for those inclined to preserve the atrocious U.S. caste system, the Court had still set the country on the right path Bickel thought.[57] Consternation still existed in his writing. Bickel asked readers of the *New Republic* what had happened to the supposed emergent liberal consensus. Even good men, he assured his readers, had signed on to the Southern Manifesto, the statement of opposition to *Brown* that all but a handful of Southern congressmen eventually signed.

Any talk of moderation from the foes of *Brown* seemed increasingly impossible. Bickel lamented that so much disrespect for the Court existed. All in all, he rejected the heated rhetoric about a decision having no basis in law, the complaints about a Court not having the power to issue such a decision and the impetus provided to resistance. But that Bickel spent his academic career responding, in some fashion, to *Brown* and its lengthened shadow is unquestioned. Years later in *The Supreme Court and the Idea of Progress*, in citing Frankfurter's concern over compliance and Jackson's doubts over judicial omnipotence, Bickel still took the correctness of the decision as settled. Frustrations had seemed predictable.[58] School desegregation, whatever its complications and the pertinacity of the status quo forces, certainly would not be the key development that induced Bickel to a sustained disapproval of the Court. Over time, from the mid-1950s onward, Bickel found it harder and harder to defend the Court, and likewise

[57] Alexander Bickel to Hellen Fuller, August 23, 1956, ABP, Series III, Box 18, Folder 1
[58] Bickel, *PWC*, at 5-6.

difficult to accept that it had reached decisions at the right time, for the right reasons and in such a way as to garner public complaisance.

The Court, in fashioning consensus and participating in a national dialogue, Bickel thought, had an important yet passive role. He argued in one instance with the support of a historical analogy, driven more by hero worship than an obvious parallel, that the Court should imitate the patience of the country's sixteenth president, Abraham Lincoln. Lincoln had allowed the question of slavery and its future to ripen and to become clear. The importance of the "slavery question" alone could not have justified hasty decisions or actions. Here then the Court would properly engage in "a Socratic colloquy" with the citizenry and the other branches of government, just as the patient Lincoln had before he made the momentous decision to issue the Emancipation Proclamation. Over time the Court could benefit from this dialogue; initial refusals to become involved in controversies would help legal and extra-legal issues become pellucid and thus guide the justices in their determinations of what principles to draw upon.[59]

History sometimes counseled too much patience. Had the Court decided *Dred Scott v. Sandford* differently, putting slavery on a road to legal extinction instead, perhaps Bickel would have found it more difficult to laud Lincoln for his patience. One important problem, however, with Bickel's view of the restrained Court involved the allowances he made, as did so many legal liberals, for *Brown* but not for other jurisprudential concerns. Put bluntly, explaining what made some legal disputes so important that the Court had to intervene but made others unsuitable for intervention remained a difficult problem for liberals like Bickel who nonetheless counseled a restrained Court.

[59] Bickel, *LDB*, at 70-71.

Overstepping this passive role carried risks. The Warren Court had met too many issues it wanted to resolve. As it took on too many issues, it had competing opinions, unflattering dissents and persistently tried to do too much. The dissents and concurrences within the Court, in essence, only helped explain, Bickel believed, the dissent outside the Court.[60] All of the simple-minded Court critics may have been on to more than they knew when they cited the dissenters, either foolishly or with some caprice, as sound justification for their own grievances with the Warren Court. Bickel, however, quarreled with the Court's critics and their proposals just as forcefully as he quarreled with the Warren Court liberals.

Bickel knew that the Court had always had enemies. Whether through constitutional amendments, direct legislative action or rhetoric they remained active; he frequently acknowledged that these efforts to counteract the Court were perennial. But he also knew that something about the Warren Court era, that many since have unfortunately forgotten, that made the Court curbing efforts even more significant. He knew that some of the Warren Court's critics, however unwittingly, offered valid judgments.

One might speculate that some of this recognition had to be bound up in his own realization that he, as a public intellectual, existed as a critic of the Court but that he scarcely wanted to give support to Strom Thurmond's fulminations on the Senate floor, Dan Smoot on the radio airwaves or the American Legion when it passed yet another resolution condemning the Court for giving aid to communist subversives. Bickel knew that as a participant in the public debate with contemporary consequences that he had a great responsibility in espousing his opinions. Paradoxically, Bickel's views on criticism

[60] Bickel, *LDB*, at 112.

of the Court from non-scholarly sources revealed the substantial limits to his own criticism of the Court. As the Warren Court participated more and more in the ordering and re-ordering of the country, Bickel increasingly recognized that restraint needed to be urged upon the Court. Nevertheless, he routinely derided the proposals bandied about through the Warren Court era to curb the Court. Curbing the Court rhetoric and proposals, however, seemed to be part of the very dialogue Bickel encouraged. Perhaps this helps explain the care he took in arguing against the efforts.

As a case in point, Bickel reacted unfavorably to the August 1958 Conference of State Chief Justices (CSCJ) and its complaints over the U.S. Supreme Court's failure to exercise judicial restraint. Bickel's frequent ally Philip Kurland evaluated the CSCJ complaints as mild, hardly outlandish and welcome. Whatever faults on the merits of the particulars, criticism of the Court served healthy ends, he suggested.[61] Bickel though was much more measured, often expressing disapproval for the state jurists though he understood that the Court had caused much of this to happen because of shoddy work and an unwillingness to know its limits. For Bickel the criticism, from whatever source, had to be helpful, not just one more effort to recycle bromides or complain of judicial activism as if it had not existed until the Warren Court era.

In another instance from the liberal Warren Court era of the 1960s, Bickel surveyed the Council of State Government's (CSG) efforts to establish as Court of the Union, remove Supreme Court jurisdiction over state legislative apportionment, and change the constitutional amending process. The CSG proposals gathered more

[61] Writing to Philip Kurland in early 1959, Anthony Lewis disagreed somewhat with Kurland in arguing "that responsible criticism is extremely difficult to supply in the case of the Court. But surely the judges of State Courts are obligated to limit themselves to responsible criticism rather than journalese, even if that limits their audience." Anthony Lewis to Philip Kurland, June 4, 1959, PKP, Box 27, Folder 8.

momentum as the Court issued its opinions in the apportionment cases. While unsupportive of the CSG endeavors, Bickel picked up on something that made these particular efforts different. In essence he thought the council remarkably mainstream, doing far more in the past to anger the American right than delight it. [62] Yet, even in commenting upon the limitation to the Court's jurisdiction on state legislative apportionment Bickel could not offer support. The Court had not offended Bickel by ruling that states had to re-apportion. The problem was that it had involved itself in matters of which no settled legal principles seemed to exist.

Bickel's dismay over the apportionment rulings would have made the CSG efforts perhaps the most likely to earn his support. He had little doubt the Court in *Baker* had turned aside settled law.[63] The majority opinion, instead of just overruling *Colegrove* or even qualifying it, instead had disingenuously pretended that Frankfurter's opinion had not put apportionment disputes out of bounds. When the Warren liberals embarked on this reversal they had no controlling legal principle to guide how they would decide between constitutional and unconstitutional apportionment.[64] What developed in the wake of *Baker* displayed the paradigmatic example of the Warren Court interfering in the political process. In the later apportionment cases, including *Wesberry* and *Reynolds*, the Court looked to American history to find support for the standard of "one-person, one-vote" that Bickel thought disingenuous, not consonant with history and perhaps an unworkable standard.

Depriving the Court of jurisdiction, after all, was something the Court could do to itself. Deferring to the Court was hardly an orthodox recommendation from

[62] Bickel, *PWC*, at 150-151.
[63] *Id*. at 175.
[64] *Id*. at 175.

conservatives and non-scholarly critics of the Court. Yet, if the Court proceeded on other misadventures akin to those with apportionment, Bickel feared that his call for a Court that could monitor itself would prove hopelessly outdated and naïve. Besides the CSG amendment was so broad that it in turn would keep the Court out of racial gerrymandering or other areas in which settled principles did exist.[65] In the end, Bickel thought that much of what stood behind these efforts was unprincipled, and not much more than a sour reaction to decisions. But then he went on to say that a better federal system, seemingly the root objective of the CSG, had much to recommend it. Unfortunately, he posited here as he did elsewhere, the virtues of federalism had far too many substandard advocates.

His preferences for a Court that acted wisely but not precipitously, explained his doubts over some of the Warren Court's later work. While Bickel's reactions to the apportionment rulings are perhaps the most well known, appearing after all in Justice Samuel Alito's 2006 confirmation testimony as one of the reasons he chose to study law, the reactions to the school prayer and Bible reading rulings are of similar importance and emblematic of Bickel, the equal opportunity critic.[66] These rulings also bring into relief Bickel's clear recognition that the Court did not just make law. The Court participated along with other actors in the political process to give meaning to the Constitution. Affording so much attention to the aftermath of decisions helped Bickel confirm his wider view of the law as more than court decrees and legislative enactments. In fact, the nuances in his views on *Engel* pervade his entire critique of contentious Warren Court decisions.

[65] *Id*. at 154-155.
[66] *Id*. at 206.

Bickel unhesitatingly supported the separation of church and state; yet, he realized that the many places throughout the country, as it came into the 1960s, maintained religious commitments that no Court ruling alone could overturn. Anyone who doubted the country's fusion of religion and the privileges of citizenship, Bickel reminded that even U.S. courts had thus far refused to accord non-believers the same rights and participation roles as believers. Courts reflected the cultural patterns that equated Protestantism with full American citizenship. Bickel recognized this as empirical truth, and as something courts could not change with a few high profile decisions.[67] Thus the consensus that existed at the time of *Engel* validated the continuation of school prayer, whatever its demerits, at least in the short term. What is more, by refusing to rule on the merits of school prayer the Court would have only granted mild support for the practice, a form of support that would have not ensured the practice would continue to exist. Without official judicial review the political process could continue to sort out the questions over school prayer. Bickel, in essence, argued that the forces of secularism and pluralism at work in the country would be far better agents for ending school prayer.

Majoritarian preferences were far more complicated than just the results from some Gallup Poll. Habits, expectations and cultural complacence guaranteed that an important consensus did not yet exist for getting rid of school prayer. With this in mind, Bickel's vital interest in compliance becomes clear. Unmistakably, he thought that the political and societal circumstances had not yet matured enough to permit relatively painless public acceptance of the ruling—an outcome he supported, just not the way and when it was reached. He also thought that public reaction to *Engel* had to have had some influence on the justices when they reached decisions the following year in *Abington*.

[67] *Id*. at 209

The Warren Court had options in 1962, and not just as something as a hypothetical for a law scholar and a classroom of students to consider. Put simply the Court could have refused to decide the case. Bluntly, Bickel said *Engel* "was unfortunate and should have been avoided altogether, as it could have been by a simple denial by the Court of the petition to review." [68] He picked up on the banality of the Regent's Prayer, calling it "mass-media religiosity." If the Court hoped to serve the separation cause he wondered why it could not let the issue work out through the political process, which for Bickel involved more than just the naïve hope that legislatures could fashion reform. The prayer in question already served as a sign that the fusion of church and state was waning. He hardly attempted to sate the decision's critics in agreeing with the idea, expressed across the political spectrum, that *Engel* portended increased secularization and the removal of God from public life.[69] Ending school prayer by court decree, however, encouraged the forces to give up on the flexibility he presumed existed in the political process. All of Bickel's thinking about *Engel* was not a criticism of the ruling per se; it was that the extirpation of school prayer could be handled differently and not solely by the Court.

The perspective, if not lessons, of history mattered. Bickel's criticism of *Engel* and those who celebrated the ruling represented one of his many attempts to encourage liberals to remember that in a different era, namely the 1930s, rule by judiciary had caused their dismay. Conservatives could abuse the past, this Bickel knew, but liberals seemed to have a hard time even remembering the recent past. The recommendation came through clearly when he wrote:

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[68] *Id*. at 207.
[69] *Id*. at 206.

> Anyone who values American public education as perhaps the single most nationalizing and therefore secular, force in our pluralistic society must have regarded it as a near disaster if the supreme court had validated the prayer in the New York Case, let alone those in the Pennyslvania and Maryland cases that followed a year later. For such an act of legitimization would have given enormous impetus to Heaven knows (!) what insistent and pervasive incursions in the public school system by organized religion.[70]

Gently, yet fittingly, Bickel chided liberals for supporting the Court for producing results the political process had not yet produced. In upbraiding the supporters of *Engel* he cautioned that one had to be aware of the means employed to achieve an end, however desirable that end. What is more, he made it clear that liberals would have easily switched positions on the Court, suddenly becoming vocal in criticism, if it had ruled against the desired end of ridding the public schools of prayer. Yet, we should pause before allowing this critique of a liberal support for judicial power to validate the charges made by so many about the Court as the source of reform. Countless Warren Court critics made this complaint not to reveal that liberals had failed to learn the lessons of the 1930s; they provided this complaint because they disagreed with the ends the Warren Court had reached.

Bickel wanted to see secular schools; he clearly expressed his devotion to that end. The secular school had its merits, but a conservative goal of nationalizing through education, ridding the country of its "pluralistic stresses," and making the country strong remained important enough that the Court should have just backed away from the legal dispute. At the time of the ruling, even with secularizing forces already at work, Bickel just did not think the time was right to change something fundamental to some classrooms and some school districts. Read improperly he thus sounded like someone who wanted local prerogatives to allow for school prayer and for schools to continue on

[70] *Id*. at 205.

as before. Yet, he could then build to a liberal goal and in the process encourage the country to turn to greater problems. The problem in public schools was not the prevalence of Protestantism; the problem involved the lack of resources provided to poorer, urban schools. School prayer might have been further put on a path to extinction, but Bickel wondered how this served as a liberal triumph all while the real burgeoning problem in schools, that of economic mal-distribution, could go largely unaddressed.[71] Bickel's reactions to *Engel* and *Abington* clearly reveal his complicated, but hardly conservative, positions.

Bickel brought one of the most important sensibilities of the academic historian—that of perspective—to his work, thinking and relationships with his colleagues. Historical perspective, when encountered willingly, has a way of complicating the present. The criticisms of those who simply embraced *Engel* and *Abington* revealed this. He could, however, be just as tough on conservatives. In one telling instance, he made sure to counsel perspective to his Yale colleague and future High Court nominee Robert Bork. Bork had, most likely more out of sincerity than bluster, accused the Warren Court of a near unprecedented judicial activism. In reviewing Bork's own written work, Bickel encouraged his colleague to not overlook the Warren Court's historical competitors for judicial misdeeds and what could reasonably called judicial activism. Nevertheless, Bickel's assistance as Bork attempted to reach out to a wider audience with his own critique, in the late 1960s, of the Warren Court is of remarkable interest.

Above all else, Bickel still contended that Bork's criticisms had considerable merit. While the Court may not have been as activist as Bork charged, Bork did not taken care of other problems in his evaluations—notably to come off as someone

[71] *Id*. at 208.

interested in more than results. Bickel thus encouraged Bork to reframe his thinking on the Warren Court, and to inform the public that inconsistent principled decision-making remained the fairest critique. Bickel lamented that such a subtle criticism might prove fruitless, since the body politic might not get it. Undoubtedly drawing upon some of his experiences with the *New Republic* and his sense of the public, Bickel told Bork that almost any attempt to write about reasoning, process and judicial restraint "run[s] the risk of sounding merely like somebody who dislikes the results and want judges who will stick closer to the Constitution. Now you really mean something by that, but most others who say it don't."[72] Bickel might have been right that the non-academics might not get it, but he encouraged a young colleague to a form of criticism that did not simply involve bashing the Court. Judicial restraint did not have to be synonymous with attacking the Warren Court. That it became as such is a victory for conservatism every bit as much as a loss for liberals.

Throughout his two decades as a legal scholar Bickel came to doubt all-encompassing ideologies and explanations. As much as he valued most liberal political outcomes and programs, he recognized that they too could promote mischief, their own downfall and could not solve all problems. Reliance upon the Supreme Court promoted its own peculiar kind of mischief, notably undermining the chances that the Court could call upon its limited power in those situations in which the body politic needed its influence most. As Bickel's views matured he became even more pessimistic about the

[72] Alexander Bickel to Robert Bork, October 9, 1968, ABP, Series I, Box 1. Philip Kurland too commented upon this common problem. In writing to Frankfurter in the late 1950s, Kurland complained of the work of Walter Berns, before Berns had left for Cornell University. Berns had, in Kurland's views, criticized the Court not for its reasoning but because the dominant views of the justices did not match his own. If, as Frankfurter counseled, judges should not confuse their own personal views with constitutional requirements, how could thoughtful critics of the Court do likewise? See Philip Kurland to Felix Frankfurter, July 24, 1958, PKP, Box 15, Folder 1.

Court's role. Writing to Professor Louis Jaffe of Harvard University in 1971, Bickel admitted that he had become "less confident than I used to be that the Court can solve any social problems at all, or even contribute anything to their solution other than to call them to attention and make facing of them even more inevitable than it probably would have been anyway."[73] Far too often, a more mature Bickel lamented in his 1969 Holmes Lectures, legal scholars "conclude by regretting its [referring to the Warren Court's] failures of method, while either welcoming its results or professing detachment from them."[74] Bickel over time came to lament even some of the "results." His skepticism, however much in tune with his scholarly interest in the soundness of the Court's opinions, had a much stronger relationship to a conception of what role the Court should have. Timeless as his answers can be, his views had undoubtedly developed over his two decades of scholarly work that roughly paralleled the existence of the Warren Court.

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Few could confuse the jurisprudence of Justice Robert Jackson with that of Earl Warren, William Douglas, William Brennan and other judicial liberals of the Warren era. But consulting Jackson's 1941 book about the New Deal era battles over the Supreme Court could promote some confusion. Jackson once wrote:

> When the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event, the Court, by intervening, restores the process of democratic government; it does not disrupt it.[75]

[73] Alexander Bickel to Louis Jaffee, March 1971, ABP, Series I, Box 10.
[74] Bickel, *TSCIP*, at 11.
[75] Robert Jackson, *The Struggle for Judicial Supremacy* (New York: Vintage Books, 1941), 285.

Alexander Bickel's scholarship and public offerings were, in many respects, a dialogue with Jackson's language that sought to widen judicial power only when most necessary. Bickel knew that school desegregation would not come about quickly enough or as a result of the political process. The Court's instrumental role thus had much to recommend it. On the other hand, bringing about the end to public school prayer and reforming the apportionment of legislative districts, in Bickel's view, did not warrant the Court's involvement. Perhaps in the future the situation would change, but from his vantage point in the 1960s the Court had intruded. From the perspective of a different age than Jackson's, Bickel recognized that the Warren Court's interference with the political process had become too significant and thus incompatible with the proper role the Court should take on in the American constitutional system. However much issues could become of constitutional import, not all such issues presented favorable chances for an estimable, not to mention acceptable, judicial resolution. Whatever the long-term contributions of Bickel's work or the extent to which he engaged the past, his scholarship and public commentary were first and foremost about the Warren Court, its power and limitations.

As Alexander Bickel witnessed the Warren Court become a more central part of the political landscape, he recognized the Court weakening its lead role as a moderator in the nation's constitutional dialogue. Judges, whatever their obvious elite credentials, were supposed to speak with the citizenry not just at them. They also had to reason, draw upon tradition and exercise power not according to felt necessities alone but according to legal principles. Unmistakable limitations to the Court's role thus existed, and cast properly the limitations seemed to bespeak an essentially conservative view of the Court.

Encouraging the Warren Court to carry out its work differently and justify its rulings better might have satisfied some non-scholarly Court critics, but all of the academic debate about principles, historical guidance and slow change hardly kept massive resistance at bay or discouraged simplistic arguments about the Court causing the crime rate to spike in the 1960s. Bickel, as a paragon of this scholarly effort, mattered all the more precisely because he did reach the public. Bickel genuinely believed, though this belief waxed and waned over time, that a Court that worked differently and more prudently could help redirect the energies of its opponents from opposition to a more responsible dialogue.

The Warren majority, however, had dispensed with such caution. Bickel argued that the liberals on the Court instead had hoped for future vindication of their actions—even if such vindication arrived long after the jurists had gone and their names were etched into history as prescient lawgivers who put the country on the right path. Again, Bickel's historical perspective hung around the edges of his analysis. His post-mortem on the Warren Court era in his richest book *The Supreme Court and the Idea of Progress* appealed to the future to remember the past not as prologue or farce but as a cautionary heuristic. Bickel contended that the Warren liberal majority most often cared little of the past, except to misuse it, or even the present; it seemed to wager that in the future few observers might even care about its instances of historical malpractice, the reasoning in its opinions and its willingness to crowd out the rival branches of government. Future generations, he worried correctly, might only care about the results of the Warren Court's decisions that seemed to augur, if not already provide, liberal gains in civil rights, the

rights for the accused, freedom of expression and the chances for improved participation in the country's democratic political culture.[76]

But there, again, was a larger purpose to improved opinions than just satisfying the nimble minds of otherwise ignored law professors and constitutional scholars. A Court that reasoned from principles and sought to illuminate its path, however others might lament specific rulings, could provide opinions that others could accept and reasons that ultimately protected judicial power for those instances when the country needed it most.[77] In short, reason and principle, not welcome results, remained the best route to justify the deviant Supreme Court.[78] Bickel's precise language on the importance of these ample concerns deserve long-standing examination by any who think the Warren Court only had only opportunistic adversaries. Bickel explained:

> [T]he supreme autonomy that the Court asserts in many matters of substantive policy needs justification in a political democracy. And it can have it, if at all, only in the claim that the function never relinquishes the pursuit of reason, and that ultimately it is principled, that the Court does not discharge its office even by doing what most people think is right or necessary, unless it does it in principled fashion. The justification must be that constitutional judgment turns on issues of moral philosophy and political theory, which we abstract from the common political process, at least initially, because it would be wrong to decide them merely by a count of noses, or by striking some bargain.

Bickel, much to his credit, recognized the ease at which his joustings with the Warren Court would not so much fall in the wrong hands but be too easily misunderstood. In counseling his colleague Robert Bork, Bickel warned that non-academic readers may all too easily locate "a disagreement about results and a certain personal distrust you have for these judges" as the sum of Bork's own writings. Bork, in Bickel's recommendation, had to get beyond criticisms over outcomes. Bickel admitted

[76] Bickel, *TSCIP*, at 61.
[77] *Id*. at 82.
[78] *Id*. at 86.

though that with this problem he doubted he had "ever dealt with it successfully."[79] Whether he did so or not, some of his contributions, acknowledged by the broader public or otherwise, to his era's legal and constitutional debates mattered to more than just the readers of the law reviews.

[79] October 9, 1968, Alexander Bickel to Robert Bork, ABP, Series I, Box 10.

VII.
Courting the Right: Richard Nixon's 1968 Campaign against the Warren Court

The main emphasis is on demagogic appeal; crime is the communism issue of 1968. This is the extent to which apparently there is a new Nixon.[1]

Abe Fortas is likely not to fit into the philosophy of a new administration; at the very least we can afford to wait until November to see. I would like to think that a new president would appoint someone more attuned to the protection of the ordinary citizen than to the protection of the criminal.[2]

Now that you and Abe Fortas have been overwhelmingly repudiated at the polls, by the poll-takers, by the Senate of the United States of America and by the American people, let me urge both of you forthwith to resign and give the people a break.[3]

In February 1956, Richard Nixon, then Dwight Eisenhower's vice-president, endorsed Earl Warren and the Court's desegregation imperative. Nixon, in a Lincoln Day speech before the New York City National Republican Club, hailed the desegregation decisions as the work of "a great Republican Chief Justice."[4] Whatever rationales existed for the endorsement, political necessity was not one of them. Perhaps the Eisenhower administration had decided to remind Republicans of their relevance as the other major party dealt with its own fissures. After all, the Democratic Party had the more difficult time at that juncture in American history figuring out its civil rights identity. African-Americans had become part of the "New Deal coalition" but the Southern Democrats had other ideas about the reliance upon these voters, let alone accomplishing anything that improved the cause of civil rights. As the Democrats dealt with their regional squabbles, the Eisenhower administration did not need to make an

[1] Alexander Bickel, "Crime, the Courts, and the Old Nixon," *The New Republic*, June 15, 1968, 8.
[2] Boyd Sobers to United States Senator Frank Lausche, July 22, 1968, The Ohio Historical Society, Frank Lausche Papers, Box 227.
[3] A.R. Stout to Earl Warren, November 6, 1968, Library of Congress, Manuscript Division, Earl Warren Papers, Box 109 (hereinafter EWP).
[4] "Bad Taste and Bad History," *New York Times*, February 16, 1956, 28.

overwhelming appeal to the region of the country that had provided most of its support for Adlai Stevenson and the Democrats in 1952 and did so again that November.

Nixon, even then at the youthful political age of forty-three, harbored animosities with the best of them. He distrusted others easily and could likewise easily earn their distrust. Whereas Nixon and Warren both were California natives from humble backgrounds who later sought legal training and developed political skills, their similarities ended there. The two men detested one another from the time that an even younger Nixon first sought out a U.S. congressional seat in his 1946 contest against incumbent Democrat Jerry Voorhis. California Governor Warren refused to endorse Nixon in a contest he later won—a slight that Nixon undoubtedly never put behind him.[5] Nixon had already learned to despise the establishment and those who put obstacles in front of him; Earl Warren just became another individual against whom Nixon held a grudge. Therefore, it must have been difficult in 1956 to offer public praise, however insincere, for a political rival who had become chief justice. Dutiful vice-presidents learn to put aside some of their own ambitions and animosities; Nixon did his part.

Twelve years later, however, Nixon unequivocally recanted his rhetorical endorsement of Earl Warren and the work of the Supreme Court. Enough had happened since 1956 to ensure the evolution of Nixon's views. Most importantly, Nixon had stepped out from behind Eisenhower. After a 1960 loss in the presidential election Nixon did not just vanish. He worked to become the clear favorite to again obtain the Republican nomination in 1968.[6] In again making his pitch to lead the country, he

[5] For this account of their animosity see Jim Newton, *Justice for All: Earl Warren and the Nation He Made*, 199-200.
[6] John Morton Blum, *Years of Discord: American Politics and Society, 1961-1974*, (New York: W&W Norton and Company, 1991), 311-312.

afforded particular attention to the Warren Court. If the "middle way" had mandated Nixon's 1956 endorsement, by 1968 the essential conservatism of the country in general and the years of criticism of the Court in particular ensured that the Warren Court had a prominent place in the presidential election.

Condemning the Court too directly, however, had possible drawbacks. Court assailants within the Nixon campaign apparatus often worked from a position that criticizing the Warren Court too directly would produce a backlash. Some influences on the campaign disagreed with this position, but for the most part the campaign attempted to fashion what it thought aggressive but not fanatical opposition to the Warren Court's rulings.[7] Accordingly, Nixon often made sure to voice his support for the High Court (as well as other courts) as a respected part of government, but whatever respect he had for the institution could not impel him to refrain from criticizing decisions, particularly those that involved protections for the accused.[8] Circumstances beyond the Nixon camp's control, notably the fiasco that developed around Earl Warren's resignation in June 1968, also helped keep the Court in the news, but the campaign itself made sure that the Warren Court remained in the headlines throughout the election cycle. Ultimately, all the years of withering, at times outrageous, criticism of the Warren Court protected Nixon as his campaign against the Court could appear moderate by comparison. Nixon's second

[7] This topic is debated ad nauseam in the Nixon campaign materials. That the campaign even had to worry about this question reveals the power of the apolitical Supreme Court myth. Forces internal and external to the campaign endlessly cited and cultivated a cherished myth of a Court above politics. For instance this point is well-articulated in a document within the Republican Task Force on Crime materials in the Richard Poff Papers. See "Recommendations Submitted by RN's Advisory Council on Crime and Law Enforcement for Use in Major Speeches, Programs and Media," Richard Poff Collection, Box 223, University of Virginia, Small Special Collections Library (hereinafter RPP).

[8] See, for just one example, an interview with Nixon, "Nixon Tells How 68 Race Stands," *US News and World Report*, November 20, 1967, 79.

campaign for the White House did not pioneer criticism of the Warren Court; it just perfected it.

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Richard Nixon will never entirely escape the tarnish of Watergate and his August 1974 resignation from the presidency. Most likely, he will also not escape the attention of those who write history, and find in his political resurrection in 1968 an important seedtime in the era of conservative prescriptions and pronouncements that have dominated American political life ever since. Yet, it is also important to emphasize another element of one of the 20th century's most influential American politicians: his durability. This durability, not to mention Nixon's tireless work to stay in the national political conversation, helps explain the thirty-seventh president. His durability also came into play as he worked hard to court conservative during the race for the 1968 GOP nomination and the presidency.

Nixon truly rose from his humble background, having attended an obscure college (Whittier College in Whittier, California) before earning a law degree from Duke in 1937. Thereafter he returned to Whittier to work as an attorney before joining so many Americans in the military service during World War II. After the war, Nixon achieved national political relevance within two years of winning a House seat in 1946. His meteoric rise from the House to the Senate in 1950 not only revealed his own good fortune and skill but also an American fascination with the outsider.[9] The attention bestowed upon Nixon helped make him a darling for the American Right. In particular,

[9] On this important point and considerable others see Daniel Frick's superb *Reinventing Richard Nixon: A Cultural History of an American Obsession* (Lawrence: University Press of Kansas, 2008).

Nixon grabbed headlines for his central role in the House Committee on Un-American Activities investigations and his role in exposing Alger Hiss as a duplicitous New Dealer with a Communist past.

Geography, his youth and appeal helped him secure the vice-presidential spot on the 1952 Republican ticket. Two terms as Eisenhower's vice-president put Nixon in a good position to become the effective leader of the Republican Party. Yet, a slightly younger, and certainly more telegenic politician from Massachusetts, who had also joined Congress in 1946, prevented Nixon's election to the presidency in 1960. John F. Kennedy became yet another establishment fixture to whom Nixon could direct his frustrations and resentment.

Nixon had to become the ultimate political comeback kid in the 1960s, even as circumstance and his efforts ensured that he was never a long-shot for the nomination in 1968. America let him back in. Following his loss in the close 1960 presidential election and failure to secure the governorship of California in 1962, Americans could have remembered Nixon principally as the oleaginous, drunken man who railed against the press and his enemies in the 1962 "last press conference" following his California gubernatorial loss to Pat Brown. Merely because of his disdain for the media, which at times bordered on the hysterical but reflected some sense of reality, one could then doubt if Nixon, in the mid-1960s, would ever revivify his prospects for elective office. The sour relationship with the media only compounded his problems. He had acquired the reputation of a political loser. The media, the American public and many in the Republican Party wondered about Nixon's abilities to shed his loser image. Some had even written Nixon off.

The hardened orthodoxy on Nixon as a loser had to be overcome if he was to stand any chance at securing the nomination in 1968, let alone the White House. As a case in point, even as Nixon continued remaking his image, in November 1966 the fledgling pundit Robert Novak voiced a conventional opinion on Nixon and his prospects. In predicting the direction the GOP would take in 1968, Novak told the host of *Firing Line*: "This is not a throwaway election; this is a serious election. They [referring to the GOP] want a winner, and Mr. Nixon is a loser. So, I think they'll look primarily to George Romney."[10] Luckily for Nixon, and as a sign of the growing conservative support for his sequel attempt at the White House, the program's host scolded Novak for his anti-Nixon views. Buckley, though he stood far short of endorsing Nixon that far in advance of the 1968 contest, provided a clear indication that Nixon had repaired some of his wounds and, at the least, represented a far more palatable opportunity for conservatives than Romney or New York Governor Nelson Rockefeller.

What then had made this ideologically flexible, high-profile campaign loser a national political figure Buckley could defend? Moreover, what did Nixon do to continue to reach out to American conservatives and, equally important, re-make himself as the political comeback kid of the 1960s? Factors both beyond Nixon's control and others he directly managed contributed to his political comeback, which included important appeals to the American Right. His relationship to conservatives and conservatism made his campaign against the Warren Court a by-product of his effort to win over and maintain the supporters of Barry Goldwater.

[10] Robert Novak spoke these lines on a late November 1966 episode of *Firing Line*. *Firing Line*, program number 037, recorded November 21, 1966, Hoover Institute Archives, Firing Line Collection, Box 51, Folder 37.

The defeat of Goldwater in 1964, the cresting wave of liberal domination that came with LBJ's 1964 victory, the accomplishments of Congress before the 1966 mid-term elections and the high tide of Warren Court liberalism ensured that conservatives and the Republican Party did not have a leading national figure. They did have ample recent evidence of liberalism's accomplishments to label as misguided. Yet the gains for the GOP in the 1966 mid-term elections augured a conservative shift and helped defuse the doomsday concerns about the viability of the Republican Party because of Goldwater's disastrous loss two years before. The Democrats maintained control of Congress, but in the House the GOP picked up an impressive forty-seven seats. Nixon had campaigned for many of these successful candidates, a list of candidates that included a new freshman representative from a district in Houston, Texas, George H.W. Bush. These mid-term results in conjunction with the deteriorating political environment, principally due to the Vietnam War and the periodic turmoil in urban areas, produced brightened conditions for the Republican Party and hence Nixon. Rapidly the tide had turned from one of a presumed liberal zenith to a reaction that drove an incumbent from the White House and opened the country up to a substantial political realignment in 1968.

Nixon's downfall after 1962 had always been somewhat overstated. As much as he loathed the establishment, he had become an established figure in the GOP. He remained a favorite of many, but by no means all, Republican Party supporters. For example, writing to Nixon's Minnesota campaign leader George MacKinnon in January 1968, Republican National Committee member George Etzel put it well in declaring Nixon "about the most capable candidate that we have in the whole country in either

party."[11] Theodore White provided contemporary approval of the view as he generously but accurately labeled Nixon "the fiber and bone of the Party."[12] Yet, Nixon had to work to gain the support of those uncomfortable with his continued relevance. The serious fissures in the GOP only complicated Nixon's political career revival efforts.

A substantial battle continued over what kind of party the Republicans would become. The Ripon Society attempted to steer the Party to moderate positions. The results of the 1964 election, if anything, seemed to suggest the country was not ready to embrace a staunch conservative in the White House. Perhaps also the country was not quite ready for someone to campaign as a staunch conservative. But the results in 1964, strangely, confirmed conservatism's reemergence far more than they seemed to indicate that Goldwater had damaged the cause. Contemporary rivals to the conservative shift, the Ripon Society recognized that Goldwater's nomination in 1964 actually provided even better chances for conservative success in the future.[13] In other evaluations of the contemporary political scene, Ripon almost seemed to predict an approaching age of conservative prescriptions and politics. Ripon had some interest in making such an admission, since doing so could help stir up, as much as possible, the moderate energies and ideas for a party Ripon hoped to mold.

Nevertheless, Nixon's credentials as the consummate politician, let alone his rhetoric and record, did not make him a clear attraction for the conservative forces remaking the GOP. More and more, the winner of the 1966 gubernatorial contest in California, the former actor and Hollywood pitch man for General Electric, Ronald

[11] George Etzell to George MacKinnon, January 19, 1968, George MacKinnon Papers, Box 18, Folder 1, Minnesota Historical Society (hereinafter GMP).
[12] Theodore White, *The Making of the President 1968* (New York: Antheneum Publishers, 1969), 156.
[13] The Ripon Society, *From Disaster to Distinction: A Republican Rebirth* (New York: Pocket Books, 1966), 81-83.

Reagan, seemed to have become the conservative rising star. Reagan was still a fresh face. Nixon, on the other hand, might have had the battle scars from consecutive losses in 1960 and 1962, but at least he would have over two decades of national political relevance by the time the 1968 election arrived. Even Nixon and the loser image had its limits in the run up to the 1968 election. He had too much experience for anyone to just presume that he had suffered a political death. What mattered to conservatives had less to do with Nixon proving he could win in 1968; what he had to do was say the right things and present himself as a comfortable custodian of conservative ideas and issues. Nixon had learned from 1964 that he could not campaign like Barry Goldwater, but he was smart enough to realize that he had to appeal to Goldwater's supporters. He also realized that he needed to court key conservative power-brokers. Conservatives seemed to have a good sense of how Nixonian foreign policy would proceed—though they would be proven wrong. Whether Nixon could say the right things about social welfare, crime, regulation, the Supreme Court and civil rights was another matter.

Conservatives also remembered a version of Nixon's past. Although he had served as Eisenhower's emissary to party conservatives, he had later defused a Nelson Rockefeller candidacy in 1960 with the infamous "Compact of Fifth Avenue." That agreement with Rockefeller ensured that conservatives looked upon Nixon with distrust if not antipathy.[14] Nixon had seemingly reached out to Rockefeller and allowed the 1960 Republican Party Platform to represent moderate principles. What is more, the secretive nature of the compact made the deal with Rockefeller a standard reason to distrust

[14] Melvin Small, *The Presidency of Richard Nixon*, (Lawrence, Kansas: The University of Kansas Press, 1999), 19. On the Compact of Fifth Avenue see Laura Jane Gifford, *The Center Cannot Hold: The 1960 Presidential Election and the Rise of Modern Conservatism* (DeKalb, IL: Northern Illinois University Press, 2009), 52-53.

Nixon's allegiance to principles of any kind, let alone conservative ones.[15] Deal-making clashed with the ideological purity that many on the increasingly relevant Right demanded. Without empirical support, many conservatives wanted to believe that moderate Republican ideology had cost Nixon the election in 1960.[16] But they knew that Nixon had reached out to Rockefeller; that apostasy alone guaranteed that Nixon would motivate the doubts of many conservatives.

Lining up key conservative figures thus proved crucial for Nixon as he worked to recover from the losses in 1960 and 1962. Barry Goldwater's support helped Nixon throughout his years in the political wilderness.[17] "A candidate who had Goldwater's endorsement," William Rusher explained later, "was virtually immunized against effective criticism from the right."[18] Campaigning for Goldwater in 1964, Nixon played the role of loyal Republican Party man even as others distanced themselves from the Arizonian and his often reckless, though in some ways ominous, campaign. One contemporary Nixon observer called this participation in the 1964 election as a Goldwater supporter, Nixon's "single most important move in his advance on 1968."[19] Goldwater did not forget this support; after his crushing defeat to LBJ, he took on an

[15] Nonetheless, a fair reading of the 1960 Republican Party Platform reveals a document infused with countless principles favorable to conservatism, including a call for low taxes and matching government expenditures with precise revenues. That said, the document also recognized a commitment for the federal government in civil rights, housing, bringing about immigration reform and spoke often directly or implicitly of rights. The 1968 platform did offer increased acknowledgment of conservative means, such as tax credits, to spur seemingly liberal ends. But the platform in 1968 was undoubtedly far more conservative, particularly in the reactions to the Great Society programs.

[16] On the perceptions conservatives carried on the 1960 Nixon loss see Gary Donaldson, *The First Modern Campaign*, (Lanham, MD: Rowman & Littlefield, 2007), 116.

[17] William Rusher, *The Making of a New Majority*, (New York: Sheed and Ward, Inc., 1975), 53-54 Rusher later argued that Goldwater's endorsement, unsurprisingly, was the most salient factor in Nixon's rise with the conservative base. Also, on Nixon stumping for Goldwater see Rick Perlstein, *Before the Storm: Barry Goldwater and the Unmaking of the American Consensus* (New York: Hill & Wang, 2001), 505-506. Also see Irwin Unger and Debi Unger, *Turning Point: 1968*, (New York: Charles Scribner's Sons, 1988), 454.

[18] Rusher, *Id*. at 65.

[19] Ralph De Toledano, *One Man Alone: Richard Nixon*, (New York: Funk & Wagnalls, 1969), 329.

important task in convincing conservatives of Nixon's bona fides.[20] In fact, he became an early, and over time stalwart, supporter of Nixon as an acceptable, indeed preferable option for conservatives. He advised Nixon and openly called for Nixon to be the 1968 candidate well in advance of the general election.

Nixon also earned the support of other prominent conservatives.[21] For instance, he benefited from the support of new Republican Strom Thurmond. Thurmond's support helped Nixon gather up Republicans in the South and lessen support for the popular California governor, Reagan. His support also helped work against the eventual third-party challenge from Alabaman George Wallace. Nixon's pledges to appoint justices of different leanings, and in general his campaign against the Court, served him well in securing Thurmond's assistance.[22] Thurmond had long bemoaned the Court's role in civil rights changes, not to mention how it had frustrated efforts to identify, heap scorn upon and punish domestic communists. Nixon's conservative line on future appointments thus enabled him to shore up support with a key Southern voice.[23]

Changing the Court and campaigning against it came to exist as a vital part of Nixon's "Southern Strategy." It had an indubitable connection to his appeal to conservatives. That former Alabama governor Wallace existed as more than just a

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[20] Barry Goldwater to Richard Nixon, November 20, 1964, Pre-Presidential Materials, Campaign Research Files: Barry Goldwater, Box 2, Campaign 1968, Richard Nixon Library and Birthplace Foundation, Yorba Linda, California (RNL).

[21] *Battle Line*, April/May, 1967, 3 reported that Gallup Poll data indicated that GOP county chairmen, many of whom had supported Goldwater, supported Nixon nearly three to one over George Romney in a head-to-head race, and nearly four to one over Romney in a race that included all other competitors. Reagan at the stage came in third in the voting. Even this early in the effort to secure the nomination Nixon had support from conservatives at the local level.

[22] Though perhaps representative of exaggeration as much as true sentiment, Strom Thurmond earned the designation "the greatest conservative in the Party" from the American Conservative Union. "Nixon Staff Plans Anti-Wallace Drive," *Republican Battle Line*, November 1, 1968, 2.

[23] Lewis Gould, *1968: The Election that Changed America* (Chicago: Ivan R. Dee, 1993), 68-69.

fringe, third-party candidate also pushed Nixon further to the right on issues of race.[24] Wallace's presence worked in Nixon's favor; the stridency of Wallace's denunciations could make Nixon seem the mainstream, polite opponent of the Warren Court. The *Chicago Defender* certainly recognized both Wallace and Nixon's interests in re-shaping the Court. On the heels of some criticism of the Court as insufficiently supportive of civil rights and the NAACP agenda, one writer cautioned readers from staying home. Not-voting would only end up helping the enemies of the Court: Wallace and Nixon.[25]

The support of Goldwater and Thurmond has served as a conventional understanding of Nixon in 1968; John Ashbrook's support, on the other hand, has not received the appreciation it deserves. Indeed, Ashbrook's quixotic 1972 challenge to Nixon's re-nomination can only be understood as a consequence of the personal betrayal the Ohioan had come to feel over Nixon's first term policies and the support that Ashbrook had provided Nixon's effort to secure the GOP nomination. Particularly during 1968, he worked to deter the moderate and Rockefeller forces both nationally and in Ohio, which Ohio Governor James Rhodes supported. Consistently, only Nixon and Reagan satisfied Ashbrook as conservative candidates.[26] In fact, his position paralleled that of the ACU, which also put Nixon and Reagan forward as the only viable conservative candidates, doing so clearly even in 1967.[27] Later on, in that group's "Conservative's Choice" poll in which a collection of conservatives could weigh in on

[24] On this point see Dan Carter, *The Politics of Rage: George Wallace, The Origins of the New Conservatism, and the Transformation of American Politics* (New York: Simon & Schuster, 1995), 324-330.
[25] Audrey Weaver, "Critic Takes Liberal Tag from Supreme Court," *Chicago Daily Defender*, October 26, 1968, 11.
[26] John Ashbrook to William F. Buckley, March 8, 1968, and John Ashbrook to Ralph DeToledano, March 8, 1968, Ashland University, John Ashbrook Collection, Box 4, Folder 31 (hereinafter JAC).
[27] American Conservative Union, Fund-raising Letter from John Ashbrook, (undated, most likely late 1967), Hall-Hoag Collection, Brown University (hereinafter HHC).

who best represented the conservative cause for 1968, Nixon and Ronald Reagan again earned the designation as the only acceptable options.[28]

Ashbrook recognized that Ronald Reagan represented the future, but encouraged potential Reagan supporters to look to Nixon at least for the present election. (Here he served, much like Goldwater, as another important conservative figure who encouraged Reagan to wait for his turn.) As a leader in the ACU, Ashbrook also did his part in challenging those prospective voters and supporters of Wallace who recognized a better conservatism alive and well with the Alabaman's outsider campaign. The price of this support meant that Nixon had to receive Ashbrook's constant counsel to campaign (and later govern) as a conservative. Ashbrook, writing to Nixon about the pending choice of a running mate, for instance, urged him to realize that:

> I believe you are making a great error in believing that you need a liberal to balance off the ticket. The great majority of conservatives—and I am not talking about the Birch type—don't consider you 'reliable.' Your pronouncements have been excellent—no one could expect them to be more. At the same time, there is a general feeling—and I really mean general—that sooner or later you will make another trip to New York as you did in 1960.[29]

Ashbrook also encouraged concerned citizens to realize that changes to the Court could come about through a change in the White House.[30] In providing its explicit, yet expected, endorsement of Nixon, the ACU prepared a "scorecard" to later monitor Nixon's compliance with pledges and conservative principles. Prominent in the consideration of what might best earn scrutiny in the ACU analysis: Supreme Court appointments. Phillip Crane, the young conservative at the outset of his congressional

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[28] "American Conservative Union Letter to Conservative Voters," (undated, but most certainly early 1968), JAC, Box 4, Folder 1.
[29] John Ashbrook to Richard Nixon, July 30, 1968, JAC, Box 6, Folder 14.
[30] For instance, John Ashbrook to Eve McQuilken, April 22, 1968, JAC, Congressional Office Files 1968, Box 6.

career, and Asbrook both agreed that the report should consider the individuals likely to earn nomination to the Court (among other positions).[31]

Securing the support of key conservative politicians paid off for Nixon in 1968. Many conservative sources of opinion had less reason to work against Nixon. Conservative voters did also. In January 1968 just over three dozen members of Congress, "many of them hard-nosed conservatives" according to *Human Events,* requested Nixon as a Republican candidate.[32] This support arrived even before the favorable results for Nixon came in from the New Hampshire primary, confirming in March 1968 that Nixon might just have become a "new Nixon" yet again. From his September 1952 Checkers speech to the 1968 campaign Nixon was seemingly always out to prove he could stay in the national political conversation. The "new Nixon" of 1968 would continue to make the support of these conservatives seem sensible as he racked up wins in primary after primary. The Republicans could outspend the Democrats in 1968, and provided Nixon could make inroads in the South—and woo some voters away from Wallace—the Grand Old Party stood poised to recapture the Oval Office in 1968. Nixon might just have made being a Republican acceptable again, and in so doing rendered conservatism all the more acceptable—however much he may have scored less than perfectly on a conservative scorecard.

Conservatives certainly had come to lament the Eisenhower years, they had lost the 1964 election, and Nixon was not the "ideal" candidate in 1968. Yet, at least Nixon had sought their support. Nixon moved to the right to win the nomination and stayed

[31] Philip Crane to John Ashbrook, September 30, 1968 and John Ashbrook to Philip Crane, October 7, 1968, JAC, Box 6, Folder 14.
[32] *Human Events*, January 20, 1968, 3.

there during the campaign.[33] One of the most vital assurances he made was to work to unmake or at least put an end to the Warren Court era. In his efforts up to the August 1968 convention and after he secured the nomination, Nixon ran against the High Court and made promises of new directions through the appointment power. Doing so helped him appeal to segments of the electorate uncomfortable with the consequences of changes in race relations and civil rights law, crime and the overall reach of government in their lives. Going after the Court helped Nixon immensely in displaying his devotions to conservatism.

Nixon's campaign afforded unusual internal attention to the Court, and in turn embraced and articulated a critical view of the Supreme Court, its rulings and the relationship of those rulings to the country's woes. He hardly led the country along in a seminar on how the Court decided cases or relied exclusively, even primarily, on some of the sensible objections to the Warren Court's work. His campaign advisors did, however, debate just how far Nixon could go in assailing the Court. Unsurprisingly, all of the recent attention devoted to a Court that had, according to the standard view of the Court's critics, caused the crime rate to go up ensured that the law and order themes garnered most of the campaign's internal, not to mention external, attention to the Warren Court.

[33] It is important to recognize the contemporary perceptions of the leading groups associated with the rival "poles" of the Republican Party. The moderate leaning Ripon Society though much more troubled by the prospects of Reagan, scarcely celebrated the probable chances of Nixon or Reagan securing the nomination. The American Conservative Union welcomed the dismay of its prominent rival. See, "Ripon Society, Glumly, Says Nixon and Reagan Lead," *Republican Battle Line*, January 1968, 2. Not long before the early March 1968 New Hampshire primary, the American Conservative Union also held out hope that Nixon's reported lead over Romney would hold and that he could dispatch with the Michigan Governor since "anything less than a big win would mean that Romney—*and thus liberal Republicanism*—could still be a major factor in the 1968 GOP nomination."

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Presidential candidates have feuded with and sometimes targeted the Supreme Court throughout American history. Nevertheless, only a few elections have featured the Court as a direct or even indirect campaign concern. The federal judiciary has been a political issue since at least the John Adams Administration. The efforts to marginalize the Jeffersonians through the Sedition Act and the last-minute Judiciary Act of 1801, which created the judgeships that led to the seminal *Marbury v. Madison* (1803) decision, ensured that later presidents and candidates for that office have afforded some attention to the Supreme Court. Famously, Thomas Jefferson won the battle with the Supreme Court in 1803 but the battles between his party and the Federalists, seen most visibly with the 1805 impeachment trial of Justice Samuel Chase, established a precedent for political fights over the judiciary. Outright campaigns about or against the Court have occurred since the early 19th century; the Court's work has also had an important role in some presidential elections. Nonetheless, the infrequency of these elections contextualizes Nixon's efforts. Some of the more prominent elections underscore the significance of and parallels to the 1968 campaign.

In 1860, the sectional discord that soon led to disunion had an ally in the Supreme Court, then under Chief Justice Roger B. Taney. Taney Court decisions in *Dred Scott v. Sandford* and *Ableman v. Booth*, from 1857 and 1859 respectively, had sanctified the Fugitive Slave Act of 1850 and seemed to augur an enhanced federal role in perpetuating slavery. Lincoln's debates with Stephen Douglas in 1858 featured discussions of the Taney Court. Lincoln's victory in 1860 owed much to the divided country and divided Democrats. Slavery had an instrumental role in these divisions, as had the Court. The

Taney Court had an important place in the campaign in 1860, but its role, in the campaign at least, rivaled that of the Warren Court in the 1968 campaign. For one, President James Buchanan had refused to name a replacement for Justice Peter Daniel, who had died in May, until one month before Buchanan left office. Buchanan nominated his Secretary of State Jeremiah Black to fill Daniel's slot. The Senate, by a single vote, denied Black's nomination. The winner of the 1860 election thus would have the chance to name the replacement. Second, and more importantly, the Taney Court had significant culpability for the disunion that followed. Countless other reasons explained the divisiveness of slavery and the choices the country had made in aiding its protection instead of extirpation, but the Taney Court had helped spur a disunion that far surpassed anything the Warren Court would ever do.[34]

Following the election results, supporters of Lincoln certainly hoped that he would have the opportunity to appoint justices who would undo *Dred Scott*. He did not disappoint at least in initial tone and rhetoric; his March 4, 1861 inaugural address criticized the Court for over-involvement and called on rivals to the Court to provide alternative readings of the Constitution. Notably, Lincoln endorsed a view that placed considerable power in the White House to interpret the Constitution, if not declare binding interpretations of its meaning.[35] Lincoln shared a few important similarities with Richard Nixon. Both men argued before the Supreme Court. Both men also belonged to the Republican Party; yet, while Lincoln helped define it from its infancy through at least the rest of the nineteenth century, Nixon, on the heels of Goldwater's 1964 effort, continued to re-define it as a party of conservatives. While Nixon would later govern as

[34] For a complete treatment see Donald Grier Stephenson, Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999), 81-106.
[35] David Silver, *Lincoln's Supreme Court* (Urbana: University of Illinois Press, 1956, reissue 1998), 2-7.

a flexible, often chaotic figure, angering conservatives in the process, he campaigned in 1968 as one of them. Most importantly, Lincoln as the president during the Civil War had the far more substantial opportunity to reshape the understanding of the Constitution and what it required than Nixon or a "Nixon Court" ever would.

After the United States had ostensibly healed the wounds that led to the Civil War, a later generation of observers turned a watchful eye to courts as enemies of reform and progress. Progressive era commentators and politicians often derided the U.S. Supreme Court.[36] They mistrusted a Court, and a judiciary more broadly, that found the Constitution inhospitable to federal and state market regulations designed to rationalize the market and protect consumers, workers and the rest of society. The infamous *Lochner v. New York* decision served as the capstone reminder that the Supreme Court, then under the leadership of Chief Justice Melville Fuller, had more interest in preserving the liberties of business and the announced contract rights of individual laborers than the overall health of society. Not even a decade after *Lochner*, during the 1912 election, Theodore Roosevelt even advocated judicial recall as he attempted to re-capture the White House. Such advocacy did not serve as an overwhelming part of his efforts, but he recognized that blaming an out-of-touch judiciary had become attractive in a different age of judicial activism.

Nevertheless, attacking the judiciary, while attractive, could have drawbacks in the progressive era. Historian Lewis Gould, for instance, has judged Roosevelt's attacks as not only consistent with the evolution of his progressive thinking but also as a political mistake that cost him potential support in the race against the incumbent William Howard

[36] See William Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton: Princeton University Press, 1994).

Taft to secure the Republican nomination.[37] Roosevelt, without the Republican nomination, then chose to run as a third-party candidate. A half-century later, Nixon and his campaign team would benefit from a three-way race and the presence of a Democratic candidate often incapable of breaking free of the harmful shadow of Lyndon B. Johnson. Nonetheless, the Nixon's campaign, whether it knew of Roosevelt's overreach or not, at least thought they were not pressing the anti-Court message too strenuously.

A generation later, Theodore Roosevelt's cousin, the patrician Franklin Delano Roosevelt, represented a similar strain of mistrust for the Court. After becoming the country's thirty-second president in March 1933, FDR, with the ample help of Congress, instituted the New Deal for the American people. Varied New Deal agencies and measures ran into constitutional roadblocks put up by the Supreme Court. Many elements of the so-called "First New Deal," including portions of the National Industrial Recovery Act (NIRA), the entire Agricultural Adjustment Act (AAA) and the Railroad Retirement Act of 1934, to name only a few prominent examples, encountered the rebuke of the Supreme Court. Efforts in the states, such as minimum wage laws, also earned the Court's disapproval. By the time FDR sought re-election in 1936 the Supreme Court, or at least five justices, had stood up to be counted as some of the country's most important anti-New Dealers.

The Court mattered in 1936 not as something FDR had to attack but as a political actor that stood in the way of reform. Voters knew the Court had foiled the New Deal. Alfred Landon, the Republican governor of Kansas who secured that party's presidential nomination in 1936, hardly had governed and then campaigned as a rigid anti-New Deal

[37] Lewis L. Gould, *Four Hats in the Ring: The 1912 Election and the Birth of Modern American Politics*, (Lawrence, Kansas: The University Press of Kansas, 2008), 56-59. For *Lochner* see 198 U.S. 45 (1905).

ideologue. He also had little chance of victory against the popular incumbent president. His moderate campaign offered to defend the Constitution, disagreed with the aggrandizement of power in the White House, and suggested a different path to economic recovery than through stipulations from Washington, D.C. He could rarely belittle the incumbent for attacking the Court. As his "Sunflower Special" campaign train traveled the country, Landon did not have a Court to defend since FDR had been unusually quiet on the matter.[38] Everyone knew that FDR was not happy with the Court but this dissatisfaction did not become a settled part of his public campaign—it neither had to nor seemed a prudent course of action for an administration that had yet to decide on how to get around the Court.[39] So the Court, as Robert Jackson described it, "was merely an issue on which the President had no need to speak."[40] FDR, in historian William Leuchtenberg's evaluation, neither had a concrete plan for the Court nor did he want to provide ammunition to the anti-New Deal cause. Ultimately, as Leuchtenberg puts it, FDR "wanted the campaign to center not on the Constitution but on the many achievements of the New Deal and the past iniquities of Herbert Hoover."[41]

Anyone who consults FDR's rhetoric from the campaign trail in 1936 cannot help but notice the absence of the Court. For instance, the September 29, 1936 formal launch of the campaign at the Democratic State Convention in Syracuse, New York featured a paradigmatic indictment of the Republican Party that surfaced throughout the campaign. The Syracuse speech though, like so many others, did not feature direct references to the

[38] For background see Donald R. McCoy, *Landon of Kansas* (Lincoln: University of Nebraska Press, 1966), 262-352.
[39] On this point see William Leuchtenberg, "When the People Spoke, What did they Say?: The Election of 1936 and the Ackerman Thesis," *Yale Law Journal*, Volume 108, June 1999, 2077-2144, in particular 2082.
[40] Robert Jackson, *The Struggle for Judicial Supremacy* (New York: Alfred A. Knopf, 1941), 177.
[41] William Leuchtenberg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1996), 107.

Court. A month later, an October 30, 1936 address in Brooklyn repeated the silence on the Supreme Court. FDR, in that speech, touted the virtues of New Deal efforts and the initiative new measures revealed, but did not pause to consider that key elements, such as the AAA and NIRA, had been voided by the Court.[42] Since FDR won the 1936 election so decisively and helped inaugurate the "New Deal coalition," there is little doubt that a referendum on the Court's work had returned a clear victory for FDR and the New Deal. The real campaign against the Court started after the November triumph. The infamous Court-packing plan appeared after FDR had won re-election.

In a far more recent and relevant precedent to Nixon's 1968 efforts, Barry Goldwater's 1964 campaign featured attacks upon the Warren Court. Notably, Goldwater commented upon contestable Court rulings on crime, school prayer and apportionment during his 1964 campaign. He lamented the excessive participatory role of the Court, and promised action, specifically through the appointment of judges and in working with Congress to counteract rulings, once he became president.[43] Yet, to characterize his campaign, or the election itself, as one in which the Court featured prominently, as some have done, would be a mischaracterization of the past. Goldwater assuredly used code words, decried federal power, earned the support of Strom Thurmond just as the South Carolinian switched over to the Republican Party and spoke of a national breakdown in law and order. These appeals and the support of such an

[42] *Public Papers and Addresses of Franklin Delano Roosevelt*, Volume 5 (New York: Random House, 1938) 383-390 and 559-562.
[43] Anthony Lewis, "Goldwater Criticism of the Supreme Court Seen as Part of Attack on Centralization," *New York Times*, November 1, 1964, 79.

ardent Court foe, often with obvious connections to racial hatred, became particularly important in his appearances in and appeals to the white South.[44]

John F. Kennedy had already replaced Felix Frankfurter and Charles Whittaker during his short time in the White House. None of the Warren Court justices seemed likely for immediate retirement. Conservatives could understandably prize the White House in 1964, but a number of Supreme Court appointments did not seem likely. Assuredly, the 27,000,000 Americans who voted for Goldwater detested the Warren Court; however, Goldwater's denunciations were neither sophisticated nor had the moment approached when retirements and membership changeover would make the Court a vital campaign issue. Goldwater suffered a historic setback, but the issue of the Court did not disappear with the Arizonian's defeat, since others had waged campaigns against the Warren Court far more diligently and for longer than Goldwater did in 1964. Even if Goldwater did not exactly pass along the anti-Court playbook to Nixon, the support he would provide over the next four years proved essential for Nixon as he sought to appeal to Goldwater's supporters.

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In 1968 the United States experienced domestic disquiet it had not experienced since the Great Depression. An unpopular war in Vietnam persisted, assassins took the lives of prominent leaders, and cities, college campuses and the Democrat's disastrous convention in Chicago evinced the fissures of the era. Lyndon Johnson had wagered that toughness in Vietnam could help provide cover as he built a Great Society at home.

[44] On these points see Gary Donaldson, *Liberalism's Last Hurrah: The Presidential Campaign of 1964* (Armonk, NY: M.E. Sharpe, 2003), 252-258.

Signal civil rights and social insurance legislation came at a great cost, but it was the war that had undermined his presidency. By 1968 Johnson's "deadly bet" had undermined the country as well.[45] Notably, the Tet Offensive in January and February 1968, though a tactical victory for the United States military in the divided Vietnam, represented one more political and psychological defeat that widened the "credibility gap" and made more Americans aware that victory in Southeast Asia seemed increasingly unlikely.[46]

Incumbency could not protect Johnson. Senator Eugene McCarthy's insurgent effort to take the nomination from LBJ seemed all the more viable after Tet. McCarthy won nearly forty-two percent of the vote in the March 1968 New Hampshire primary; while LBJ commanded a slightly larger percentage of the vote there, the close result counted as a victory for McCarthy and a cause of further party disarray. The results in New Hampshire enticed Robert Kennedy to join the race. With his brother interred at Arlington National Cemetery, the forty-two year old, first-term senator from New York had revitalized ambitions to restore Camelot. Kennedy had feared causing a split in the party, but McCarthy's success in New Hampshire revealed fissures that Kennedy could claim he alone did not cause.[47] Johnson's abysmal approval ratings, his relatively poor showing in the New Hampshire primary and the unpopularity of the war in Vietnam led to his decision, announced to the nation on March 31, 1968, not to seek re-nomination.

On the domestic scene, the April 4, 1968 assassination of Reverend Martin Luther King, Jr. and the June 5, 1968 assassination of RFK the night he had won the California

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[45] I take this line from Walter LaFeber, *The Deadly Bet: LBJ, Vietnam and the 1968 Election* (Lanham, MD: Rowman & Littlefield Publishers, 2005).
[46] On the Tet Offensive and the 1968 election see Maurice Isserman and Michael Kazin, *America Divided: The Civil War of the 1960s* (New York: Oxford University Press, 2000), 222-225.
[47] William Chafee, *Unfinished Journey: America Since World War II*, 5th edition (New York: Oxford University Press, 2002), 337.

primary, provided further evidence of a country undergoing an internal war. Major U.S. cities, including the nation's capital, suffered immediate and long-term damage during the riots that followed James Earl Ray's murder of Reverend King. Observers wasted little time connecting these tragic events to the continued call for "law and order" and the need for the judiciary to enforce the law against criminals. Even the memorializing of RFK that occurred in Congress featured the ritualistic complaints about the crime problem. Sirhan Sirhan's violent act revealed nothing about the *Miranda* ruling but commentators were quick to connect these and other public tragedies to the Warren Court. Tellingly, as right-wing radio commentator Clarence Manion put it late in the campaign season:

> Many of the things that make this Presidential campaign so critical and dangerous are traceable directly to the injudicious, revolutionary conduct of the United States Supreme Court under the leadership of Chief Justice Earl Warren.[48]

A presidential election could either lessen these societal tensions or exacerbate them. Along with third-party candidate Wallace, Nixon opted to exacerbate these tensions. "Law and order" tactics, rhetoric and proposals threatened to divide the country further even as the proponents of this vision argued that getting tough on crime would ensure order. Eventual Nixon campaign advisor and policy-researcher Martin Anderson, as but one voice, argued that the crime concerns would be crucial in the 1968 election.[49] Others in the Nixon campaign effort endorsed crime, and thus by inclusion the Warren Court, as the preeminent domestic campaign concern. The GOP concurred, recognizing

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[48] Clarence E. Manion, "Fifteen Years of Warren Court Arrogance Can Be Arrested in Fifteen Minutes," *The Manion Forum*, October 20, 1968, HHC. Clarence Manion not only had training as a lawyer but he had also served on the law school faculty at Notre Dame for over two decades. In reaching an audience through his radio program, Manion did not always present "big-tent" conservatism but his criticisms of the Court usually came across as mainstream.

[49] Martin Anderson to Leonard Garment, September 8, 1967, Len Garment 1968 Campaign File, Anderson Folder, Name File Box 67, Nixon Presidential Returned Materials Collection:White House Central Files, RNL.

crime as the top domestic campaign issue in 1968.[50] Internal campaign chatter and Republican National Committee material frequently mentioned the Warren Court, its softness on crime, and the importance of highlighting this theme.[51] During Nixon's campaign, the Republican Task Force on Crime, under the leadership of Richard Poff (R-VA) both listened to and assisted the Nixon effort.[52] Such coordination provided one more obstacle for the Democrats to overcome if they hoped to keep the White House.

Along with its emphasis upon crime and the willingness to politicize the crime problem, the Nixon camp refused to acknowledge that stoking further discord could backfire. If anything, the Nixon campaign continuously recognized that the mood demanded that the country stay divided. Campaigning aggressively but carefully against the Warren Court offered a means by which Nixon could remind the electorate what had helped cause these divisions: the excesses of liberalism in general with the assistance of an over-involved Supreme Court in particular.

Cultural markers of the era also revealed a willingness to embrace "law and order." Nixon merely gave the "law and order" effort a prominent champion. The detective series *Dragnet* reappeared on network television in January 1967. *Dragnet* demonstrated for its viewers that perhaps a little bit of nostalgia could help cure societal ills; if law enforcement could just do its job, unencumbered by judge-made restrictions, it

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[50] "Crime Tabbed as No. 1 Issue in Campaign," *Republican Congressional Committee Newsletter*, July 1, 1968, Pre-Presidential Materials, Campaign Research Files, Box 23 Crime, Campaign 1968, RNL.
[51] The RNC's "The Answer Desk," a summary of news developments, quotes, polling data, campaign developments, information to challenge Humphrey and Wallace and other relevant issues in the political arena, regularly found its way to Nixon campaign advisers Martin Anderson, Patrick Buchanan and H.R. Haldeman. Frequently, it revealed a concern with the Supreme Court, in particular under the heading of "law and order." In addition to quoting the dissenting opinions from key, unwelcome cases, the Republican Party "Answer Desk" made sure to stay on target in placing the Court as an important cause in the crime problem. Humphrey's views on crime, developments with the Abe Fortas fiasco and the Court also frequently interested the Nixon campaign team. "The Answer Desk" available in Sub-Series D, Boxes 2 and 3, The H.R. Haldeman Collection, RNL.
[52] See, for instance, Richard Poff to Patrick Buchanan, April 22, 1968, RPP.

could apprehend criminals and ensure they encountered swift punishment. Television programming aside, even the United States Postal Service joined in with a special "law and order" postage stamp in 1968.

Written in the aftermath of the 1967 riots, Nixon's September 1967 *Reader's Digest* article (ghostwritten by the staunchly conservative Patrick Buchanan) noted that only a few years before, conveniently at or near the beginning of LBJ's first full term, the United States did not suffer from urban disorder, rising crime rates and turmoil. Even before this article Nixon had come to recognize the importance that crime and the Court could have in his electioneering, but as the electioneering became more intense in 1967 this article served as a key sign that Nixon would play up crime over the next year. Well in advance of the November election, Nixon bluntly asked in this piece: "What has happened to America?" The answers he provided could surely remind the uneasy electorate that Nixon had at least noticed the top domestic problem; he might have even done enough to convince some voters that he wanted to use the presidency to combat the problem. Typical of the reactions that Nixon undoubtedly hoped this piece might have, Dorothy Webb of Forest Hills, New York, thought the article revealed a "marvelous understanding of the problems." Nixon would gain supporters, Webb contended, because of this article and his obvious awareness of the important domestic issue. If Dorothy Webb responded favorably, so might others.[53]

In the article Nixon argued that in the 1960s the United States had become a wretched place. "Far from being a great society," he vented, "ours is becoming a lawless

[53] For this comment on Nixon's article I draw from Dorothy Webb to Richard Nixon, February 16, 1968, RNL, Campaign 1968 Collection, PPS 165, Box 4a.

society."[54] Borrowing language from legendary columnist Walter Lippmann, Nixon put blame on "Judges [who] have gone too far in weakening the peace forces against the criminal forces."[55] One could attempt to spread the blame around, but by assailing courts and judges in 1967 and 1968 it was abundantly clear that the Warren Court was the actual enemy. Nixon suggested that solutions were available. The country had to face its tormentors, using tough measures to punish and banish those who presumably made American streets and sidewalks unsafe at any hour.

Nixon's description of the problem did not ignore racial issues but dwelled most upon the idea of a collapsing societal respect for public order, which could still easily be interpreted as putting blame on civil rights agitation and the fallout to the country's history of racial injustice. Nixon made sure these interpretations were likely. As his campaign progressed over the next year it became particularly adept at using coded language and going just far enough in its rhetoric to ensure that race connected to these problems of lawlessness. Such collapsing respect, the article contended, had its root causes in "permissiveness" and "sympathy for the past grievances of those who have

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[54] Richard Nixon, "What Has Happened to America?" *Reader's Digest*, October 1967, 50. Pre-Presidential Materials, Campaign Literature, Box 2, Folder 1 Contents of a Notebook of Presidential Literature, Campaign 1968, RNL. Former President Eisenhower echoed some of the same themes, including the problems created by the Supreme Court, in the same publication only two months before. See, Dwight D. Eisenhower, "We Should Be Ashamed," *Reader's Digest*, August 1967, 67-71. Americans, in Ike's scolding words, "ought to be ashamed." (quote at 68).

[55] Richard Nixon, "What Has Happened to America?" 50. On the heels of Nixon's *Reader's Digest* piece, advice came from his law-school classmate Charles Rhyne. That any advice for Nixon on this front came from a life-long friend is not surprising, but Rhyne had argued before the Supreme Court for those who sought to challenge Tennessee's legislative apportionment setup in *Baker v. Carr*. He encouraged Leonard Garment, and hence Nixon, to tread carefully. Attacks upon the Court could easily back-fire since the Court, in his opinion, remained a venerated body. One might wonder though whether the notion of a Court beyond reproach still had viability after the preceding fourteen years. Even with this cautionary suggestion, Rhyne did not instruct the campaign to refrain from citing unpopular decisions; he just did not think it would do any good for Nixon to call out certain members of the Court or deride the body. On Rhyne's comments I draw on Leonard Garment to Richard Nixon, September 27, 1967, Len Garment 1968 Campaign File, Nixon-Garment Memos, Name File Box 68, Nixon Presidential Returned Materials Collection:White House Central Files, RNL.

become criminals." Yet, such talk of public order connected to the profile that many Americans had of criminals and deviants. Nixon and those in his campaign structure knew that he could not invoke racism as explicitly as Byrd machine Democrats or segregationists; he could, however, make appeals in a more subtle, but still effective, manner. Unlawfulness and disorder therefore connected to urban unrest and African-Americans. Being tough on crime presented an effective means by which Nixon could communicate his sympathies to disenchanted white Americans.

Through 1967 and on into 1968, Nixon argued prominently that sociological thinking about crime obscured the individual culpability that lay at the core of criminal behavior. On matters of the Court and crime in particular, Nixon often seemed to accept the argument that criminals, in paroxysms of rationality, had picked up on signals from the Warren Court. These signals from the Court in turn led potential criminals to view crime as a prudent choice. Society and the Court ensured the adversarial process of justice took the utmost care in handing out punishment to the accused; hence, individuals came to believe the individual benefits outweighed the costs of engaging in crime.[56] The hyper-rationality of this argument alone reveals its perennial absurdity, but Nixon and his advisors knew the politics of the matter. Therefore, the campaign had to question any view that social conditions and economic inequalities served as a major determinant in causing crime.

Internally, however, far more debate occurred over the question of environment, poverty and sociological factors of crime. Yet the debate often had its inspiration in managing the disdain such sociological acknowledgements might produce with those voters who wanted to hear that criminals became criminals because of their own choices.

[56] See, *Nixon on the Issues* (Nixon-Agnew Campaign Committee, New York: New York, 1968), 86-87.

In other words, the politics of acknowledging that criminals did not just choose crime had more importance to the campaign than a commitment to empiricism, let alone curtailing the causes of crime over the long-term. While a commitment to politics and winning was not the creation of Richard Nixon, that the Nixon camp fretted so much over how far it could go in blaming the criminal, only to then blame the criminal so frequently during the campaign, reveals the clear hard-line conservatism of the campaign. Throughout 1967 and 1968 Richard Nixon took on the questions about the causes of crime differently, sometimes carefully, but always with an appreciation for his audience and the potential political gain that would attend to any position.

Frustrating as always to those who study his life and political career, Nixon most likely knew that sociological factors were an important element in explaining crime. He had come from a humble background; there would always be some doubts in his mind that such factors trumped individual choices. Pressures, electoral and otherwise, however, undoubtedly led him to downplay such talk. Another late 1967 Nixon essay reveals that Nixon, at least in some instances, had a willingness to present a more nuanced view of crime. In an article for the American Trial Lawyers Association journal *Trial*, he spoke highly of combating crime through improving social conditions. Had he written a piece for the American Bar Association perhaps it would have represented a different view; the trial lawyers after all maintained a far different vantage point on the criminal justice process. Be that as it may, Nixon's flexibility and presumed appreciation for where the article appeared did not obscure the essential conservatism behind his views. His acknowledgments of sociological factors in explaining crime were still laden

with sordid presumptions about the underclass and urban slums as crime centers.[57] Even when he attempted to connect crime to sociological conditions he relied upon a worldview shaped first and foremost by images and reporting from riots in Detroit and Newark.

Certain key domestic policy campaign advisors did not even have Nixon's willingness to entertain sociological and environmental factors. In fact, individuals in and around the Nixon campaign often seemed to compete for the role of pushing Nixon away from anything more than a mild acknowledgment of the environmental causes of crime. The internal attention to the crime problem and the Warren Court only helps explain the public positions Nixon took. Short-term political gain stood behind the clear emphasis on the culpability of criminals. Political calculation alone, however, cannot explain the frequency with which those in the campaign counseled against nods to the liberal worldview on crime; many around Nixon undoubtedly believed that crime had its most important causes in the choices made by rational criminals.

Campaign position papers on crime and comments on those documents proved time and again that the only valid positions were dismissals of the complications of crime and pointed disagreement with those who spoke of such complications. For instance, Evelle Younger, the district attorney of Los Angeles and the chairman of Nixon's Advisory Council on Crime and Law Enforcement, made sure to emphasize that the Nixon campaign had to avoid the cowardly talk of poverty and environment. Even focusing upon those factors, according to Younger, would not produce less crime.

[57] Richard Nixon, "On Crime in the United States," *Trial*, October/November 1967. Tellingly, Nixon also said: "If the people of means and education were terrorized in such a manner, it would not be tolerated, and it cannot much be longer tolerated in the urban slums." This is pseudo-populism. It was easily those most unaffected or under-affected, but still vexed, who Nixon hoped to charm with his rhetoric.

Younger incorrectly believed that Johnson's Task Force on crime had mainly issued a report that was an extension of the Great Society. In other words, Younger thought that Great Society liberalism simply endorsed increasing social spending as the means to cut back on crime. Unwilling to gamble that any expansion in social insurance initiatives would do anything other than add to the dole, Younger contended that the Johnson approach to decreasing crime involved nothing more than bribing the under-class into good behavior. During an election cycle it was of little surprise that Younger elided the obvious consensus that existed across the political spectrum on targeting criminals. Though he exaggerated the extent to which liberals hoped to "bribe" criminals into good behavior, his analysis did recognize that liberals at least had a more nuanced, sociologically-friendly view of the causes of crime.

Campaign advisor Martin Anderson also encouraged a rejection of anything other than a mild emphasis upon environmental explanations and palliatives. In commenting upon the Kerner Report, which had resulted from a Johnson Administration Task Force review of recent riots from the mid-1960s, Anderson disparaged the attention granted to economics and urban decay.[58] The February 1968 Kerner Report only seemed to confirm that liberals and the administration, even as they often backed away from the findings, had gone too far in putting blame on society for riots, disorder and crime. Anderson and others in the Nixon effort, not to mention conservatives more broadly, looked upon the Kerner Report as a boost to their complaints that liberalism did not have the answers to the country's problems. Speaking of race and poverty so openly surely rendered the Kerner findings different from those in the 1967 report from LBJ's Crime Commission.

[58] Martin Anderson, Memorandum, "Report on the National Advisory Commission on Civil Disorders," March 4, 1968, Campaign Research Files, Box 17 Civil Rights, Riots Commission Report. Campaign 1968 Collection. RNL.

Unsurprisingly, in the spring of 1968 Nixon came out as a forceful critic of the Kerner Report, a move that *Human Events* contended "substantially helped him with Republican conservatives."[59] As Nixon fought as a "new Nixon" throughout the primary season, even casual observers could notice that he had little use for explanations of crime rooted in anything other than the guilt of the accused.

Arguably, the key Nixon campaign concern in late 1967, through the primary season, and throughout 1968 was how to position Nixon and the crime problem to the electorate.[60] With the Nixon position on the causes of crime quite clear, the other important question involved just how far the candidate could take his criticism of the Warren Court. One of the most telling Nixon campaign documents on this issue resulted from the efforts of Martin Pollner. Reactions to his "Crime – The Supreme Court: A Proposed Program of Action" both from within the formal campaign team and those who had informal roles provide useful insights on the campaign's efforts to ensure that the Warren Court earned an acceptable amount of blame for the country's crime problem.

Pollner, who had worked at the U.S. Justice Department and later in private legal practice at Nixon's law firm in New York (Nixon, Mudge, Rose, Guthrie and Alexander), served, along with Martin Anderson, as one of the key campaign voices on crime. His

[59] *Human Events*, March 16, 1968, 5.

[60] Victories in early primaries, his campaign aides believed, would help Nixon overcome the image of a loser that he carried because of the defeats in 1960 and 1962. Throughout 1967 he made sure, in his public presentations, to identify the primaries as a crucial source for sorting out the Republican candidates. In making these suggestions about the importance of the primaries, the Nixon campaign brilliantly shaped a campaign narrative that the media later chose to articulate. Goldwater encouraged Nixon to consider skipping out on the New Hampshire primary; Nixon wisely ignored this advice, earning a victory in New Hampshire helped Nixon stake out a lead he never relinquished. On encouragement for Nixon to use the primaries and build up expectations for victories there I draw upon Leonard Garment to Richard Nixon, April 25, 1967, Len Garment 1968 Campaign File, Nixon-Garment Folder, Name File Box 68, Nixon Presidential Returned Materials Collection:White House Central Files; Goldwater's advice came in communication to Nixon available in Barry Goldwater to Richard Nixon, July 5, 1967, Pre-Presidential Materials, Campaign Research Files: Barry Goldwater, Box 2, Campaign 1968, RNL; on Nixon speaking of the importance of the primaries see, for instance, "Nixon Tells How 68 Race Stands," *U.S. News & World Report*, November 20, 1967, 74-80.

fifty-one page proposal represented the authoritative campaign template on politicking against the Court. Put together most likely in mid to late-1967, the document represented a mild betrayal of the hard-line approach in its acknowledgment that sociological conditions had an important role in causing crime. Nevertheless, even after this sop to the liberal worldview, Pollner's indictment of the Court (and prescription for this problem) stood out principally for the care he counseled. Going after the Warren Court, while desirable, had to be done without earning the campaign clear association with those Americans who thought impeach Earl Warren billboards belonged on every highway in the country.[61] The campaign wanted their votes but did not want to risk the potential backlash of too aggressively assailing an entire branch of the federal government. Unsurprisingly, not everyone in and around the campaign agreed with this call to moderation.

As did numerous others in the campaign, Pollner wisely counseled Nixon to avoid mere grumbling about these decisions. Instead, he suggested that all of the grumbling and grievances had to feature some sophistication that might, in turn, lessen any drawbacks to attacking the High Court.[62] Pollner captured the peril and limitations of Court bashing when he wrote that:

> Complaining about Supreme Court decisions will not put one criminal behind bars. Further, such complaints, from responsible sources, tend to destroy confidence in our system of government. If the courts continue to criticize police practices and law enforcement officials continue to criticize the courts—how then can the citizen retain his faith in either?[63]

[61] Martin Pollner, "Crime – The Supreme Court: A Proposed Program of Action," (undated), Pre-Presidential Materials, Campaign Research Files, Box 22, Folder Martin Pollner Reports, Campaign 1968, RNL.
[62] *Id*. at 18-19.
[63] *Id*. at 19.

Yet, as had and would others in the Nixon campaign apparatus who contributed to the discussion of the Court and crime, Pollner, after admitting in numerous instances that the Court was not directly responsible for the crime rate, proceeded to hold the Court responsible. The Court had certainly made things more difficult. He did not yet blame the Court for the rise in crime but he envisioned a future in which its decisions would cause crime. While Pollner bluntly termed the idea of the Court causing the crime rate to rise as "unfair," the decisions portended a far more unwelcome future. His argument implicitly hinted that if the Warren Court's brand of criminal procedure liberalism were to persist, one day the Court would cause the crime rate to rise. He called upon his fortune-telling skills in contending:

> The Supreme Court's primary purpose appears to be to attempt to establish safeguards against isolated police abuses. However laudable this goal may appear, and although the Court's sweeping decisions may indeed prevent isolated abuse, they also prevent proper, previously court-sanctioned investigations and convictions. [64]

This call for care in doling out criticism produced notable responses from others in positions to influence the Nixon campaign. Others were far more explicit in 1967 and throughout 1968, reminding the Nixon campaign that it could go too far and seem unfair in its criticisms. Budding academic William Gangi, who has since gone on to a long career at St. John's University, encouraged Nixon to realize that "any condemnation of the Court will be interpreted as fascist."[65] Closer to the general election, the Nixon campaign and its advisors did worry over the extent to which attacks upon the Court might prove counter-productive, at least providing circumstantial proof of the importance of Pollner's template. Others connected to the campaign in some manner also counseled

[64] *Id*. at 51.
[65] William Gangi to Richard Nixon, November 26, 1967, Pre-Presidential Materials, Campaign Research Files, Box 21, Folder 18, Campaign 1968, RNL.

restraint. Key Republican members of Congress and Governors encouraged Nixon to avoid "a direct attack on the Supreme Court as an institution."[66] All of these understandable worries might have come from sincere respect for the Court, but more likely resulted from fears of earning the campaign an association, in the public mind, with the far Right.

Reactions to the Pollner piece came to the Nixon campaign in the fall of 1967 and thereafter. All throughout the next year, even after Nixon had secured the nomination, the campaign still debated how to explain crime to the electorate and how far Nixon could go in assailing the Court. Scholar Jerome Hall of Indiana University Law School, for instance, called Pollner's work "wholly inadequate."[67] Some reviewers of the essay found it unsatisfactory because it had not spelled out more clearly how a Nixon administration would deal with the crime problem. Other individuals in and around the campaign urged a far more open criticism of the Court that still did not go so far as to become overtly disrespectful. Two Minnesotans, George Mackinnon and Warren Burger, argued for a more careful yet direct citation of the Warren Court. But even these voices counseled that such criticism had to come across as more than just disagreement with how the Court had ruled in high profile cases.

MacKinnon, whom Nixon would later appoint to the federal bench and at the time worked as Chief Counsel for Investors Mutual Funds, urged Nixon to campaign against the Court with care. While MacKinnon made sure to emphasize that appellate work and important American justice credos guaranteed that law enforcement and prosecutorial

[66] Senator John Tower to Richard Nixon, September 16, 1968, Pre-Presidential Materials, Campaign Research Files, Box 23 Crime, Folder 6 (Crime-Republicans) Campaign 1968, RNL.
[67] Jerome Hall to Patrick Buchanan, October 23, 1967, Len Garment, 1968 Political Campaign File, Box 7, Nixon Presidential Returned Materials Collection:White House Central Files, RNL.

efforts would always have obstacles put before them, he nevertheless argued that "Recent Supreme Court decisions . . . added to that burden. To the extent that they change pre-existing law and their new decisions have retroactive effect, they are unreasonable." MacKinnon backtracked by commenting that although the Supreme Court rulings on crime represented one important part of the problem, to attack those rulings alone did not represent the "soundest basis for action.[68] In one sign of a different age, MacKinnon encouraged Nixon to back federal gun laws. In the final analysis, however, he urged the campaign, much as Pollner had, to be careful before getting into a public and long-term spat with the Warren Court.

MacKinnon served as the Minnesota campaign chairman for Nixon. While Nixon did not carry Minnesota in the general election, earlier on it mattered because of significant support for Rockefeller in the state. Perhaps of greater long-term significance, MacKinnon provided a valuable contact point for the campaign to benefit from the advice of another Minnesotan, Warren Burger. Future Supreme Court chief justice and Nixon's gift to conservative Court critics, Burger counseled the Nixon campaign to be forceful in its criticisms. More importantly, he took a hard-line on "law and order" politics and prescriptions. Some of his international comparisons that supported his frustrations with the U.S. criminal justice process had later parallels in Nixon's campaign rhetoric. Indeed, his public role and overlooked access to the campaign help us explain his later appointment to the Supreme Court.[69]

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[68] George MacKinnon to Richard Nixon, September 18, 1967, Pre-Presidential Materials, Campaign Research Files, Box 21 Crime, Miscellaneous Folder, Campaign 1968, RNL. MacKinnon also indicated that Warren Burger intended to supply his own views on the Nixon crime piece.

[69] Martin Pollner mentions Burger's role in an undated memorandum to Richard Nixon and Leonard Garment. Burger had provided a review of Pollner's "Crime – The Supreme Court: A Proposed Program of Action." See Martin Pollner to Richard Nixon and Leonard Garment, (n.d.), Pre-Presidential Materials, Campaign Research Files, Box 23 Crime, Campaign 1968, RNL. George MacKinnon also mentions

Burger had served in the Eisenhower Justice Department before his appointment to the Court of Appeals for the District of Columbia in 1956. On the bench he served as the conservative counter to Judge David Bazelon. Judge Burger's voting habits, speeches, articles and public commentary certainly revealed his own discomfort with the liberal Warren Court. In particular, he expressed frustration over the Warren Court's rulings on the exclusion of evidence. More broadly, while he wanted to ensure that law enforcement followed rules and treated the accused with fairness, the way to reach these ends did not feature reliance upon courts of law alone. Tainted evidence and disreputable practices deserved exclusion, but the courts, with so many vague pronouncements and tendentious and naïve rulings, threatened to stymie legitimate police actions. Moreover, Burger did not think these rulings had been successful in deterring the few cases of police misconduct. Burger had frequently encouraged cross-national comparisons, particularly to Western Europe; he thought that these comparisons revealed the merit of these systems of justice. Endless delays and protections, as part of the adversarial system, had simply gone too far. Western European countries had avoided these delays; hence, the United States could learn something from looking abroad.[70]

Burger's record and well-known frustration with Warren Court jurisprudence made him an attractive candidate both for contributing to the campaign and later as a Supreme Court nominee. He had a sterling reputation as a spokesperson for the counter-

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Burger's help. See George MacKinnon to Richard Nixon, September 18, 1967, GMP, Box 18, Folder 3. The memo that I believe Burger wrote does not have a date, though if the memo is one that MacKinnon had promised Nixon it would have arrived after MacKinnon's September 18 note. For what I believe is the memorandum from Burger, see an undated letter to George MacKinnon: "Crime as a National Issue" Webber to MacKinnon, (n.d.), Campaign Research Files, Box 21, Crime-General, Campaign 1968, RNL.

[70] See, for instance, "What to Do About Crime in the U.S.: A Federal Judge Speaks," *U.S. News and World Report*, August 7, 1967, 70-73. The article is based on excerpts from Warren Burger's May 1967 address at Ripon College. He did speak humanely though of the cause of rehabilitation and ensuring that those criminals with mental impairments received adequate care. Burger's Ripon College speech circulated within the Nixon campaign and the Republican Task Force on Crime.

arguments to the liberal criminal procedure rulings. As an illustration of Burger's reputation, Brian Gettings, lead counsel and Executive Director of the Republican Task Force on Crime, encouraged Representative Poff to enlist Burger's help, calling him "a standout on an otherwise radical court."[71] Free from any obligation to censor his comments and under some cover of anonymity, Burger recommended that the Nixon campaign provide blunt and direct criticism of the Supreme Court. Burger's remarks made their way to the Nixon camp, most likely, as a pseudo-anonymous response to "Crime – The Supreme Court: A Proposed Program of Action." Judge Burger encouraged the campaign to take a far more forceful position on the Warren Court. Exempting the Warren Court from criticism never had a fierce advocate in the campaign, but Burger encouraged an open battle with the Court that surpassed what even Nixon most often provided.[72]

Burger forcefully encouraged the campaign to exclude talk of poverty and environmental causes for crime. He did not deny the causal role of such factors but argued against their citation; he made it clear that the campaign did not want to send mixed signals to voters and others who would shape the campaign narrative. He offered biting criticism of the Warren Court's recent 5-4 decision in *United States v. Wade*. *Wade* had confirmed a Court of Appeals ruling that the original trial court had erred in not excluding the testimony of witnesses who had identified a defendant allegedly

[71] Brian Gettings to Richard Poff, August 25, 1967, RPP, Box 223. Getting was referring to the Court of Appeals for the District of Columbia.

[72] In addition, it is possible that material from August 1968 also was the handiwork of Burger. There is a six-page memorandum in the George MacKinnon Papers that he claims "was prepared by one of judicial friends in Washington." MacKinnon passed on the document about crime, the care with which Nixon should criticize the Court and encouragement for Nixon to appeal to the "quiet Americans." Interestingly, the document, if from Burger, represented some backtracking on the issue of assailing the Court. The document asserted that by the fall of 1968 the public already knew what courts were to blame for the crime problem. See George MacKinnon to Rose Mary Woods, August 5, 1968, and the untitled memorandum, GMP, Box 18, Folder 3.

responsible for robbing a bank. The Warren Court ruling, though filed under a confusing arrangement of concurrences and dissents, essentially held that defendants subject to lineup identification should benefit from Sixth Amendment guarantees of legal counsel. Burger had a predictably raw reaction to a ruling he labeled "a miserable example of overreaching." Thereafter, the Nixon campaign position papers and other public offerings singled out *Wade* as worthy of criticism. Campaign chatter, in calling attention to *Wade*, acknowledged Burger's exact language in his characterization of the ruling.

Within Burger's obvious tryout for the Supreme Court appointment short-list, he stuck to his interests in comparing the United States criminal appeals process to that elsewhere, in particular Europe. Cross-cultural comparisons revealed that the United States could not even keep up with its first world peers. They provided an alarming truth that he believed the country would not be able to handle. He wrote in an amazingly scornful tone that:

> A great many civilized countries do better justice at the lower levels than we do by rather summary administration type dispositions. The judicial decisions which expanded post-conviction remedies have nearly destroyed finality in the criminal law. Future scholars will look back on much of this and regard many judges as congenital idiots. They won't be far off target.

Burger's most important point of criticism of Pollner's crime and the Court template was that it had not gone far enough. He reacted sternly to analysis that sometimes reflected "too much anxiety about offending the Supreme Court." Burger thought such anxiety unwarranted. He thought "it . . . imperative that there be criticism of the Supreme Court's holdings." What is more, Burger even suggested that disobedience and criticism of the Court's work already had the support of thoughtful judges and lawyers; Nixon only had to repeat the standard practice of citing the

dissenting language from the contested Warren Court decisions. Backtracking somewhat, he noted that perhaps blaming the Warren Court too directly for the crime rate could have political drawbacks. Nonetheless, he did not think it "unfair" to credit the Court with causing crime. Politics demanded some hesitance, but the man who would later replace Earl Warren had no doubt that the Court's decisions had an ample role in causing the crime problem. His reactions were significant because the future chief justice of the United States Supreme Court instructed Nixon to wage an all-out political battle with the Warren Court. Whatever else one can say of this analysis, it came from someone comfortable with playing politics with the Court.

Even as the campaign debated how far it could go in assailing the Court, the following year, after Nixon had already cemented his front-runner status, he made sure the electorate knew where he stood. For instance, in Nixon's May 8, 1968 address "Toward Freedom from Fear" he hit on points that paralleled the long-standing concerns of Fred Inbau, the AELE, Warren Burger and Americans everywhere who rejected the permissive new rules that enabled criminals to go free. Nixon decried that confessions had been set on a path to extinction and that the notable rulings had sent the message to criminals, potential and actual, that crime could go unpunished. He further lamented "barbed wire . . . legalisms that a majority of one of the Supreme Court has erected to protect a suspect from invasion of his rights has effectively shielded hundreds of criminals from punishment as provided in the prior laws." In a campaign stop in Dallas later that month, Nixon's rebuke to the High Court continued to emerge clearly. During a press conference there Nixon cited cases in which the Court had unleashed lawlessness

upon the country. Rising crime rates, while not entirely the fault of judicial missteps, gained considerable influence from bad law and over-involved judges.[73]

That spring Nixon also encouraged Congress to pass the portion of the omnibus crime bill then under consideration that would curtail the supposed evils of the *Miranda* and *Escobedo* rulings. Absent success on that front, he even counseled amending the constitution.[74] When that crime bill passed the Senate in May, Nixon praised the passage as a necessary first step in helping rescue the country from crime. Yet, that legislation merely represented a first step. The election in the fall presented a further opportunity to fix years of inattention to this problem.[75]

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Writing to a constituent in October 1960, first-term Senator Philip Hart (D-MI) remarked how "difficult [it is] to question a man who has been serving on the Supreme Court and participating in the cases which come before it."[76] That June Hart had put forth a Senate resolution opposing any interim Supreme Court appointments. The resolution's obscurity is overmatched by the prescience involved in some of the arguments bandied about in support of it.

President Eisenhower had appointed Earl Warren, William Brennan and Potter Stewart all while Congress was not in session. Predictable rumblings occurred about an abuse of power and circumvention of the Senate's role in offering its "advice and

[73] "Nixon Links Court to Rise in Crime," in *New York Times*, May 31, 1968, 18.
[74] Richard Nixon, "Toward Freedom From Fear," Campaign Literature, Pamphlet Series Folder 1, Box 1. Campaign 1968 Collection, RNL.
[75] Statement of Richard Nixon, Portland, Oregon, May 24, 1968, Pre-Presidential Materials, Campaign Research Files, Box 23, Folder 6 (Crime: Republicans) Campaign 1968, RNL.
[76] Phillip Hart to Clarence Hosch, October 10, 1960, Supreme Court, Box 2, Phillip A. Hart Papers, Bentley Historical Library, University of Michigan (hereinafter PHP).

consent" on the appointments. Recess appointments had many Democratic Party senators looking to at least communicate their clear disapproval. Under the guise of preventing legislative-executive struggles, Hart and some of his fellow Democrats hoped a resolution could deter future recess appointments. Another reason Hart supported the restrictions involved the possibility that a sitting justice's votes and opinions might earn excessive scrutiny whenever the Senate did have the opportunity to hold hearings and, most likely, later vote on a recess appointment.[77] Presumably the Senate would get around to passing judgment on any recess appointment without much delay, but even the brief time someone sat on the Court would have required that individual to develop a significant and impossible-to-hide paper trail.

Hart advertised his proposal as appearing at an opportune time since no appointments seemed imminent before Eisenhower's tenure ended.[78] In a sense, Hart's worries about subjecting a sitting justice to scrutiny could have just as well sent a cautionary tale for any president who chose to elevate a sitting justice to the top chair. The Senate eventually passed Hart's resolution via a 48 to 37 vote. Future President Lyndon Johnson voted for the resolution. Eight years later, however, the lame-duck Johnson chose to forget the spirit of Hart's proposal. He also chose to downplay the importance that his own unpopularity, paired with that of the Warren Court, would have in ensuring that an appointment from within would only heighten the chances that the Warren Court itself would be put on trial. Thurgood Marshall, in his appearances before

[77] *Congressional Record*, June 16, 1960, Supreme Court, Box 2, PHP. Any number of law professors and Deans responded to Hart's requests for perspective on his resolution. Individuals from Catholic University, the University of Michigan and the University of Chicago, to name only a few, failed to point out the obvious: the concern over calling a new justice to task for his brief service when the individual did come before the Senate would emerge even more so if a sitting justice earned an appointment to become chief justice. Two recent chief justices, Edward Douglass White and Harlan Fiske Stone, both had served as justices prior to their elevation. These letters can be found in Supreme Court, Box 2, PHP.

[78] Philip Hart to James Eastland, August 1, 1960, Supreme Court, Box 2, PHP.

the Senate Judiciary Committee in July 1967, had already answered hostile questions about Court rulings in which he had not even participated. Elevating a sitting Warren Court justice to the chief justice chair would only ensure that hostile questioning of the nominee would occur. LBJ did it anyway.

From June through October 1968, Abe Fortas, Lyndon Johnson and Earl Warren provided an assist to Nixon's efforts. The botched attempt to elevate Fortas to the chief justice position in 1968 provided headlines and a reminder of the Court's importance during the election cycle. All could see just how consequential the Court had become. Opposition to the Fortas nomination produced a setback that stands out as perhaps the best evidence, proximate to the 1968 presidential election, of an influential dissatisfaction with the Warren Court.[79]

On June 13, 1968, Warren wrote to LBJ that he intended to resign from the Court. Few doubted that he had timed his departure to permit the current occupant of the White House to name a successor.[80] The chief justice cited his age as a prominent factor in his decision; he had, after all, recently turned seventy-seven. But this citation was most likely an excuse not a reason for the retirement. It was no secret that Warren did not want to see Nixon, who by then had become the odds-on favorite to become the Republican nominee, gain the opportunity to select his successor at some point in the next four to eight years. As James Reston aptly commented, "President Johnson and

[79] Hebert Klein claimed years later that "Nixon strongly opposed" the Fortas nomination. Herbert G. Klein, *Making it Perfectly Clear* (New York: Doubleday & Company, 1980), 27. Fortas biographer Bruce Murphy regards the LBJ White House thinking that Nixon stood firmly behind the efforts to defeat the nominations as unlikely or at least ridiculously difficult to prove. Crediting Nixon with derailing the nomination should require a lower standard of proof. His attention to the Court already ensured that the GOP would make a substantial attempt to oppose Fortas.

[80] "Supreme Court: The Warren Court," *Newsweek*, July 1, 1968, 33.

Chief Justice Warren have many things in common, but none greater than their deep personal hostility to Richard Nixon."[81]

Some Americans wrote to Warren expressing hope that LBJ would find a replacement cut from the same judicial cloth. Many others praised Warren for his service to the country and its ideals. Interestingly, however, even those who chose to praise Warren did not miss out on the obvious connection between Warren's departure and the November election. For instance, Louis Fisch of Van Nuys, California appreciated that Warren's departure before the election helped forestall the chances that a "vacancy will be filled with an appointment whose philosophy may be further to the right."[82] But even some well-wishers expressed frustration over Warren's retirement for what seemed blatantly preservationist reasons. Albin Davis, for instance, even made the compelling point that since the Court had become so consequential in the policy and politics of the country, it was only natural that the ballot box should have some relationship to future appointments. However much he hoped to see the preservation of Warren Court liberalism, he contended that the resignation so close to an election set a bad precedent and could only stoke further distrust in the Court and government. Davis encouraged Warren to realize that:

> Since the Court has become an architect of social, economic and political policy, it is more important than ever that the will of the people be reflected in the President's appointments. If the people decide in the coming election that they want a change, the new President will be unable to effect this change on the judicial branch of government.[83]

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[81] James Reston, "Washington: The Next Chief Justice," *The New York Times*, June 23, 1968. Interestingly, Reston thought that Nixon did not have enough credibility with conservative senators to prevent LBJ from successfully appointing a successor to Warren.

[82] Louis Fisch to Earl Warren, June 23, 1968, Box 107, EWP.

[83] Albin Davis to Chief Justice Earl Warren, July 9, 1968, Box 107, EWP. Many Warren supporters who encouraged him to stay did so not in the hopes of depriving Nixon, or a non-Democrat for that matter, of making Court appointments; some Warren supporters just did not want to see the unpopular Johnson carry out the appointment. Nearly as often as individuals encouraged Warren to allow the next president to name

If Warren's workaday supporters picked up on the politics of his departure, the Court's critics could hardly be expected to remain silent. Phyllis Schlafly, for instance, echoed the thinking of many other commentators in decrying the Warren move. She contended that it represented nothing more than an attempt to ensure that a Republican could not appoint a replacement if and when Warren retired at some time following the November election. Warren, so her reasoning held, had recognized a rising tide of conservatism as evinced in Max Rafferty's recent defeat of incumbent Thomas Kuchel in the California Republican primary for the Senate. To save the Court, and its recent handiwork, from the conservatives, Warren thus chose to resign.[84]

Obviously this narrative of a conservative ascendancy had self-serving motivations; after all, the staunchly conservative Rafferty lost the general election in November. Yet, even Schlafly had a valid point. If Warren did not pay attention to recent election results he did know that an unpopular president had already decided not to seek re-election. Warren's departure simply could not be separated from the presidential election. In September, even Nixon's Nixon, running mate Spiro Agnew spoke out. Agnew labeled, with some accuracy, Warren's exit a "precipitous resignation."[85] LBJ clearly had the power, as assigned by the Constitution, to name a replacement; but legitimate concern existed over the obvious ploy to preserve the Warren Court's work through naming a replacement for Warren before the November election results.

LBJ responded that he would accept Warren's resignation as soon as a successor earned confirmation from the Senate. Hence, LBJ had indicated, in essence, that

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a replacement, perhaps merely out of disfavor for Warren, others encouraged him to remain just so that the unpopular LBJ would not earn the opportunity.

[84] Phyllis Schlafly, *The Elephant's Roar*, Box 5, Right-Wing Collection, Cornell University Library.

[85] "Agnew Assails Student Demonstrators," *New York Times*, September 9, 1968, 42.

Warren's resignation was not a resignation after all. The administration wanted to name a successor only if one could be confirmed, and if not, Warren could just remain on the bench. This unusual, though not clearly unethical, attempt to keep Warren on the Court if a nominee did not earn the assent of the Senate served as clear evidence that the administration expected a battle, and further revealed that it, not just the Republican Party and anti-Court Southern Democrats, had a comfort level with politicizing the judiciary. Although the partial resignation might not have been unethical or unconstitutional, it was undoubtedly a political mistake.

A few administration-friendly senators encouraged LBJ to get rid of the contingent retirement of the chief justice, but he refused to do so.[86] If Warren's departure alone did not incite the wrath of those who hoped to see another president name the successor, the conditional nature of the resignation only further politicized an appointment that already seemed destined for partisan wrangling. Thus from the beginning the White House provided the political opponents of the Court in the Senate, of whom Nixon had become an unquestioned leader by example far more than by direct involvement, an unexpected gift. The Warren resignation could keep the Court in the headlines throughout the summer but the conditional nature of the resignation seemed to prove what the Court's critics would have otherwise needed to prove: the White House had decided, late in the president's term, to preserve the Warren Court era, but would not risk the chances of having Warren's exit allow another president to name a successor.

[86] On this point see John Massaro, "LBJ and the Fortas Nomination for Chief Justice," *Political Science Quarterly*, Winter 1982-1983, 603-621. Massaro, based upon substantial evidence from the LBJ archives, holds the administration accountable for counting too much on the support of Dirksen and Russell in the Senate and for mismanagement of the nomination. Massaro argues that the mismanagement not the court critics counted more in the defeat of Fortas. However persuasive this critique, I think it mismanages history in downplaying the very reasons the anti-Warren Court senators had to oppose the nomination and the importance of the presidential election in ensuring that a lame-duck, unpopular president would have diminished power to bend the Senate to his will.

Nearly two weeks after Warren's letter, on June 26, 1968, LBJ announced that Fortas, his friend and advisor of two decades, would replace Warren. LBJ went through the motions but he knew he wanted Fortas. The same thing could be said of the man he picked to take the Fortas associate justice spot, LBJ friend and Fifth Circuit of Appeals judge Homer Thornberry. Both judges earned support from the legal community. Yet, such support would not prove sufficient to convince those who opposed the elevation of Fortas. In many respects this Fortas battle provided what the previous year's nomination of Thurgood Marshall had not: a fight the Warren Court opponents not only could win but also one they chose to fight.[87]

LBJ's appointments of Fortas and Thornberry incited immediate opposition. Even Earl Warren soon had to defend LBJ's powers to appoint new justices, doing so in a rare, early July session with reporters.[88] Although the Democrats had a commanding majority in the Senate, in 1968 the rules still required a 2/3 agreement to cut off debate. The Democrats had sixty-three senators at the time. Yet, even with the substantial control over the Senate, the party did not have the necessary unanimity to prevent a filibuster. As evidence of the South's continued antipathy for the Warren Court, from the outset key Southern Democrats such as Robert Byrd, James Eastland and Russell Long opposed Fortas. What is more, nearly two dozen Republican senators came out right away against the appointments.[89] They would help ensure that Nixon, not Johnson,

[87] Mark Tushnet argues that the 1967 hearings and Senate consideration of Thurgood Marshall mostly involved the theatrics of Marshall opponents. See Mark Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991* (London: Oxford University Press, 1997), 25-27.
[88] Fred P. Graham, "Warren Defends Johnson's Naming of a Successor," *New York Times*, July 6, 1968, 1.
[89] Fred P. Graham, "Johnson Appoints Fortas to Head Supreme Court; Thornberry to be Justice," *New York Times*, June 27, 1968, 1.

would have the opportunity to name a successor to Warren when he left the bench not in 1968 as planned, but after the term that ended in 1969.

In the Senate, Robert Griffin (R-MI) spearheaded the stop-Fortas efforts. The one-time House member had first come to the Senate in May 1966 through an appointment by the governor of Michigan George Romney. In explaining his views on the nomination before the Senate Judiciary Committee, Griffin urged a vigorous role for the Senate in deciding upon not only the qualifications of a Supreme Court nominee but also other questions. Though he posited that some deference might be expected with cabinet appointments, no such deference had a basis in history or the Constitution. He went further in arguing that "to assure the independence of the judiciary . . .it is important then to recognize the 'advice and consent' power of the Senate with respect to the judiciary is . . at least as important as the power of the President to nominate."[90] Griffin seemed to be sticking up for the Senate as much as going after the Warren Court. Yet, according to one of Fortas' principal biographers "politics . . . and not the philosophy of the Supreme Court" mattered to Griffin.[91] Griffin, as would other Republicans, had a clear partisan interest in opposing the nomination so that a Republican president could appoint justices after LBJ had left office. Later in the summer, the Republican National Convention attempted to have the Republican Platform Committee weigh in on the Fortas nomination. The attempt failed, but derailing the Fortas nomination became inseparable

[90] "Statement of Senator Robert F. Griffin before the United States Senate Committee on the Judiciary," July 11, 1968, Pre-Presidential Materials, Campaign Research Files, Box 78, Folder 1, Supreme Court July 1968, Campaign 1968, RNL.

[91] Bruce Murphy, *Fortas: The Rise and Ruin of A Supreme Court Justice* (New York: William Morrow and Company, 1988), 306. Such a position for Griffin kept him from serving as the voice of the many Southern Democrats who did take issue with the Court's jurisprudence. All that mattered though was creating enough of a delay.

from the politics of 1968. Thus Nixon stood to benefit most from Griffin's efforts and those who lobbied against the appointment.

The misgivings, at least within the Senate, with the Fortas elevation involved charges of cronyism, his continuing relationship with LBJ, financial improprieties, complaints that a lame-duck president should not appoint someone for such an important post, recent rulings on obscenity, and, most importantly, the larger indictment of the Warren Court. Fortas had served as a trusted advisor to LBJ. He had known LBJ since his years in the U.S. House and infamously helped "Landslide Lyndon" emerge in 1948 as the victor in a bitter run-off Texas primary battle for the Democratic nomination for the Senate. Washington insiders knew that Fortas remained an informal advisor to LBJ, even after Fortas went to the Supreme Court in 1965. Fortas, in his testimony before the Senate Judiciary Committee in July did not deny helping LBJ from time to time but insisted that such help had been insubstantial advice, not help with drafting legislation, speeches or more important matters. Fortas mischaracterized the relationship; it did seem to violate age-old expectations of separation of power, standards of judicial propriety and, provided legislation had been involved, the age-old unwillingness of the Supreme Court to offer advisory opinions. Later revelations in 1968 only confirmed that Fortas had provided more than token guidance to LBJ, including helping with the 1966 State of the Union Address.[92] Fortas also advised LBJ in 1966 to veto the Washington, D.C. crime bill, citing what he viewed as unconstitutional provisions prohibiting pornographic materials in the nation's capital.[93]

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[92] On this point see Laura Kalman, *Abe Fortas: A Biography* (New Haven: Yale University Press, 1990), 351.

[93] Michael Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* (New York: Columbia University Press, 2005), 131.

The principled position that Fortas should have exercised better judgment, even if he had not violated ironclad ethical commands in advising the president, would later return to haunt the Fortas foes. Notably, the legacy of the Fortas fiasco involved not so much his relationship with LBJ but from the financial improprieties that surfaced in 1968 and then the following year in forcing his resignation from the Court. During the 1968 attempt to engineer the replacement for Warren, questioning the arrangement of payments to Fortas for his lectures at American University took on importance as but one more rallying point for the opposition. Even if the American University lectures and payment had not clearly put Fortas on the wrong side of the ethical divide, Supreme Court judges, so the argument proceeded, should be held to higher standards.[94] While these putative transgressions alone were not so prominent as to derail Fortas in 1968, they were just the start of the tit-for-tat process that led to Fortas' resignation from the bench in May 1969 and helped later derail the appointments of Clement Haynsworth and Harold Carswell to take over the seat Fortas vacated.

The lame-duck concerns and the record of the Warren Court, matters more directly connected to Nixon and the campaign, had unusual salience during the 1968 battle.[95] Immediately following the announcement of the nominees, Nixon weighed in that LBJ should have let his successor make the appointments.[96] For the most part,

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[94] "Judicial Propriety: The Fortas Case," *Wall Street Journal*, September 18, 1968.

[95] South Dakota Senator Karl Mundt voiced opposition to the appointments based in no small part on LBJ's "lame duck" status. Not long after the nominations he announced his intention to oppose any nominee put forth before the next Presidential administration—clearly hedging his bets for a favorable outcome in November. *Your Washington and You: Report from Karl Mundt*, July 23, 1968, Pre-Presidential Materials, Campaign Research Files, Box 78, Folder 1, Supreme Court July 1968, Campaign 1968, RNL.

[96] Murphy, *supra* note 91, at 302. On the Senate floor, Democrat Stephen Young of Ohio responded to the efforts to deny LBJ already afoot. Young recognized nothing but a meddlesome Richard Nixon. He found allies in Wayne Morse of Oregon and Frank Moss of Utah, both Democrats who recognized an objectionable partisanship behind the resistance to Fortas. *Congressional Record*, June 28, 1968, 19243; *Congressional Record*, July l0, 1968, 20482.

however, Nixon did not take a strong public stand in supporting the efforts to deny LBJ's nominees. Be that as it may, he did not have to do so. He resisted the calls to step in to defuse the uproar over the nomination. After taking note of the Republican convention and the campaign year politics, *The New York Times* held out that Nixon could help end the impasse over Fortas if he rejected the partisan wrangling and insisted upon an independent judiciary not subject to reprisals.[97] Even after the July hearings before the Senate Judiciary Committee and the apparent success of those attempting to delay if not force a defeat to the nomination on into the fall, Nixon's position was one in which he could passively let the Fortas fiasco benefit his campaign against the Warren Court.

Nevertheless, it was a convenient for the Fortas supporters to argue that Nixon stood behind the opposition. They were both right and wrong. Abe Fortas, writing to Earl Warren in late July, commented that the opposition stemmed from dislike for the Court's work and that "the opposition in the Senate is a combination of Nixon-Republican partisanship." He also argued that "developments at the Republican Convention" would have a key importance in foretelling his chances. Optimism, easy now to label unwarranted, infused Fortas's communication with Warren. But Fortas recognized accurately, with some defensive hyperbole, that the opposition featured a "bitter, corrosive opposition to all that has been happening in the Court and the country: the racial progress, and the insistence upon increased regard for human rights and dignity in the field of criminal law." Fortas even, paradoxically no less, found some favorability in the budding ordeal. Consistent perhaps with an optimism he had at the time that he

[97] "Independent Judiciary," *The New York Times*, August 14, 1968.

would earn confirmation, he told Warren that the opposition to the nomination had revealed the unsavory tactics and misguided judgments of the Court's foes.[98]

Hubert Humphrey also charged that opposition senators were doing all of this as a favor to Nixon. Unsurprisingly, Democrats continued to call for Nixon to reject the election year hold-up, even up to the weeks before the White House withdrew the Fortas nomination on October 1, 1968. After months of delay, Mike Mansfield (D-MT) told viewers of *Face the Nation* in early September that Nixon should support the Fortas nomination.[99] Mindful perhaps of the need to attract voters not already pre-disposed to support the Republican ticket, however, Nixon neither endorsed nor restrained the Fortas foes. Still it strains credulity to think that Nixon did not relish the chance to make appointments to the Supreme Court. Nixon's rhetoric during the campaign was more than enough to credit him with a causal role in the opposition. The direct connection between Griffin's efforts and the Nixon campaign came more from the broader electioneering environment in which Nixon had already made sure that people knew what he thought about the Warren Court.

Opposition to the Warren Court alone scarcely explained all of the Fortas troubles, but this opposition proved indispensable in preventing his 1968 elevation. His testimony contained abundant falsehoods meant to minimize his role as an advisor to LBJ, but these concerns and so many others only helped validate, by helping to obscure, the more important issue: the record of the Warren Court. Sam Ervin attacked Fortas, indicting him along the way as an accomplice in the Warren Court revolution. In another example, Norris Cotton (R-NH), in communicating to his constituents, discounted all of

[98] Abe Fortas to Earl Warren, July 25, 1968, Box 352, EWP.
[99] *Face the Naion*, Transcript of original broadcast September 8, 1968, Pre-Presidential Materials, Campaign Research Files, Box 78, Folder 6, Supreme Court September 1968, Campaign 1968, RNL.

the seemingly non-partisan reasons. Barely a month into the Fortas fiasco, he indicated: "I shall vote 'No' because confirmation of these two nominations will perpetuate the policies of the Warren Court for many years to come, and that, in my opinion, would be a catastrophe." Cotton recognized that the Court had made contributions, for instance in ending segregation, but on the whole it had done much harm.[100] Strom Thurmond, unsurprisingly, wondered how any antagonist of the Warren Court could stand aside during this battle. As he put it:

> If this body confirms the nomination of Fortas to be Chief Justice, it will insure the continuation of the Supreme Court as a radical influence on the American political scene for the next 20 to 30 years. Fortas' positions since he has been on the court have paralleled those of Chief Justice Earl Warren in case after case.[101]

The White House counted on Everett Dirksen to round up enough Republicans to prevent a filibuster and secure the help of Senator Richard Russell (D-GA).[102] Much to LBJ's chagrin, Russell ended up turning against the nomination, in no small part because of the administration's delay in appointing a Russell favorite to a federal judgeship and Russell's developed fear that his support might be perceived as a "corrupt bargain." Russell eventually even crossed over to join Griffin's stop-Fortas effort.[103] Even Dirksen eventually backtracked on his enthusiasm for separating the elevation of Fortas from the Warren Court's record. In his statement before the Judiciary Committee in which he offered his support for Fortas, Dirksen made sure to call attention to Fortas's

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[100] "Norris Cotton Reports to You from the United States Senate," July 25, 1968, copy located in, Box 109, EWP.
[101] *Strom Thurmond Reports to the People*, July 22, 1968, Pre-Presidential Materials, Campaign Research Files, Box 78, Folder 1, Supreme Court July 1968, Campaign 1968, RNL.
[102] Murphy, *supra* note 91, at 270-285
[103] *Id*. at 336-359.

dissent in the recent apportionment case, *Avery v. Midland County*, and in other areas that might make Fortas less objectionable.[104]

Dirksen, however, had led efforts in the past to nullify or combat certain Court rulings by amending the Constitution. He had agreed with frustrated colleagues and constituents that the Court's rulings on criminal procedure and law enforcement practices deserved legislative scrutiny.[105] Such an open citation of Fortas's welcome jurisprudence belied the admonitions provided elsewhere to avoid employing his opinions and votes against him.[106] One wonders what, other than their time spent in the Senate and Dirksen's political prowess, prompted LBJ to rely upon Dirksen. The two legislative titans did have a history, and LBJ clearly needed to rely upon someone from across the aisle to round up GOP supporters. Dirksen might have been a Court critic because of political convenience as much as out of sincerity, but he still represented a less than ideal choice to help the White House. Regardless, once the nomination quickly went sour, Dirksen's support most likely would have meant little for Fortas anyway. The following year, Dirksen's September 7, 1969 death deprived Congress of one of its legends; but Dirksen had the chance, before his heart attack, to cast a supportive vote for another chief justice nominee in June 1969. That nominee, Dirksen openly contended, recognized "that the judicial power, when lodged in the hands of an arrogant judiciary, can be a strong force for evil."[107]

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[104] 390 U.S. 474 (1968); in *Avery* the majority opinion extended *Reynolds v. Sims* to smaller, local representative bodies.
[105] Everett Dirksen to Francis Borth, December 5, 1967; Everett Dirksen to James Chapman, February 15, 1968; Everett Dirksen to George Barry, February 8, 1968, Working Papers, Box 17, Folder 1270, EMDP.
[106] Everett Dirksen, "Statement Before the Judiciary Committee," Working Papers, Box 13, Folder 966, EMDP
[107] "Senate Confirms Burger 74 to 3," *New York Times*, June 10, 1969, 1.

LBJ later remarked that "Republicans and the conservatives in the Senate . . . were horrified at the thought of a continuation of the philosophy of the Warren Court." This horror led to an "opposition [that] was strengthened by the fact that the Republicans and the Southerners were convinced that Richard Nixon, if elected, would choose a conservative Chief Justice."[108] The raw LBJ assessment may accurately describe the anti-Warren Court efforts, but it only makes his administration look all the more foolish in its own effort to secure the put Fortas in the center chair. While the presumption up until 1968 was that a president's pick would eventually earn the endorsement of the Senate, the Warren Court's controversial work and LBJ's weakened state made for a nearly impossible confirmation environment. Democratic stalwart Clark Clifford and White House Counsel Larry Temple had warned LBJ that an appointment of Fortas and Thornberry would face inauspicious odds during an election year. LBJ pressed on regardless.[109] Surely compelling reasons to oppose the nomination existed. All of the ethical problems alone created more than enough cover for those senators (and public commentators) who did not want to express other motives. Be that as it may, many senators felt no reason to hide their animosities for the Warren Court, and, in turn, grounded their opposition to Fortas in clear expressions of these animosities.[110]

Had Abe Fortas politely refused to testify before the Senate Judiciary Committee, his nomination would have most likely still attracted unprecedented attention if not opposition. The Court's work over the past fifteen years hardly explained everything

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[108] Lyndon Baines Johnson, *The Vantage Point: Perspectives on the Presidency, 1963-1969*, (New York: Holt, Rinehart and Winston, 1971), 546.
[109] For the counsel Clifford and Temple offered to LBJ see, Robert Dallek, *Flawed Giant: Lyndon Johnson and His Times, 1961-1973*, (New York: Oxford University Press, 1998), 557.
[110] Later, after the Fortas defeat, LBJ considered putting up Philip Hart, who the Senate might have had a more difficult time rejecting. On the possibility of appointing Hart see Michael O'Brien, *Philip Hart: The Conscience of the Senate* (East Lansing, MI: Michigan State University Press, 1995), 121-123.

about the difficulties in getting the Senate to even hold a vote on the nomination. Be that as it may, the election year politics ultimately made the appointment an unexpected gift for the Nixon campaign. When the nomination was withdrawn, not long after the Senate did not even come close to cutting off debate, the general election was only a little over one month away. From June until early October, the Johnson White House did as much for the Nixon campaign against the Court as Nixon could have done on his own. No series of Nixon speeches, articles or position papers could ever do as much to remind voters in 1968 of the contested role of the Warren Court.

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If Nixon's attention to "law and order" and the Fortas fiasco provided two of the most significant cornerstones of a 1968 referendum on the Warren Court, the relatively weak response from the Hubert Humphrey campaign provided the other cornerstone. LBJ's Crime Commission had already proved that his administration had a firm commitment to addressing the crime problem. Boxed in by events, the administration almost had to move to tougher positions on crime. In its defense, the administration made considerable contribution to social welfare with Great Society programs. But the focus on crime and then LBJ's dismissal of the Kerner Report revealed the rapidly developing limits to liberalism, at least from the Johnson White House. Important differences between liberals and conservatives on the crime problem remained. One of the more noteworthy involved the Warren Court. As a case in point, the entire rationale advanced by the dissenting members of the LBJ Crime Commission involved the role of the courts and particularly the Supreme Court. If we accept the overall argument that the

Commission and its findings illustrated a consensus of sorts on the crime problem, we can still recognize that important area of disagreement in the report. Nixon had spoken up for that view during his 1968 campaign. The campaign of eventual Democratic nominee Hubert Humphrey failed, however, to rebut the anti-Court, "law and order" milieu.

Time and again, the Humphrey camp responded to issues that it could not or chose not to control.[111] Humphrey's campaign meekly resisted the most popular domestic issue of the day, thereby helping to exacerbate the tensions of the era and the campaign. Humphrey's campaign differed from Nixon's in its interpretations of causes of crime, certain solutions, and rhetoric, but it did not discount the importance of the issue.[112] Moreover, despite the different tone on the causes of crime, the usual nostrums about getting at the root causes of crime appeared, but hardly dominated—further testifying to the political popularity of getting tough on crime.[113] His campaign scarcely provided a spirited defense of the Warren Court either. When he did, Nixon shot back immediately.

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[111] One instructive contemporary example comes from Reverend Don Covill of Appleton, Wisconsin. Hoping to influence the Humphrey campaign, Covill encouraged the campaign to attack the "law and order" issues as phony and revealing of contradictions in the putative conservative emphasis upon the power of the states. He recognized though that taking this route offered a best chance for Humphrey who could never hope to match the appeal of Nixon and Wallace, who both offered the rhetoric of retribution. Covill did not doubt though that Humphrey could not just push more conventional liberal prescriptions, nor could he (or should he) attempt to out-Nixon Nixon. See, September 16, 1968, Don Covill to Max Kampelman and Steven Bailey, Minnesota Historical Society, Hubert H. Humphrey Papers, 1968 Campaign Files, (Hereinafter, MHS-HH1968CF), Research Files, Order and Justice, Box 10-11.

[112] See October 9, 1968, "Memorandum from John Stewart to Robert R Nathan on Humphrey Television Statement on Crime," Minnesota Historical Society, Hubert H. Humphrey Papers, 1968 Campaign Files, (Hereinafter, MHS-HH1968CF), Research Files, Subject: Law Enforcement 1968. Humphrey termed the problem with crime "a national crisis." "Humphrey Terms Crime No.1 Issue," *New York Times*, July 8, 1968, 31; "national crisis" from August 25, 1968, Statement by Vice-President Hubert Humphrey, "Order and Justice: The Right to Life," MHS-HH 1968CF, Task Forces: Order and Justice, Box 13-5.

[113] September 16, 1968, Democratic National Committee News Release, "Vice-President Humphrey Offers Blueprint for Order and Justice," MHS-HH 1968CF, Task Forces: Order and Justice, Box 13-5.

Humphrey did, on occasion, attempt to deflect some of the criticism from the Court. For example, in a mid-September address, Humphrey complained that those who "sought refuge from the complex problem of crime in a free society in the decisions of the Supreme Court . . . are just plain wrong."[114] He neither extolled the merits of the Court's role in interpreting the Constitution nor defended the legal and empirical rationales that underpinned recent high-profile criminal procedure rulings. At least he had stuck up for the Court. Nixon did not let the clear Humphrey rhetoric go unchallenged. Later that month, in Houston, Texas, Nixon derided Humphrey's defense of the Court as merely an attempt to stifle healthy debate. Humphrey, in Nixon's estimation, had "refused to take issue with the decisions of the Supreme Court." Going further, Nixon asserted that his Democratic rival "praises those decisions."[115] Nixon had not merely invented the charges in the hopes of branding Humphrey a supporter of the Warren Court's misguided jurisprudence. In a truism revealed time and again throughout American history, assailing the Court, as Nixon did, has always been easier than supporting its work and explaining the reasoning behind its interpretations of law. Unsurprisingly, defending the Court remained an infrequent component of Humphrey's campaign. The failure to defend the Court only ensured that the Nixon camp could continue to set the parameters for the debates over crime and the influences of the Warren Court.

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[114] Hubert Humphrey cited in "Crime and the Campaign," *The Washington Post, Times-Herald*, September 18, 1968, A24.

[115] Nixon speech cited in John P. MacKenzie, "Nixon Defended on Court View," *Washington Post, Times-Herald*, September 29, 1968, G8. Nixon friend Charles S. Rhyne insisted that the quote was wrong. Rhyne thought Nixon knew the difference (and practiced it) between going after decisions and attacking the Court as an institution.

Just as the Humphrey campaign refused to articulate its support for the Warren Court's toxic criminal procedure jurisprudence, it could never seem to stake out appealing yet still liberal positions on crime. Recent events and Nixon's efforts since at least the fall of 1967 had ensured that Humphrey would always be playing catch-up. Before the Democratic convention in Chicago, Humphrey complained directly to his campaign manager Larry O'Brien of a need "to shape up our campaign organization on this issue." Humphrey contended that too many people made exceptions, excuses and yielded to the GOP. As of August 1968, he worried that the campaign had not properly represented his ideas and ideals on the crime issue.[116] What these ideas and ideals were must have remained a mystery to some contemporary observers, if not the campaign. Some of the points of rebuttal that the campaign had offered were banal and did not display a confident approach. For instance, Humphrey claimed that the states with the top crime rates were in fact homes to Republican governors—with Spiro Agnew's Maryland conveniently if not accurately labeled as a top offender.

Humphrey also spoke of the successful law enforcement role he had as Minneapolis mayor. A typical Republican response wondered if Humphrey and his supporters realized how things had changed since his mayoral tenure in the mid 1940s. Since the tail-end of the New Deal era, Court decisions had set out new rules and regulations that would have assuredly frustrated Humphrey's pre-Warren Court success.[117] Arguments he made about the Republican Party as the poor choice to bring civility, order and respect for the law back to the country, did not accompany either a

[116] August 6, 1968, Memorandum from Hubert H. Humphrey to Larry O'Brien, MSH-HH 1968CH, Lawrence O'Brien, Box 9-1.
[117] "Answer Desk #19," September 12, 1968, Sub-Series D, Box 3, Folder 4 (September), The H.R. Haldeman Collection, RNL.

cogent defense of the Warren Court's work or the adversarial system of criminal justice. What is more, there could be little doubt, at least to many voters if not political observers, that another Democrat in the White House would lead to the appointment of judges who would continue to reach liberal decisions.

On other occasions the campaign even seemed to realize that the crime issue, by its existence alone, imperiled the Democratic Party's chances in 1968. The Humphrey Campaign's Task Force on Order and Justice largely conceded that if the voters wanted Nixon's tough measures and rhetoric, then Humphrey could not wage a successful challenge. In essence, his own Task Force told Humphrey that he could do little to change minds, appeal to the country with different palliatives or, perhaps, even win the election. The Task Force, first put together in early July 1968, included Harvard professor and recent chairman of the 1966 White House Task Force on Crime, James Q. Wilson; James Vorenberg, also of Harvard; Herbert Jenkins, who still remained Chief of Police in Atlanta; and nine others from academia, government and police administration.[118] These individuals might have offered valued counsel, but according to the Humphrey campaign leadership, many of the Task Force members scarcely felt devotion to Humphrey or looked favorably on his prospects.[119]

Humphrey thus had to sway voters with his long-term ideas about bringing groups together and with federal efforts to provide enhanced anti-crime resources, both technological and human. Notably, the Task Force did urge changes. One of the more important involved the rules governing inadmissible evidence. The Task Force

[118] July 8, 1968, United Democrats for Humphrey News Release, "Twelve Named to Humphrey Task Force on Order and Justice," MHS-HH 1968CF, Task Forces: Order and Justice, Box 13-5 .
[119] July 3, 1968, "Memorandum from David E. Birenbaum to Robert R. Nathan," MHS-HH 1968CF, Task Forces: Order and Justice, Box 13-5.

encouraged both legislative and Justice Department work to bring about a relaxation in rules of admissibility. Whatever else, the overall recommendations existed in a confused state, alternatively calling for efforts at crime prevention only to then turn around to advocate more prisons, more police on the streets and sending messages of deterrence, if not retribution. These messages might not have had the draconian bent of the Nixon-Wallace campaigns, but they hardly sounded like the suggestions of crime-coddling liberals either. The Task Force's confusion paralleled the messages from a campaign that was not sure what it wanted to advocate.[120]

The Task Force offered one important proposal that the campaign never put to great use: defending the Warren Court. Perhaps this is understandable since the Warren Court had simply become too unpopular. Humphrey and his Task Force argued that improving courts and moving the accused through the process, not targeting judges as the offenders, offered sound policy. The Task Force report proclaimed with unmistakable reference to Nixon (and Wallace):

> Some candidates for high public office have sought refuge from the complex problem of crime in a free society in the decisions of the Supreme Court of the United States and of lower courts. The High Court's decisions, it is claimed, are a principle cause of the crime rise, the failures of criminal justice, and alleged moral laxity. Whether these views be sincere or whether they represent political irresponsibility, it is our belief that they are just plain wrong.[121]

The document further lamented:

> Most important, the hysterical cry that murderers can now roam the streets with impunity as a result of Supreme Court decisions constitutes a dangerous kind of fraud and deception. . . . There can, and should, be no denial that some court decisions have made the law enforcement task more exacting and demanding in some areas. . . . The Supreme Court did not change the Constitution. By applying

[120] July 16, 1968, "Memorandum from Marshall Loeb to Doug Bennett," MHS-HH 1968CF, Task Force: Order and Justice, Box 13-5.
[121] "Order and Justice: Task Force Report to Vice-President Hubert H. Humphrey," MHS-HH 1968CF, Task Force: Order and Justice, Box 13-5.

> the Bill of Rights to states and localities, it federalized the standards of law enforcement, requiring state and local police to adjust to higher national standards. . . . The focus of attention upon the Supreme Court is a great public disservice. This scapegoat approach diverts attention from the real problem, and it undermines willingness to accept responsibilities and duties essential to the success of our nation's efforts to combat crime and violence.[122]

Nixon and the "law and order" crowd ridiculed the Task Force and Humphrey for its silences on the Court. The Republican Party "Answer Desk" made sure to deride the Humphrey Report in particular as insufficiently inclined to seek punishment for wrongdoers and overly inclined to accept factors other than individual choice as the determinants of crime. Victims of crime may have even picked up signals from society (and the Court), thus even refusing to report crimes since there seemed such little interest in meting out punishments.[123] Nixon made mention of this, for instance, in his international comparisons and in wondering why crime rates had not soared during periods of economic downturn. He remained devoted to the idea that criminals chose their paths. In the end, whatever the Nixon campaign might have done to expose the Humphrey weaknesses on "law and order," the disastrous August events at the Democratic National Convention only made the incumbent Party seem all the more unable to keep the country together.

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The 1968 Supreme Court ruling in *Green v. County School Board of New Kent County*, perhaps the most seminal school desegregation ruling since *Brown,* indicated that the Court had lost patience with resistance and token efforts to provide desegregated

[122] Id. at 21-22. Also see, "The Real Nixon: A Statement by Lawrence O'Brien" MHS-HH 1968CF, Nixon: Miscellaneous 1968, Box 1-2.
[123] "Answer Desk #11," September 17, 1968, Sub-Series D, Box 2, Folder 2 (September), The H.R. Haldeman Collection, RNL.

schools.[124] Segregated schooling had to end immediately. The ruling only further reminded foes of school desegregation that presidential candidates could not just sit on the sidelines of this important legal issue. Nixon's promises to oppose forceful efforts at desegregation tied in with his thinking and rhetoric about the Court. He had apparently learned from 1960 that courting African-American voters would not pay electoral dividends. Later in the campaign, Nixon endorsed freedom of choice plans to undercut support for Wallace, even as he chose not to ridicule Wallace's explicit defiance and racism. The racial politics of the 1968 election ensured that the Republican Party would, thereafter, court white voters at the expense of reaching out to African-Americans.[125] Yet, just as the Court had lost patience with those who forestalled school desegregation, much of the country had lost patience with the Court. Nixon's victory would seemingly help begin the effort to slow down if not reverse the era of liberal judicial activism.

Nixon's narrow election victory in 1968 featured important wins in electoral vote-rich states like California, Illinois, New Jersey and Ohio. He dominated in the midwest and west. Losses in Texas, Pennsylvania and New York did not help his electoral tally, nor did his "Southern Strategy" gather up all of the votes that would have made the results a more resounding Nixon triumph. Interestingly, in the five states that Wallace won in the South, Nixon only came in second in Arkansas and Georgia; Humphrey came in second in Alabama, Louisiana, and Mississippi. Nixon, it must not be overlooked, did win other states in the South. He won Florida, Kentucky, North Carolina, Tennessee, South Carolina and Virginia. Had Nixon not won the electoral votes in Florida, South

[124] *Green v. County School Board of New Kent County* 391 U.S. 430 (1968).
[125] On these points see Jeremy D. Mayer, *Running on Race: Racial Politics in Presidential Campaigns, 1960-2000* (New York: Random House, 2002), 74 and 92-94.

Carolina and Virginia he would not have had the necessary electoral votes to claim victory, thus throwing the election into the hands of the House of Representatives.

Nixon's attentiveness to crime and the Court certainly helped in the South. Attacking the Court presented a seemingly moderate but nonetheless effective means for Nixon to appeal to racial animosities and some of the sinister forces at work in the country.[126] The Warren Court had such influence over the duration of its existence that all of the sniping and attempts to counter its work dignified the efforts of one of the twentieth century's fiercest political campaigners.

Nixon's narrow 1968 triumph still represented a rebuke to the Warren Court. The manner by which Nixon had made the Court a campaign issue mattered as much as, if not more than, the narrowness of his win or simply combining the votes of Nixon and Wallace as further evidence of the victory of the anti-Court crowd. The Fortas fiasco and the ineffectual rebuttal from the Humphrey campaign also guaranteed that Nixon's "law and order" discourse proved an instrumental part of the campaign. Nixon's victory had arrived quite late for the anti-Warren Court crowd. Yet, Nixon did effectively employ the Court issue to put the Democrats on the defensive and to shore up support with conservatives working in and on the GOP. For the enemies of the Warren Court, it seemed that help had finally arrived.

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[126] In another example, he set up a false dichotomy between supposed establishment African-American voices and the rest who pressed for even more liberalism. Liberalism, in this conception, involved handouts and the continued expansion of the apparent commitment to social welfare, seen most recently with the Great Society. Nixon in turn argued against any further growth for government in providing this safety net. Instead he called for means by which African-Americans could participate more completely in private enterprise, risk and reward. On the campaign trail he clearly appealed to racial divisiveness and appealed to the conservative animus against social welfare programs. That he would later come out with his Family Assistance Program understandably upset conservatives. See May 16, 1968, "A New Alignment for American Unity," CBS Radio Network Address, Campaign 1968 Collection, Campaign Literature, Box 1, RNL.

With Nixon's victory, conservatives had reason for optimism; they seemed to have found a winner. Conservative leader John Ashbrook enthusiastically welcomed the Nixon victory, telling one constituent that Nixon had created the hope of new, tough positions on crime and in foreign affairs.[127] Not long after the election, Ohioan John Schaffer wrote to Ashbrook that "the most important thing that needs to be done right now is a reform of the Supreme Court." Unsurprisingly, Ashbrook agreed with Schaffer; reliably conservative Americans would have also.[128] How this might come about was far less clear, but Earl Warren had already attempted to retire in 1968. The failed effort to replace him already represented a substantial liberal blunder. The Court's foes could see that Nixon would, upon Warren's eventual re-retirement, put someone of an entirely different legal and political philosophy at the head of the Court.

[127] Congressman John Ashbrook to Murray Bullock, December 18, 1968, JAC, Box 4, Folder 21.
[128] John C. Schaffer to John Ashbrook, December 3 1968, and John Ashbrook to John C. Shaffer, December 13, 1968, JAC, 1969 Congressional Office Files, Box 7 (emphasis in original).

Epilogue

It is vitally important . . . that there be a reversal of the role Supreme Court has assumed during the past 15 years.[1]

Except for the contribution he may be able to make to the cause of world peace, there is probably no more important legacy that a President of the United States can leave in these times than his appointments to the Supreme Court.[2]

From the outset of Richard Nixon's presidency he continued to draw upon the rhetoric of unity that in fact augured divisiveness. For instance, in speaking to Department of Justice (DOJ) employees only a few days after his inauguration he provided a pep talk about the importance of law enforcement to Americans. DOJ employees, unsurprisingly, did not hear about his animosity for bureaucrats. What they did get were comments that fit with his rhetoric from the law and order campaign. After lauding his Attorney General choice, John Mitchell, Nixon said: "There has never been a time in this nation's history when more Americans were concerned about the enforcement of law and reestablishing not only respect for law but law that deserves respect, and that means how the laws are enforced will bring that respect." Furthermore, he confidently predicted that "there will be virtually no index of the success of this administration that will be more closely watched than what happens in the conduct of the enforcement of the law by the Department of Justice."[3]

Yet, that Nixon made these comments, to a DOJ audience no less, is significant for numerous reasons. First, Mitchell's shopworn comment that those who followed the

[1] Quote from Harry Byrd Jr., *Congressional Record*, October 15, 1969, 30156.
[2] Richard Nixon, "Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr. and William H. Rehnquist to Be Associate Justices of the Supreme Court of the United States," October 21, 1971, *Public Papers of President Nixon* (hereinafter *PPPN*).
[3] "President Nixon Remarks to Employees at the Department of Justice," January 30, 1969, *PPPN*.

administration should "watch what we do, not what we say" perfectly illustrates the hollowness of Nixon's remarks. Second, he relied on this theme time and again in his first year in the White House, notably making similar references during his announcement of his nominee to replace Earl Warren. Finally, and most importantly, Nixon's presidency featured many things, but "respect for the law" was not one of them. If the Warren Court had, as its manifold critics alleged, damaged respect for the law and stable constitutional government, the individual who benefited most from the opposition to the Supreme Court and sought to remake it, damaged respect for the law and public trust for government far more than any of the high profile Court rulings. Thus, one of the most consequential Warren Court critics provided an unsavory coda to the entire Warren Court era. The individual who had campaigned against the Court and then had the opportunity to appoint four justices, provided yet another failure for those who had hoped that a rival branch of government could help turn the country away from the Warren Court's legal liberalism. Richard Nixon's victory seemed to portend that the Warren Court era would soon expire. Yet, something happened along the way to this supposed expiration. Controversies, constitutional or otherwise, continued to develop over the Court's work. Conservatives recognize, to this day, that they cannot let the legacy of the Warren Court diminish. The Warren Court remains a contested Court that merits disapproval. This disapproval survives even though evidence since the Warren Court era confirms both the Court's moderation and estimable contributions to successful social and political improvements in the country. Plausibly, we can say that American conservatism and its views on the federal judiciary since the Warren Court era are, in fact, inseparable from that era.

Had Nixon cared to do so he could have made a contribution to an estimable conservative philosophy on judicial power and the role of the Supreme Court. Over the previous fifteen years some of the Court's critics had tried to frame their criticisms around legitimate concerns over the role the Court should have in a healthy, representative democracy that valued tradition as much as innovation, individual liberty as much as societal cohesion. Most of the critics, however, had lamented outcomes and rulings, not that litigation, interests and the country's essential conservatism had put the Court in the unfortunate position of reforming the country via judicial decree. Nixon on the campaign trail and as he had the opportunity to change the composition of the Court, all in his first term, sought to criticize (and possibly invalidate) the excesses of the Warren Court not repair the country's deteriorating relationship to its highest judicial body. The thirty-seventh president ensured that politics, recriminations and a conservative brand of judicial activism would become the order of the day, particularly in the years following his own departure from Washington, D.C. In the short-term his appointments at least satisfied conservatives and the Court's critics, but key high-profile rulings ensured that the Warren Court era did not end with Earl Warren's retirement.

Continuity, at least in the short term, existed with the Supreme Court's membership. Earl Warren remained on the Court one term longer than he had planned. Ardent supporters of the chief justice encouraged him to stay on the bench. After the election and on into the Court's 1968 term he encountered an ample supply of laudatory messages from Americans. Californian Tom Atha, for instance, expressed directly a sentiment that others indicated less directly; Atha bluntly "hope[d] you will <u>not</u> leave the

Court to a Nixon appointee."[4] Nixon's victory had disheartened some Court-watchers, but they expected the same outcome as those who despised Earl Warren and the most dangerous branch. Observers, far and wide, recognized that the new president would likely have a chance to create a "Nixon Court." Court-watcher Alexander Bickel, for instance, told fellow Frankfurter clerk and Justice Department attorney Philip Elman, that "Nixon looks to have the most striking opportunity to remake a Court since Taft"[5] Warren's departure from the bench following the 1968 term provided the new president his first of an eventual four chances to re-make the Court.

Those on the Right expected Nixon to live up to his campaign promises. As commentator James Kilpatrick put it, the appointment of a justice who "leans toward free and easy construction of the Constitution" would evidence a vital strike against Nixon's conservative supporters. While Nixon could assuredly take into account other factors in his appointments, the legal worldview of such appointments had to emerge as pre-eminent to satisfy the conservative Court critics who had supported Nixon.[6] That acceptable worldview, above all else, had to involve notable opposition to the Warren Court's way of doing things. Former President Eisenhower advised Nixon to name Eisenhower's trusted Attorney General Herbert Brownell. If Nixon chose, for whatever reason, not to accept that suggestion, Eisenhower nevertheless encouraged him to elevate Associate Justice Potter Stewart to the top spot.[7] Brownell, however, would have been

[4] John Atha to Chief Justice Earl Warren, December 10, 1968, Library of Congress, Manuscript Division, Earl Warren Papers, Box 107 (emphasis in original).
[5] May 21, 1969, Alexander Bickel to Philip Elman, Yale University, Sterling Library, Alexander Bickel Papers, Series I, Box 10.
[6] James Jackson Kilpatrick, "Conservatives Watching Nixon's Court Choice," *Washington Star*, April 8, 1969, A-11.
[7] Dwight Eisenhower to Richard Nixon, December 13, 1968, Box 39, Nixon Presidential Returned Materials Collection, White House Special Files (WHSF), Richard Nixon Library and Museum, Yorba Linda, California.

unacceptable to Nixon's supporters from the South.[8] Thomas Dewey's name also circulated. The two-time Republican presidential candidate from 1944 and 1948 declined Nixon's offer, preferring instead to serve as an informal advisor.[9] Nixon loyalist Charles Rhyne, William Rogers and John Mitchell also had their names circulate as possibilities.[10] Nixon chose to go in another direction, selecting an unmistakable champion for the "law and order" cause. Federal judge and clandestine campaign advisor Warren Earl Burger received the nomination on May 21, 1969.

The Warren Court's congressional critics applauded the nomination of Burger. For instance, Senator John Tower (R-TX) acknowledged that Nixon had picked someone with "a reputation as a hardliner on criminals."[11] Not even three weeks later Burger earned confirmation from the Senate over only three dissenting votes. Fittingly, the liberals in the Senate not only provided their votes for Burger but also failed to contribute to the debate over the Warren Court. Few could blame them. They had little chance since the Judiciary Committee, still under the command of James Eastland, staged perfunctory hearings and the floor debate lasted three hours. Warren Burger had no difficulty assailing the Warren Court or in encouraging the Nixon campaign to do so. His nomination, however, benefited from an environment in which the Warren Court had overstayed its welcome. His record was clear; there was little need to interrogate someone who had built up his judicial pedigree in opposing the putative excesses of the Warren Court. Assailing the Warren Court continued to be easier than defending it. The

[8] Stephen Ambrose, *Nixon: The Triumph of a Politician, 1962—1972* (New York: Simon & Schuster, 1989), 274.
[9] Richard Norton Smith, *Thomas E. Dewey and His Times* (New York: Simon & Schuster, 1982), 631.
[10] For instance, see, Fred P. Graham, "Crucial Choice for Nixon: A New Chief Justice," *New York Times*, May 4, 1969, E7.
[11] "Nixon Nominates his Chief Justice," *Los Angeles Times*, May 22, 1969, 1.

Nixon White House, however, should not have misread the easy confirmation of Burger. Soon enough, liberals and others uneasy with the Nixon White House received an opportunity, which they used not so much to defend the Warren Court's legacy as to thwart, at least temporarily, the obvious effort to remake the Court.

Burger's presence alone, some anticipated, could be instrumental. Critics had afforded particular attention to the 5-4 decisions of the Warren Court era, particularly recent rulings on the rights of the accused. Hugo Black's wildcard status, in conjunction with Harlan, Stewart and White's willingness to support conservative rulings, meant that Burger's presence at the outset of the term in 1969 seemed to provide a glimmer of hope for opponents of the Warren Court. Nixon seemed to have lived up to his campaign promises. Burger's selection and confirmation, in the words Patrick Buchanan wrote to William Rusher, served "as conclusive evidence of the President's rigid adherence to the pledges of the late campaign."[12] Already conservatives had expressed disappointment over other high profile appointments in the initial months of the Nixon presidency. No complaints developed over Burger's selection.

Nixon's liaison to conservatives had little need to remind or exaggerate the symbolic importance of the Burger nomination. Conservatives recognized the importance without the prodding of the White House. John Ashbrook, for instance, thought highly of the selection. He commented to one constituent that Burger had the right credentials and would not be predisposed to have the Court overstep its role. He hoped that Nixon might look to state courts for future appointments of individuals who

[12] Patrick Buchanan to William Rusher, (no date but likely May 21 or 22, 1969), William Rusher Papers, Manuscript Division, Library of Congress, Box 13.

also would help the Court reach the right decisions on criminal procedure.[13] Appointing Warren Burger, according to the American Conservative Union, "fulfilled the first installment of his [referring to Nixon] 1968 campaign pledge to reverse the liberal trend of the Supreme Court."[14] That the Nixon White House could expect support and received it from conservatives for such an appointment reveals how important the Warren Court had become to the politics of the era.

The opportunities to replace justices did not end with Chief Justice Warren's retirement. Abe Fortas's financial indiscretions combined with the collusion of the Nixon White House and anti-Court critics in Congress helped drive Fortas from the bench. Financier Louis Wolfson had provided a $20,000 retainer to Fortas in 1966, with an initial understanding that Fortas would receive the same fee every year thereafter for his consultancy. The fee would, even on Fortas's death, continue to go to his wife and prominent attorney, Carol Agger. Fortas, in June 1966, extricated himself from the consulting relationship, but did not do so until after learning that Wolfson was under investigation by the Department of Justice.[15] Wolfson would later be indicted and convicted for violating securities laws and perjury. Public disclosure and knowledge of this relationship by the media and the Warren Court's foes put Fortas on the defensive. The appearance of impropriety mattered far more than actual impropriety on his behalf. Under the threat of impeachment and with wavering support from his own colleagues, Abe Fortas resigned on May 14, 1969.[16]

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[13] John Ashbrook to Irene Nolan, July 22, 1969, Ashland University Archives, John Ashbrook Collection, 1969 Congressional Office Files, Box 7.
[14] "A New Direction for the Court," *Republican Battle Line*, May 1969, 7.
[15] For background see Laura Kalman, *Abe Fortas: A Biography* (Yale University Press, 1990), 373-375.
[16] The actual announcement occurred the following day.

But that his own departure from the bench received a fiendish assist from the Nixon White House and John Mitchell further revealed a chosen continuity in the country's relationship to the High Court. For years, the Warren Court's critics had made the defensible criticism that the Court had become too involved in the political life of the country. Yet, Nixon and the enemies of the Warren Court chose to perpetuate the politicization of the Court by working to remove Fortas. The same year as Fortas resignation, this trend continued with the efforts, spearheaded by Representative Gerald Ford (R-MI), to impeach Justice Douglas. Though the efforts to oust Douglas failed, they represented one more effort to strike back at the Warren Court.

Changes were afoot also. Already such change had come from the successful delay (and hence defeat) of Fortas's 1968 nomination to replace Warren. His removal, as much if not more than the 1986 Ronald Reagan era defeat of the Robert Bork nomination, served as a key moment in ensuring that future nominations to the Court would receive increased scrutiny. What followed Fortas's resignation, however, truly revealed the cynicism of the Nixon White House and the dire consequences of an environment of recriminations over the Warren Court. Instead of benefiting from the Fortas resignation, the Nixon White House made two failed attempts to replace him, and in the process provided parallels to the foolish errors made by the Johnson White House during the Fortas fiasco of 1968.

With the appointment and easy confirmation of Warren Burger in the summer of 1969, one could have expected Nixon to fill the other opening Fortas's departure had

provided and any other future slots with ease.[17] Preoccupied with managing the first troop withdrawals from South Vietnam, the promulgation of the "Nixon Doctrine" and Nixon's only trip to Vietnam in July, the White House waited for over three months before announcing a replacement for Fortas. Nixon had been expected to name a "strict constructionist." Strom Thurmond had already made headlines in endorsing Donald Russell, a District Court judge and former South Carolina governor. And though other names circulated, the White House paid some debt to Thurmond and the South in August 1969 by naming South Carolinian Clement Haynsworth. A twelve-year veteran of the United States Court of Appeals for the Fourth Circuit, Haynsworth faced the sustained resistance of liberal interest groups and a large portion of the Senate. Principally, the opposition relied on the judge's own record, including a perceived anti-labor bias in certain key rulings, rulings that strayed from an acceptable course on school desegregation and his unwillingness to disqualify himself from cases in which he had at least a discernible, if not substantial, financial interest.[18]

Although the Nixon Administration dismissed the comparisons to the prior problems that had led Fortas to resign, contemporaries realized that opposition to the Haynsworth nomination drew some inspiration from the Fortas defeat in 1968 and departure from the bench the following year. After the Judiciary Committee hearings had finished in late September, the Committee endorsed Haynsworth with a narrow 10-7 vote. Democratic Senator Birch Bayh, perhaps seeking to compensate for his own cynical embrace of "law and order" politics, emerged as the ringleader of the efforts to defeat the

[17] For a brief narrative of Nixon's appointments consult Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*, (Lanham, MD: Rowman & Littlefield Publishers, 1999).
[18] For background see John P. Frank, *Clement Haynsworth, the Senate, and the Supreme Court* (Charlottesville: University Press of Virginia, 1991).

nomination. On October 8, 1969 his office released a bill of particulars outlining the varied ethical questions involving Haynsworth and his past judicial behaviors. The prefatory remarks to the bill of particulars recognized the importance of "public confidence in the integrity of the federal judiciary." Without saying so directly, the remarks clearly drew inspiration from the circumstances that had led to Fortas's resignation.[19] Supporters of Haynsworth, unsurprisingly, condemned the effort to deny his confirmation as solely rooted in an opposition to his judicial worldview. With considerable hypocrisy, Nixon rejected the notion that judicial philosophy alone could serve as a justifiable reason for any Senator to reject a nominee (ignoring that it had served as a fundamental factor in his selections.) After all, Nixon realized that Haynsworth, much like Burger, maintained views of the Constitution and its interpretation that were clearly in opposition to those of the Warren Court's liberals.[20]

Tellingly, however, Republican defections portended problems not only for Haynsworth but also for the later appointment of G. Harrold Carswell (and the administration generally). Already facing off against a Democrat controlled Congress, Nixon could scarcely afford to have Republican senators abandon him on key matters. Yet, the charges leveled against Haysnworth, in conjunction with the heightened interests in any perceived ethical lapses in a nominee's past, helped ensure some GOP discontent. As an example, Senator Margaret Chase Smith (R-ME), a moderate Republican and the only woman in the Senate in 1969, warned the White House that she could not in good conscience support Haynsworth; her prior opposition to Fortas, she argued, necessitated

[19] "Statement by Senator Birch Bayh," October 8, 1969, Wells Library, Indiana University, Birch Bayh Papers, Press Files.
[20] Richard Nixon, "Remarks at an Informal Meeting With Members of the White House Press Corps on Judge Haynsworth's Nomination to the Supreme Court," October 20, 1969, *PPPN*.

such consistency. Whatever mitigating evidence existed could not quell the doubts over Haynsworth's fitness to serve on the Court. However much the administration had to proceed with a most important goal of instilling "desperately needed confidence in the Supreme Court and the judiciary," it had to do so with a different nominee. Like many others, Smith relied upon the charges of ethical impropriety when she stated that Haynsworth's "admitted faulty judgment alone is sufficient for me to withhold my approval."[21] Ultimately, on November 21, 1969 the Senate turned down the nomination by a 55-45 vote. The administration could not win the support of key GOP senators from the North, vitiating the expected support it received from seventeen Southern Democrats who had waited for years to see a conservative Southerner sit on the Court. The Court had already begun the 1969 term without a full complement of justices; Nixon's next choice ensured that the Court would remain that way until June 1970.

Instead of recognizing its weak political hand, the Nixon White House doubled-down with another nominee from the South, appointing Federal District Court Judge G. Harrold Carswell on January 19, 1970. Haynsworth had been a controversial choice; Carswell, on the other hand, managed to make Haynsworth seem like an ideal nominee. Almost immediately the nomination encountered trouble. Opposition to Carswell centered on his votes in key civil rights cases, his slim judicial and intellectual pedigree, his involvement in the incorporation of a private Florida golf club in 1956—ostensibly to avoid integration—and an old speech he had made about segregation. Later revelations about a racially restrictive covenant (a contract provision seemingly outlawed in the late 1940s) also seriously hampered his chances. In his capacity as an appellate judge, he often encouraged a much slower approach to achieving desegregated schools.

[21] *Congressional Record*, October 8, 1969, 29041-29042.

A Georgia native, Carswell simply could not escape a past that the Warren Court had helped make far less acceptable for a public figure, particularly one who hoped for election or appointment to high national office. His racist past was simply too much to overcome. Interest groups kicked off a spirited campaign to defeat the nomination. The Leadership Conference on Civil Rights declared, amidst the Judiciary Committee hearings in January and February, the nomination "an open insult to American minority groups."[22] Truer words may have been spoken before and since, but Carswell's nomination was also an "insult" to the liberal jurisprudence that had made tremendous contributions to the civil rights and liberties of countless Americans. The battle that followed over the next two months might have ensured that Nixon earned plaudits as a defender of the American South. What it did not do, however, is ensure that a Court that for so long had attracted foes because of its over-involvement in the political process, would step back from the edge that it supposedly reached long ago.

In the end, Carswell could muster no more votes than Haynsworth had, suffering a 51-45 rebuke by the Senate. Senator Walter Mondale (D-MN) expressed satisfaction to Arnold Aronson and Marvin Caplan of the Leadership Conference on Civil Rights, a group that had been instrumental in defeating the nomination, that "at least some things go right around here every now and then."[23] Conservatives too believed something had gone right—even amidst a defeat. Some even recognized that the failed appointments would only help ensure that Nixon would be viewed as a friend in the South. Nixon, after all, had appointed one of their own. Such a view gave consent to the institutional,

[22] Arnold Aronson to Participating Organizations, Memorandum 2-70, January 30, 1970, Library of Congress, Manuscript Division, The Records of the Leadership Conference on Civil Rights, I: Box 117 (hereinafter RLCCR).
[23] Walter Mondale to Arnold Aronson and Marvin Caplan, April 29, 1970, RLCCR, I: Box 117.

political and grassroots racism in that region. That a region of the country might provide a president its support as consequence of a failed Court nomination confirms the importance of the Supreme Court in the era.[24] Yet, in doing something right, both Senate liberals and conservatives had now bequeathed a poisonous legacy over High Court appointments to future generations. Following the April 8, 1970 vote, the Nixon administration did not miss the opportunity to play up the political gains the setback allowed. Years later Nixon described the impetus for his comments as "cold and reasoned anger," but one cannot ignore the political dividends the language might accrue for the White House.[25] Nixon bemoaned the anti-Southern bias and opposition to his court choices. Both nominees, he bellowed to the press, had been unfairly labeled as bigots and enemies of civil rights.[26] Angrily he remarked:

> I have reluctantly concluded—with the Senate as presently constituted—I cannot successfully nominate to the Supreme Court any Federal appellate judge from the South who believes as I do in the strict construction of the Constitution. Judges Carswell and Haynsworth have endured with admirable dignity vicious assaults on their intelligence, their honesty, and their character. They have been falsely charged with being racists. But when all the hypocrisy is stripped away, the real issue was their philosophy of strict construction of the Constitution, a philosophy that I share, and the fact that they had the misfortune of being born in the South. After the rejection of Judge Carswell and Judge Haynsworth, this conclusion is inescapable.[27]

Less than a day after the Carswell setback, Nixon made a more prudent choice for the High Court. He decided upon the life-long friend of Burger, Minnesotan Harry Blackmun. Blackmun, like Burger, had served as a Federal Appeals Court judge, having received the appointment to the Eighth Circuit in 1959. Though Blackmun had garnered

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[24] "In Re Carswell," *National Review Bulletin*, April 28, 1970, B57.
[25] Richard Nixon, *The Memoirs of Richard Nixon* (New York: Warner Books, 1978), 523.
[26] "After the Carswell Defeat—Nixon's New Strategy," *U.S. News & World Report*, April 20, 1970, 19-20.
[27] April 9, 1970 "Statement About Nominations to the Supreme Court," John Woolley and Gerhard Peters, *The American Presidency Project* [online], <http://www.presidency.ucsb.edu/ws/?pid=2456>.

a tentative job offer on April 9, the official announcement did not occur until April 14. Both the media and opponents of the last two nomination provided favorable comments on the nomination. Good sense seemed to have returned to the process. Perhaps Nixon's two failed Court appointments, in addition to the problems with Fortas, had exasperated enough people so that the Senate was just ready to move on. Whatever the motivations, Blackmun was a superb choice. He earned the unanimous consent of the Senate in a May 12 vote.[28]

Years later, Nixon admitted that he did not want similar problems with his replacements for Hugo Black and John Harlan.[29] He would have been foolish to do otherwise. The Black and Harlan departures created a void on the court as it opened its 1971-1972 term. The two Supreme Court legends had retired within one week of each other in September 1971. Harlan had advocated, for the most part in the high profile decisions, positions unpersuasive to the majority of the Warren Court. He had inherited Frankfurter's position as the apostle of restraint. Nevertheless, Harlan remained tremendously well-liked on the Court even as he opposed many of the liberal rulings. Black had grown increasingly cantankerous, but he had served on the Court since 1937, long enough that his jurisprudential views had traveled a road from deviant, then dominant and finally almost impossible to categorize.

The Court began the term with only seven members. Observers recognized the importance of two more appointments all within Nixon's first term. Some wondered if the Court would be willing to continue to hold a place in the constitutional system as an

[28] Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (New York: Times Books, Henry Holt and Company, 2005), 46.
[29] Nixon, *supra* note 25, 523-524.

arbiter of governmental power and protector of individual liberties.[30] Arguments from some liberals that Nixon should not make two appointments, a year before the 1972 election, earned nothing but derision from conservatives. The situation with LBJ in 1968 had featured a lame duck president and the dishonest direction of the process. Further, the suggestion that Nixon should pair an administration choice with another nominee acceptable to liberals was a horrible idea, and would violate, as William F. Buckley Jr. put it, Nixon's "pledge to do his best to restore equilibrium to the federal system."[31] The Haynsworth and Carswell defeats were regrettable but not, for those who hoped to bury the Warren Court, disastrous enough to require deals with liberals both in and, more importantly, outside of Congress.

Speculation for one of the appointments focused on Richard Poff, whose Republican Task Force on Crime had proved an able accessory to Nixon's 1968 campaign. The Virginian fulfilled numerous expectations for Nixonian judicial appointments. Most notably, he was a Southerner, a devout law and order advocate and relatively youthful at forty-seven. But with Poff's name in circulation, many civil-rights leaders promised to oppose his nomination. Instead Nixon chose another Southerner, former ABA president Lewis Powell to replace Harlan. (The Powell appointment confirmed that Nixon could indeed appoint a Southerner, regardless of what he had said in his April 1970 reaction to the Carswell defeat.) To replace Black, Nixon selected the youthful former clerk to Justice Robert Jackson and current Assistant Attorney General, William Rehnquist.

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[30] Alan M. Dershowitz, "They Will Affect the Nation For Years to Come," *The New York Times*, September 26, 1971.
[31] William F. Buckely Jr., "Two Whats for the Supreme Court," *Washington Star Syndicate*, October 9, 1971.

Nixon's October 21 televised announcement of his two appointments contained little of the rancor of his speech from seventeen months prior when he excoriated the opponents of the Haynsworth and Carswell nominations. He made, however, one of his most explicit public pronouncements on his reasons for choosing his candidates. The context of his deteriorating relations with conservatives made this explicit statement all the more necessary. After all, prominent conservatives had already announced that July that they had suspended their support for Nixon. Reasons involved issues both domestic and foreign, but Nixon had governed in such a way that challenged the commitments he had made in 1968. The *National Review* stated: "We consider that our defection is an act of loyalty to the Nixon we supported in 1968." [32] Conservatives were still unwilling to accept that campaigning and governing were separable components of presidential politics.

After commenting upon the forces that had encouraged him to nominate someone from the Senate—ostensibly to fill Black's seat—and the similar forces seeking a women justice, Nixon spelled out two criteria he felt most important. For one he spoke of only appointing the most qualified of candidates—something the Carswell nomination had belied and now perhaps helped mandate. Second, he extolled a judicial philosophy involving the "duty of a judge to interpret the Constitution and not to place himself above the Constitution or outside the Constitution."[33] Powell and Rehnquist were confirmed within four days of one another in December 1971. With the painless confirmation of Powell, who garnered no dissenting votes, and the confirmation of Rehnquist, who despite the late emergence of his memorandum "A Random Thought on the Segregation

[32] "A Declaration," *National Review*, August 10, 1971, 842.
[33] *A New Road for America: Major Policy Statements, March 1970 to October 1971*, (Garden City, New York: Doubleday & Company, 1972), 609.

Cases" for Justice Jackson, nonetheless received only twenty-six dissenting votes, the administration seemed well on its way to creating a "Nixon Court."[34]

Yet, while Nixon had clearly remade the Court, the Court he made did not simply undo the Warren Court's work. In their first term, the Nixon appointees voted together frequently. With Justice Stewart and White, the four new appointees, if they remained a voting bloc, could overwhelm Warren Court liberals Brennan, Douglas, and Marshall. Something happened, however, on the way to this jurisprudential counter-revolution. A Court reconstituted to challenge the jurisprudential liberalism of the past fifteen years produced, in the short-term, notable rulings that, if anything, seemed to fit the mold of the past rather than a conservative future.

While the "new" Supreme Court curtailed its support for school desegregation efforts, failed to provide an open venue for varied civil rights claims, reigned in the alleged absoluteness of the "one-person, one-vote" principle in legislative districting, refused to entertain challenges to the Vietnam War and did stem some of the more favorable tendencies to criminal defendants that the Warren era had unleashed, the new Court was, on the whole, hardly as anti-Warren Court as its original supporters had hoped it would be. As Bernard Schwartz has noted, "the Burger Court's main significance was its consolidation and continuation of the Warren heritage."[35] Notably, we can see in the areas of capital punishment, the right to counsel, gender discrimination and privacy, rulings that suggested that a legal counter-revolution was not yet under way. In fact, early rulings in *Furman v. Georgia*, *Argersinger v. Hamlin*, *Frontiero v. Richardson* and

[34] For background on Rehnquist's appointment see John Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court* (New York: Free Press, 2001).
[35] Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* (Reading, MA: Addison Wesley Publishing Company, 1989), 413.

Roe v. Wade, cases decided with the participation of all four Nixon appointees, produced results that encouraged liberals.[36] The four Nixon appointees stood together in dissenting in *Furman*, a case which put capital punishment in legal limbo until the 1976 ruling of *Gregg v. Georgia* provided the Court's renewed endorsement of the practice.[37] But *Argersinger* featured a unanimous Court extending the right to counsel to misdemeanor offenses; *Frontiero*, decided over the dissent of Rehnquist, established that gender discrimination challenges should be subject to at least a heightened standard of scrutiny; *Roe v. Wade*, announced in January 1973 over the dissent of Rehnquist and White, established that a right to have an abortion, at least in the first trimester of pregnancy, was a right that all women had.

The acknowledgment of a failed short-term counter-revolution of the Nixon Court is now the conventional wisdom. What we must also consider, however, are the ramifications of the failure to bring about a substantial change in the politics of the Supreme Court. If the Warren Court truly had crowded out other political actors, as some had plausibly argued, then subsequent appointments and the debates around the Court should have involved every attempt to de-politicize the Supreme Court. This assuredly has not occurred. An institution with limited power depends upon the consent and support of the rival branches of government. It also depends upon the respect, if not veneration, of the public. Nixon did little to contribute to this important component of constitutional law and politics. The Court tried, notably in upholding the rule of law in cases and controversies surrounding the Watergate scandal. Be that as it may, after his

[36] *Furman v. Georgia*, 408 U.S. 238 (1972); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).
[37] *Gregg v. Georgia*, 428 U.S. 153 (1976); on the country's temporary flirtation with ending capital punishment see Stuart Banner, *The Death Penalty: An American History* (Cambridge: Harvard University Press, 2003), 231-307.

exit from the White House Nixon, in his 1978 memoirs, contended that similar to "many legal and political moderate conservatives, I felt that some Supreme Court Justices were too often using their interpretation of the law to remake American society according to their own social, political, and ideological precepts."[38] Elsewhere in his post-resignation non-mea culpa he described himself as one who held a "conservative judicial philosophy."[39] His commitment to this way of thinking had been conditioned as much as anything by his obvious need to appeal to conservatives and the extent to which they recognized the Warren Court as a contestable political concern. In many ways, one of the most important contributions of the Nixon campaign in 1968 and the appointments thereafter was that any conservative view of the Supreme Court would be bound up in assumptions, grievances and the contested moments of the Warren Court era.

That legacy continues to have an influence to the present. Even after his exit from the White House, Nixon felt compelled to remind future generations that he had been and continued to be a sound conservative. Even the disgraced former president, who had governed not only to the detriment of the country but to the detriment of his own relationship with American conservatives, made a contribution to the conservative prescriptions that have dominated political debate over the past four decades. He did this in making sure this "philosophy" existed, primarily, as one in opposition to the Warren Court. What he or others in the anti-Warren Court crowd did not do, however, is help fashion a suitable and workable definition of a "conservative judicial philosophy" that borrowed from the meritorious concerns over the actual limits to judicial power. Courts alone cannot convince the body politic that the interpretations of judges are estimable and

[38] Nixon, *supra* note 25, at 517
[39] *Id*. at 525.

worth supporting; they require the support of other actors and forces in the democratic process. Conservatives have forgotten, to their own detriment, that the failures and, in many respects, conservatism of the country in the 1950s and 1960s required the Court to push the country along. Yet, rather than arguing for judicial minimalism, conservatives on to the present are often apologists for judicial activism when such activism serves the policy and legal outcomes they support. We are still waiting for a better definition of this "conservative judicial philosophy."

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