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# AN UNABASHED LIBERAL LOOKS AT A HALF-CENTURY OF THE SUPREME COURT

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*The author is a civil rights attorney who describes himself as a “superannuated Court-watcher” and “an unabashed liberal.” Joseph Rauh served as a law clerk to two Supreme Court Justices in the days when the Justices’ chambers were in their own homes, and later, as an advocate for civil rights before the High Court. From his own unique vantage point, he has observed over the past fifty years many things about which the rest of us can only speculate. Here he relates assorted anecdotes, observations, and admonitions, along with his own personal history of the last half-century of the Supreme Court.*

I have spent much of the last half-century in and about the United States Supreme Court — as the last law clerk to Justice Benjamin N. Cardozo and the first law clerk to Justice Felix Frankfurter back in the 1930s; as a frequent advocate before the Court in open and closed sessions; as a participant in the confirmation process of Court nominees; and as a defender of the Court as it withstood right-wing onslaughts. This Essay is a recital of that experience and attempts to portray the Justices not as mythological supermen but as human beings, warts and all. This essay is my attempt at a personalized history of the Supreme Court from the presidency of Franklin Roosevelt to the present, accompanied by my own opinions, musings, and advice.

I have discovered that if one lives long enough, everything comes around twice. When I became Justice Cardozo’s law clerk in the summer of 1936, a conservative majority of the Supreme Court was repeatedly invalidating President Roosevelt’s New Deal. The Court invalidated measure after measure designed to ameliorate the suffering during the worst depression in our nation’s history and to build a new “welfare state” insuring a modicum of economic right and justice for all Americans. So today, a half-century later, a new conservative and reactionary majority of the Supreme Court threatens rights under our Constitution as precious as those for which F.D.R. struggled in his day.

## THE HUGHES COURT, NEW DEAL & COURT PACKING

When I went to work for Justice Cardozo in 1936, the Court was hopelessly

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divided. The dominant faction consisted of four ultra-conservative Justices: Willis Van Devanter, appointed by President Taft in 1910 and no longer productive; James Clark McReynolds, appointed by President Wilson to get rid of him as United States Attorney General; Pierce Butler, a railroad lawyer appointed by President Harding in 1922, who spent an inordinate amount of his time and effort on the Court trying to reverse judgments against the railroads under the Federal Employers Liability Act; and George Sutherland, another Harding appointee of that year and a former Republican Senator who had fought against Louis Brandeis's confirmation in 1916.

Against this bloc stood the three liberals: Brandeis, the people's attorney, appointed by Wilson in 1916; Harlan Stone, former dean of the Columbia Law School and United States Attorney General, appointed by President Coolidge in 1925; and Benjamin Cardozo, the Chief Judge of the New York Court of Appeals, appointed by President Hoover in 1932.<sup>1</sup>

Hostility between the two blocs was inevitable and open. They even held intra-bloc "skull practice" regularly.<sup>2</sup> The four conservative Justices rode in the same automobile to and from the Supreme Court building for oral arguments and for the Saturday conferences of all nine Justices at which they decided the cases. To compete with these regular get-togethers of the conservatives, the liberals began to meet at Brandeis's home on Friday evenings to plan their strategies for the Saturday conferences. I always waited until Justice Cardozo returned to his apartment so I could get a full report on the liberal warm-up. I never found the Justice more unhappy than on the few occasions when Brandeis or Stone announced that they were not going to join his dissent in a particular case the following day, despite their belief that the majority was going to decide the case wrongly.

The balance of power, of course, lay with the other two Justices, Chief Justice Charles Evans Hughes and Associate Justice Owen Roberts. When Chief Justice Taft retired in 1930, there was considerable speculation about who would be named as his successor. Justice Frankfurter later relayed to me the story of Hughes's nomination as told to him by Joseph Cotton, Hoover's Under-Secretary of State. A meeting to discuss Taft's successor was held in Hoover's office, which Cotton attended. The President said he felt obligated to offer the position to Hughes, a former Associate Justice of the Supreme Court and the Republican standard-bearer in the 1916 presidential race. One of those present at the meeting told the President that he was safe in making the offer because Hughes would have to decline since his son, Hoover's Solicitor General, would resign his post as the government's spokesman before the Court if his father became Chief

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1. The appointment of so liberal a Justice as Cardozo by so conservative a President as Hoover was noteworthy for that reason alone. Moreover, Cardozo would be the second Jewish Justice on the Court and was already 62 years of age. But the Senate Republican leadership conveyed to Hoover its belief that the best politics for 1932 lay in choosing the best man for the Court, and Cardozo was almost universally acknowledged as the proper successor to the Olympian Holmes.

2. This is a widely used athletic term and quite apt here. Sometimes when the team can not practice outside, the coach will have the team "practice" inside by talking about the plays they will use in a game.

Justice. So Hoover called Hughes on the telephone and offered him the position of Chief Justice. After a short period of small talk, Hoover hung up the phone, blurting out, "The son of a bitch doesn't give a damn about his son's career."<sup>3</sup> Despite Senator George Norris's Senate floor attack on Hughes as the exemplar of "the influence of powerful combinations in the political and financial world,"<sup>4</sup> Hughes was confirmed fifty-two to twenty-six and became, at least in Justice Cardozo's opinion, a "brilliant and efficient Chief Justice but one without wisdom."

Roberts's road to the Court was an equally uncertain one. Shortly after the Hughes confirmation, Hoover's nomination to the Supreme Court of Federal Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit came before the Senate. Parker had upheld the so-called "yellow dog contract" against union membership.<sup>5</sup> This action, combined with his earlier ugly racist public statements, was enough to defeat Parker. Roberts, a prominent corporation lawyer who had been the prosecutor in the "Teapot Dome" scandal, became the ninth Justice. Together with Hughes, Roberts held the legal fate of the soon-to-be New Deal and much state social legislation in his hands.

Justice Roberts quickly became a fellow-traveller of the conservative four, with the Chief Justice swinging back and forth sufficiently to earn the sobriquet: "the man on the flying trapeze." The Court, in the hectic years of 1935 and 1936, invalidated President Roosevelt's National Recovery Act, Agricultural Adjustment Act, Railroad Retirement Act, and Bituminous Coal Conservation Act, as well as other New Deal legislation and administrative actions. These decisions, plus the Court's ruling at the end of the 1935-36 Term invalidating the New York minimum wage law,<sup>6</sup> not only killed the laws already considered, but threatened those enacted but untested such as the Wagner Labor Relations Act, the Social Security Act, the Holding Company Act, and bills on the drawing board, including a federal wage-hour child-labor law.

Something had to be done if the New Deal was to be saved and expanded. There was talk in the air about constitutional amendments, including expanding the commerce clause of the Constitution; prohibiting less than two-thirds of the Court from invalidating federal or state legislation; permitting a majority of the two houses of Congress to re-enact a law invalidated by the Court without further Court review of the law; and making laws passed by two-thirds of each House unreviewable.

Roosevelt's landslide re-election in 1936 settled the matter. He would act on the Court, but the constitutional amendment route was too slow for him. Shortly after the election, he referred publicly to Congress's power to enlarge the

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3. While I was in San Diego as Regents' Lecturer at the University of California, I had the good fortune to encounter Chief Justice Hughes' grandson, Professor Stuart Hughes. I told him this story which I had heard from Felix Frankfurter. He smiled and said, "Well, that story was certainly told often enough inside our family."

4. S. HENDEL, *CHARLES EVANS HUGHES AND THE SUPREME COURT* 79 (1951).

5. *International Org., United Mineworkers of Am. v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839 (4th Cir. 1927); see J. RAYBACK, *A HISTORY OF AMERICAN LABOR* 319 (1966).

6. *Morehead v. Tipaldo*, 298 U.S. 587 (1936).

Court and gave out hints that the time for action on the Supreme Court front was not far off. Nevertheless, Justice Cardozo seemed considerably shaken when, in early February 1937, just three months after the election, he came into the little room in his apartment where I worked to give me the news of the court-packing plan that President Roosevelt had just submitted to Congress. He said Roosevelt wanted to add a Justice for every one who did not retire after the age of seventy, up to a maximum of six. Cardozo at once spoke of his opposition to the court-packing plan, saying rather plaintively, "No judge could do otherwise." But, at least to me, there was no sign that his devotion to Roosevelt lessened one bit.

Roosevelt's original rationale for his court-packing plan was that the Justices were behind in their docket because they were too old to do their work. This theory simply did not hold water. The Court may have been doing its work too intrusively or too harshly, but it was not behind in its docket. Hughes's brilliance and administrative drive saw to that. This weak rationale hurt the President's cause.

I had a front row seat at the ensuing battle. On the surface, the adversaries were President Roosevelt and Senator Burton K. Wheeler. But at the working level, the adversaries were men who had once been bosom allies: Ben Cohen and Tom Corcoran took the Roosevelt side,<sup>7</sup> Justice Brandeis the other. Cohen and Corcoran, for whom I worked in 1935, stated repeatedly that they had not participated in the drafting of the original court-packing bill predicated on the age and inadequacy of six of the Justices. Cohen wrote Brandeis later in 1937, "Neither Tom nor I was consulted in the formulation of the Court proposals which the President did decide to sponsor . . . . Once the President's proposals were made, Tom and I worked for their adoption."<sup>8</sup> Although Cohen and Corcoran may have been more involved in the early stages than the letter to Brandeis implies,<sup>9</sup> they certainly disagreed with the initial age-inadequacy rationale for the bill and soon had that rationale turned around. Roosevelt began preaching the need "to save the Constitution from the Court and the Court from itself,"<sup>10</sup> stressing the importance of the New Deal legislative program and of having it *now*. Roosevelt began gaining ground.

But Justice Brandeis was also at work. Senator Wheeler's son Ed remem-

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7. See J. LASH, *DEALERS AND DREAMERS* 291-316 (1988) (relating the roles of Cohen and Corcoran, two very close advisors of President Roosevelt).

8. Letter from Cohen to Brandeis (July 30, 1937) (Box 13, Cohen papers, Library of Congress).

9. Warner Gardner, who worked closely with Attorney General Homer Cummings on the preparations of the Administration's court-packing plan, has written that "Cummings and I spent a morning with the ubiquitous Corcoran and Cohen, finding that they were in strong support and without suggestions for change." W. GARDNER, *The Public Path 1909-1947*, in *PEBBLES FROM THE PATHS BEHIND* 77 (1989). There is no record of this meeting in Cummings's diary, although there is a reference in his diary to the President telling him "he had tried it on Tommy Corcoran and the latter agreed it would work." J. LASH, *supra* note 7, at 293. As a fervent believer in Mr. Cohen's integrity and truthfulness, I suggest that the apparent contradictions may be explained by Corcoran and Cohen's unawareness of the age-inadequacy rationale for the packing as opposed to the packing itself.

10. H. COMMAGER, *DOCUMENTS OF AMERICAN HISTORY* 383-84 (7th ed. 1963).

bers how the opposition to the court-packing plan evolved. His sister Elizabeth had just had a baby. The Wheelers and Brandeis were close enough for a visit from Mrs. Brandeis to Elizabeth and the baby. During the course of the "courtesy" call, Mrs. Brandeis casually mentioned to Elizabeth that "Louis [Brandeis] agrees with your father." As expected, as soon as Mrs. Brandeis left, Elizabeth called her father, and Wheeler promptly arranged a meeting with the Justice. Brandeis then put Wheeler in touch with the Chief Justice. Out of that conversation came the Chief Justice's letter to Wheeler demonstrating that the Court was fully abreast of its work and that any increase in the number of Justices could only impair the Court's efficiency. Wheeler strengthened his attack on the bill before the Senate Judiciary Committee by presenting the letter from the Chief Justice. Hughes had only obtained the approval of Brandeis and Van Devanter for his letter to Wheeler, and I always had the feeling Cardozo was as opposed to the Hughes-Brandeis intervention as he was to the plan itself.

In any case, big goings-on occurred down at the Court. Shortly after Roosevelt announced his court-packing plan, Roberts publicly switched to the liberal side on the validity of state minimum wage laws, providing a five to four majority for the constitutionality of such a law from the State of Washington.<sup>11</sup> Many thought that the switch came as a result of F.D.R.'s proposal, but this hardly could have been the case. Roberts had cast his vote *for* the Washington law in conference before Roosevelt made his proposal. If Roberts was affected by any extraneous influence, it must have been the landslide 1936 election. While Mr. Dooley<sup>12</sup> put the proposition most ineloquently when he stated, "th' Supreme Court follows th' iliction returns," Roberts could well have been affected by the realization that F.D.R. was speaking for the hopes and aspirations of the vast majority of Americans.

Whatever the reason for Roberts's switch in the minimum wage law case, another switch soon occurred of such magnitude that its only possible explanation was the court-packing plan. In 1936, the Court by a six to three vote had ruled in *Carter v. Carter Coal Company*<sup>13</sup> that Congress's power over interstate commerce was not broad enough to support federal regulation of labor conditions in the mines. In February 1937, just days after Roosevelt made his proposal for restructuring the Court, advocates argued the constitutionality of the National Labor Relations Act of 1935 before the Court. At the ensuing conference of the Justices, the vote was five to four to uphold the law, both Hughes and Roberts switched from their position in *Carter Coal*. When Cardozo reported on the conference action during our ride home from the courthouse, he was elated by the switches. But about all that this kindly gentleman could bring himself to say in criticism was that he "considered it quite an achievement to make the shift without even a mention of the burial of a recent case." He did

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11. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

12. Mr. Dooley was a creation of U.S. humorist Finley Peter Dunne and much quoted in the early years of this century.

13. 298 U.S. 238, 297-310 (1936).

smile some time later when I told him the gag going around about "a switch in time saves Nine," but he never said anything like that himself.

When the decision upholding the Labor Act came down in April 1937,<sup>14</sup> the anti-New Deal conservative bloc knew that the gig was up. "Every consideration brought forward to uphold the act before us," McReynolds literally shouted as he read from his dissenting opinion, "was applicable to support the acts held unconstitutional in causes decided within two years."<sup>15</sup> Shortly after the decision, in early May, there was a knock on Justice Cardozo's apartment door; there was Justice Van Devanter asking to see Justice Cardozo. Minutes later, Cardozo brought me the news that Van Devanter was retiring. The judicial struggle against the New Deal was over.

Actually, Van Devanter had wanted to retire a few years earlier because he recognized his drastically reduced productivity. Had he done so, his action might well have obviated the necessity for any court-packing plan. But from what I gathered from Cohen and others, Van Devanter consulted Brandeis about his retirement, and Brandeis, after conferring with then-Professor Felix Frankfurter, urged Van Devanter to stay on the Court because of his valuable input in conference. I have never been able to understand this "valuable input in conference" talk; in all Cardozo's detailed reporting of the conferences, I never remember him even mentioning Van Devanter's name, although there were repeated references to what McReynolds, Sutherland, or Butler had said. The Brandeis-Frankfurter advice to Van Devanter was a judicial tragedy.

With the retirement of Van Devanter and the favorable action of the Court in the Labor Act case and in the Social Security cases soon afterwards,<sup>16</sup> the urgent need for the plan was over. Roosevelt could have declared victory and departed from the battlefield with his head held high. But he apparently had gone too far to turn back or, at least, thought he had.

On June 14, 1937, the Senate Judiciary Committee filed a report excoriating the President and his court-packing bill.<sup>17</sup> The bitterness of the Committee report is summed up in its last sentence: "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."<sup>18</sup> As Professor Leuchtenburg has related, however, two days later F.D.R. pulled a rabbit out of his hat.<sup>19</sup> The President invited all 407 Democratic Senators and Congressmen to picnic with him over the weekend at Jefferson Island, where he used his geniality and charm to his advantage.<sup>20</sup> The tide started to turn once again in his favor. The Admin-

14. See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

15. *Id.* at 77 (McReynolds, J., dissenting).

16. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937).

17. Senate Committee on the Judiciary, *Reorganization of the Federal Judiciary*, S. Rep. No. 711, 75th Congress, 1st Session, 1 (1937).

18. *Id.* at 23.

19. See Leuchtenburg, *F.D.R.'s Court-Packing Plan: A Second Life, A Second Death*, in *SUPREME COURT HISTORICAL SOCIETY YEARBOOK* 1988, at 80 (1988).

20. For an interesting account of the weekend at Jefferson Island and its effect on the President's plan, see *id.* at 81.

istration offered a new bill that looked more like a compromise than it really was. When debate on the bill opened in July, Democratic Majority Leader Joe Robinson indicated that he had the votes for passage.<sup>21</sup> Robinson's sudden death, apparently due to the unnatural heat of that summer coupled with the tension of debate, led to the bill's defeat.<sup>22</sup> The Senate voted to recommit the bill to the Committee, and that was the end of the struggle.

Justice Cardozo wrote me from his summer place just afterwards: "'It was a famous victory.' Have you any idea what I refer to?" Small wonder the Justice was jubilant. His opposition to the bill, even though on the theory that "no judge could do otherwise," had been vindicated. More importantly, he was on the verge of becoming the leader of a new liberal majority on the Court. Sadly, after only two months with the new Court, Justice Cardozo became ill and was bedridden. In July 1938, he passed away.

For myself, I thought then and I think now, that divine providence must have played a hand in what seems to me a perfect outcome of a venture that began so dubiously. The Roosevelt court-packing plan resulted in the change of course by Justices Hughes and Roberts, and their switch saved the New Deal. At the same time, the ultimate defeat of the plan after Joe Robinson's death prevented a dangerous precedent from threatening the stability of our constitutional legal system, which is based on the separation of powers and the independence of the federal judiciary. Both the effect of the plan while it was alive, and its ultimate death, are monuments to the resiliency of our democratic system. Senator Hiram Johnson's shout to the galleries, "Glory be to God," right after the Senate voted to send Roosevelt's bill back to committee was an appropriate ending for one of the most dramatic periods in the Court's history.<sup>23</sup>

A few interesting sidelights on the Hughes court: Chief Justice Hughes was the engine that made the Court function. In the conferences of the Justices, he opened the consideration of each case by stating the facts and giving his own view on what the Court should do. The Justices then spoke in order of their seniority, agreeing or giving a different view. Strangely enough, they voted from the most junior up, on the theory, Cardozo laughingly explained, that the juniors shouldn't be intimidated by the votes of more senior members of the Court. Although possibly one of the most "political" Supreme Courts in our history, the Justices sternly shunned the electoral process; in an effort to be perceived as non-political, they didn't even vote in national or state elections.

Each Associate Justice had just one law clerk (each has four now) and, certainly in the case of Justice Cardozo, the role was more companion than collaborator. Cardozo wrote his opinions long-hand between Saturday at dinner time when he received his assignment from the Chief Justice and the following Monday morning. When I walked into his office Monday, he had a complete draft of the opinion ready. "It wasn't just the case in which I wanted to write," he would usually say, "but it has its interesting points. I put in the relevant

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21. *Id.* at 82.

22. *Id.* at 84-86.

23. *Id.* at 87.

federal and New York cases [they lined the wall of his apartment], but maybe you could add a few from New Mexico or somewhere out there. We don't want to appear too provincial."

### THE ROOSEVELT-TRUMAN COURT

Roosevelt had no more trouble with the Supreme Court after the hectic days of the first half of 1937. Vacancies and new appointments came fast and furious until it was truly the Roosevelt Court. He put Hugo Black in Van Devanter's place and Felix Frankfurter in the hallowed seat previously occupied by both Oliver Wendell Holmes and Benjamin Cardozo. On Hughes's retirement, he made Stone the Chief Justice. Before he died in office in 1945, Roosevelt was able to add to the Court such liberal giants as William O. Douglas, Frank Murphy, Robert Jackson, and Wiley Rutledge. This array was certainly a far cry from the Court Roosevelt inherited in March 1933.

When Frankfurter took his seat on the Supreme Court in January 1939, almost everyone assumed that he would become the dominant spirit and intellectual leader of the new liberal Court. After all, he had been, in the words of Brandeis, "the most useful lawyer in the United States": defender of Tom Mooney, the alien victims of the Palmer Red Raids, the striking miners of Bisbee, Arizona, Sacco and Vanzetti, and too many others to mention. Probably the most influential advisor to President Roosevelt, Frankfurter was teacher and sponsor to many of the men and women who made up the New Deal, and was as knowledgeable on the history and significance of the Supreme Court as any living person.

Just a year before his appointment to the Court, Frankfurter had written about Holmes in words that were generally considered to state his own preference for judicial activism in the area of civil freedom and judicial restraint in the area of economics:

Mr. Justice Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable condition of a free society from that which he attached to liberties which derived merely from shifting economic arrangements . . . [and] was far more ready to find legislative invasion in this field [civil liberties] than in the area of debatable economic reform.<sup>24</sup>

But his formula for Holmes was not to be his own; a deep belief in judicial restraint in all matters overtook even his lifelong dedication to civil liberties.

The flag salute case of 1940,<sup>25</sup> decided during Frankfurter's second term of Court, was an unhappy watershed in Frankfurter's judicial career. Two grade school Jehovah's Witnesses refused to salute the flag because, in their view, the salute was an irreligious act denying the supremacy of God. Pursuant to its rules, the local board of education threw the children out of public school. Hughes reported on the case in favor of the school board and assigned the writ-

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24. F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 51 (1938).

25. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

ing of the opinion to Frankfurter because of his “moving statements at conference on the role of public schools instilling love of country in our pluralistic society.” A few weeks later, Edward Prichard, Frankfurter’s most brilliant, if indiscreet, law clerk, knocked on the door of my house during the evening and, out of breath from haste and excitement, plunged his full three hundred pounds into our largest chair. Prich pulled out of his pocket the printed drafts of Frankfurter’s opinion upholding the requirement that students salute the flag and Stone’s dissent from that ruling. Despite his winded state, he was able to get out this much: “This is the end of our Justice’s role on the Court. Phil [Philip Graham, then Justice Stanley Reed’s law clerk and shortly to become Frankfurter’s] — and I have tried every argument we know to get him to change his mind but it doesn’t do any good. *You* have to do something.”

Here I was being transformed into an elder statesman at age twenty-nine just because I had been Frankfurter’s first law clerk a year before. Naturally I was bewildered about what to do. In violation of every rule of Supreme Court confidentiality that I had learned while working for the Court, I read the Frankfurter and Stone draft opinions. It was very clear that Prichard and Graham were right about the damage Frankfurter was doing to himself and his role on the Court, and to the civil liberties to which he had devoted his whole life. I told Prich that I was willing to plead with the Justice on behalf of all three of us, but I knew that our beloved teacher’s first question would be: “How in heaven’s name did you get my opinion?” There was just no way out of our dilemma, and my role ended before it started.<sup>26</sup>

The disaster Prichard and Graham foresaw was not long in coming. Newspapers and law reviews denounced the decision in no uncertain terms.<sup>27</sup> Mrs. Roosevelt thought it very wrong to force little children to salute the flag when this was repugnant to their consciences. Justice Douglas, who had concurred in the decision along with all the other Justices except Stone, and who had himself praised the Frankfurter opinion as “historic” and “truly statesmanlike,” talked to Frankfurter about the case in the fall of 1940. He told Frankfurter: “Hugo would now not go with you in the flag salute case.” Frankfurter asked Douglas: “Why, has he reread the Constitution during the summer?” “No,” said Douglas, “but he has read the [news]papers.”<sup>28</sup>

Scholars have advanced many reasons why America’s leading civil libertarian required two young students to salute the flag against the children’s religious beliefs. Some argue it was patriotic panic after the Nazis’ May 1940 breakthrough. The hole in that argument is that the case was argued and decided in conference during the Allied-German stand-off and before the breakthrough. Others have suggested it was an immigrant Jew’s demonstration of his love of country. But such an argument assumes an insecurity on Frankfurter’s

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26. Some 40 years later, Prichard gave me his permission to tell this story at a lecture at the University of Kentucky in his honor and in his presence.

27. See J.F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER & CIVIL LIBERTIES IN MODERN AMERICA* 113 (1989).

28. J. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* 209 (1975).

part that was not otherwise apparent. I once thought Frankfurter's irritation at Jehovah's Witnesses in general, evidenced by such references in his opinion to their "crotchety beliefs" and "individual idiosyncracies,"<sup>29</sup> might have influenced the outcome. That seems to me now not a significant enough reason for this career-threatening decision from the venerable civil libertarian who had so often sided with some pretty strange characters.

As is often the case, I suppose the best answer is the simplest one: judicial restraint. If Frankfurter had been a member of that school board, hell or high water could not have forced him to deny those children their schooling. But he had just been through years of leading the call for judicial restraint by a Supreme Court that was invalidating New Deal and state social measures right and left. It must have been nearly impossible for him to subordinate his deep belief in judicial restraint in his first acid test on so vital a question. One may also ask how this stands up when compared with the above-quoted statement about Holmes that Frankfurter made two years earlier.<sup>30</sup> All that statement did was distinguish Holmes's view on individual liberties indispensable to a free society from Holmes's view on economic liberty. While Frankfurter may have accepted that distinction made by his idol Holmes, he apparently never fully embraced it, and came to resist the distinction more and more whenever judicial restraint was at stake.

Whatever the reason for Frankfurter's decision, it ended his short period of leadership of the Roosevelt Court. Two years later, Black, Douglas, and Murphy dissented in another Jehovah's Witnesses case and, although it was irrelevant, took the strange step of announcing that the flag salute decision had been "wrongly decided."<sup>31</sup> The following year, 1943, the flag salute case was explicitly overruled with only the two most conservative members of the Court, Roberts and Reed, on the Frankfurter side in dissent.<sup>32</sup>

A full analysis of why public reaction to the flag desecration case in 1989<sup>33</sup> was so different from the 1940 flag salute case is outside the scope of this essay, but experts may someday ascribe the change to eight years of Reagan flag-waving and other pronouncements of heedless patriotism over individual rights. The overruling of the flag salute decision in 1943 (significantly, in the midst of war) was clearly in deference to the public outcry against it. In the early 1940s the first amendment right of the individual outweighed public reverence for the flag. What then explains the reversal of sentiment reflected in the public outcry almost a half century later against Brennan's Holmesian decision in the 1989 flag burning case upholding the individual's first amendment right to burn the flag? The difference between the individuals and the actions involved can only partly explain the public outrage: The earlier case involved two young school children asserting their religious conscience by refusing to salute the flag; in

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29. *Gobitis*, 310 U.S. at 598.

30. See *supra* text accompanying note 24.

31. *Jones v. Opelika*, 316 U.S. 584, 623-24 (1942).

32. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

33. *Texas v. Johnson*, 109 S. Ct. 2533 (1989).

1989 the defendant was a far-out radical who burned a flag while shouting "America, the red, white and blue, we spit on you."<sup>34</sup> But also something had happened to national opinion.<sup>35</sup> George Bush made headway in his 1988 campaign by attacking Michael Dukakis for vetoing a law requiring an in-school pledge of allegiance to the flag. But Dukakis's veto was an expression of the Court's 1943 flag salute decision, which was itself the result of public demand.

At any rate, the chasm that the flag salute cases produced between Frankfurter and the other liberals was far greater than just the overruling of his opinion. Black became the leader of the liberal majority on the Court, evoking Frankfurter references to his "phalanx." Frankfurter even began to question the motives of the others, especially Black and Douglas. His diaries, for example, find him comparing Black to the "cheapest soap box orator," and describing him as "a politician, although a very bad one," "violent," "vehement," and "reckless."<sup>36</sup> Black, in turn, dubbed Frankfurter "a search and seizure liberal" because Frankfurter had a broader view of the fourth amendment than had Black. For most of the time, until Frankfurter's last years, the hard feelings continued. Whether this affected the actual outcome of any cases cannot be demonstrated with certainty, but stubbornness on both sides may well have played a role.

Even when Black and Frankfurter were on the same side, collaboration was well nigh impossible. The case of my client, William Remington, is an illustration.<sup>37</sup> In 1948, Remington, a Commerce Department official, was accused by a self-proclaimed Communist spy, Elizabeth Bentley, of having given her information to pass on to the Russians during the war. In the ensuing proceeding under the Truman Loyalty Program, Remington was cleared by the Loyalty Review Board, and *The New Yorker* magazine published a feature article on the case destroying Bentley's credibility. The forces of McCarthyism were not about to desert one of their leading sprayers of charges, however. In the spring of 1950, Remington was called before the House Un-American Activities Committee for a second time and grilled about his activities and associations while working at the Tennessee Valley Authority when he was a sophomore at Dartmouth College. Then he was called before a third grand jury considering his case. He denied under oath that he had ever been a member of the Communist Party and was indicted for perjury on that denial. Remington's case thus paralleled the contemporaneous (but more famous) case of Alger Hiss.

The process against Remington was far more flawed. The foreman of the indicting grand jury was collaborating in the preparation and publication of a book by the accusing witness, Elizabeth Bentley. Her book could only be a suc-

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34. *Id.* at 2536.

35. The outcry against the 1989 flag burning case had abated sufficiently by the summer of 1990 to cause Congress to defeat the Administration's proposal for weakening the first amendment by authorizing federal and state anti-flag-burning laws. But a majority of each House (not the requisite two-thirds) did support the Administration proposal and the issue may well play a role in the November 1990 Congressional elections.

36. See, e.g., J. LASH, *supra* note 28, at 174, 182, 227.

37. See generally *Remington v. United States*, 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952); *Remington v. United States*, 208 F.2d 567 (2d Cir. 1953), *cert. denied*, 347 U.S. 913 (1954).

cess if her credibility vis-à-vis Remington was resuscitated. In addition, the prosecutor before the grand jury had been Bentley's attorney. Working together, they called Remington's estranged wife before the grand jury and forced her—by threatening statements, harsh and misleading questions, and denial of food—to change her earlier story that she and her husband had never been members of the Communist Party.

The case went to trial before a judge who prejudged guilt by refusing our motion for a definition of Communist Party membership, saying that Remington himself "was best able to say whether he was a Communist and 'what that means.'" With the case before that judge and with Remington's wife now on line to corroborate at least a part of Bentley's testimony, conviction came swiftly in the McCarthy climate of 1951. The Court of Appeals for the Second Circuit, however, promptly reversed the conviction and sent the case back to the district court for a new trial.<sup>38</sup>

At this point, we took an unusual step: we petitioned the Supreme Court to review the case, seeking a dismissal on grounds of the grand jury's wrongdoing. In an effort to get around that mess, the Government reindicted Remington for perjury on statements he made when he took the stand in his own defense at his trial. The Supreme Court denied our petition to review the case,<sup>39</sup> and Remington was retried and convicted for perjury on those statements. Despite what had happened before the original grand jury, the court of appeals affirmed the conviction by a two to one vote.<sup>40</sup> The man generally deemed the greatest living judge at that time, Learned Hand, had written a powerful dissent on our side, and we confidently again asked the Supreme Court for review. That was not to be. On February 8, 1954, our petition was denied—we lacked the requisite four votes for review.<sup>41</sup>

We were not the only ones distressed by the Court's action in refusing to hear the case. Judge Hand wrote Frankfurter a strong letter, stating that he was confused and hurt by the Supreme Court's refusal to hear the case. On March 3, 1954, Frankfurter responded to Hand that "[t]hree of us [Black, Douglas, and Frankfurter] voted to hear the case—and the fourth [Jackson] didn't because the extreme views expressed by that essentially lawless Black indicated the hopelessness of agreement even among those who were outraged by the [Government's] behavior."<sup>42</sup> When Frankfurter read this part of the letter to me, he added that when he had gone to conference, he had been certain Jackson would provide the fourth vote for review. Jackson, he said, changed his mind when Black announced in conference that the *Remington* case would be an appropriate vehicle for overruling *United States v. Williams*,<sup>43</sup> in which Black and Frankfurter had dissented from a decision that upheld a perjury charge arising out of a trial

38. 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952).

39. 343 U.S. 907 (1952).

40. 208 F.2d 567 (2d. Cir. 1953), *cert. denied*, 347 U.S. 913 (1954).

41. 347 U.S. 913 (1954).

42. Letter from Frankfurter to Hand (March 3, 1954) (copy on file at *North Carolina Law Review* office).

43. 341 U.S. 58 (1951).

based on a defective indictment. Apparently, both Frankfurter and Jackson considered Black's statement extreme. Frankfurter voted for review despite Black's statement, but Jackson did not.

As was the custom in the McCarthy days, Remington was sent to a high security prison rather than one for white-collar prisoners, and there he was murdered. Justice Frankfurter tried to console me: "You and I did everything in the *Remington* case that human beings could do." Why, I still wonder, did Frankfurter feel that it was Black rather than Jackson who was the culprit?

Frankfurter's feelings for Douglas were no kinder. The case of Julius and Ethel Rosenberg,<sup>44</sup> convicted of Russian espionage and sentenced to death, is illustrative. The Supreme Court refused to review the case despite Frankfurter's protest that "it is not unreasonable to feel that before life is taken review should be open in the highest court of the society which has condemned them."<sup>45</sup> A few months later, in June 1953, the last day of the term, review was denied once again.<sup>46</sup> Later that same day, attorneys for the Rosenbergs applied for a stay of execution on grounds not previously considered by the Court.<sup>47</sup> Douglas promptly granted a stay of execution so that the lower court could consider the Rosenbergs' new contention. The Eisenhower Administration was anxious to get the now world-watched Rosenberg affair out of the way, however. Attorney General Brownell persuaded Chief Justice Vinson to take the unusual step of calling the widely dispersed Justices back into session. Frankfurter returned to Washington and, having closed his own house for the summer, spent the night with my wife and me. Sitting on our porch that evening, he was a distressed man. He thought the sentencing judge, Irving Kaufman, "unjudicious in both the manner and substance of the sentencing," and especially disapproved of Kaufman's going to synagogue to pray for divine guidance. Frankfurter saw no need for Brownell and Vinson's haste: why not at least let the court of appeals use the summer to consider the new point? Above all, he was angry at Douglas, who, he said, had not backed review of the case at crucial moments and now, at the last minute, pulled what Frankfurter called "a grandstand play."

The Vinson Court made short shrift of Douglas' stay order<sup>48</sup> and, almost immediately, the Rosenbergs were executed. Frankfurter held out for a full review of the case until the very end, but, as in the *Remington* case with Black, he seemed to blame Douglas, whose views were closer to Frankfurter's than most of the others were, for his own failure to win out for full review.

#### IMPROVING SUPREME COURT REVIEW PROCESS

The *Remington* and *Rosenberg* cases raise the question whether the Court's

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44. *United States v. Rosenberg* 195 F.2d 583 (2d Cir.), cert. denied, 344 U.S. 838, reh'g denied, 344 U.S. 889 (1952), 346 U.S. 273, reconsideration denied, 346 U.S. 324 (1953).

45. *Rosenberg v. United States*, 344 U.S. 889 (1952) (memorandum of Frankfurter, J.).

46. *Rosenberg v. United States*, 346 U.S. 273, reconsideration denied, 346 U.S. 324 (1953).

47. The Rosenbergs argued that the Atomic Energy Act of 1946 limited the death penalty in the law under which they had been sentenced.

48. *Rosenberg v. United States*, 346 U.S. 273, reconsideration denied, 346 U.S. 324 (1953).

procedure for determining whether to review a particular case can be improved. Particularly, I wonder whether the existing secrecy regarding the review process is necessary, especially as to how the Justices vote on denials of review. The Justices customarily do not note dissents, although this custom is not universally followed when review is denied.<sup>49</sup> I recognize the impracticality of written decisions on each of the massive number of petitions for review. Revealing how the Justices vote when disagreement exists, however, would give the public, especially attorneys and scholars, at least some notion of where the Justices stood. Equally important, public knowledge and consideration of the votes on review might persuade Justices to hesitate before making sudden decisions during the heat and pique of the moment. Would Jackson have voted against review in Remington's case if his vote, in the face of all that massive governmental wrongdoing, was going to be made public? Would Douglas have failed to support review in some of the earlier stages of the *Rosenberg* case?

In innumerable instances, the Supreme Court has refused to review cases generally believed to be as important and worthy of review as those the Court has accepted and decided. In my own experience, for example, the Supreme Court has often said "no" to such cases. In 1951 the Supreme Court refused to rule on the question of whether courts having jurisdiction over a fugitive from justice could consider the constitutionality of the penal action of the State demanding extradition;<sup>50</sup> in the late 1950s, the Court refused to review the Georgia malapportioned county unit voting system;<sup>51</sup> in 1960, the Court refused to review the issue of whether the State Department could deny a deeply interested congressman the use of a passport for travel to Communist China;<sup>52</sup> in 1961, the Court refused to review whether Deerfield, Illinois, could condemn for a park the partially constructed housing intended for sale to blacks;<sup>53</sup> and in 1980, the Court refused to consider the Secretary of Labor's refusal to upset the United Steelworkers' election for national officers despite massive irregularities, and thus broke the back of the already-weak union democracy movement.<sup>54</sup> It would appear somewhat archaic to keep the votes on review of such important cases under lock and key, except when they come out in the irregular manner referred to above.

Two unreviewed cases in which I also was involved may warrant special mention in this context. In 1957, the Court refused to review the question of whether a union that represented black as well as white railroad firemen could refuse to admit blacks to membership.<sup>55</sup> The Court was so troubled by its own action in refusing to review this case that it stated that its denial was predicated

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49. See, e.g., *Porter v. Herter*, 364 U.S. 837 (1960) ("Mr. Justice Black and Mr. Justice Douglas are of the opinion certiorari should be granted.").

50. *Johnson v. Matthews*, 182 F.2d 677 (D.C. Cir.), cert. denied, 340 U.S. 828 (1950).

51. *South v. Peters*, 89 F. Supp. 672 (D. Ga.), aff'd, 339 U.S. 276 (1950).

52. *Porter v. Herter*, 278 F.2d 280 (D.C. Cir.), cert. denied, 364 U.S. 837 (1960).

53. *Progress Dev. Corp. v. Deerfield Park Dist.*, 26 Ill. 2d 296, 186 N.E.2d 360, cert. denied, 372 U.S. 968 (1962).

54. *Sadlowski v. Marshall*, 464 F. Supp. 858 (D.D.C. 1979), cert. denied, 447 U.S. 905 (1980).

55. *Oliphant v. Brotherhood of Locomotive Firemen and Enginemen*, 262 F.2d 359 (6th Cir. 1958), cert. denied, 359 U.S. 935 (1959).

upon the "abstract context in which the questions sought to be raised are presented by this record."<sup>56</sup> But, as we said in our petition for rehearing, the question was "as far removed from an abstract context as night from day"—white union leadership was discriminating against the black firemen without the blacks being allowed to vote on who the union leadership should be.

Possibly the most distressing denial of review came in the half-dozen AB-SCAM convictions. Our request for review in one of those cases was on behalf of Congressman Jenrette.<sup>57</sup> The prosecution had no grounds whatsoever to believe that Jenrette was prepared to accept a bribe. Yet the prosecution used a convicted professional confidence man as their tool to induce Jenrette, an alcoholic with large debts, to accept money in what the trial judge concluded "was nothing more than test of the integrity and moral fiber of a member of Congress."<sup>58</sup> We literally begged the Supreme Court for review, using these words:

The dangers to the doctrine of separation of powers which lies at the very heart of our constitutional system is clear. The line between temptation and framing is delicate; one person's ideas of temptation may be another's framing. Furthermore, 'Secret police powers exercised honorably by today's high-minded officials can readily be tomorrow's abuses in the hands of less scrupulous administrators.' Before the nation risks those dangers and charts a new course for government away from our historic separation of powers, the Court entrusted by the Constitution with its final interpretation should give full consideration to those dangers. As lawyers who have long labored in the constitutional fields of civil freedom, we believe it is our duty to call those dangers to this Court's attention with the most urgent plea that this case be reviewed.<sup>59</sup>

The answer was still "no," and the Court had set a dangerous precedent. While a proposal that votes be announced when petitions for review are denied would not answer fully why the denials occurred, it would likely shed some light on the process and on the prognosis. This at least would be a step in the right direction. After all, denial of review is almost always a *final* governmental action, and there is no apparent justification for hiding an important part of the process from interested citizens.

### THE BROWN DESEGREGATION CASES

Back in 1941, Hughes retired and was succeeded by Stone as Chief Justice. As war approached, Roosevelt was reaching out to the Republican Party in the interest of national unity, and the appointment of Stone was a step in that direction. Stone retired five years later, and Vinson succeeded him. Truman apparently had considered appointing a sitting Justice to the post, especially Black or

56. *Oliphant*, 359 U.S. 935 (1959).

57. *Jenrette v. United States*, 594 F. Supp. 769, 788 (D.D.C. 1983), *aff'd*, 744 F.2d 817 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985).

58. *Id.*

59. Petition for Writ of Certiorari at 19, *Jenrette v. United States*, 594 F. Supp. 769 (D.D.C. 1983), *aff'd*, 744 F.2d 817 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (No. 84-1171).

Jackson, but their public brawl soon made this impossible. Instead, he chose Vinson—a friend, Treasury Secretary, and former federal appellate judge.

Vinson was hardly an inspired choice. In 1951, he led the Court in upholding the convictions of the nation's top Communist leaders under the Smith Act,<sup>60</sup> and his decision added fuel to the McCarthy flames. An even greater test of Vinson's leadership came the following year in the school desegregation cases.<sup>61</sup> As I pointed out in a civil rights lecture several years ago, one beauty of our government is its resiliency. When the engine of one branch sputters, another reaches out to meet the nation's needs. That's what happened here.

This was the national civil rights situation in 1952. Congress was a helpless giant on civil rights; King Filibuster ruled the Senate. Not a single federal civil rights bill, not even one against lynching, had passed for eighty-two years. The Supreme Court was just beginning to fill the vacuum created by this congressional impasse with cases involving discrimination in voting rights,<sup>62</sup> union bargaining,<sup>63</sup> restrictive covenants,<sup>64</sup> and higher education.<sup>65</sup> But what would the Court do now with the *Brown v. Board of Education* line of cases involving the most fundamental civil rights question of all? Would it reverse *Plessy v. Ferguson*,<sup>66</sup> its own 1896 case upholding segregation under the inherently flawed separate-but-equal doctrine?

Rumors abounded around Washington that the Court was badly split and anything could happen. Despite these rumors, it always seemed to me that, in a world two-thirds of which is not white and in a nation asserting, if not always practicing, the highest principles of equality, we could not tolerate any part of the law of apartheid. But, as has been well-documented in later years, the situation back then was much closer to disaster than I thought at the time.

In 1952 the Court was divided: Vinson, Clark, and Reed were against overruling the 1896 decision permitting segregation; Black and Douglas were strongly in favor of overruling *Plessy*, with Black nevertheless predicting havoc in the South when the decision came down; Burton and Minton seemed likely to overrule *Plessy* but weren't saying very much; Jackson favored leaving the issue to Congress; and Frankfurter's judicial restraint feelings worried him about overruling a case that had been the law of the land for more than a half-century, but he had been too long on the side of civil rights to end up doing anything but work for a unanimous anti-segregation decision. With the Court hopelessly divided, in June of 1953 the Justices accepted Frankfurter's suggestion to set down the segregation cases for reargument in the following term of the Court. While awaiting reargument, Vinson died of a heart attack in September 1953. Frankfurter told his law clerk and others, "This is the first solid piece of evidence I've ever had that there really is a God." President Eisenhower's appointment of

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60. *Dennis v. United States*, 341 U.S. 494 (1951).

61. *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

62. *Smith v. Allwright*, 321 U.S. 649 (1944).

63. *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944).

64. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

65. *Sweatt v. Painter*, 339 U.S. 629 (1950).

66. 163 U.S. 537 (1896), *overruled*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Earl Warren, California's popular governor, as Chief Justice resolved the matter; Warren strongly favored equal treatment of public school children and believed segregation was clearly and inherently unequal.

The *Brown* case was reargued in October 1953. Warren took his time to bring the doubtfults around to his view. He did not put the case on the conference agenda for two months and waited another substantial period before taking a vote. His low-key draft opinion was another unifying factor. Jackson and Reed were the last two Justices to come around to the majority. Warren took his draft opinion over to Jackson in the hospital, and it satisfied him. Then Warren went to Reed, who was the only Justice to have voted in conference to uphold segregation, and, according to Reed's law clerk who was present, Warren said to Reed: "Stan, you're all by yourself in this now. You've got to decide whether it's really the best thing for the country." Reed went along, and the Court was spectacularly unanimous. Warren, aided by Frankfurter and Divine Providence, had done the country proud.

For me at least, one question about *Brown* remains unresolved: Would there have been a unanimous verdict from the Court against segregation if the Government's brief had not proposed that the Supreme Court give the state and local school authorities and the lower federal courts a reasonable period of time to work out when and how segregation must end? Borrowing the phrase from a boundary dispute case by Justice Holmes, the Government's lawyer in oral argument turned the requirement in the brief into "with all deliberate speed."<sup>67</sup> Maybe my question would be better stated as a series: Would unanimity have come without the "all deliberate speed" qualification? How important was unanimity? Would resistance to the decision have been greater or less if the Court had ordered school authorities and lower federal courts to accord the plaintiffs and other segregated blacks their newly won rights immediately?

First, a word about the incubation of the phrase "with all deliberate speed." The attorney in the Solicitor General's office handling civil rights cases was a former Frankfurter student and law clerk, Philip Elman. The childless Justice Frankfurter had a loving, almost father-son relationship with those few who had been both student and law clerk. As Elman later revealed in a law review interview,<sup>68</sup> he kept the Justice informed on his problems in getting the Department of Justice to file a brief in the cases supporting desegregation, and the Justice kept him informed on how deeply divided the Court actually was. Although Elman says Frankfurter never suggested anything along the lines of "with all deliberate speed," he also stated that "it did grow out of my many conversations with him [Frankfurter] over a period of many months."<sup>69</sup> Elman knew from Frankfurter that the split on the Court endangered both the overruling of *Plessy* and Court unanimity on the question, and so the Government had to add a new dimension that would be persuasive to the Court. This is what Elman did, and

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67. Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 829-30 (1987).

68. *Id.* at 817.

69. *Id.* at 828.

no Justice apparently questioned the proposal. Certainly, Frankfurter thought Elman's new dimension was persuasive to the Court; in a letter to McGeorge Bundy dated May 15, 1964, Frankfurter wrote that "Phil Elman was the real strategist of the litigation."<sup>70</sup>

The brilliant array of lawyers, almost all black, who brought the *Brown* cases to the Court and briefed and argued them there, have a dim view of the "with all deliberate speed" phrase and Elman's role in bringing it about. Even Elman concedes that there is a "point" to the criticism of his private conversations with Frankfurter about civil rights cases in which he was involved as a government lawyer.<sup>71</sup> Although one must assume this was indiscreet and wrong, it was without venality and possibly inescapable in light of the nature of the relationship between the two men. And, the broader question of whether "with all deliberate speed" slowed compliance, by giving those opposed to desegregation throughout the country time to form its ranks, is not going to be resolved in my lifetime, if ever.

Thirty-six years ago, when the *Brown* decision came down, I favored speedy action toward desegregation. At the 1956 Democratic National Convention, the civil rights groups fought for a plank supporting the decision—we lost. In 1957 the civil rights groups fought to keep a provision to enforce the decision in the then-pending civil rights bill—we lost. Later that year, it took federal troops to integrate Little Rock, Arkansas schools. The opposition to *Brown* proved both wider and deeper than many had expected. About the only thing one can be certain of today is that this unanimous decision was one of the greatest moments in the nation's constitutional history and lots of people contributed to it—Chief Justice Warren and eight Associate Justices; the determined, inexhaustible and eloquent lawyers for the plaintiffs; Divine Providence, and, yes, the Frankfurter-Elman connection.

#### THE WARREN ERA

Wherever scholars ultimately place the credit for the historic *Brown* decision, Chief Justice Warren came out of the struggle as the dominant figure on the Court. For the next decade and a half, he led the Court through its most liberal period in our judicial history. Ironically, a good deal of the credit for those halcyon legal days goes to President Eisenhower, who himself viewed much of the Warren Court's actions with dismay. Indeed, Eisenhower later called his appointment of Warren the "biggest mistake" he had ever made. Despite this, it was Eisenhower who, shortly after *Brown*, appointed William Brennan to the Court. Brennan became Warren's partner in the leadership of the Court and, until his recent retirement, stood as the unrivaled sentinel of civil freedom in America.<sup>72</sup> And it was Eisenhower who appointed two thoughtful moderates to the Court, John Harlan and Potter Stewart. They, along with

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70. *Id.* at 845.

71. *Id.* at 843.

72. Justice Brennan retired on July 20, 1990.

those stalwart New Dealers Black and Douglas, contributed much to the greatness of what appropriately could be called the Warren-Brennan Court.

Most Americans likely would say that the unanimous *Brown* decision was the Warren Court's greatest contribution to our constitutional government. But Warren himself thought *Baker v. Carr*<sup>73</sup> was the most significant case of his tenure because, as a former Warren law clerk has written, "Warren saw *Baker* and its progeny as striking at three evils that he considered to be obstacles to enlightened government: the presence of special interests, the selfishness of public servants, and the imperfect vindication of participatory rights held equally by all citizens."<sup>74</sup> Warren was not intimidated by Frankfurter's long-accepted contention that the Court was getting into a "political thicket" when it entered the malapportionment area. Warren was not willing to accept the idea that some votes should be weighed differently from others and recognized the practical impossibility of getting malapportioned bodies to reform and equalize themselves. As a result, the Warren Court's reapportionment cases struck a blow for equality in America second only to *Brown*.

No less controversial than the Warren Court's desegregation and malapportionment cases were its decisions expanding the rights of defendants in criminal cases. The decision in *Miranda v. Arizona*,<sup>75</sup> which requires a clear warning to a suspect that he or she has the right to remain silent and to have the assistance of a lawyer, drew the most public fire. Warren was deeply hurt by the attacks upon him and his Court for *Miranda* and other defendants' rights decisions. I remember calling upon him one afternoon late in the 1960s to ask him to speak at a function honoring Benjamin Cohen. After refusing my request gently, he held me in his office and poured out his feelings on why the decisions of his Court supporting the rights of criminal defendants to fair procedures were an important part of law enforcement, a field to which he had devoted his life. He said the attacks on the Court in this area had grown so vicious that even his very supportive family sometimes hinted that he might be going a little too far.

The "soft-on-crime" attacks then and now bear witness to the tremendous advances in criminal procedure in just the span of my own life. On a canoe trip at age sixteen, I remember listening to a radio in the center square of a small Maine town blaring out the world's opposition to the execution of Sacco and Vanzetti, immigrant Italian anarchists convicted of murder and scheduled to be executed the next morning. I have always wondered how our country could insist on executing these two men, when almost the whole world believed them to have been deprived of a fair trial. In the wee hours of the morning after the Court denied review, lawyers for the condemned men made a final desperate appeal to Holmes to stay the execution. But Holmes could do nothing. His

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73. 369 U.S. 186 (1962). In *Baker*, the Supreme Court reversed its own line of decisions that treated reapportionment cases as raising only "political questions" to be left to the legislature. After *Baker* had settled the jurisdictional issue, two years later Warren himself wrote the decision outlawing malapportionment in *Reynolds v. Sims*, 377 U.S. 533 (1964), and set forth the now-accepted principle of "one-man, one-vote."

74. G. WHITE, EARL WARREN, A PUBLIC LIFE 238-39 (1982).

75. 384 U.S. 436 (1966).

short opinion stated that the Supreme Court did not review state criminal trials; he added helplessly that "far stronger cases than this have arisen with regard to the blacks when the Supreme Court has denied its power."<sup>76</sup> Today the protections of the Bill of Rights apply to state trials, and unreviewed but unfair trials are a thing of the past. The four-decade road from Holmes's *Sacco and Vanzetti* decision in 1926 to Warren's *Miranda* in 1966 was a tortuous one, but one that again reflects the great resilience of our legal system.

The grandeur of our Bill of Rights was never more evident than on June 17, 1957, when the Warren Court handed down four landmark civil liberties cases back-to-back. In the *Yates* case,<sup>77</sup> the Court for all practical purposes overruled its decision of six years earlier, in which Vinson had dispatched the Communist leaders to jail for advocacy outlawed by the Smith Act. The second case involved my friend, and sometimes-client, John Stewart Service. Service's loyalty-security problems stemmed from correctly reporting from his Foreign Service post the coming Communist victory in China. The Court invalidated Secretary of State Dean Acheson's firing of Service under Joe McCarthy's pressure and ordered Service reinstated to the State Department.<sup>78</sup> In *Sweezy v. New Hampshire*,<sup>79</sup> Warren overturned the contempt conviction of a university professor for refusing to answer questions from the New Hampshire Attorney General, acting as the legislature's investigating agent, about a "subversive" lecture the professor supposedly gave.<sup>80</sup> In *Watkins v. United States*,<sup>81</sup> Warren completed his condemnation of McCarthyite investigating committees by blasting the House Un-American Activities Committee and invalidating Watkins's conviction for refusing to give the Committee the names of Communists he had known, at least without the Committee telling him why it needed such information.

The *Watkins* case tells a good deal about the McCarthy days. In the 1950s, charges of "Fifth Amendment Communist"<sup>82</sup> against those refusing to answer questions on grounds of self-incrimination blackened not only the accused individuals, but also the organizations in which they were involved. Walter Reuther, President of the United Automobile Workers (UAW) and himself a champion of civil liberties, felt bound to inform the entire UAW staff that they could not plead the fifth amendment in response to questions about Communism and still retain their jobs. He promised UAW legal assistance to any staff member resisting an investigating committee in other ways. John Watkins, a UAW organizer, walked into my office in early 1954, showed me his subpoena from the

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76. Justice Holmes's remarks are from an unpublished memorandum. U.S. National Archives, Records of the Supreme Court of the United States, Record Group 267, item no. 32919, at 467. See *Commonwealth v. Sacco*, 261 Mass. 12, 158 N.E. 167, *cert. denied*, 275 U.S. 574 (1927).

77. *Yates v. United States*, 354 U.S. 298 (1957), *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1 (1978).

78. *Service v. Dulles*, 354 U.S. 363 (1957).

79. 354 U.S. 234 (1957).

80. *Id.*

81. 354 U.S. 178 (1957).

82. This was a term applied by Senator Joseph McCarthy and others to witnesses who pleaded the fifth amendment in response to investigating committee questions about Communist membership or associations. Often the committee had no proof of such membership or association.

House Un-American Activities Committee, and told me he “wanted to take the fifth” because his conscience wouldn’t let him “name names.” But he needed his job, so he accepted the UAW directive. Watkins told the Committee all about his own Communist activities but refused to name others without a court order directing him to do so. Watkins won. Warren’s decision not only strictly limited the activities of congressional committees, but affirmed the principle long advocated by civil libertarians “that there is no congressional power to expose for the sake of exposure.”<sup>83</sup> Happiness for a lawyer is having the Supreme Court not only vindicate one’s client, but pronounce a deeply held principle en route to that result.

It was great fun to appear before the Warren Court. Maybe this was because I always had the feeling the Chief Justice was sympathetic to the liberal issues for which I was advocating. But it was also because there was generally a pleasant politeness on the Chief Justice’s part that pervaded the Court’s atmosphere. In the days of Chief Justice Hughes, when the lawyer’s allotted time was up and the red light went on, the story going around was that the Chief Justice would cut the lawyer off sharply, even in the middle of the word “if.” In contrast, Warren just graciously prodded the lawyer to complete his thought and sit down. Ironically, about the only unhappy moment I had during the dozen or so cases I argued before the Warren Court came from an exchange with my own mentor, Justice Frankfurter, the sharpest interrogator of his day. Arguing for the UAW in a political expenditures case, I answered a Frankfurter question only to have him almost shout, “That was a good stump speech, now answer the question.” This leads me to make just one suggestion to lawyers arguing before the Supreme Court: Give a *direct* answer to a question whenever it comes, even if you feel strongly that it disrupts the whole plan and symmetry of your argument. As the time per side in oral argument was gradually cut down from one hour to a half hour—the process was completed under Chief Justice Burger—lawyers became more and more concerned during lengthy questioning that they would not have time to make the points they thought important. Yet a lawyer always has to remember that it is not what he or she thinks is important that counts, but what the person looking down on the lawyer thinks is important.

If, as I believe, the Warren Court was the answer to liberal prayers, it soon became the target for the fury of right-wing America. “Impeach Earl Warren” signs became commonplace. The House of Representatives began passing bills to overrule decisions it did not like.<sup>84</sup> A constitutional amendment against one-man one-vote came too close for comfort, just narrowly losing in Congress. Senators began proposing removal of Supreme Court jurisdiction in areas where particular hostility existed for the Supreme Court’s action. Indeed, shortly after the Warren Court’s civil liberties field day in June 1957,<sup>85</sup> Senator Jenner introduced a bill to withdraw appellate jurisdiction in security matters from the

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83. *Watkins*, 354 U.S. at 200 (1957).

84. The bills are summarized in Rauh, *The Truth About Congress and the Court*, THE PROGRESSIVE, November, 1958, at 30 col. 2.

85. See *supra* text accompanying notes 77-83.

Supreme Court.<sup>86</sup> But I never thought Warren was as disturbed by this public and congressional outcry as he was by the protest against his opinions advocating criminal defendants' rights. Of course, little came of the furor. I testified against the Jenner Bill before the Senate Internal Security Subcommittee in February of 1958, arguing that the decisions the bill sought to reverse were legally and morally right and that elimination of the Court's appellate jurisdiction in those areas threatened our constitutional system. The next day I happened to see the Chief Justice making his way through the lobby of the Statler Hotel. With a smile, he said, "I saw your generous advertisement for us in the *Post* this morning." Warren's confidence was borne out in August when the Senate put all the anti-Court bills to sleep.<sup>87</sup>

A further word is necessary to address the suggested possibility that Congress may change the interpretation of the Constitution by selectively withdrawing Supreme Court jurisdiction over particular subject matters, as the Jenner Bill attempted to do. This notion has persisted in recent history from those who undoubtedly considered President Franklin Roosevelt's effort to accomplish the same result by Court-packing to be an abomination. Joe McCarthy's supporters tried it on what they contended were security matters. Nixon supporters tried it on school busing. Reagan supporters tried it not only on busing, but also on abortion, affirmative action, and apportionment. One cannot refrain from thinking that the conservatives who take this position are quite short-sighted. The Supreme Court's role over much of our history has been as the protector of private property. Some day a radical Congress might try removing Supreme Court jurisdiction as a way to avoid the constraints of the constitutional provisions for "just compensation," "obligation of contracts," and "due process" for deprivation of property. Conservatives should be, but do not seem to be, grateful to Republican Senator Lowell Weicker and the others who beat back all such assaults on the Court over the years.

#### THE MOVE TO A CONSERVATIVE COURT

Three events in the summer of 1968 signalled the beginning of the Court's slide away from its liberal peak under Warren. In June, Warren resigned as Chief Justice, effective at President Johnson's pleasure. In July, Richard Nixon's acceptance speech at the Republican Convention opened the ongoing struggle for the heart of the Court with the battle-cry that "some of our courts" have "gone too far in weakening the peace forces, as against the criminal forces."<sup>88</sup> And President Johnson's nomination of Abe Fortas, brilliant lawyer and Justice, to replace Warren as Chief Justice ran into trouble. I recall Paul Porter, Fortas's highly respected partner and campaign manager, repeatedly complaining to me that liberals were not doing enough to get Fortas confirmed.

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86. S. 2646, 85th Cong., 1st Sess. (1957).

87. See Rauh, *supra* note 84, at 30, 33 ("The supporters of the Court won the day, but their victory is no ground for complacency. . . . One can only hope that the next time the civil rights organizations . . . will all recognize that *any* bill which undermines the Court affects the interests of all.").

88. G. WHITE, *supra* note 74, at 309.

The longer the effort went on, the more hopeless the Fortas cause became. Fortas's problems centered on his liberal ideology and his acceptance of a fifteen thousand dollar fee for a few seminars at American University's law school, contributed by five donors with potential Supreme Court business. This was combined with the political weakness of an unpopular and lame-duck President trying to confirm two cronies—Fortas and Homer Thornberry.<sup>89</sup> This gave the opposition enough votes to maintain their filibuster against confirmation, a filibuster that went unchecked until Fortas asked Johnson to withdraw his nomination.

There was still time to provide a successor similar to Warren, something Warren very much wanted. A quickly confirmable choice was ready at hand in the person of Senator Philip Hart, quite possibly the best-liked Senator of his time. That suggestion was funnelled into the White House through diverse channels but, sadly, nothing ever came of it. Warren continued, and the choice of the new Chief Justice became Nixon's.

### THE BURGER COURT<sup>90</sup>

The Burger story starts with the case of Dr. John Peters in 1955,<sup>91</sup> fourteen years before Nixon's appointment of Burger as Chief Justice in 1969. Peters, a distinguished Professor of Medicine at Yale, was employed by the Public Health Service as a Special Consultant to advise the Surgeon General. He got tangled up in the government's Loyalty Program and was discharged for disloyalty predicated upon statements "given by confidential informants not disclosed to him" about his alleged Communist activities. Peters went to court to clear his name. After the district court<sup>92</sup> and the court of appeals<sup>93</sup> both upheld the Loyalty Review Board's finding against him, Peters successfully petitioned the Supreme Court for review. The Solicitor General at the time was Simon Sobeloff, a Baltimore lawyer of great distinction and even greater conscience. He made clear to Attorney General Brownell that he could not defend the position that a person could be discharged by the government for disloyalty without facing his accusers. Assistant Attorney General Warren Burger came forward, agreed to sign the Government's brief and to argue before the Court that Peters's discharge upon statements of unknown, faceless informers did not unconstitutionally deprive him of any rights. In the end, Burger lost the *Peters* case. Peters had been cleared by the lower loyalty board. At oral argument, Frankfurter, who considered it a cardinal sin for the Court to decide a constitutional question if it wasn't necessary to reach the proper result, suggested to Peters's counsel that the Loy-

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89. Thornberry, a judge on the United States Court of Appeals for the Fifth Circuit, was withdrawn as a nominee for Fortas's vacant associate justiceship by President Johnson in October 1968.

90. Chief Justices have been chosen over the period covered by this Essay according to no discernable pattern. Earlier the story of Hughes's appointment was told. Stone satisfied Roosevelt's drive for rational unity in the war-preparation atmosphere of the time. Vinson was a Truman friend. Warren's political career, like Hughes's, won the post for him. The stories of the last two, Burger and Rehnquist, are of special, if depressing, interest.

91. *Peters v. Hobby*, 349 U.S. 331 (1955).

92. *Id.* at 333.

93. *Id.*

alty Review Board had no power to review such "an acquittal" and that this was grounds enough to reverse the court of appeals. Peters's counsel, former Judge Thurman Arnold, heatedly told Frankfurter he did not want to win on any such technical ground, and Frankfurter equally heatedly, made clear to Arnold that the Court, not counsel, would decide the ground and it did. That turned out to be a lucky break for me, as the Court's avoidance of the "right to face one's accuser" point gave me the opportunity to argue that question before the Court some four years later.<sup>94</sup>

Following the *Peters* case, Burger was appointed to the United States Court of Appeals for the District of Columbia Circuit. Burger's tough-on-crime performance on that high-profile court made him the perfect choice for Nixon, who was looking for someone who would stand up against crime. With the backing of a new President and having done nothing on the court of appeals to frighten the nation's minorities into opposition, Burger's nomination as Chief Justice sailed through the Senate, and he became Chief Justice in 1969.

I have always thought Simon Sobeloff knew he was forfeiting his own chances for a position on the Supreme Court when he took his principled stand in *Peters*. But, as he himself said at the time, "I do it because I have to be able to live with myself." Sobeloff became an outstanding federal appellate judge but, more importantly, he remains today a role model for young lawyers of the "conscience-over-personal-advancement" school.

Meanwhile Nixon had another chance to move the Court to the right, this one largely unsuccessful. Fortas resigned from the Court on May 14, 1969, under pressure from John Mitchell, Nixon's Attorney General, and from press revelations that he was accepting funds from a foundation controlled by Louis E. Wolfson, a financier in trouble in the federal courts. Nixon nominated for Fortas's seat Clement F. Haynsworth, a federal appellate judge from South Carolina. The case against him was overwhelming. My colleague Clarence Mitchell and I, with the assistance of Marian Edelman and Rick Seymour of the Washington Research Project, laid out for the Senate Judiciary Committee Haynsworth's abysmal record on civil rights. AFL-CIO President George Meany and his counsel, Tom Harris, were equally forceful on the nominee's labor union cases (nine cases, all against labor). But even Haynsworth's anti-civil rights and anti-labor records might not have been enough to defeat him. Many liberal Senators who supported the nomination of Fortas for Chief Justice had argued that a nominee's philosophy and ideology are outside the pale in deciding whether to confirm or reject him. Some of us who supported Fortas had urged the Senators to defend him on the correctness of his views, not their irrelevance, because we feared the theory they were adopting would come back to haunt them. That fear might well have been realized if the Committee had not discovered that Haynsworth had committed serious ethical lapses, including sitting on at least six

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94. See *Taylor v. McElroy*, 360 U.S. 709 (1959); see also *Greene v. McElroy*, 360 U.S. 474 (1959) (secretaries of armed forces not authorized to deprive petitioner of his job due to alleged Communist sympathies in proceeding in which he was not afforded safeguards of confrontation and cross-examination).

cases involving customers of a company in which he had a substantial interest.<sup>95</sup> Recently, Robert Bork has called this "a quite trivial ethical matter,"<sup>96</sup> but it was enough for the Senate, at least when combined with the civil rights and labor opposition. The Senate rejected Haynsworth by a vote of fifty-five to forty-five.<sup>97</sup>

Nixon, outraged at losing on Haynsworth, promptly tried again. His effort to push the Court to the right paralleled his political "Southern Strategy," and he had the right man at hand for both causes in another federal appellate judge, this one from Florida, by the name of G. Harrold Carswell. Nixon must have known Carswell would be opposed, for civil rights opposition to him existed even for the lower federal court. But he also may have believed that the Senate, tired out from the Haynsworth confirmation struggle, would not tackle another nominee so soon.

Nixon was not far off. I have seldom seen the liberal Senators as outraged at the civil rights lobby as when Clarence Mitchell and I began urging a second confirmation battle, this one against Carswell. But the mood in the Senate changed quite fast. An enterprising reporter uncovered an early Carswell speech, strident in its defense of segregation. Civil rights lawyers began telling of his courtroom hostility. A Republican Senator, Roman Hruska, pulled the ultimate gaffe with this remarkable statement of support: "Even if he [Carswell] was mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?"<sup>98</sup>

Ironically, the *coup de grace* may have been delivered by a tenaciously conservative, but scrupulously honest, Southern columnist, James J. Kilpatrick, who actually favored confirmation. When Carswell dissembled about his role in the transformation of a Tallahassee municipal golf course into a private segregated club, Kilpatrick wrote that, "[I]f Carswell didn't know the racial purpose of this legal legerdemain, he was the only one in north Florida who didn't understand."<sup>99</sup> Despite all of this, the American Bar Association stuck with Carswell, and he almost made it to the Court. Although the final vote was fifty-one to forty-five against confirmation, we kept hearing reports that the Administration had two promises from Senators to vote for Carswell if their votes would put him over the top. When Senator John Sherman Cooper of Kentucky announced that he would vote for Carswell, the whole struggle came down to the vote of the other Senator from Kentucky, Marlow Cook. If he too voted for Carswell, his vote plus the Administration's two hidden votes would have made the score even

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95. See *Nomination of Clement F. Haynsworth, Jr., of South Carolina, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary*, 91st Cong., 1st Sess. (1969) (statement of Senator Birch Bayh of Indiana).

96. R. BORK, *THE TEMPTING OF AMERICA* 348 (1990).

97. Haynsworth's recent death sparked loose talk about the Senate having made a mistake in failing to confirm him. This revisionist history seems to be based on Haynsworth's post-defeat record on the Fourth Circuit. But that record was at best equivocal (at least when compared with Justice Blackmun's) and the devastating 1969 confirmation hearings on Haynsworth must be history's real basis for judgment.

98. 26 CONG. Q. ALMANAC 159 (1970).

99. Wash. Post, March 27, 1970, at A22, col. 2.

at forty-eight, with Vice President Agnew breaking the tie for Carswell. When, several days before the vote, I heard what Cooper was going to do, I telephoned Wilson Wyatt, a former Kentucky lieutenant governor who was very close to the *Louisville Courier Journal*, and begged for help on recovering the Cooper vote. The word that came back was simple: "Cooper is gone because he says he is working to change the Administration position on Vietnam. But you will get Cook; he usually votes opposite to Cooper anyway, and he won't miss this chance to show him up." Cook voted with us, Carswell was defeated, and the nation was saved from possibly its worst appointment to the Supreme Court this century.

Nixon was temporarily blocked in his Southern Strategy and his drive for a more conservative Court. For his third try, he not only went North, again to Minnesota, but, swallowing his pride, appointed a Harvard College summa cum laude graduate, Harry Blackmun, who had a fine reputation as a conscientious moderate judge on the United States Court of Appeals for the Eighth Circuit. Confirmation was certain and, after a rocky start, Blackmun has honorably filled the seat of the greats—Holmes, Cardozo, and Frankfurter—with his own brand of independence and greatness. The struggles against Haynsworth and Carswell paid off handsomely.

Nixon was not blocked for long, however. The death of Justice Hugo Black and the resignation of Justice John Marshall Harlan within forty-eight hours of each other in 1970 gave Nixon two new opportunities to affect the course of judicial history. To replace Black, the all-out Alabama liberal, Nixon chose a Virginia conservative, Lewis F. Powell. To replace Harlan, the New York moderate, he chose the first reactionary Justice since the anti-New Deal Court of the 1930s, William H. Rehnquist. Powell had little difficulty being confirmed; his support in the American Bar Association for legal services for the poor and his moderate desegregation actions as Chairman of the Richmond School Board diffused potential opposition. Rehnquist faced, but weathered, serious resistance.<sup>100</sup>

With the confirmation of both Justices, the Burger Court was virtually in place. As it turned out, the Burger Court's shift to the right was considerably less sharp than most observers, at least on the liberal side, had predicted. The tenacity of liberals Douglas, Brennan, and Marshall—holdovers from the Roosevelt, Eisenhower, and Johnson Administrations—and their ability to bring along two or three of their colleagues at crucial moments, checkmated the Chief Justice. The Burger Court can best be described as a jerry-built way-station on the road from Warren liberalism to Rehnquist "reactionaryism."

Burger himself was quite likely the most political Chief Justice of our time. His close contact with Attorney General Mitchell—including his recommendations of the appointments of federal judges and even the Special Prosecutor; his equivocal role in the Watergate tapes cases; and his effort to win review of the criminal convictions of Watergate principals Haldeman, Ehrlichman, and

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100. See *infra* text accompanying notes 111-18.

Mitchell (as ferreted out by that intrepid *National Public Radio* reporter Nina Totenberg)—all evidence his political nature. Three other examples warrant more detailed examination.

One of the clearest rules of the Supreme Court, although an unwritten one, is that the Chief Justice assigns a case when he is in the majority and, when he is not, the senior Justice in the majority assigns the case. Burger, a staunch opponent of the position that the Constitution protects a woman's right to an abortion, and clearly in the minority in *Roe v. Wade*,<sup>101</sup> nevertheless assigned the writing of the case to Blackmun. The assignment was clearly the prerogative of Douglas, the senior Justice in the *Roe* majority. Perhaps Burger took this liberty with the rules and precedents because he hoped that Blackmun's opinion would assert a milder pro-choice statement than one written by Douglas or a Justice selected by him. Possibly Burger thought that a Douglas opinion or assignment would result in much swifter action, which would bring the decision before the public during the 1972 campaign and weaken Nixon's anti-choice position. At any rate, Burger not only did not follow standard procedure for assigning the opinion to a colleague, but also persuaded the Court to carry the abortion cases over until the next term, postponing the decision until after the election. His "concurrence" in the decision could more appropriately have been designated a "dissent."

About the same time, the internal workings of the Court in another case were equally political, if not as well-known. In June 1972, George McGovern won the California Democratic presidential primary by defeating his principal rival, Hubert Humphrey, in a winner-take-all race. Humphrey initially accepted with good grace the result that McGovern's victory would give the latter all the California delegates to the Democratic Convention, but was persuaded by his aides and supporters to reverse himself and assert a claim to a proportionate share of the California delegates. This would have amounted to McGovern losing 151 of the 271 California delegates and could very well have determined the outcome. The Credentials Committee of the Democratic National Convention ruled for Humphrey, and I went to court on behalf of McGovern, ably assisted by young and determined co-counsel. Although the district court called changing the rules after the primary "dirty pool," the judge believed himself powerless and dismissed the case. The United States Court of Appeals for the District of Columbia Circuit heard an emergency appeal on the morning of July 4th; on July 5th, the court of appeals held that the belated change in the rules constituted a denial of due process of law and ordered that the entire McGovern California delegation be seated.<sup>102</sup> The next day the Democratic National Committee filed its petition for review in the Supreme Court; the Committee asked that the Court, adjourned for the summer, convene a special term to review and reverse the court of appeals order. The Convention was now only four days off.

Right away, the Supreme Court began to leak like a sieve from the Justices'

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101. 410 U.S. 113 (1973).

102. *Brown v. O'Brien*, 469 F.2d 563 (D.C. Cir.), *vacated*, 409 U.S. 816 (1972).

law clerks to my young associates. In the heat of battle, I never even considered that it may have been unethical even to listen to their reports on the leaks or to fail to put a stop to them. At any rate, the first leaks made clear that Burger was already lobbying his colleagues on the Court against us, even though all our papers were not yet in. It was unclear just how he planned to upset the lower court's order. Throughout the day, leaks emerged regarding how the Justices were lining up. Although we had counted on Justice Brennan, he did not want to leave his ill wife and return from Nantucket for an oral argument. Did this mean he wanted to leave the court of appeals order intact or change it without briefs and oral argument? Finally news came that Burger was arguing that the Court should grant a stay without briefs and oral argument, even though this would amount to a decision on the merits against the McGovern forces because the Convention would be acting with an inoperable court of appeals decision. At dinner time we got the idea to leak Burger's position to the *Washington Post* and then answer it with the *Post* as our source. At four o'clock in the morning on July 7, we assembled after two or three hours sleep and prepared a "Supplemental Memorandum" answering the "published reports" and pointing out the unfairness Burger's proposition would be. When the Supreme Court Clerk's Office opened for business in the morning, the new document was there for filing.

We waited all day for word from the Court. Around ten o'clock in the evening, it finally came. The Court granted the stay, with Marshall, Douglas, and White dissenting.<sup>103</sup> Douglas called Burger's per curiam opinion "an oblique and covert way of deciding the merits."<sup>104</sup> Marshall said the California primary was an integral part of the presidential election machinery and that its rules could not be changed after the event.<sup>105</sup> Brennan said there was not time to act and then concurred in the act of granting the stay.<sup>106</sup> Four days later, the Convention overruled its Credentials Committee, seating the entire McGovern delegation, and he was promptly nominated. Burger's intervention was not only of dubious legality but counter-productive in effect.

Burger's rulings on major political expenditure issues were not unlike his other maneuvers for the conservative political side. In 1976 he joined in the Court's ruling that Congress could not limit the amount a person might spend from his family's private fortune to get himself elected to office,<sup>107</sup> nor could Congress limit the amount an individual could spend to elect or defeat someone else, so long as the spending occurred independent of the candidate.<sup>108</sup> Burger wanted the Court to go further and knock out public financing and contribution limits as well, but here he was in the minority.<sup>109</sup> Burger's equating of unlimited political spending with free speech turned the first amendment upside down.

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103. 409 U.S. 1, *vacated*, 409 U.S. 816 (1972).

104. *Id.* at 6 (Douglas, J., dissenting).

105. *Id.* (Marshall, J., dissenting).

106. *Id.* at 5-6.

107. *Buckley v. Valeo*, 424 U.S. 1, 51 (1976).

108. *Id.* at 45-51.

109. *Id.* at 51-52 (Burger, C.J., dissenting).

Conceived as the cornerstone of democracy, Burger considered the amendment the basis for a growing political plutocracy.

#### REAGAN FORGES THE REHNQUIST COURT

When Ronald Reagan took over the reins of government in January 1981, the Court was a mixed bag. Brennan and Marshall led the liberal bloc with Blackmun not far behind. The power resided in the middle bloc, consisting of Stevens, Powell, and Stewart. Reagan and his Republican platform had made it perfectly clear that the new Administration would appoint Justices "characterized by the highest regard for protecting the rights of law-abiding citizens . . . [who would] return decision-making power to state and local elected officials . . . who respect traditional family values and the sanctity of innocent human life . . . who share our commitment to judicial restraint."<sup>110</sup> The Supreme Court clock would go back a long way under Reagan. The litmus test for federal judges, at all levels, would be their likelihood to overrule the decisions in past decades banning school prayer, supporting abortion, supporting affirmative action and enforcing school busing, and protecting the rights of criminal defendants. Reagan's success in moving the Court to the right would become the election pledge he fulfilled most effectively.

Reagan did not have long to wait for his first Supreme Court appointment. Stewart retired during Reagan's first year in office, and Reagan promptly chose Sandra Day O'Connor, a state court judge from Arizona, to be the first woman on our highest Court. O'Connor was no pro-choice feminist, but rather an anti-abortion conservative. Confirmation was a cinch. It is too early to tell whether the first woman on the Supreme Court will, ironically, be the fifth vote to ban a woman's right of choice or simply the deciding vote in how far the Court will go in permitting state restrictions on abortion.

Burger retired in the spring of 1986. It seemed then, and still appears to me, that the Administration pressured Burger to leave the Court so it could promote to his post the most conservative and reactionary sitting Justice, William Rehnquist, and appoint an equally conservative appellate judge, Antonin Scalia, to the vacant spot. The Administration's ploy produced a younger Chief Justice and a younger Associate Justice, thus extending the Reagan judicial philosophy just that much longer into the future. Additional support for the theory that Burger was pressured comes from the fact that his stated reason for retiring was almost laughable: to devote full time to the chairmanship of a commission on the bicentennial of the Constitution, as though some formal celebration of law was more important than making law.<sup>111</sup>

At any rate, Reagan got his opportunity to appoint Rehnquist as his Chief Justice and Scalia, a clone of Rehnquist, as his Associate Justice. At first, it seemed like the civil rights forces had a good chance to defeat Rehnquist for

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110. H. SCHWARTZ, *PACKING THE COURTS* 5 (1988).

111. Later, I heard Burger concede on television that in deciding to retire, he had considered the fact that the 1986 election might produce a Democratic Senate—which it did—and this could make it more difficult for the Administration to win confirmation of its choice for his successor.

Chief Justice, which, of course, would have killed the Scalia nomination temporarily. There had been substantial opposition to Rehnquist's initial appointment to the Court, and his decade and a half as Associate Justice more than confirmed the fears of his opponents. Washington was agog with "I-told-you-so's" from Rehnquist's earlier opponents when he alone dissented in *Bob Jones University v. United States*,<sup>112</sup> in which the Court ended tax exempt status for discriminatory private schools, and virtually alone in *Keyes v. School District No. 1*,<sup>113</sup> in which the Court ordered desegregation of the Denver school system.

Even more important than Rehnquist's right-wing decade and a half on the highest Court is the issue of his credibility. At the Senate Judiciary Committee confirmation hearing on August 1, 1986, Senator Metzenbaum asked me if I saw the issue relating very directly to the credibility and the integrity of Rehnquist; the Senator had put his finger on the vital inquiry. In 1986, the key was not what Rehnquist had done as a law clerk for Jackson in the 1950s or what he had done for the Republicans in Arizona in the 1960s,<sup>114</sup> but whether he was telling the truth at his two confirmation hearings. The evidence appears incontestable that he was not. His testimony that the 1952 memo he wrote for Justice Jackson opposing *Brown v. Board of Education* expressed Jackson's views rather than his own is not credible. An excerpt on this point from Richard Kluger's remarkably well-researched and detailed book, *Simple Justice*,<sup>115</sup> had already gone into the record concerning the memorandum.<sup>116</sup> I issued a challenge at the hearing, and I here again challenge anyone to read Kluger's statement and not come away with the conviction that Rehnquist's memorandum reflected his own views, not Justice Jackson's. This position was corroborated by Jackson's faithful secretary as well as by more recent scholars.<sup>117</sup> Rehnquist's testimony that he had not harassed black voters in Arizona in 1962 was almost equally unbelievable. Indeed, I had hardly testified when a panel of witnesses, including a distinguished San Francisco attorney, James Brosnahan, Assistant United States Attorney in Arizona at the time, gave eyewitness testimony corroborating my own.<sup>118</sup> Rehnquist's betrayal of his sworn oath saddens me; I remember the Supreme Court under the moral values of my chiefs, Cardozo and Frankfurter, and the role models they gave the young lawyers of an earlier period. Nevertheless, the

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112. 461 U.S. 574, 612 (1983) (Rehnquist, J., dissenting).

113. 413 U.S. 189, 254 (1973) (Rehnquist, J., dissenting).

114. During the 1952 Term of the Supreme Court while the *Brown v. Board of Education* desegregation decision was under consideration, Rehnquist, then a law clerk to Justice Robert Jackson, prepared a memorandum taking the segregation side of the case. Rehnquist's defense at both confirmation hearings (for Associate Justice in 1971 and then Chief Justice in 1986) was that he was just stating Justice Jackson's views. *Nomination of Justice William J. Rehnquist: Hearings Before the Committee on the Judiciary*, 99th Cong., 2d Sess. 321-25 (1986) [hereinafter *Hearings*].

During the 1962 election, Rehnquist was a Republican challenger of voters in south Phoenix, Arizona, a predominantly black and Hispanic area. There were repeated charges and complaints that the challenging effort was a harassment of voters designed to reduce their numbers by confrontation and intimidation. *Id.*

115. R. KLUGER, *SIMPLE JUSTICE* 603-09 (1975).

116. *Hearings*, *supra* note 114, at 326-33.

117. *See, e.g.*, Schwartz, *Chief Justice Rehnquist, Justice Jackson and the Brown case*, *THE SUPREME COURT REVIEW* 1988 at 245 (1989).

118. *Hearings*, *supra* note 114, at 915-16, 984-1036.

Republican Senate confirmed Rehnquist, and both the Senate and the civil rights groups had no stomach for a battle over Scalia.

### FILLING POWELL'S POSITION

As 1987 dawned, Reagan and Rehnquist almost, but not quite, had control of the Court. Justice Powell had the swing vote. Although a strong conservative, Powell was a holdout on some of the most important items on the Reagan-Meese agenda. On June 2, 1987, speaking at a public luncheon of the Alliance for Justice, a leading organization in the struggle for a liberal federal judiciary, I predicted that Powell would retire at the end of that Supreme Court term. Twenty-four days later he did exactly that. I have no clairvoyance and I had no leaks. It was just elementary logic: I was absolutely certain in my own mind the Administration had pushed Burger off the Court and, of the remaining Justices, Powell was the only one who could be pushed that would make a difference in the Administration's favor.

Powell's retirement apparently was no surprise to the Administration. Senator Orrin Hatch had been disqualified by a congressional pay raise earlier in the year, and Robert Bork, a federal appellate judge in the Nation's Capital, was the obvious choice; his appointment came within days. Bork probably was not much further to the right than Rehnquist and Scalia, who had been confirmed only a year earlier, but he had written out his conservative and reactionary position in such detail that it appeared that way. More organizations came out against Bork than had ever opposed a judicial nominee before. The Leadership Conference on Civil Rights received sufficient financial assistance from its constituent organizations and dedicated supporters to run a grassroots campaign against him. The People for the American Way, women's groups, and others carried the message to the public via the media. It soon became clear that the public was not willing to have Bork reopen the great civil rights and other Bill of Rights battles of the past three or four decades. Even the American Bar Association Committee, which has regularly rubber-stamped every nomination to the Supreme Court, had a few dissenters this time. The Senate Judiciary Committee, especially Republican Arlen Specter and Democrat Edward Kennedy, did the best job of interrogation in years. As Bork began to waffle during Senators' questioning of his views on the first amendment, Senator Leahy coined the leading phrase of the struggle, "confirmation conversions."<sup>119</sup>

Yet the biggest factor in Bork's defeat may have been "none of the above." My most graphic picture of the summer and fall of 1987 is of Martin Luther King, Jr. reaching up from the grave to throttle Bork and temporarily block the Administration's plan to dominate the Court: The Voting Rights Act of 1965,<sup>120</sup> conceived in King's protest at Selma, Alabama, enfranchised Southern blacks and subsequently made possible the Democratic Senate victory in 1986. It was Southern Democratic Senators, elected in part by a black electorate, who

119. H. SCHWARTZ, *supra* note 110, at 138.

120. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at 42 U.S.C. §§ 1971, 1973-1973p (1988)).

cast the decisive votes against Bork.<sup>121</sup>

Whatever "confirmation conversions" Bork may have had for a short time at this hearing, the book he published after he was rejected for a Court seat shows no evidence of any lasting conversion.<sup>122</sup> The book is largely a polemic for the doctrine of original understanding, by which Bork means "how the words used in the Constitution would have been understood at the time,"<sup>123</sup> despite the fact that the absence of adequate records of the Constitutional Convention and the state ratification conventions makes ascertaining such understanding impossible today. But there is no evidence that the authors of the Constitution thought their words were forever immutable. Indeed, for more than fifty years, no one bothered to publish Madison's notes, generally regarded as the record of the Convention's proceedings. To Bork, "judicial restraint" is simply another way of saying "original understanding"; he defines it in express terms as "adherence to the original understanding."<sup>124</sup> But there are many types of judicial restraint: strict construction, deference to elected bodies, and not deciding constitutional questions unless absolutely necessary, among others. Justice Frankfurter, the twentieth century's leading exponent of restraint, relied less on original understanding than did Justice Black, the admitted activist. Claiming original understanding as the only acceptable doctrine, Bork can even call the current Rehnquist Court "left-liberal." With such incredible conclusions, how long he will be treated as a serious legal figure remains to be seen.

The civil rights forces and their allies, inside and outside the Senate, promptly snatched defeat from the jaws of victory in the Bork affair. After Reagan's nomination of a self-proclaimed ultraconservative, Douglas Ginsburg, went up in a small quantity of marijuana smoke,<sup>125</sup> the President nominated Anthony Kennedy as his third shot at filling the vacancy left by Powell. Then a kind of civil rights and liberal anaesthesia set in. Maybe it was a combination of fatigue from the Bork effort and the relief of having avoided a second struggle through the self-destruction of Ginsburg. The failure of the liberals to rally against Kennedy's nomination was not an intellectual "throwing in of the towel," but it was a physical and motivational one.

We knew, of course, that Kennedy's vote on the then four-to-four Court made his nomination as dangerous as Bork's. We knew, too, of Kennedy's right-wing stance while on the United States Court of Appeals for the Ninth Circuit: against Hispanic voting rights,<sup>126</sup> against fair housing plaintiffs who

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121. Burger clearly was right when he suggested that the 1986 election might affect the chances of confirming the Administration's choice for the position of Chief Justice. It is not unlikely that Rehnquist is Chief Justice today because Burger was pushed off the Court in the nick of time.

122. R. BORK, *supra* note 96.

123. *Id.* at 144.

124. *Id.* at 167.

125. Shortly after Reagan sent the nomination of federal appellate judge Douglas Ginsburg to the Senate, it was revealed that he had smoked marijuana while a professor at the Harvard Law School. In the midst of the media flurry that followed, Ginsburg asked that his nomination be withdrawn. See *N.Y. Times*, November 8, 1987, at 1, col. 6.

126. *Azanda v. Van Sickle*, 600 F.2d 1267, 1275 (9th Cir. 1979) (Kennedy, J., concurring), *cert. denied*, 446 U.S. 951 (1980).

wanted to live in an integrated neighborhood;<sup>127</sup> for terminating a school desegregation order even though the record showed recent non-compliance;<sup>128</sup> against the “comparative worth” claim that the wages paid by Washington State for jobs predominantly performed by women were discriminatory;<sup>129</sup> for the Navy’s ban on homosexuals;<sup>130</sup> and against claims of discrimination made by flight hostesses discharged for a weight requirement that was not applied to male stewards.<sup>131</sup> These and other cases not only demonstrated Kennedy’s insensitivity to civil rights, but also his myopic penchant for seeing the facts as against the victims, not the perpetrators, of discrimination. Despite these obvious warnings, the civil rights movement expressed concern about Kennedy but not opposition. The Senate Judiciary Committee, relieved of any pressure from outside, hurried up the hearings and played patty-cake with Kennedy on the stand.

Although, unlike Bork’s case, there was no paper trail of Kennedy’s writings other than the decisions just mentioned, the Committee had a simple way of finding out where Kennedy stood on all the great issues of the day. The Committee had only to take a list of the significant Supreme Court Bill of Rights cases during the past quarter century or so and ask Kennedy what he had said about them to his colleagues on the court of appeals, to the faculty members of the law school where he taught, and to other close associates. Even if a Senator should not ask a nominee how he will vote on a particular case or issue, there’s no reason why a senator can’t ask what the nominee has said about a previous decision. That is a fact just as much as a written statement would be, not an expression of opinion on future cases. What I was pleased to call the Committee of Septuagenarians Against Kennedy—a duo consisting of Molly Yard of the National Organization for Women and myself representing the Americans for Democratic Action—did testify against Kennedy; we were brushed aside like leaves in a windstorm, and Kennedy’s confirmation was never in doubt. Although we liberals won the Bork battle, Reagan won the Supreme Court war. The Court was now his.<sup>132</sup>

#### THE REHNQUIST COURT’S REIGN

“Night has fallen on the Court as far as civil rights are concerned,” said my friend Ben Hooks, Executive Director of the NAACP. And night fell at once, as Kennedy took his place early in 1988 beside Rehnquist, O’Connor, Scalia, and

127. *TOPIC v. Circle Realty*, 532 F.2d 1273, 1276 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976).

128. *Spangler v. Pasadena Bd. of Educ.*, 611 F.2d 1239, 1242-47 (9th Cir. 1979) (Kennedy, J., concurring).

129. *AFSCME v. State of Wash.*, 770 F.2d 1401, 1408 (9th Cir. 1985).

130. *Beller v. Middendorf*, 632 F.2d 788, 792 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

131. *Gerdorn v. Continental Airlines, Inc.*, 692 F.2d 602, 610-11 (9th Cir. 1982), *cert. denied*, 460 U.S. 1074 (1983).

132. Shortly after the completion of this essay, Justice Brennan retired from the Court on grounds of age and health. On July 23rd President Bush nominated David H. Souter, a New Hampshire lawyer and judge, to fill the liberal vacancy with one more conservative. The public knows almost nothing about Souter’s views on the great issues of the day, other than that, according to President Bush, he is a conservative who will “interpret the Constitution, and not legislate”. *Wall Street Journal*, Aug. 24, 1990, at 1, col. 6. The Senate Judiciary Committee’s obsequious questioning of Souter assured his confirmation.

White. Rehnquist, the former lone dissenter of earlier days, now gave a clear exhibition of his and his conservative colleagues' newfound control of the Court at the very first conference of the Justices attended by Kennedy. Twelve years earlier in *Runyon v. McCrary*,<sup>133</sup> the Court had held that the Civil Rights Act of 1866<sup>134</sup> prohibited racial discrimination in contracts and barred private racially motivated refusals to contract, and therefore prohibited such actions by private schools.<sup>135</sup> The case before the Court on the day of Kennedy's arrival involved the question of whether the same statutes against contract discrimination also barred harassment of blacks on the job.<sup>136</sup> Although neither the parties, the federal government, nor anyone else asked the Court to reconsider *Runyon*, the new majority of five ordered argument on the question of whether the Court should reconsider the earlier case and, thus, whether the 1866 law should apply to private contracts at all. One will have to go far to find as blatant a piece of judicial activism, especially by the self-proclaimed apostles of judicial restraint, than this action of the Court. Since I have never seen any evidence that there is more judicial restraint on the right than on the left, the Court's action came less as a surprise than as a warning of things to come. Actually, the outcry against the Court's action in ordering reconsideration of its earlier decision implementing the 1866 statute shocked the Court into taking a different tack—instead of removing all private conduct from the parameters of the statute, the Court simply took a big step toward emasculating the law by saying it applied only to the making and enforcement of private employment contracts, but not to harassment on the job.<sup>137</sup>

Having thrown any pretense of self-restraint out the window, the Court shortly took the opportunity to reject another conservative article of faith: that democratic government is better served by the constitutional judgments of elected officials (Congress, state legislatures, city councils) than by unelected "elite" judges. In January 1989 the Court invalidated a Richmond, Virginia City Council set-aside plan for minority businesses, even though the city was fifty percent black and less than one percent of its prime construction contracts were being awarded to minority businesses.<sup>138</sup> Here was the elected city council, a body as close to the people as can be found, of a city that once was the heart of the Confederacy, seeking to bring minorities into the long-discriminatory construction industry. Yet the newly constituted Supreme Court said "no." No wonder Marshall felt forced to say in dissent and in discouragement, "[T]oday's decision marks a deliberate and giant step backward in this Court's affirmative action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general."<sup>139</sup>

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133. 427 U.S. 160 (1976).

134. The Civil Rights Act of 1866, 14 Stat. 27, (current version at 42 U.S.C. § 1981 (1988)).

135. *Runyon*, 427 U.S. at 168-79.

136. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2369 (1989).

137. *Id.* at 2372-75.

138. *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 708 (1989).

139. *Id.* at 740 (Marshall, J., dissenting).

Then in June of 1989, the Court simply rained anti-civil rights cases. Not only did the new right wing majority emasculate the 1866 "contract" statute, as discussed above,<sup>140</sup> but it greatly weakened enforcement of fair employment practices law in other respects as well. It revised its eighteen-year-old standards governing proof of discrimination in Title VII disparate impact cases;<sup>141</sup> held that court-approved consent decrees are open to challenge by other persons affected by the decree for an apparently indefinite period of time;<sup>142</sup> held that a challenge to a facially neutral seniority system must be timely filed when the system is first put in place and that persons who are affected only later may not then file a challenge;<sup>143</sup> and exculpated discriminatory conduct where other factors contributed to the result.<sup>144</sup>

### SURVEYING THE CYCLES IN THE COURT

As my cycle of the Supreme Court began in the 1930s with the Court raining blows upon the New Deal, so it ends at the opening of the 1990s with the Court starting to unravel the great Bill of Rights gains that were made in the interim. As I stated half jokingly at the outset, if one lives long enough, everything will come around twice. However, I begin to wonder. As I was describing the swing from the anti-New Deal Court to the liberal Roosevelt Court, and then on to the peak liberal Court of Earl Warren on down through the Burger Court to the present conservative/reactionary Rehnquist Court, I was unable to find any precedent for the cycle that occurred during the time I have lived and worked. Of course, there was the slide from the great John Marshall, who forged our strong central government, to Roger Taney and his disastrous *Dred Scott* decision.<sup>145</sup> However, generally the Court, prior to the period just surveyed, seems to have followed a curving and somewhat bumpy road rather than a smooth cycle of liberal and conservative viewpoints. Whether this conclusion is correct and, if so, why, I must leave to historians and scholars.

But what of the immediate future? Has the Court hit its conservative peak? Can we expect a turnaround such as the anti-New Deal Court made in 1937? The answer is obvious: "No." President Bush is no F.D.R.; on the contrary, he has made clear his view that he is perfectly satisfied with his Court. Indeed, Bush's vetoes of pro-choice bills passed by Congress last year demonstrate a Reagan mindset on Bill of Rights issues. Every indication, including Souter's nomination, is that Bush's appointments to the Supreme Court, or to any other court for that matter, will be as obeisant to the views of right-wing America as his predecessors were.

Whether Congress knows it or not, or likes it or not, the protection of the Bill of Rights today is in its hands. With the engines of the executive and judi-

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140. See *supra* text accompanying notes 136-37 (discussing *Patterson*).

141. *Wards Cove Packing Co., Inc. v. Atonio*, 109 S. Ct. 2115 (1989) (5-4 decision).

142. *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (5-4 decision).

143. *Lorraine v. AT&T Technologies*, 109 S. Ct. 2261 (1989) (5-4 decision).

144. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (5-4 decision).

145. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

cial branches of our government sputtering over Bill of Rights issues, our hopes in this area lie with the Congress. Senators and Congressmen are expressly required by the Constitution to take an oath "to support this Constitution" and their faithfulness to their oath today is being tested.

The first task, of course, is protecting the Supreme Court and the lower federal courts from a further swing to the right. Although the remaining liberal Justices on the Court seem determined to serve for life,<sup>146</sup> another vacancy or vacancies on the Court cannot be ruled out. This superannuated Court-watcher feels that the time has come for the Senate's Democrats to make their position on future nominees clear. Instead of waiting until Bush makes a nomination of the Reagan-Nixon variety, the Senate Democrats should adopt a resolution announcing their unwillingness to confirm anyone to the Supreme Court who has failed during his lifetime to show by word or deed substantial dedication to the Bill of Rights. There is no greater responsibility of the Supreme Court, and of the lower federal courts as well, than protecting the freedoms guaranteed by our Bill of Rights and the burden of proof should be on the nominee to prove his dedication to those freedoms. Furthermore, the Bork rejection made clear that the Senate and the American people do not want to repeat the great battles for civil freedom already fought. Instead of an ad hoc battle over each new nominee, the Senate Democrats and the Republican supporters of the Bill of Rights would simply measure the nominee's record against the terms of the resolution, and the Senate would make its decision without all the rancor of the Haysnworth, Carswell, Rehnquist, Ginsburg, and Bork affairs.

There is much Congress can do in its role as protector of the Bill of Rights. Much of what the conservative and reactionary majority of the Court has already done or can be expected to do in the future is in the area of hostile construction of civil rights and other remedial acts of Congress. Nothing could send a more meaningful signal to the Court than speedy reversals of the interpretive decisions it rained down on the civil rights movement last year. In February 1990 Senator Edward Kennedy and Congressman Gus Hawkins introduced the Civil Rights Restoration Act of 1990<sup>147</sup> to do just that. Unfortunately, although this bill passed both Houses of Congress by wide margins, President Bush vetoed the bill. Congress narrowly failed to muster the requisite two-thirds vote to override the veto. The battle will continue in Congress next term.

There is still more Congress can do. Section five of the fourteenth amendment provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."<sup>148</sup> The Supreme Court gave this constitutional provision a broad interpretation in upholding a section of the Voting Rights Act of 1965; there is great potential for future congressional action in this area. Already, legislators advocating freedom of choice are working in both Houses of Congress to hold back state limitations on abortion. They are propos-

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146. Justice Marshall has stated several times this year that he takes seriously his appointment for life and intends to remain on the bench as long as he is able.

147. S. 2104, 101st Cong., 2d Sess. (1990).

148. U.S. CONST. amend XIV, § 5.

ing legislation that will prohibit a state from restricting the right of a woman to terminate pregnancy before fetal viability. Bills to enable states and local bodies to enact set-asides are on the drawing boards in some congressional offices. One can hope for further developments in Congress along these innovative lines.

Looking back on more than fifty years in and about, in front of, with and against, our highest Court, it is clear that this was a period during which the Court took great steps toward individual rights and liberty. Just how far back the existing conservative majority of the Court will take our nation remains to be seen. No doubt that will depend on the political consensus of the nation and especially the political consensus of the Congress, today and in the months and years to come. Rights under our Constitution must depend on ever-shifting protectors, and today the burden to prevent a major retreat is in the hands of Congress.

