

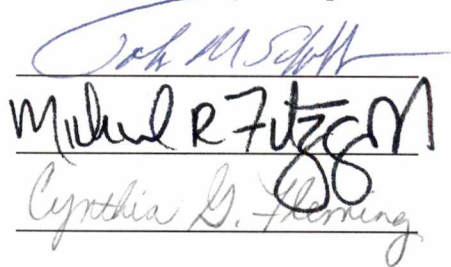
To the Graduate Council:

I am submitting herewith a dissertation written by John Wilson Wells entitled, "Presidential Agendas and Supreme Court Performance: An Analysis of the Nixon and Reagan Justices." I have examined the final copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.



Otis Stephens, Major Professor

We have read this dissertation
and recommend its acceptance:



Associate Vice Chancellor and
Dean of The Graduate School

**PRESIDENTIAL AGENDAS AND SUPREME COURT
PERFORMANCE: AN ANALYSIS OF THE
NIXON AND REAGAN JUSTICES**

A Dissertation
Presented for the
Doctor of Philosophy Degree
With a Major in Political Science
The University of Tennessee, Knoxville

John Wilson Wells
December 1996

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DEDICATION

This dissertation is dedicated to my parents

Rev. William R. Wells

and

Barbara J.C. Wells

who never failed to stress the value of education and
who have always served as sources of encouragement.

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ABSTRACT

This study examined the extent to which the Supreme Court may be described as legitimate in a democratic society. Unlike the other two branches of the federal government, the Judiciary does not answer to the electorate. In order for an institution such as the Court to be considered legitimate, therefore, there must be some link between elections and the policy output of the justices. This project began by discussing the policy agendas of two recent presidents, Nixon and Reagan, and then assessing the levels of compliance demonstrated by their respective blocs of justices. In the case of both presidents, their justices displayed a marked proclivity to support, at least in part, the policy options articulated at the time of their appointments, although there were differing levels of compliance.

Finally, the study concluded by explaining these disparate levels of compliance. A variety of variables, both internal and external, provide indications as to why bloc justices, while more supportive of the issue areas than the non-bloc justices, did not fully endorse the policy positions of their benefactor presidents. The fact that the Nixon and Reagan bloc justices did have a discernibly higher level of support for the stated agendas does provide some evidence of a link between the democratic process and the Supreme Court.

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CHAPTER ONE: THE POLITICS OF APPOINTMENT

When Chief Justice John Marshall expanded the power of the federal Judiciary in the landmark case of *Marbury v. Madison*, a powerful new element was inserted into the American political landscape an independent Judiciary with the ability to check the other branches. Thomas Jefferson recognized this new reality and worried that the Federalist dominated bench would block the Republican program.¹ With this in mind, President Jefferson began the process of attempting to curb Marshall's power by finding jurists who would counter-balance the new Chief Justice's nationalist policies. So began the effort which subsequent presidents have consistently emulated - finding justices whose ideology comports with that of the administration.

The process, known as "packing the Court," is not without its critics. There has always been an attachment to the idea of a dispassionate, objective Judiciary which simply applies the law to specific situations. The fear that the Court could become a kind of super-legislature if it strayed from this rigid conception was addressed in the Federalist Papers when "Publius" reassured the American people that the Judiciary was indeed the "least dangerous branch."² The idealized vision of a Court removed from politics has given way to the far more realistic appraisal that the Court shares much in common with other political institutions.

Lifetime tenure being what it is, there is an overwhelming probability that the "right" pick could still be serving on the Court advancing a given agenda years after the current administration has

¹ Just before he left office, the lame duck Federalist Congress gave President John Adams the opportunity to fill a host of judgeships newly created by the Judiciary Act of 1801. This led Jefferson to worry that the Republicans had succeeded in winning the presidency only to have its effects muted by a solid phalanx of Federalist judges. A discussion of Jefferson's efforts to counter Adams' efforts can be found in Saul Padover's classic study of the Jefferson presidency (1942). See also Randall, 1993; Cuninghame, 1987; and Mapp, 1991. A concise overview of the Marshall and Taney Courts can be found in Newmyer, 1968.

² A more contemporary examination of Judicial supremacy can be found in Alexander Bickel's *The Least Dangerous Branch*, 1962. He found that there was little support for the idea of a dominant judicial branch.

receded into history. This realization, not lost on the senate whose "advice and consent" is required, has often given rise to partisan rancor during confirmation hearings. Therefore, the selection process has become yet another political battleground. In several respects this helps to legitimate what otherwise might be a decidedly undemocratic institution. Since presidents are searching for justices whose ideological predilections are consistent with their own, the choices of Supreme Court justices have at least a tangential relationship to the democratically casted ballots of quadrennial elections.

Despite the expectations on the part of presidents that they are finding the "right" kind of jurists, their efforts have not always been successful. This study will scrutinize the efforts of Richard Nixon and Ronald Reagan to "pack" the Court and examine the difficulties they encountered.

STATEMENT OF OBJECTIVES

This study has the following objectives:

- (1) To examine the specific policy goals Presidents Nixon and Reagan expected their nominees to advance when they made their selections for the Supreme Court;
- (2) To assess the consistency of appointees' opinions with the expectations of the appointing presidents;
- (3) To advance explanations to account for ideological breaks between the presidents and their appointees;
- (4) To examine the scholarly literature dealing with the efforts of presidents to appoint members of the Court who share the president's basic ideological agenda and policy goals;
- (5) To advance some general predictions for the future relationship between presidential expectations and subsequent performance on the bench.
- (6) To examine the use of Supreme Court nominations to further the process of coalition building within the electorate.

LITERATURE REVIEW

Article II, Section 2 of the Constitution of the United States establishes the authority of the President to appoint, with the advice and consent of the senate, members of the federal judiciary. The process of selection and appointment has received a great deal of attention from political scientists.

The literature on the Presidential power to appoint justices has several general themes. First, the process of selecting appointees contributes to the political nature of the Supreme Court. Quite apart from any idealistic expectations of being above politics, the Supreme Court is now and always has been deeply immersed in politics. This makes a president's selection of nominees among his most important decisions (Segal and Spaeth, 1993), (Gates, 1989). By selecting nominees who share the administration's ideological agenda, the president can use his appointment power to build coalitions within the electorate. Since the appointment of justices is such a high profile act, selecting particular justices can clearly demonstrate a president's good faith to political allies.

These political realities conflict with more idealistic views of Supreme Court appointments. Idealistically, the President determines choices for the Court based upon professional qualifications. This idealistic image, still held by many in the United States, was evidenced by the questioning of President George Bush's nomination of Clarence Thomas. A major line of attack in the Senate was that Thomas was not the best qualified person for the position (Phelps and Winternitz, 1992).

Thomas had served in the Reagan administration and was touted as a probable conservative vote. If Bush was trying to find someone who would agree with his policy preferences and goals, then he has been well served by the conservative Thomas. This effort to find ideological stalwarts for the Court realistically describes the president's efforts. Even though presidents know what they want, they can only attempt to find ideological conformity from their nominees - there are no guarantees of success. Truly, the appointment process remains as David O'Brien has termed it, "Judicial Roulette" (1988).

There is no consensus in the literature as to presidential success rates. Some scholars, such as Laurence Tribe (1985), have argued that presidents nearly always get what they want from their nominees while scholars such as David O'Brien disagree (1986). Others charge that presidential efforts to advance their own agenda when making appointments has altered the constitutional role of the Court (Bork, 1990; Graglia, 1990). According to this line of thought, nominees chosen due to their consistent agreement with the appointing president are unlikely to make decisions based upon the constitutional precepts which were deliberately set beyond the reach of temporary political majorities. Rather, they will pursue the goals of the presidential agenda under which they received their appointment. Accordingly, the Court has become less a deliberative body and more an arm of the executive - assisting it in carrying out immediate political objectives.

In essence, these competing conceptions of the Court - an impassioned body set above the temporary majorities of the electorate v. an institution with strong ties to public opinion and trends at the ballot box - are representative of the republican v. democratic view respectively.³ The republican view traces its origins back to Plato's conception of an enlightened leadership searching for the truths of the law set beyond the reach of the masses.⁴ The democratic view of the Court, on the other hand, has philosophical ties to Rousseau. In the latter view, the Court should attempt to find the general will of the people and fashion law as it relates to the context of today's society. Those espousing the republican view tend to become alarmed when the Court seems to be paying attention to popular will too closely. They see this as a dangerous politicization of the Court.

³ The terms "republican" and "democrat" in the this context should not be confused with the political parties of the same names.

⁴ Plato was, of course, concerned with the ability of the wise to discern justice as it related to the metaphysical Forms. He advocated that an upper segment of society be more or less separated so that its members might seek the transcendent truth. This is antithetical to the democratic ideal, which is not surprising since Plato did little to disguise his contempt for Athenian democracy. A good overview of Platonic thought can be found in Annas, 1981.

The charge that the Court is too political is nothing new. According to Robert Scigliano, "Every president has been aware that the men he puts on the Court will, through their decisions, help shape public policy and perhaps the basic relations between the Supreme Court and the Presidency itself" (1971: 85). David O'Brien has suggested that the "reality is that every appointment is political..." (1986: 45) "... every appointment is a political matter and the judiciary is not a meritocracy" (1988: 36). Generally, the Court is depicted in the literature as a political institution quite open to being shaped by the executive (Zobel, 1991).

While ideological consistency is the overriding concern of presidents, it is not the only factor influencing judicial selection. Among other variables, there is a role reserved for merit in the selection process. Presidents will attempt to select someone qualified but they do not earnestly seek the best if that means conflicting with ideological purity. The one possible exception was the nomination of Benjamin Cardozo by Herbert Hoover⁵.

Other variables which appear in the literature include: geography (Rohde and Spaeth, 1976), (O'Brien, 1986); demographic characteristics such as ethnicity, race, and gender (Rohde and Spaeth, 1976), (Tribe, 1985), (O'Brien, 1986), (H. Schwartz, 1988), (B. Schwartz, 1993), (Scigliano, 1971), (Savage, 1992); and patronage (Segal and Spaeth, 1993), (Wagman, 1993). Depending upon the historical circumstances surrounding any given nomination, the preceding variables will rise and fall in strength or may not appear at all. The one variable, however, that is persistent throughout the literature is the variable of ideology. Above all else, Presidents seek nominees who will not negate executive policy preferences once on the Court. The overriding goal of finding a nominee who is in basic agreement with the President is clearly consistent with the picture of the Court as a political institution.

⁵ Hoover was already weakened by the onset of the economic depression and therefore open to pressures which usually can be resisted by presidents in a stronger position politically.

In searching for the right nominees, Presidents have employed a variety of methods. They do so because they have become well aware that the views of a given nominee before service on the Court are not necessarily indicative of how they will vote once they are safely on the bench with lifetime tenure. To facilitate the process of prediction, presidents have utilized several cues. A major cue is partisanship⁶.

According to Rohde and Spaeth, "It appears that the choice of nominees with the same party affiliation is less a means of rewarding party stalwarts than it is a means of assuring a coincidence of views on important issues between the President and his nominees" (1976: 100). As John Brigham points out, "The nominee is usually a member of the president's party and in addition shares with the President those ideological proclivities that are said to matter in deciding cases" (Brigham, 1987: 80). David O'Brien (1988) suggests that the tendency of Presidents to appoint members of their own party is nothing new. He points out that presidents make no effort to achieve any partisan balance in appointments and the party affiliations of justices have historically mirrored those of their benefactor presidents.

Other variables are also used to predict doctrinal performance. The most significant of which is if a president thinks he knows the "real" politics of a nominee. As Theodore Roosevelt observed, "Nominal politics of the man have nothing to do with his actions on the bench. His real politics are all important" (Segal and Spaeth, 1993: 100). This statement reflects the very real concern on the part of presidents that partisanship may be less than perfect in guaranteeing ideological conformity. This allowed Democrat Harry Truman to appoint Republican Harold Burton, Republican Eisenhower to appoint Democrat Brennan, and Republican Nixon to appoint Democrat Powell. As far back as Taft the perception of a nominee's "real" politics led William Taft to give half his appointments to

⁶ This was a major cue for President Truman who primarily relied on party stalwarts when making his selections. President Roosevelt relied on it as well when making his first appointment - Hugo Black.

Democrats. Regardless of the surface appearance of bipartisanship, the president is still looking for ideological compatibility (Corsi, 1984: 143).⁷

Another cue is personal friendship. Presumably, friends are well known, their "real" politics apparent, and there is the added bonus of personal loyalty (Rohde and Spaeth, 1976), (Abraham, 1992). This was the rationale for the Truman appointments. Truman's experience illustrates why even this is not a solid guarantee of getting what is desired. On several occasions, including the famous "Steel Seizure" case during the Korean War, Truman's friends did not uniformly agree with him. Tom Clark, for example, went on to side with Felix Frankfurter and the Court's other conservatives during the balance of his tenure. Truman's use of cronies served him less well than he probably had hoped.

Examining potential nominees' opinions from lower court decisions has also been a cue (Rohde and Spaeth, 1976), (Abraham, 1992), (Savage, 1992), (Smith, 1993). At some level, according to the literature, presidents will use any or all of the preceding in helping to narrow down potential candidates but the extent to which a president is truly willing to risk political capital in the appointing of justices varies according to the current political environment. Robert Scigliano (1971) sets out four conditions which must be present for the president to risk political capital for his nominee: a) the issue must be a high level of intensity; b) it must assume a form in which it can be dealt with judicially; c) the President must have a policy option in mind to deal with the issue; and d) the Court must either be uncertain or outright hostile toward the administration on the given issue. If these conditions are prevalent, presidents will pay particular attention to the cues in order to affect the Court's direction.

⁷ With the increasing ideological homogeneity in the parties, the instances of cross-partisan appointment are declining. Ford, Reagan, Bush, and Clinton have given all of their appointments to party members.

Occasionally presidents have the opportunity to shape the Court in a dramatic way through multiple appointments. George Washington, Andrew Jackson, Abraham Lincoln, Ulysses Grant, William Taft, Warren Harding, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, Richard Nixon, and Ronald Reagan all had opportunities during their terms in office to make multiple appointments.⁸ This study focuses on the efforts of the latter two but all have attempted to leave their mark.

In the words of William Rehnquist, "There is no reason in the world why a president would not pack the Court - appoint people to the Court who are sympathetic to his political and philosophical principles" (O'Brien, 1986: 44). O'Brien goes on to say that the impulse to do just that is often times irresistible to the president (1986: 67). John Brigham (1987) has provided an explanation of presidential attempts to "pack" the court. The chief executive begins hearing talk of a legacy when there is more than one vacancy while that president is in office. He goes on to say that this is particularly true when some ideology or style links the administration to the courts.

Numerous dissertations have dealt with the efforts of presidents to leave their ideological mark on the court and advance their policy agenda. Barbara Ann Perry (1986) argued that while representativeness is a factor in Supreme Court appointments, ideology and policy consistency are realities. Only in the cases of Thurgood Marshall and Sandra Day O'Connor did the representativeness factor have primary importance. Perry's point is well taken but it must be remembered that in appointing Marshall and O'Connor, Presidents Johnson and Reagan chose a liberal Democrat and a moderate-conservative Republican respectively. Even though these presidents may have been attempting to gain some sort of demographic representativeness on the Court, they still

⁸ Other presidents have had the opportunity to appoint one or two members of the Court. This list refers to those who had more than two vacancies to fill.

sought out nominees with the same or similar ideology. Thus, even when other factors exert themselves, the underlying effort is to affect the direction of the Court.

Ronald Romine (1984) defined ideology as the primary concern when appointing justices. He defined ideology as the effort to "pack" the court in favor of the president's agenda. Romine constructed a "politicization" index to explore the hypothesis. His findings suggested that some appointments are more political than others. According to Romine, the political nature of the process of selecting nominees has increased. While not a straight rise it is generally increasing.⁹

James Fadely (1990) in his dissertation, looked at the expectations of Franklin Roosevelt in selecting nominees for the bench. While not the central aspect of his dissertation, he pointed out that Roosevelt, consistent with his desire to rid the Democratic party of its conservative wing, had no intentions of appointing anything but ideological purists¹⁰. Having failed in his efforts to change the court by extra-traditional means he simply continued by more orthodox approaches through the appointment process. Roosevelt's definite goals and the desire to further them helped determine his appointments.

The failure of Roosevelt's appointees to stay together and form a consistent bloc was the subject of a dissertation by Robert Harrison (1987). Harrison began with the position that Roosevelt was trying to pack the court through the appointment process. He then continued by pointing out that Roosevelt's goal was not necessarily successful. He used the balance of his work to point out the reasons why. Among the more important reasons he cited were the contrasting backgrounds of the

⁹ He cites the appointment of Louis Brandeis as the most ideological of the nominations and the nomination of John Paul Stevens to be the least.

¹⁰ In the mid-term elections of 1938, President Roosevelt encouraged liberals in Georgia and Maryland to challenge incumbent Democratic senators in order to silence their conservative criticisms of his administration. His willingness to divide the party in this way was indicative of Roosevelt's desire to bring about uniform progressivism within the Democratic party.

nominees. These radical differences, Harrison argues, were responsible for the failure of the Roosevelt bloc to stick together and articulate a consistent interpretation of the law.

The specific expectations held by various Presidents in making district court selections was the subject of a dissertation by Kevin Lyles (1991). Lyles began by defining the policy preferences of certain administrations in selected policy areas such as abortion rights, religious liberty, affirmative action, school desegregation and voting rights. The dissertation came to the conclusion that given a firm and well stated position on the part of the administration, presidents have great success in naming judges who comport with the goals of the executive. If the president takes part directly in the process of selection, he has generally experienced even greater success.

Stacy Jordan (1992) examined the extent to which the antitrust decisions of certain Supreme Court justices are consistent with policies pursued by the Presidents responsible for their appointments. An ideological link was found between judicial performance and the President doing the appointing. Republican nominees were observed to be far less likely to condemn predatory pricing. The dissertation's conclusion was that the nominees of certain Presidents are predisposed to vote in a way that frustrates the enforcement of the antitrust laws.

A good example of dissertation research dealing with presidential expectations and Supreme Court appointments was provided by Bruce Kalk (1992). Kalk offered arguments to suggest that the failed appointments of Carswell and Haynesworth by Richard Nixon were made with a twofold goal in mind - reverse the judicial activism of the Warren Court and reach out to the formerly "solid" Democratic South which then seemed ripe for realignment. Despite the inability of his nominees to gain Senate approval, he concluded that Nixon was successful in helping to realign the South. Thus, presidential rationale for selections are sometimes influenced by factors quite apart from simple service on the bench.

The dissertation of Jennifer Warden-Adebanjo (1992), contrary to the assertions of Kalk, argued that the nominees of Richard Nixon did little to change the ideological direction of the Court. Warden-Adebanjo identified Nixon as the central character in the transition from the Warren Court to the Burger court. Despite his campaign rhetoric in 1968 suggesting his desire to turn the Court rightward, his efforts, as well as those of two subsequent Republican Presidents, have been largely unsuccessful. She concluded by arguing that the Supreme Court is unpredictable and the link between presidential expectations and subsequent performance is, at best, weak.

HISTORICAL CONTEXT OF PRESIDENTIAL APPOINTMENTS

To understand the connection between the appointment power of the President and subsequent performance on the part of nominees, there must be a historical context. Presidents have generally been successful in naming members of the Court who share their basic views. In fact, less than one fourth of the justices, Republican or Democrat, can be characterized as being in opposition to the program of the president who appointed them (Rohde and Spaeth, 1976).

George Washington, for instance, was concerned about using the judiciary as a means of strengthening nationalist sentiment early in the republic¹¹. His nominees largely did that (Tribe, 1985). In such cases as *Chisolm v. Georgia*, *Ware v. Hylton*, and *Hylton v. The United States*, the justices appointed by President Washington rendered decisions friendly to the goal of nationalism. The performance of the Washington appointed Court is largely credited with laying the foundation

¹¹ While Washington has been characterized as being "above party," there is overwhelming evidence to the contrary which suggests that he was in almost complete sympathy with the Federalist attempts to strengthen the federal government and extend nationalist power. For a full discussion see Sharp, 1993. His book focuses specifically on the political debates of the 1790s. Richard Norton Smith's *Patriarch* (1993) provides a good assessment of Washington's efforts to remain in the middle between his Treasury Secretary, Hamilton and his equally outspoken Secretary of State, Jefferson.

from which the Marshall Court strengthened the federal government during the first third of the nineteenth century.

Not all presidents have had Washington's success however. The best early example of a regretted nomination was James Madison's appointment of Justice Joseph Story. The opportunity to appoint a justice in 1810 elated the Republicans. Both President Jefferson and his hand picked successor, James Madison, had been perturbed by the Federalist dominated bench. They hoped to find individuals with enough stature and character to oppose John Marshall and uphold the doctrines of states' rights, small government, and agrarian interests. Jefferson remarked upon hearing of the death of the justice whom Story would ultimately replace, "Old Cushing is dead. At length then, we have a chance of getting a Republican majority in the Supreme Judiciary" (Schwartz, 1993: 60).

Whatever hopes the Madison administration had for Justice Story were shattered early. Not only would Story fail to join the anti-Marshall efforts, he actually participated both actively and enthusiastically in Marshall's reshaping of America's pliable Constitution. He became a prime architect of national interests in his own right. In the 1816 case, *Martin v. Hunter's Lessee*, Story demonstrated his belief in the supremacy of national over state institutions. In this case, which would have been written by the Chief Justice himself had he not been involved in the litigation, Story rejected the state centered opinion of Virginia and declared emphatically that the Supreme Court had appellate jurisdiction over state court decisions.¹²

Professor Laurence Tribe (1985) has argued that the fervent Federalist inclinations of Story should have come as no surprise to President Madison. In his attack on what he entitles the "Myth of the Surprised President," Tribe cited Jefferson's warning to Madison regarding Story's innate Federalism as partial evidence that President's get what they expect out of nominees. Regardless of

¹² See Schwartz, 1993.

Tribe's assertion, Madison must certainly have been shocked at the intensity of Story's devotion to nationalism. Even if the argument is accepted that Madison knew something of Story's views, he surely didn't expect the wholesale assault the justice conducted on Jeffersonian philosophy. As such, Madison's effort to fill the 1810 vacancy must be labeled a failure and a disappointment.

Although he didn't experience misfortune to the extent which Madison did, President Lincoln too, failed to gain all that he had hoped from his Supreme Court nominees. When Chief Justice Taney died, Lincoln had a host of qualified potential successors but he chose, in the interests of national unity and party politics, Salmon P. Chase (Abraham, 1992).¹³ Chase stood by the Lincoln expectation on war related issues but in 1870 he, along with fellow Lincoln appointee Stephen Field, charted his own course in *Hepburn v. Griswold*. The Court's decision in this case overturned greenback legislation passed during the war. Although the decision was soon overruled, Lincoln would surely have not been pleased (Abraham, 1992).

According to Professor Tribe (1985) President Grant nominated Joseph Bradley and William Strong in a deliberate attempt to gain a favorable verdict in the Legal Tender cases. He was successful, for in *Knox v. Lee* the administration got what it wanted when the previous decision was struck down. The later, more favorable decision, was rendered possible by the Grant nominees. This episode adds evidence that a president is generally successful in getting nominees to support him on matters of immediate interest and only less successful as time goes by and other issues present themselves.

Oliver Wendell Holmes, Jr. is often cited as an example of a justice who strayed from the wishes of his appointing president. Holmes, regarded as one of the leading jurists in American

¹³ Chase had been a consistent critic of the Lincoln administration and had actually been an opponent of Lincoln for the nomination in 1860. Lincoln's appointment must therefore be viewed as at least a partial attempt to neutralize a political opponent. See David Herbert Donald's notable biography of Lincoln (1995).

history, had a keen intellect and an almost reverential respect for the institution of the Court. The legacy of Justice Holmes is one of deference to the legislature except when they cut into the non-economic precepts of the Bill of Rights - especially freedom of expression and Fourth Amendment guarantees. Regardless of the fact that Roosevelt had many reasons to be satisfied with his selection, he remained, as Henry Abraham described him, "peevish" about his choice due to Holmes' pro-business stands on anti-trust matters (1992: 163).¹⁴

William Howard Taft had perhaps the best opportunity since Washington to reshape the Court. In his single term he was able to appoint six justices. He searched for nominees whose "real" politics were in accord with his own (Abraham, 1992). Accordingly, he ignored the nominal politics of three of his appointees and appointed them despite their affiliation with the Democratic party. Taft's first appointment, Horace Lurton of Tennessee, was a Democrat but a southern conservative. His second appointee, Charles Evans Hughes, was selected due to his ideological consistency with the president (Schwartz, 1993).

Taft's other appointees: the elevation of Edward White to the Chief Justiceship, Willis Van Devanter, Joseph Lamar, and Mahlon Pitney, were all selected on the basis of their being potentially conservative justices who would strike a pro-business posture (Schwartz, 1993). Clearly, the goal of Taft was philosophical compatibility. Laurence Tribe (1985) argued that Taft was largely successful in placing his ideological stamp on the Court.

The most noted example of a president attempting to alter the balance of the Court occurred during the presidency of Franklin Roosevelt. Elected during the severest point of the Great Depression, the country expected Roosevelt to attempt at least some sort of government led remedy.

¹⁴ There is some irony here in that Holmes seemed to reflect the T. Roosevelt philosophy in virtually every other way. Roosevelt harbored similar negative sentiments toward his executive successor even though Taft, in many ways, carried out the Roosevelt program of trust busting and conservation in an even more zealous way than Roosevelt himself. Slightings toward Roosevelt and his policies were often more perceived than actual.

Time and again the judiciary blocked executive initiatives to deal with the bleak situation. In the mid-thirties the Court struck down such measures as the National Industrial Recovery Act and the Agricultural Adjustment Act¹⁵. With the Wagner Act and the Social Security Act coming before the Court in a very short time, the President decided to take bold action rather than risk the fate of these latest initiatives before the hostile Court.

Given life tenure on the Court, there were no guarantees of any vacancies in time to save the president's program. The Court seemed as committed to the concept of economic laissez faire as they were at the turn of the century and showed few indications of reversing. Roosevelt had promised the American people action. Given his large electoral majorities, it was frustrating to have the mandate of the electorate and yet be unable to do anything with it.

Roosevelt announced a plan commonly referred to as his "Court packing plan." Although the plan was ultimately defeated, Roosevelt was quickly presented with more traditional opportunities as various Court members began retiring. Conservative Taft appointee, Willis Van Devanter, was the first to retire. Roosevelt was now free to fill the vacancy with like minded jurists. His first selection was Hugo Black, a stalwart New Deal senator from Alabama.¹⁶ Over the course of the next few years, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert Jackson, James Byrnes, and Wiley Rutledge all were added to the Court and Harlan Fiske Stone was elevated to Chief Justice.

¹⁵ The National Industrial Recovery Act's being struck down was a particular blow to the White House since this was a linchpin agency of the New Deal. From Roosevelt's perspective, much like Jefferson's a century before, the conservatives on the bench were doing what they failed to accomplish at the ballot box - exert power.

¹⁶ Roosevelt's selection of Black was something of a surprise. Although Black had been a loyal supporter of the New Deal program, he had also been a member of the Ku Klux Klan. See Bell and Cooper, 1991.

The Court, after 1937, was different.¹⁷ It ceased to be an obstacle to the President's program and for all intents and purposes, ignored the Tenth Amendment.

Roosevelt's initial failure to reshape the Court in his own philosophical image was ultimately rendered moot by the cumulative impact of his appointees. His immediate program of attempting to resuscitate the moribund economy by using government as an utilitarian instrument was allowed to proceed. Although some of the Roosevelt appointees were not as supportive of an expanded governmental role (Frankfurter, Jackson, and Reed) the overall impact was such that Roosevelt got most of what he wanted.

President Truman is generally regarded as having been less fortunate in his efforts to shape the Supreme Court. His first opportunity to fill a vacancy came early in his tenure with the retirement of Justice Owen Roberts. To fill the seat, the President turned to his old senate colleague Harold Burton. The President was comfortable with Burton for a variety of reasons. He had been a staunch New Deal loyalist, a close friend, and as far as Truman could tell, shared the President's ideology (Abraham, 1993).

Chief Justice Harlan Fiske Stone died suddenly in 1946. To fill the void, President Truman chose another crony who had served in a variety of government capacities, Treasury Secretary Fred Vinson. Again, like Burton, the President leaned on his personal relationship with Vinson to predict what kind of Chief he would be. Given the critical tone of later scholarly assessment of Vinson, Truman was clearly searching for ideological compatibility rather than someone with impeccable legal talents.¹⁸

¹⁷ An important change in the Court's direction was signaled when Justice Owen Roberts dropped his opposition to the Roosevelt program. This was said to have been the "switch in time that saved nine."

¹⁸ Scholars have consistently ranked Vinson near the bottom of the list in effectiveness. Long after his death, Court colleagues recounted their affection for Vinson personally as well as their near utter disregard for his intellectual abilities. See Schwartz, 1993

Attorney General Tom C. Clark was nominated to replace Frank Murphy in 1949. Clark was generally perceived to have been of mediocre talent and largely followed the pro-government lead of Chief Justice Vinson (Schwartz, 1993). Truman later regretted Clark's nomination for in his opinion, Clark did not adequately reflect the views which Truman assumed he would.

Truman's last appointment to the Court was former Indiana Senator Sherman Minton. According to scholars (Abraham, Schwartz, Smith, etc.) he is remarkable only for his consistently unremarkable record. With Minton, the Truman opportunities for shaping the Court were at an end. Although Truman vented when the Court sided against him in the Steel Seizure case of 1952, Professor Tribe (1985) argues that Truman got the balance of what he expected.¹⁹ While the Truman justices were, indeed, consistent in their mediocrity, Truman's cronies stayed essentially true to his expectations.

Dwight Eisenhower is generally known to have been less than satisfied with his Court selections. The first vacancy occurred in 1953 when Chief Justice Vinson died. Vinson's death could not have come at a more critical time for the nation and African-Americans in particular. The Court was badly fractured over the issue of school desegregation. Justices Frankfurter, Reed, and Jackson were wrestling with the decision as to how to vote in the *Brown* case then before the justices (Wagman, 1993).²⁰

Eisenhower selected California governor Earl Warren to be Chief Justice.²¹ There was little indication that Warren would become the focal point for conservative criticism. He had been a prosecutor in California, a supporter of the internment of Japanese-Americans during the war, and a

¹⁹ Civil Rights is an example of an area where the Truman justices did exactly what was expected of them.

²⁰ See Kruger, 1976.

²¹ Apparently, Eisenhower had promised Warren a seat on the Court in return for his support in wrestling the Republican nomination away from Senator Robert Taft in 1952 (White, 1982).

consistent opponent of President Roosevelt. In reality, however, Eisenhower had badly miscalculated. Warren's brand of judicial activism, spurred on by a reformer's zeal, was destined to reshape both the Judicial branch and the nation as a whole.

Eisenhower, like Taft and Roosevelt before him, was given the chance of leaving a lasting mark on the bench with multiple appointments. His next appointee was more consistent with what Eisenhower expected (Wagman, 1993). John Marshall Harlan, named for his grandfather who had served the Court with distinction, replaced Robert Jackson in 1954. Following Harlan was Eisenhower's selection of William Brennan to replace Minton. Charles Whittaker and Potter Stewart would then follow.

From the perspective of ideological compatibility, the Eisenhower record is a mixed bag. His five appointees by no means formed a consistent bloc so there has been little scholarly reference to an Eisenhower Court. Laurence Tribe (1985) described justices who diverge from their president's agenda as "surprises". Eisenhower certainly had at least two surprises - Warren and Brennan. Not only did both justices depart from what Eisenhower had in mind, they became leading figures of the progressive judicial tradition.

John Kennedy was a different kind of president than Dwight Eisenhower in that Kennedy's administration was more willing to use the federal government in instrumental ways to shape society. This was evidenced by such episodes as the integration of the University of Mississippi and the efforts to gain anti-poverty legislation in Congress. This more expansive vision carried over to the president's appointments to the Supreme Court. In 1962 Kennedy made two appointments - Arthur Goldberg and Byron "Whizzer" White.

According to Robert Scigliano (1971) the Kennedy administration had reason to be disappointed in White and more than satisfied with Goldberg. Despite his brief tenure on the Court, Goldberg consistently provided for Warren a fifth vote in crucial cases. He quickly aligned himself

with the Warren-Brennan-Black-Douglas wing of the Court on matters pertaining to individual liberty and civil rights. White, on the other hand, was widely perceived as having traveled from the political left to the right during his time on the Court.

Lyndon Johnson was also given two opportunities to influence the Court. Both Abe Fortas and Thurgood Marshall joined the aforementioned liberal bloc headed by Warren. Given the reformist inclinations of the Johnson administration, both appointments were in line with the president.

This brief historical sketch clearly notes that presidents have generally been successful in gaining what they want out of their nominees but this is not a hard and fast truth. Occasionally, presidents like Madison, Lincoln, Wilson, and Eisenhower have had reasons to look back with some measure of regret. The survey shows, however, that when the president has some specific objective, he usually achieves it. Grant, for example, was able to get his short term goal of reversing the greenback verdict. Roosevelt was able to remove the judicial obstacle to his New Deal. This study will examine the immediate policy goals of the Nixon and Reagan administrations to determine whether or not their respective appointees to the Court confirmed or ran counter to the goals set forth by each president.

THESIS STATEMENT

Both Presidents Nixon and Reagan used the Supreme Court to advance their ideological agendas and construct political coalitions. Nixon's Supreme Court appointments were made on the basis of their ability to appeal to the South on the issues of crime and busing. Reagan's Supreme Court nominees were made on the basis of their ability to appeal to Religious conservatives on the issues of religion in public life and abortion. Nixon had the greatest success from his appointments in

the area of reversing the impact of the exclusionary rule due to the unusually strong favorable internal and external variables.

HYPOTHESES AND ASSERTIONS

The project begins with the assertion, based upon the literature review and historical overview, that presidents often get what they want from their Supreme Court nominees. Compliance, however, is far from a hard and fast rule. A second assertion, again grounded in the literature review, is that failure to gain compliance from their appointees on the Court is not attributable to a lack of presidential desire for conformity. Finally Supreme Court appointments take place not simply within the confines of an administration but before the broader national political backdrop which includes a variety of mitigating variables affecting compliance.

The study hypothesizes that internal variables, including institutional constraints such as following precedence, and the value framework employed by individual justices have an impact on compliance. The study further hypothesizes that external variables, including the recognition on the part of justices that their decisions have the potential of affecting a dramatic impact on the American political landscape, will also have bearing. The extent to which justices seek to avoid an adverse impact affects judicial compliance. Finally, if justices perceive the president's agenda as being compatible with the current values construct (as explained in Chapter 8, the general will) of contemporary society, they will more likely conform to presidential wishes.

METHODS

The method employed will be a systematic, empirical analysis of presidential judicial selection and subsequent jurisprudential performance. The data are Supreme Court decisions and

scholarly commentary. To gain further background information other sources such as official presidential records and the Congressional Record will also be employed.

CHAPTER OUTLINE

This dissertation will be divided into eight chapters. The first chapter will serve as the introduction -- an examination of the literature, a brief historical review for purposes of context, and a dissertation overview. Chapter Two retraces the public sentiment toward the Warren Court at the end of the 1960s - the time of Richard Nixon's rise to power. The statements of Mr. Nixon regarding his consideration of what a good justice should be will be examined. Nixon's failed efforts at nominating Clement Haynesworth and Harold Carswell will be reviewed as well as the charged political atmosphere surrounding the Supreme Court in the wake of the Fortas fiasco and the attempts of Gerald Ford to bring about the impeachment of William Douglas. A careful exploration will reveal Nixon's ultimate goals in selecting nominees.

Chapter Three addresses the relevant cases dealing with criminal procedure during the time in which Nixon's justices sat as a bloc (1972-1986). The chapter will examine the positions of each of the Nixon justices with a careful eye focused on compatibility with the goals outlined by Nixon in the preceding chapter. Chapter Four addresses the Nixon justices' jurisprudence surrounding the controversial issue of mandated busing for purposes of achieving racial balance in schools.

Chapter Five scrutinizes Ronald Reagan's agenda and discuss the ideological "litmus tests" he had for potential justices. Chapter Six explores the Supreme Court opinions of the Reagan justices in the area of abortion rights and how their performance ultimately fell short of what Reagan had in mind.

Chapter Seven investigates the performance of the Reagan justices in the area of school prayer illustrating how the Reagan justices in this crucial area as well, failed to deliver all that the

President may have wished. The last chapter will conclude by comparing the relative success of the two presidents and the factors accounting for their differing levels of success. Finally, some general predictions for the future of presidential nominations as well as other potential areas of research will be advanced.

CONTRIBUTIONS TO THE LITERATURE

The Supreme Court is an extremely important institution in American politics. Despite the voluminous work investigating the Court's role in the policy process, understanding of the Court's interactions with the executive is still lacking. Due to the practice of judicial review, the Court remains an ever present threat to the policy initiatives of the executive. A recognition of that fact has led Presidents to attempt to appoint like minded jurists to the bench. The extent to which elections of presidents are, in part, also elections for judges and justices must be explored more fully.

This research is important for the study of the Supreme Court for the following reasons:

- (1) The research adds to the current literature which emphasizes the political role performed by the Supreme Court;
- (2) The study examines the relative success both presidents experienced in their efforts to leave their ideological mark on the Supreme Court;
- (3) The study places the Court in perspective as a policy making institution within the American political system;
- (4) The study illuminates the link between appointments to the Supreme Court and political coalition building;
- (5) By examining the link between presidential expectations and subsequent judicial performance, the extent to which the Supreme Court can be described as a democratic institution is addressed;

- (6) This study advances some general predictions about the future of presidential appointments to the Supreme Court.

CHAPTER TWO: THE SUPREME COURT AND THE SOUTHERN STRATEGY

The following chapter is divided into three parts. The first chronicles the emerging Republican majority in the South as the region moved slowly away from its traditional alliance with the Democratic party. It begins by tracing the rising Southern disillusionment with the Democratic party and how this presented an unique opportunity for the incoming Nixon administration to establish a Republican lock on the White House. Section two examines the specific Supreme Court selection criteria employed by President Nixon and how that process related to the President's much vaunted "Southern Strategy." Finally, the chapter concludes with an examination of the six men whom Nixon nominated for the Supreme Court.

THE EMERGENCE OF THE REPUBLICAN SOUTH

Richard Nixon won the election of 1968 by a very narrow margin.¹ The election, held in one of the most divisive years since the Civil War, was made particularly more polarizing by the presence of Alabama Governor George Wallace - the voice of the politics of backlash. His fiery speeches denouncing the perceived cultural and political excesses of the generation, threatened to delay the emergence of a solid Republican south.² Nixon recognized the need to foster the South's partisan realignment if the Republicans ever hoped to end the hegemony of the New Deal coalition. His task

¹ Nixon defeated Humphrey by less than one percentage point making the election of 1968 second in closeness only to the narrow defeat of Nixon in 1960.

² In 1968 Hubert Humphrey ran third in several deep southern states. This indicated that the old Roosevelt coalition was breaking down. When Nixon and Wallace's popular votes are added together, they composed 57% of the electorate. As Kevin Philips recognized in *The Emerging Republican Majority* (1969), this indicated a clear majority of the American electorate was prepared to abandon the egalitarian politics of President Lyndon Johnson. Nixon sensed that he had the same opportunity Franklin Roosevelt had in 1932 to turn his party into the majority party for a generation.

was complex in that he needed to appeal to the South without alienating the rest of the country. This simultaneous effort is known as the Southern Strategy.

The center of the Southern Strategy was the Supreme Court. The retirement announcement of Chief Justice Earl Warren in 1968; the continuing financial difficulties of Abe Fortas; and the declining health of aging Justices John Marshall Harlan, and Hugo Black presented the incoming president with an unusual opportunity to reshape the Court's ideological composition.

Having campaigned against the Court, President Nixon could plausibly argue that voters had given him a mandate to change the personnel and consequently, the ideological direction of the Supreme Court (Friedman and Levantrosser, p.361; 1991).

Nixon began the process, later to be pursued by Reagan, of redirecting the course of judicial activism which had emerged under Earl Warren (Parmet, 1990).

Nixon's fortuitous timing of arriving in office at the time of great personnel change on the Court, came as the South was experiencing political transition. The Democratic Party had been home to most southerners since the days preceding the Civil War. Following the collapse of the Whig Party in the 1850s, most southerners gravitated to the Democratic party which promised to fight any federal attempt to meddle with the South's "peculiar institution."³ This relationship continued after the war as Democrats urged restraint and "easy Reconstruction" while so called Radical Republicans, such as Thaddeus Stevens and Charles Sumner, demanded a prostrated, militarily occupied, and totally

³ In the 1830s President Jackson's expansion of federal power concerned the South. The famous Nullification Controversy with John C. Calhoun had begun the drift of many southerners into the hard core states' rights wing of the Whig party (Virginian President John Tyler would be an example). By the 1850s, the nationalistic Henry Clay wing of the Whig party gained dominance while the Democratic Party seemed willing to do whatever was necessary to keep the country together - including leaving slavery alone. This began the South's "solid" affiliation with the Democratic party. For full discussions of Jacksonian politics see Remini, 1966; Latner, 1979; Watson, 1990. For an examination of the rise of the Whig coalition see Freehling, 1990. Daniel Walker Howe's *The Whig Temptation* (1979) remains the best treatment of the Whig ideology in the 1840s.

reformed South.⁴

As long as Reconstruction continued, federal troops remained in the South and the Republican program - evolving through its various forms, was enacted (Stamp, 1965). In 1876, the election deadlocked between Republican Rutherford Hayes and Democrat Samuel Tilden. In a well known settlement, southern states agreed to support the former Union soldier, Hayes, in return for the promise to remove federal occupation troops (Tindall and Shi, 1993). This led to the collapse of the remaining Republican regimes in the South and the reemergence of white Democratic home rule.⁵

This bargain between powerful northern Republicans and local southern Democrats became the center of an unspoken pact allowing an otherwise bitter South to return to the Union without the threat of northern intervention in local southern affairs. For over seven decades this agreement stayed in place and helped to seal southern allegiance both to the Union and to the Democratic party. The old alliance between the South and urban north first forged under Thomas Jefferson and George Clinton in 1791 was thus revived.⁶

In 1948 the first cracks in the foundation of that alliance began to become apparent. President Harry Truman, a border state Democrat, presumably "safe" as far as the Jim Crow supporters were concerned, began placing civil rights higher on the national agenda. Clearly, Truman was no

⁴ Radical Republicans were convinced that the war had been about slavery and improving the condition of Southern blacks. In their estimation, failure to carry through on these war aims would only bring dishonor to the Union war dead. For a full discussion see Foner, 1988.

⁵ Republican Reconstruction regimes remained in power in only a few states at the time of the bargain of 1876 but southerners as a whole saw it as symbolic that the last of the federal troops would be leaving Charleston, Atlanta, Richmond, etc. See Patrick, 1967.

⁶ At the time of the dispute between Jeffersonian Republicans and Hamiltonian Federalists in the 1790s, Jefferson and Madison traveled to New York to forge an alliance with then governor George Clinton. This alliance between the urban north and South continued into the twentieth century as was evidenced by the fact that as late as the elections of 1952, 1956, 1960, 1964, 1976, and 1980, Democrats nominated a Southerner and a Northerner while Republicans tended to try to link the Midwest and Eastern establishment with California. For a full discussion of the Jeffersonian alliance with Clinton, see Cunningham, 1987; Sharp, 1993; Randall, 1993.

outspoken civil rights leader but he did represent a fundamental break with the Democratic tradition of benign neglect in the area of black rights.

A bold and forceful presentation by Hubert Humphrey, mayor of Minneapolis, at the 1948 Democratic nominating convention sparked such unrest on the part of Southerners that much of the Mississippi and portions of the Alabama delegations walked out to form their own States' Rights or "Dixiecrat" party. They nominated South Carolina Governor J. Strom Thurmond for president.⁷

The civil rights rhetoric, which was followed by a civil rights plank in the Democratic platform, signaled an end to the bargain of 1876 (Scher, 1992). In the eyes of southern leaders, this may have signaled the start of a concerted effort on the part of the Democratic party and subsequently the federal government to dismantle slavery's stepchild, Jim Crow.

Disenchantment with the Democratic party grew with the emergence of a new generation of leadership within the party. Southern politicians committed to the South's traditions, such as Jimmy Byrnes of South Carolina, Richard Russell of Georgia, John J. Sparkman of Alabama, and James O. Eastland of Mississippi, were being replaced by more progressive national Democrats like Adlai Stevenson, Hubert Humphrey, and Averell Harriman - none of whom were interested in maintaining southern loyalty at the price of continuing black servitude.⁸

⁷ Despite later protests from Senator Thurmond, there was little question in 1948 that the split was over the immediate issue of black rights and not the more traditional issue of states' rights. Even if the arguments of Senator Thurmond are accepted, one must remember that states' rights, in the southern context, has nearly always been a codeword for the South's racial policies. The states' rights rhetoric at the time should be viewed from the perspective of thwarting national civil rights legislation. For a full discussion of Thurmond's presidential aspirations in 1948, see Cahodas, 1993.

⁸ The transformation of the Democratic Party in the late 1940s and 1950s is telling. Although southern senators continued, due to seniority, to dominate key committee chairs, the party was turning increasingly to liberal northerners to carry the party standard. Adlai Stevenson, for example, had little substantive policy positions which recommended him to the South. The drift to the left would, of course, become much more pronounced in the 1960s and ultimately the so called "New Left" would succeed in taking over the party with the nomination of George McGovern. Disaffected blue collar Democrats would become known as "Reagan Democrats" in the 1980s.

The Republican party of the 1950s offered no real solace to southerners either. It was the home of civil rights advocates like Jacob Javits and Nelson Rockefeller of New York. Dwight Eisenhower even sponsored a civil rights bill in 1957 and despite his protestations and subsequent remorse, he was, nevertheless, responsible for appointing Earl Warren as Chief Justice. With no one enthusiastically seeking their support, the 1950s was a time of fluctuation and transition for the South (Scher, 1992).

In the eyes of southern fire eaters, the Supreme Court's 1954 *Brown v. Board of Education of Topeka, Kansas*, with its unanimous declaration against legalized separation of the races in education, took its place in the pantheon of national "wrongs" perpetrated against the South. Along with the 1828 "Tariff of Abominations,"⁹ the abolitionist rhetoric of Lucretia Mott and William Lloyd Garrison, and the election of Abraham Lincoln - the Supreme Court's decision sought to reshape the South and alter its institutions.

Coming just six years after the Democratic Party's 1948 violation of the agreement of 1876, the Court's decision created a siege mentality among many southerners (Scher, 1992). The election of 1960 would be the last time the South would vote for a non-southern liberal Democrat. Realignment was becoming a reality.

The conservative ascendancy within the Republican party, as evidenced by the rise of Arizona Senator Barry Goldwater, appealed to dislocated southerners. The victory of John Tower in the Texas senate race of 1961 and the near defeat of Lister Hill in Alabama in 1962 foreshadowed the coming Nixonian alliance with the South (Dent, 1978).

⁹ In 1828 Congress agreed to pass an increase in the tariff to protect America's infant industries which were predominantly located in the north. This angered southern "fire-eaters" like John C. Calhoun who blamed the high tariff for a drop in South Carolina cotton exports. His well known nullification stances were aimed at reversing what he perceived to be the advancing of the goals of one state at the expense of another. This gave rise to Calhoun's famous "Compact theory" of the union. See Freehling, 1990

For Republicans, 1964 would be the most encouraging year to date in their efforts to urge realignment in the south. The Republican party rejected the moderation of Nelson Rockefeller in favor of the western populism of Goldwater. As Richard Sher (1992) pointed out, "From the standpoint of traditional southerners, Goldwater's message seemed to be a reaffirmation of the bargain of 1876." (p.119)

Assisting the Republicans in gaining the loyalty of white southerners was the fact that Lyndon Johnson was now perceived as a traitor to both his race and region (Kearns 1976; and Dalleck, 1991). He had picked up the legislative mantle of the slain John Kennedy and urged passage of the 1964 Civil Rights Act. What's more, he had extended executive support to the civil rights movement by regularly meeting with leaders of the Southern Christian Leadership Conference and publicly praising their efforts. Goldwater, on the other hand, was opposed to the 1964 Act and despite his membership in the NAACP, seemed somewhat hostile to the goals of the nation's civil rights organizations.¹⁰

Ultimately, the most dramatic sign of growing southern disenchantment with the Democratic Party was the permanent defection of Senator Strom Thurmond of South Carolina. In 1964 he not only endorsed Goldwater, but he actively campaigned for him and urged fellow southerners to follow his example. (Dent, 1978). While Lyndon Johnson was rolling up a win of lopsided proportions across the rest of the country, Barry Goldwater was carrying the Deep South.¹¹ The election of 1964 had broken the Democratic Party's automatic lock on the South's electoral votes. Richard Nixon recognized that the Republican Party had a tremendous opportunity going into the 1968 general election.

¹⁰ By 1964 the Civil Rights Movement had begun to turn violent. The alliance between white liberals and southern black clergy was being replaced by the Black Power Movement. This transformation was fueling a backlash in middle class America and adding to the increasing alienation of southerners from the Democratic Party. See Carson, 1981 for a discussion of the changing tactics of the civil rights movement and the rise of student activism.

¹¹ See Robert Dallek, 1991 and Kearns, 1976 for analysis of Johnson and the 1964 election.

The presidential campaign of 1968 occurred during one of the most raucous times in modern American history. The nation was mired in the seemingly endless struggle in South East Asia. The incumbent president was the most unpopular in a generation and the social fabric of the country was being profoundly altered by a cultural revolution emanating from the campuses of the country's colleges and universities.

When President Johnson removed himself from consideration for the Democratic nomination, the way was opened for peace candidates such as Robert Kennedy and Eugene McCarthy to enter the race for the Democratic nomination.¹² On the Republican side, Richard Nixon was staging one of his many political comebacks while George Wallace added to the election year drama by running as an independent.

Two domestic issues galvanizing voters nationally and southerners in particular were school busing to achieve racial balance and the issue of law and order. Following the *Brown* decision of 1954, areas of the South had sought to flout the Court's directive by employing "massive resistance." Losing patience by the middle 1960s, the Court began urging the South to move more quickly in the direction of integration. For the courts, the primary mode of achieving the goal of ending separate but equal facilities was busing.

Other options were repeatedly struck down by the Supreme Court. The *Prince Edward County* decision in 1964 struck down the efforts of the state of Virginia to subsidize private segregated schools while closing their integrated public schools. This was followed by *Green v. New Kent County School Board* which struck down the approach of letting students pick the school to which they would

¹² Johnson found himself in the worst of all possible political worlds going into the election of 1968. By pushing a civil rights agenda he had permanently separated himself from his southern base and by continuing the war in Vietnam, he was demonized by the left. Johnson recognized the futility of his re-election efforts and following an embarrassingly near defeat at the hands of Wisconsin Senator Eugene McCarthy in the New Hampshire primary, Johnson withdrew in March of 1968. See Dallek, 1991 and Kaiser, 1988 for insight into Johnson's political troubles in 1968.

rather go. Under the free choice plan the schools in New Kent County remained 85% segregated (Lasser, 1988). *United States v. Montgomery Board of Education* signaled the Court's willingness to actually become involved in formulating solutions and not simply standing by striking down options.

The issue of school busing had achieved a rare level of saliency in the American political consciousness by 1968. According to some polls, 94% of the American people were aware of the issue (Funston, 1977; p.52). For Nixon, the issue posed a dilemma. On the one hand, he felt the effort to achieve racial balance through busing was nothing more than judicial tyranny and in violation of the constitution (Price, 1977). While he did profess the belief that state mandated segregation was wrong, segregation stemming from residential patterns was beyond the reach of the federal government. By busing children across district lines, the government was attempting to counter existing residential patterns and was therefore going too far. (Price, 1977).

In Nixon's mind, this distinction between state sponsored segregation and residential segregation was crucial but defending action in one area while condemning it in the other was a political dead end. To urge ending de jure segregation would anger the South while denouncing efforts to end nonimposed segregation would anger the rest of the country. Liberals would never give him any credit for pushing desegregation and southerners would protest if he did (Parmet, 1990). Despite the delicacy of the situation, the heated atmosphere surrounding the question of busing would be one in which political gains could be made if Nixon played the issue properly. Nixon would be given his opportunity when the Court began imposing remedies on school systems outside the South. When the issue became nationalized, efforts to confront it gave Nixon the opportunity of gaining southern support without alienating areas outside the South.

The second controversial area offering potential political gain was the issue of law and order. In a series of cases upholding the rights of criminal defendants (*Massiah v. U.S.*, *Escobedo v. Illinois*,

and *Miranda v. Arizona*)¹³ the Supreme Court had placed itself on a collision course with public opinion, especially in the South.

The 1960s witnessed an alarming rise in the crime rate and many people blamed the permissiveness of the Supreme Court (Genovese, 1990). Dr. King's assassination in April was followed by the assassination of Sen. Robert Kennedy in June. Coming on the heels of the assassinations were riots and demonstrations at the Democratic National Nominating Convention in Chicago.¹⁴ In response to the public outcry over crime, President Johnson, albeit reluctantly, signed the Omnibus Crime Bill of 1968.

In the eyes of many southerners and conservative Republicans, the law was not nearly enough. In response to the tragic events of 1968, California Governor Ronald Reagan voiced the concern which was gaining wide currency in middle class America,

This nation can no longer tolerate the spirit of permissiveness that pervades our courts and other institutions (Lasser, 1988; p.194 -195).

Theodore White, the presidential campaign chronicler, observed,

The two surest fire applause lines in any candidate's speech were always his calls for 'law and order' at home and peace in Vietnam (White, 1969; p.189).

¹³ "...the revolution in criminal procedure was only one dimension (albeit a major dimension) of the Warren Court's effort to expand the scope of constitutional rights along a wide spectrum that included the many facets of freedom of expression, the condemnation of various forms of racial discrimination, and the implementation of principles of equality in voting for officials at all levels of government." (Stephens, 1973; 122) See chapter Six *ibid.* for a full discussion of the "Escobedo-Miranda Revolution." Clearly the criminal cases were part of the egalitarian impulse of the 1960s which was rapidly losing its vitality in the 1970s.

¹⁴ The reaction to the student demonstrators in Chicago illustrated the deep division within the Democratic Party over the issue of law and order. Mayor Richard Daley ordered police to clear the demonstrators away from the building using whatever force they deemed necessary. This provoked angry and public denunciations of the Chicago police tactics from such party stalwarts as Connecticut Senator Abraham Ribicoff. See Kaiser, 1988 and Patterson, 1996.

The law and order theme played particularly well in the South. Many southern leaders recognized that concern over the ill-treatment of blacks was a major impetus for the Court's expansion of the rights of criminal defendants. The murders of three civil rights workers in 1964 by local law enforcement officials in Mississippi, as well as numerous similar instances across the South, fueled the Court's efforts to ensure certain basic guarantees for criminal defendants.¹⁵

By denouncing busing and espousing pro-law and order themes, Richard Nixon had a golden opportunity in 1968 to guarantee Southern allegiance to the Republican party. By pushing these issues, Nixon could offer the assurances that the deal of 1876 which left the South alone to deal with its own problems would again be respected. This time, the Republican Party would be its guarantor and there would be no betrayal. The Warren Court would be the object of attack for Nixon. His overriding concern would be to find the right kind of jurists who could get through the confirmation process, reassure the South, and reverse the Warren Court precedents. His opportunities for beginning the process would come at the outset of the administration in 1969.

THE SUPREME COURT AND THE SOUTHERN STRATEGY

Nixon made assaulting the Warren Court's record a central tenant of his campaign strategy by presenting himself, in contrast to the Court, as the guardian of traditional social and political mores. This was very appealing in the South. He announced that he wanted justices who would only interpret and not make the law (Genovese, 1990). This call for "strict construction" would become a persistent rallying cry in Nixon's references to the Supreme Court.¹⁶

¹⁵ At the height of the student led civil rights movement, students from across the country poured into Mississippi in an effort to register black voters. In the course of their efforts three civil rights workers, Goodman, Schwerner, and Cheney, were murdered at the hands of Klan connected local officials. See McAdam, 1988 for a discussion of student efforts to bring about civil rights reform.

¹⁶ "Strict Construction" refers to a constitutional hermeneutic known as "Originalism" which seeks to approximate as closely as possible the original intent of the constitutional framers. The term itself gained wide currency in critical response to the Warren era decisions. Many opponents of the

He traveled across the South pledging to appoint justices with,

experience or great knowledge in the field of criminal justice, and some understanding of the role some of the decisions of the High Court have played in weakening the peace forces in our society (Lasser, 1988; p.195).

Throughout the campaign, Nixon's attacks on the Court's positions on crime were unrelenting (Kutler, 1990).

The Supreme Court was on the minds of many people during the 1968 campaign. The announcement by Chief Justice Warren that he was going to step down was followed by President Johnson's effort to appoint Abe Fortas, a leading liberal, as Warren's successor. Nixon viewed the timing of Warren's decision as being aimed at him personally (Ambrose, 1989).¹⁷ The Republicans in the senate apparently viewed it the same way and were successful in delaying and ultimately ending the Fortas nomination.

The prospect of naming the next Chief Justice raised the stakes of the 1968 campaign. Southerners had a well defined idea about what they wanted in a Chief Justice. When asked to describe the kind of nominees he would name, Nixon, with the southern ideal justice in mind, replied, "conservative appointments only" (Dent, 1978; p.82). To underscore his alliance with the South, he repeatedly expressed his concerns regarding both busing and law and order.

Warren precedents charged that the Court was going beyond the constitution and engaging in social engineering. Contemporary self-styled proponents of the doctrine would include Leno Graglia, Robert Bork, and Justice Antonin Scalia. For a full discussion, see Bork, 1989.

¹⁷ Apparently, Warren and Nixon had little regard for one another. Nixon had agreed with Eisenhower when the former president expressed regret at having placed Warren on the court (See Baum, 1985). Warren also felt somewhat betrayed by Nixon when the latter had supported Eisenhower for the Republican nomination in 1952 instead of remaining loyal to Warren's favorite son candidacy. For a full discussion see Ambrose, 1990, Aitken, 1993.

Nixon's wooing of the South, with his consistent bashing of the Supreme Court, was calculated to dampen the effects of George Wallace's campaign. Wallace was making great strides among the voters of the Deep South with his anti-Warren anti-Court rhetoric.

What are the issues going to be in 1968?... Schools, that'll be one thing... The people don't like this triflin' with their children, tellin' 'em which teachers to have to teach in which schools, and busing little boys and girls half across a city just to achieve the proper racial mix... I'll give you another big one for 1968: law and order. Crime in the Streets. The people are going to be fed up with the sissy attitude of Lyndon Johnson and all the intellectual morons and theoreticians he has around him. They're fed up with a Supreme Court that... it's sorry, lousy, no account outfit! (White, 1969; p.346).

Wallace's effectiveness posed a potential threat to the Nixon campaign since he had the potential of denying Nixon the wealth of southern electoral votes and swinging the outcome toward Humphrey. By usurping Wallace's issues without adopting his inflaming rhetoric, however, Nixon was able to build bridges to southern leaders while remaining competitive among more moderate voters. Of particular importance to the Nixon campaign was gaining Senator Strom Thurmond's support by attacking the Supreme Court. As Harry Dent recalled,

When I called the senator to come to the Marriott Motel in Atlanta on June 1, 1968, to give Nixon and his team our pledge of support, the point which assured Thurmond the most was the pledge to appoint Supreme Court Justices who will respect the Constitution rather than rewrite it. When Thurmond heard Nixon make that statement, he said, "That does it, Harry, let's go ahead and commit (Dent, 1978; p.207).

Nixon's strategy, threatened by the presence of George Wallace, was effectively clinched by his pledge to reverse the ideological tide of the Warren Court. To reassure his new political allies, Nixon peppered his campaign speeches with promises of conservative orthodoxy in choosing Court nominees. His promises later in his administration can be viewed within the context of firming up this alliance.

I'll never make a liberal appointment to the Supreme Court. It'll take every appointment I can make just to get a balanced Court. Balancing the Supreme Court is the most important and lasting effect I can have on government while I am president, and I intend to have that effect (Dent, 1978; p.207).

During the heat of the campaign Mr. Nixon made numerous promises which were consistent with his deal with Thurmond. At one point during the campaign he declared that he didn't think it was proper for judges to "act like school boards." Asked about busing, he replied that children should not be forced to go to schools where they may be as many as "three grades behind the other students." (New York Times, August 7, 1968; p.30). His anti-busing and tough on crime stances were supplemented by his call for justices who would not legislate. This commitment to strict construction, echoed in subsequent Supreme Court fights during the Reagan administration, struck a chord with many Americans who felt that the Warren Court had become a superlegislature (Evans and Novak, 1971).

Nixon's anti-Court rhetoric did not go unchallenged by his Democratic rival, Hubert Humphrey. The Vice-President charged that Nixon's attacks on our courts and his "vilification of our law enforcement officials would inevitably set group against group and race against race." (New York Times, October 2, 1968; p.1). Humphrey's counter-jabs were to no avail. On election day, the final tally in the popular count was close but Nixon's Southern Strategy had worked. Despite losing the Deep South to Wallace, Nixon was able to carry the Upper South and ultimately win the contest.

NIXON'S SUPREME COURT NOMINEES

Upon assuming the Presidency in 1969, Nixon had many campaign promises to fill. His first goal was to establish a strong foreign policy and to try and bring the fighting in South East Asia to an end. His second goal was to begin molding the Supreme Court as he had promised his southern backers he would (Ehrlichman, 1982).

Fulfilling his promises to the South early was important in many respects. On the one hand, the new president faced a Congress dominated by the opposition party. This partisan disadvantage

could be circumvented, however, by forging an ideological alliance with conservative southern "Boll Weevil" congressmen (Milkis, 1993).¹⁸ If Nixon appointed southerners, or even those who sympathized with the views held by many southerners, he could send an important political message - alliances with Nixon pay off (McClellan in Friedman and Levantrosser, 1991). It was very important for Nixon to move quickly. Otherwise, the alliance could fall apart if southerners felt betrayed by the administration.

Historically speaking, the Wallace supporters, whom Nixon was trying to woo, had every right to be skeptical. Third parties have traditionally run the risk of being absorbed by one of the two major parties. In 1896, for example, the Populist Party was courted by the Democrats. William Jennings Bryan had adopted the Populist demand for the free and unlimited coinage of silver and the lowering of the national tariff. Faced with the impossible choice of risking absorption by the Democratic Party or splitting the pro-silver vote and thus putting William McKinley in the White House, they chose the former. Initially, it seemed as though they had made a good move but by 1904 the Democrats, bowing to political expediency, jettisoned their pro-silver stance and nominated gold standard supporter Judge Alton B. Parker. By that point the Populist Party apparatus had disappeared and there was no political vehicle to advance their agenda.

Southerners in 1969 faced the same kind of Hobbeson's choice. To give their unflinching allegiance to the Republicans and abandon their separate identity as Wallace supporters, they ran the risk of being simply co-opted into the Republican party and possibly betrayed by these new allies down the road. The fact that Nelson Rockefeller had been a serious contender for the 1968 Republican nomination was not lost on southern conservatives. On the other hand, to remain a separate regional entity, would run the risk of splitting the conservative vote and inadvertently contributing to the election of Northern Democratic liberals. This had nearly happened in the election of 1968.

¹⁸ Southern congressmen who tend to vote more conservatively than their national counterparts are known as boll weevils.

Also prodding Nixon to keep his promise to reshape the Court was the possibility of facing Senator Edmund Muskie in 1972 (Parmet, 1990). The senator from Maine had been a popular addition to the Democratic ticket in 1968 and his Lincolnesque style was very appealing to voters across the Northeast and Mid-west. If he were to head the ticket in 1972, Nixon would need the South to ensure victory. Therefore, the alliance needed to be solidified.

Selecting a new Chief Justice was at the top of Nixon's domestic agenda. His earnest effort to select a nominee who fit the ideal ideological description prompted a White House staffer to observe, "You know, the President really believes in that Southern strategy - more than he believes in anything else." (Evans and Novak, 1971). Nixon wanted the selection of the new Chief to be a symbol to the country that the Warren era was over and the excesses of the time were about to be rolled back (Ehrlichman, 1982).

Former President Eisenhower suggested his Attorney General, Herbert Brownell, for the post but Nixon rejected the idea since Brownell's strong civil rights record would not play well in the South (Ambrose, 1989). He needed someone who would be a sure bet for reversing the criminal rights revolution (Abraham, 1992). Nixon was provided a list of potential nominees but in the end, he himself chose the man who would lead the counter-revolution - Warren Earl Burger. Burger's name was the reverse of Warren's and Nixon hoped that his jurisprudence would be as well.

Burger, unknown to most of the general public, had caught the attention of the President on several occasions. Early in the administration, Burger had come to the White House to administer oaths for some minor officials. This provided an opportunity for the politically astute judge to chat with the new chief executive. Apparently, Nixon liked what he heard (Ehrlichman, 1982). "Burger fit the Nixon model: strict law and order, conservative, and a critic of the Warren Court" (Genovese, 1990; p.41).

Nixon felt good about Burger because he had a lower court record from which to draw some insight into his judicial ideology. Having been a senior member of the Eisenhower Administration, Nixon shared the frustration Eisenhower felt after having appointed Warren to the center chair (Baum, 1985). By not selecting a politician and choosing a sitting judge, he had narrowed the odds of repeating Eisenhower's mistakes.

Burger had first attracted Nixon's attention with a *U.S. News and World Report* article written in 1967 (Kutler, 1990) (Ambrose, 1989). In it, Burger had charged that the, "criminal law inspired in criminals the hope that their lawyers would find some legal loophole through which they might escape punishment. Thus, the law neither deterred criminals nor encouraged them to mend their ways." (Friedman and Levantrosser Calluori, 1991; p.362).

A speech given by Burger at Rippon College in 1967 reiterated these same sentiments and summed up his views on law and order in strong and uncompromising ways. Nixon had his nominee, the kind that would send the South the message that his promises would be kept.

Burger had little trouble being confirmed by the senate. Just as Franklin Pierce and Warren Harding were said to possess the physical characteristics of the archetypal president, Judge Burger looked like a Chief Justice.¹⁹ Initially, Nixon was very pleased with his selection. Adding to his sense of satisfaction was the knowledge that he had done the selecting himself.²⁰ Presumably, the counter-revolution was under way and with the strong possibility of new vacancies, the President would have more opportunities.

¹⁹ Chief Justice Burger had wavy white hair, a deep commanding voice, and, according to some members of the Court, a somewhat haughty manner. See Woodward and Armstrong, 1979.

²⁰ Even better for Nixon, Burger seemed open to being led by the President. On at least one occasion, December 18, 1970, Presidential aide John Ehrlichman reported that the President and Chief Justice openly discussed a busing case then pending before the Court (Ehrlichman, 1982). This was highly unusual and if true demonstrates an intimate but improper collusion between the two branches.

Nixon's second opportunity to build bridges to the South emerged when Abe Fortas announced his retirement. Fortas's character had repeatedly been questioned during his confirmation hearings for Chief Justice. The Republicans had turned the occasion into a platform from which to launch attacks against the Warren Court (Ambrose, 1989). The subsequent collapse of Fortas's efforts to gain the center seat left his continuing service on the Court in doubt.

His career continued to unravel in April 1969 when President Nixon hosted a surprisingly warm farewell party for Chief Justice Warren. Although the two men had little fondness for one another, Nixon recognized that the opportunity could be used to advance the Southern Strategy. Having reestablished some ties to the Chief Justice by hosting the dinner, Nixon instructed Attorney General John Mitchell to approach Warren with various pieces of incriminating evidence which could be used against Justice Fortas. Nixon hoped Warren would relate the message to Fortas who might then conclude that resignation was his best option. The plan apparently worked, for shortly thereafter, Fortas announced his intention to quit. Suddenly, there was another vacancy on the Court (Ehrlichman, 1982).

At this point, Nixon had the opportunity to turn to the South. In the President's view the South really had no true representation on the bench. Although Justice Hugo Black was from Alabama, he had established himself as a leading social libertarian and along with Douglas seemed to represent the very things Southerners most despised. Justice Fortas, albeit from Tennessee, was a crony of Lyndon Johnson and closely allied with the political left. Nixon's Justice Department began scanning the South for the "right" kind of nominees.

The effort to fill the Fortas seat represents the most blatant effort on behalf of the Southern Strategy. Despite the President's obsessive persistence, efforts to name a Southern conservative were repeatedly frustrated until Nixon found his ideal, Judge Clement Haynesworth. The Greenville, South Carolina native was just what Nixon was looking for. Not only was the President getting a

conservative Southerner, the nomination of a South Carolina native served to repay the political debt Nixon owed to Senator Thurmond.

Haynesworth's record was consistent with the President's wishes in many ways. He had voted against court ordered desegregation efforts in the *Prince Edward County* case and had little patience for those accused of criminal conduct (Parmet, 1990). Haynsworth had become a Republican in 1964, the same year as Strom Thurmond (Evans and Novak, 1971). This made him the perfect selection for Southerners looking for a new partisan attachment. Nixon's communications director, Patrick Buchanan, confided to conservative columnists from across the country that the administration had found a judge who would not "zigzag" once on the bench (Ehrlichman, 1982). The administration was confident it had found an ideological purist who would serve as yet another bridge to the emerging Republican South.

Following the bitter campaign of 1968 and the divisive fight for Abe Fortas, the Democratic senate was in no mood to hand Richard Nixon a victory, especially one which promised to hasten the erosion of Democratic hegemony in the South. In vituperative tones, senators took turns blasting the nominee. Even Northern Republicans were uncomfortable with Haynsworth's weaknesses in the area of civil rights.²¹ Like many southern leaders of his age, Haynsworth's racial views, while not explicit, were still a matter of concern for civil rights groups. The South Carolina in which Haynsworth had been raised and in which he had led his professional life was a state committed to racial separation and white supremacy. Only within the previous decade had openly anti-black rhetoric become viewed as bad social form.

²¹ Even though conservatives were already the majority in the Republican party, they were still roughly a decade away from the position of dominance they would experience during the 1980s. The so called "Eastern Establishment," or moderate Republicans, still enjoyed a significant voice in the senate. Haynsworth would find little support from the likes of eastern Republicans such as Margaret Chase Smith of Maine, Charles Mathias of Maryland, Jacob Javits of New York, and Richard Schweiker of Pennsylvania.

On October 27, 1969, Nixon held a news conference to defend his embattled nominee and salvage something of his Southern Strategy. He reiterated his support for Haynsworth and repeated his declaration that "by age, experience, background, and philosophy" Haynsworth was the best nominee for the bench (Weekly Compilation of Presidential Documents, 10/27/69; p.1443). Nixon went on to attack those senators who were prepared to vote against Haynsworth because of his philosophy.

Taking aim at Washington Senator Warren Magnuson, Nixon said,

I do not believe it is a proper ground [rejecting a nominee based on philosophy]. I would agree with those Senators, many of whom are now opposing Judge Haynsworth, who, in the Marshall confirmation, categorically said that a judge's philosophy was not a proper basis for rejecting him from the Supreme Court. (WCPD, 10/27/69; p.1441).

Nixon expounded on his earlier themes of advocating strict construction and admonishing those who would try to legislate from the bench. In an effort to bolster his nominee's chances, he tied Haynsworth to the successful nomination of Warren Burger.

But if Judge Haynsworth's philosophy leans to the conservative side, in my view that recommends him to me. I think the Court needs balance, and I think that the Court needs a man who is conservative - and I use the term not in terms of economics, but conservative, as I said of Judge Burger, conservative in respect to his attitude towards the Constitution. (WCPD, 10/27/69; p.1445).

Nixon deliberately attached his Supreme Court nominations to the Southern Strategy when he linked opposition to Haynsworth to what he termed an anti-Southern bias within the senate. This was Nixon's effort to connect his nominee to the powerful and persistent belief of many southerners that they remained less than full citizens. Recent biographers of Nixon, such as Jonathan Aitken (1993) and Tom Wicker (1991), have sought to explain Nixon's aligning himself with the South in such an intimate way. In Aitken's estimation, Nixon had been sympathetic to the South since his days at Duke Law School. Wicker, on the other hand, points to the fact that Nixon had always harbored a class

based anger to those who were advantaged.²² By forming an alliance with the South, he was identifying himself with the nation's regional underdog.

Regardless of the efforts to gain insight into Nixon's thinking, which given Nixon's complex personality are often contradictory and muddled anyway, the truth remains that supporting Haynsworth was good politics. The fact that opposition to the nominee was coming primarily from Northern and Western senators allowed Nixon to join in the Southern mystical and romantic conception of the "lost cause" thus further binding him to the region politically. Nixon aide, Harry Dent, handled much of the Southern Strategy. He observed,

The President particularly wants to see us scoring points on Haynsworth in the South. He has been pushing me on this. (Kutler, 1990; p.145).

Nixon's efforts on behalf of Haynsworth failed to convince a majority of the senate that they should confirm the nominee. In a vote characterized more by geography than partisanship, the senate rejected the South Carolina judge 45-55. An angry Nixon explored numerous options for responding to the setback. In a move not unrelated to the rejection of Haynesworth, John Ehrlichman was given the task of encouraging Representative Gerald Ford to introduce a bill of impeachment against the Court's leading liberal maverick, Justice William O. Douglas (Ehrlichman, 1982).

The impeachment effort was designed to avenge the loss of Nixon's nominee. The President did not go all out in his effort to see to it that the impeachment was successful because, perhaps, he fully expected other members of the Court to be stepping down very soon. His goal was to send a

²² Wicker contends that Nixon's anti-elitist attitudes were formed during the course of his life. His father had, despite hard work and determination, failed in nearly every business enterprise while others, whom Nixon considered to be less hard working, thrived. While at Whittier College, Nixon formed a rival fraternity of young men from working class backgrounds. They shunned open ties and jackets in favor of open neck shirts and sport coats. During the HUAC hearings of the late 1940s, Wicker contends that Nixon zeroed in on Alger Hiss whose patrician bearing and aristocratic background conflicted with Nixon's populist inclinations. Wicker builds his book around the theme of Nixon struggling to overcome his natural introversion and connect with people on a class level, thus the title of the book *One of Us*.

message to both the senate and the Supreme Court that he was resolved to continue his efforts to reverse the ideological direction of the judiciary. (Ehrlichman, 1982).

The President was combative following the defeat of Haynsworth and ready to go beyond the thrust at Douglas to show it. He instructed Harry Dent,

Harry, I want you to go out and this time find a good federal judge farther down South and further to the right (Dent, 1978; p.210).

The lengths to which President Nixon would go to demonstrate his loyalty to the southern pact with Thurmond was fully illustrated with his nomination of Florida judge, G. Harold Carswell.

Carswell's nomination demonstrated conclusively that Nixon had not abandoned his goal of finding a committed strict constructionist who supported his views on busing and law and order (Ambrose, 1989). The nominee ran into trouble almost immediately when he appeared before the Senate Judiciary Committee. Unlike Judge Haynsworth, the evidence of Carswell's racism was overt and well documented. In a campaign speech made when running for the legislature in 1948, Carswell had blatantly appealed to racist sentiment. In the years since the race Carswell had never publicly repudiated his views. Senator Kennedy had the text of the speech entered into the Congressional Record.

Carswell's compatibility with President Nixon's descriptions of a good justice were the subject of much discussion during the confirmation hearings. Senator Kennedy asked Carswell to express his own opinions regarding the most serious problems faced by the United States in the 1970s. The nominee responded by arguing that crime and the "dope" problem were among the most pressing (Congressional Record Senate Judiciary Committee, 1/27/70; p.25). Further confirming his consistency with Nixon, Carswell expounded on the need for the Courts to,

restrain themselves, interpret the constitution in a strict constructionist manner, and avoid turning the bench into a continuing constitutional convention (ibid, p.20).

Nixon wanted desperately for Carswell to be confirmed but unlike his predecessor, Carswell's past indiscretions were virtually indefensible (Parmet, 1990). The President tried to direct attention away from his nominee's past by stressing the argument that he had the right to name justices who shared his view of the constitution. He stressed this line of defense in a letter to Senator Saxbe.

What is centrally at issue in this nomination is the constitutional responsibility of the President to appoint members of the Court -and whether this responsibility can be frustrated by those who wish to substitute their own philosophy or their own subjective judgment for that of the one person entrusted by the Constitution with the power of appointment. The question arises whether I, as President of the United States, shall be accorded the same right of choice in naming Supreme Court Justices which has been freely accorded to my predecessors of both parties (Weekly Compilation of Presidential Documents, 4/6/70; p.467).

President Nixon's efforts on behalf of Judge Carswell were ultimately no more successful than his previous efforts for Haynsworth. The senate rejected the nominee leaving Nixon in the position of having had two nominees rejected in a row. After the Carswell defeat, Nixon characterized his response as being "cold and reasoned anger." (Genovese, 1990; p.42). Even after this second rejection, there was a desire to appoint a southerner. He approached Tennessee senator Howard Baker and West Virginia's Robert Byrd as possibilities but backed away from both (Parmet, 1990). Perhaps Nixon recognized that gaining a southern justice who shared his ideology was becoming akin to George Pickett's ill-fated charge on the third day at Gettysburg. Nixon ultimately concluded that a southerner was nonconfirmable and therefore looked elsewhere.

In what can only be described as a diatribe of controlled rage, Nixon appeared before the White House press corps on April 13, 1970. The President charged that the true reasons for the rejection of his two choices had to do with their being from the South and their commitment to the "philosophy of strict construction of the Constitution." (Weekly Compilation of Presidential Documents, 4/13/70; p.505).

The President reiterated his earlier position as to why he had selected the two men in the first place.

I chose them because they were both men of the south. In selecting both men, I had several criteria in mind. First and foremost, they had to be men who shared my legal philosophy of strict construction of the Constitution, men who would help to restore to the US Supreme Court the balance that it genuinely needs - that balance I pledged to the American people that I would help to restore (ibid. p.505).

Nixon reminded the press that, in his estimation, liberals had dominated the Court for the previous fifteen years and some semblance of balance must be restored. Having delivered his stinging response to the senate's rejection of his nominees, Nixon announced that his next choice would come from outside the south but would, he reinforced defiantly, be an adherent to the strict construction of the Constitution.(ibid. p.506).

Nixon was sincere in his demand for a strict constructionist for the Supreme Court. He genuinely felt that the Court under Earl Warren had gone too far (Price, 1977). His posturing in front of the press after the defeat of Carswell, however, was probably an attempt to yet again solidify his hold on the south and let them know that he had stood by them and the causes which they endorsed. Nixon could now share in the south's sense that it was being mistreated by the rest of the country (Genovese, 1990).

The President's next step was to find a confirmable strict constructionist. Harry Andrew Blackmun, an Eisenhower appointee to the federal judiciary, seemed to be just such a choice. Although he was from outside the south - Minnesota - there was good reason for the President to be optimistic about his choice of Blackmun. The new nominee was close friends with the sitting Chief, having in fact served as his best man. There was every reason to believe that Blackmun would, indeed, become the junior member of a conservative "Minnesota twins." (Ehrlichman, 1982).²³

²³ Blackmun's friendship with Burger was a large part of the reason he received the nomination. Presumably, Burger knew his friend's "true politics" and could guarantee his participation in the counter-revolution. See Ehrlichman, 1982.

Upon being chosen as a possible nominee, Blackmun was grilled by two members of the Nixon Justice Department - one of which was future Chief Justice William Rehnquist. (Baum, 1985). Apparently, Blackmun passed muster with the rigidly conservative Rehnquist for he received a favorable recommendation from his future colleague.

Blackmun appeared in nearly every way to share the philosophy of his childhood friend, Burger. He had frequently quoted Burger's opinions and writings with approval and held the confidence of the Chief Justice (Abraham, 1992). In no way did Nixon want to give the impression that by appointing a nonsoutherner, he had abandoned his promises to the region. He instructed his chief of staff, H. Robert Haldeman, to have Senator Roman Hruska praise the nominee as someone who shared the same constitutional philosophies as the previous two choices. In fact, he wanted to present the picture of his latest selection being even further to the right on matters of law and order (Kutler, 1990).

Given the combative nature of recent events involving the Court, it is improbable that Nixon believed himself to be settling for anything less than a tried and true conservative. He had too much political capital invested to simply abandon the goals of the southern strategy. Whereas Nixon had gained ground in southern quarters by attempting to gain confirmation for two southerners, it was not enough. Long lasting political coalitions are not forged on gestures. There has to be a few victories.

Upon announcing the identity of his latest selection, Nixon's press secretary, Ron Ziegler, quoted the President as saying that "he was highly impressed by Judge Blackmun's personal qualities, [and] that he was highly impressed when he studied Judge Blackmun's judicial record." (Weekly Compilation of Presidential Documents, 4/14/70; p.522). He further reiterated the President's conviction that in Blackmun, he was nominating another "strict constructionist." (ibid, p.523).

Blackmun was quickly confirmed and the country was spared from another intense battle between the President and the senate. After Fortas, Carswell, Haynsworth, and the impeachment effort

against Douglas, both sides of Pennsylvania Avenue were tired of political combat involving the Supreme Court.

The opening rounds of using the Supreme Court for coalition building had gone rather well for Nixon. Certainly he had not anticipated the rhetorical bludgeoning of his two southern nominees, but he did gain a great deal from the two episodes (Dent, 1978). He had solidified his bond with the South and had gained easy confirmation for Justice Blackmun. By gaining senate approval for the so called "Minnesota Twins" he had taken steps to strengthen the weakened "strict constructionist" wing of the Court.²⁴ Conservative expectations of a looming counter-revolution on the Court were buoyed even further when, in the late summer of 1971, two more Court vacancies occurred.

Justice John Marshall Harlan was a conservative appointee of President Eisenhower. Unlike the nominations of Warren and Brennan, who, from the standpoint of Eisenhower's ideological leanings, turned out badly, Harlan had stayed essentially right of center and was regarded with warmth and admiration by members and observers of the Court alike.

The Court's other vacancy in September 1971 was a member far more infamous in conservative circles - former Alabama senator and Roosevelt appointee, Hugo Lafayette Black. Although an avowed strict constructionist, Black had been an active member of the Warren wing of the Court. Despite the increasing frequency of conservative opinions in the latter years of his tenure, Black's leaving the court was greeted with relief by southerners.

Now faced with the opportunity of selecting two members of the Court, Nixon had the opportunity to fundamentally alter the direction of its jurisprudence. Fully cognizant of this, and still determined to use the vacancies as a means of strengthening his coalition with the south, the President

²⁴ Although strict construction has generally been a label applied to conservative jurists, some liberals have claimed that they were, in fact the true strict constructionists, Hugo Black for example. See Black's dissent in *Griswald v. Connecticut*, 381 US 479.

ordered his Justice Department staff to perform the by now familiar ritual of scanning the south for strict constructionists. (Dean, 1976).

Communications Director, Patrick Buchanan, felt like he had found the perfect nominee for one of the seats. He urged the President to select Virginia Representative Richard Poff. (Milkis, 1993). In Buchanan's estimation, there would be little gained by going after someone like Irving Kristol's favorite choice, Edward Levi. There just wasn't much political leverage to be gained in selecting a Jewish nominee (ibid.). Poff, on the other hand, promised to pose a difficult political dilemma for the Democrats. They would be forced to decide between further alienating the south, and thus hastening the region's increasing disillusion with the national Democratic party, or they could avoid that by confirming Poff. To confirm Poff, however, would, chances are, hand the administration its third strict constructionist and the counter-revolution could get underway in earnest.

Poff's negative posture on civil rights was a bit too overt and blatant for the President. Having seen Carswell burned by his own words, Nixon did not relish the prospect of witnessing another potential nominee being grilled before the Senate Judiciary Committee. Poff's signing of the Southern Manifesto in the mid-1950s virtually guaranteed another raucous confirmation fight.

Backing away from the ideal just a bit, Nixon again briefly considered nominating West Virginia Senator Robert Byrd. Byrd would be well greeted in the south due to his rather consistent stance against sweeping civil rights measures but his personal resume had some problems. He had never served as a judge and, in fact, had never passed the bar exam. (Friedman, and Laventrosser, 1991).²⁵

Questions as to whom the President might appoint filled the pages of the print media. Many were pushing Nixon to appoint a female. This view was apparently held by the none-too-soon-to-

²⁵ Robert Byrd had not yet begun his move to the left. When he was elected majority leader following Mike Mansfield, Byrd became more of a national Democrat and led the fight against much of the Reagan program in the 1980s.

speaking first lady. Although the pressure was there, Nixon did not seem to be overly interested in gender representation as a criteria. He decided to stay the original course of finding justices who could be counted on to reverse the legacy of the Warren Court. Nixon informed the press at an October 4 news conference,

The two justices that I will appoint, will be men - or individuals, who first - and this is the most important qualification - share the general judicial philosophy and approach of the two men on the Court whom I previously have appointed. That gives you an indication of my direction (Weekly Compilation of Presidential Documents, 10/4/71; p.1343).

Nixon finally decided to nominate William H. Rehnquist, the Justice Department official upon whom he had leaned so heavily in gaining information about his previous appointees. For the other seat, Nixon turned again to the south. His latest southern choice was far safer than his previous selections from the region. Lewis Powell was the former head of the American Bar Association and had no record of vitriolic public attacks on integration.

In nominating these men, Nixon again stressed their conservative judicial philosophies and reiterated his trust that both men represented his judicial philosophy. In a press conference held on October 25, 1971, Nixon declared,

Whether an individual is a Democrat or a Republican cannot and should not be a decisive factor in determine whether he should be on the Court (WCPD, 10/25/71; p. 1431).

By selecting the Democrat Powell, Nixon, like Taft, Truman, and Eisenhower before him, believed he was appointing someone whose "real politics" made up for the difference in partisanship.

In a deliberate jab at former Chief Justice Warren, Nixon observed that a justice "should not twist or bend the Constitution in order to perpetuate his personal political and social views." (ibid, p.1432). Nixon continued by reminding the American people that he was fulfilling the pledge of reversing the Warren Court just as he had promised when he was running for the presidency.

You will recall, I am sure, that during my campaign for the Presidency, I pledged to nominate to the Supreme Court individuals who shared my judicial philosophy, which is basically a conservative philosophy. Now, let me give you an example of what that philosophy means." Nixon then went on to quote the imminent journalist, Walter Lippman by saying, "...the balance of power within our society has turned dangerously against the peace forces - against governors and mayors and legislatures, against the police and the courts (ibid. p.1432).

The President concluded the introduction of his nominees by once again stressing his staunch law and order position and denouncing judicial activism.

As a judicial conservative, I believe some court decisions have gone too far in the past in weakening the peace forces against the criminal forces in our society. In maintaining, as it must be maintained, the delicate balance between the rights of society and defendants accused of crimes, I believe the peace forces must not be denied the legal tools they need to protect the innocent from criminal elements. And I believe we can strengthen the hand of the peace forces without compromising our precious principle that the rights of individuals accused of crimes must always be protected. It is with these criteria in mind that I have selected the two men whose names I will send to the Senate tomorrow (ibid. p.1432).

William Rehnquist was a conservative. For Nixon this was a fact of which he was quite certain. He had good reason to feel comfortable with his nominee. Rehnquist had clerked for conservative Justice Robert Jackson and had supported Barry Goldwater. For the past several years, Rehnquist had been part of the Nixon Justice Department. While serving in that capacity, he had written a letter of support for Judge Carswell in which he defended the Judge's positions and argued that it was possible to hold the Carswell's views and not be a racist.

Rehnquist fit the President's desire for someone who would have little patience for busing and would be a strict law and order justice. He had supported, as assistant attorney general, the President's positions on wiretapping and surveillance. He further had opposed a Phoenix ordinance prohibiting racial discrimination in public accommodations (Calluori in Friedman and Levantrosser, 1991). His views on the government's role in solving the racial problem were public knowledge. He had written

a letter to the *Arizona Republic* in which he had argued that the job of schools was to educate children, not to foster integration. (ibid).

The Rehnquist nomination ran into trouble with the revelation of notes written by Rehnquist for Justice Jackson during the Brown case (Milkis, 1993). Before the Senate Judiciary Committee, Rehnquist was pressed about his opposition to busing by Senator Bayh of Indiana.²⁶ Rehnquist defended his position saying that his opposition was based upon busing over long distances and that there may be more harm to children than good if such policies were pursued (Congressional Record, 11/4/71; p.169).

Rehnquist openly embraced the label strict constructionist providing it was defined as

Attempting to ascertain a constitutional meaning... by the use of the language used by the framers, the historical materials available and the precedents which other Justices of the Supreme Court have decided in cases involving a particular provision (ibid. p.55).

Despite tough questioning from Senators Bayh and Kennedy, Rehnquist went on to confirmation by a less than enthusiastic vote of 68-26 (Baum, 1985). William Rehnquist's nomination and confirmation was a stunning political success for the President. Short of his actually being from a southern state, Rehnquist represented everything the President desired. Subsequently, Nixon boasted of his having found a man with identical beliefs to his own and gaining for him a seat on the court. (Milkis, 1993).

Lewis Powell was regarded more highly by the legal profession than was Rehnquist.²⁷ It was this recognition on the part of the administration that compelled them to present the two nominations together as a package (Jeffries, 1994). Lewis Powell seemed on the surface to be a move toward

²⁶ Bayh was a liberal senator from Indiana who consistently opposed Nixon's Supreme Court nominations. He was later defeated by a young conservative named Dan Quayle in 1980.

²⁷ By benefit of his service in the Nixon Administration, Rehnquist was considered a highly political appointment. Powell, on the other hand, had a strong reputation in the legal community.

moderation on the part of Nixon. He had been a moderate member of the Richmond School Board and it was well documented that Powell had urged Virginia Governor Lindsay Almond to steer away from his campaign of "massive resistance" to the Court's 1954 Brown decision. (ibid.)²⁸

Despite the seemingly centrist views of Powell, his standing with the civil rights community was anything but cordial. During the era of civil rights strife, Powell had been largely silent and vague on the issues. He sat on boards of discriminatory companies and had been a member of all white clubs. In fact, his law firm had never employed a black attorney. (ibid.)

On the issue of law and order, Powell had been critical of the *Escobedo* and *Miranda*. It was this opposition that brought fire from Senator Mathias during the committee hearings (CR 11/8/71; p.231). Powell had also been critical of requiring a warrant to electronically eavesdrop on possibly subversive groups (Calluori in Friedman and Levantrosser, 1991). These flashes of conservatism did serve as lightening rods to more moderate and liberal senators but they also served to punctuate the President's commitment to his southern constituency. Powell was easily confirmed.

As Richard Nixon's first term came to an end, he had been given the opportunity of filling four Supreme Court vacancies. In so doing, he had fulfilled his goal of using these appointments to appeal to his burgeoning southern base of support. The question in the autumn of 1971 was whether this new Nixon block of justices would advance the cause of law and order and serve as an obstacle to those who would use busing as a means of achieving racial balance. Further, would these justices reflect the President's conception of the role of the judge by employing a strict construction hermeneutic when interpreting the constitution?

As the four Nixon appointed justices took their seats, the country was shifting away from the egalitarian ethos of the previous Warren era. Significant opposition to government activism was

²⁸ Lindsay Almond had served as governor of Virginia during the 1960s and advocated shutting down the public school system rather than submit to integration. He called on other southern states to join his program of "massive resistance."

exerting itself. The "New Left" decried the excesses of government authority while the libertarian strain within the Republican Party was on the ascendancy.²⁹ Foremost in the minds of southern Americans were the issues of law and order and busing. The new Burger Court was to set the tone for both issues early on.

²⁹ E.J. Dionne (1993) presents a compelling case that the egalitarian underpinnings of the 1960s was assaulted from both the left and the right. The "New Left" was no more accepting of governmental authority than were old line conservatives. Together they helped to bring about the end of federally sponsored initiatives to better the society.

CHAPTER THREE: TAKING AIM AT THE EXCLUSIONARY RULE

THE ROLE OF CRIMINAL RIGHTS IN ESTABLISHING THE GOOD SOCIETY

Aristotle described politics as the process of determining how best we might order our lives together. Within that process, there is perhaps no greater area of contention than how society should deal with crime. The intense political nature of the debate (societal tolerance of deviance v. "evolving standards of decency") illustrates the mid-twentieth century notion that the way the nation defines itself is at least partially dependent upon how the debate is resolved.

On the one hand, a strong stand against crime elevates the value of stability over that of freedom by granting the police wide discretion in combating social deviancy. The Warren Court's extension of certain guarantees based upon the Fourth Amendment are, on the other hand, illustrative of the approach of limiting the extent to which the state can intervene in the life of a citizen.¹

As with any political question dividing a given polity, both approaches are historically manifested in the collective national political consciousness. This is what makes the issue of dealing with law and order so intensely controversial. Both liberty and stability are values that are accepted as major elements in the lexicon of American styled liberalism. The two values trace their origins to the

¹ In essence, what the debate about crime involves is the extent to which we are willing to allow either the value of stability or the value of freedom to be dominant. Thomas Hobbes is well known for his philosophical treatises which described this basic dilemma. For Hobbes, excessive freedom leads to a state of nature which is "nasty, brutish, and short" whereas a strong central figure can establish order, albeit at the expense of freedom. In the spirit of John Stuart Mill, John Locke, and Thomas Jefferson, the Warren Court chose to strengthen the value of freedom by guaranteeing certain basic rights to criminal defendants even if the presence of those rights diminished the possibility of a conviction. Nixon wanted to return to a pre-Warren conception where stability is elevated over freedom.

Jeffersonian/Hamiltonian debate of the 1790's concerning the proper role of government.² Just as then, the inherent tension created by balancing these two competing values forms the basis for rich and divisive debate. Richard Nixon was attempting to advance his stability based view of law and order by selecting justices who shared this conception.

THE BURGER COURT AND CRIMINAL RIGHTS

As discussed in Chapter Two, Nixon's Southern Strategy was revolved around finding justices who agreed with the President on the issues of school desegregation and law and order. Like Governor Wallace, President Nixon's 1968 campaign rhetoric charged that the Warren Court had weakened the forces of the law and fostered the kind of societal atmosphere in which crime could more readily take place. The two Warren era decisions that served as flashpoints for the conservative charges, *Mapp v. Ohio*³ and *Miranda v. Arizona*,⁴ dealt with searches and seizures and interrogation and arrest respectively.

The Nixon Administration wanted to see the Burger Court curtail the effects of both cases and restore what they perceived to be a more balanced approach to criminal procedure. The approach envisioned would weaken the practical impact of the Fourth Amendment and riddle the Warren era precedents with enough exceptions to effectively reduce their instrumental impact. In this way, the

² Alexander Hamilton, Washington's first Treasury Secretary and co-founder of the Federalist Party, believed that the threat to the liberty of the state came from the masses. Jefferson, on the other hand, perceived the greatest threat to liberty as being a central government too excessive in its efforts to bring about stability.

³ Made the exclusionary rule applicable to the states through the Fourteenth Amendment.

⁴ Required police to inform suspects that they were protected against self-incrimination.

Nixon agenda advanced the cause of a stable polity over the extension of the libertarian equality principle inherent in Warren era decisions.

No clear consensus in the literature has emerged as to whether or not Nixon's justices did, in fact, fully reverse the Warren era precedents. As for the Exclusionary Rule, the most restrained position is that they did little to fundamentally alter the balance between law enforcement agencies and the accused. In this view, the central tenants of the Warren Court were not only preserved but actually legitimated by a Burger Court that was decidedly less committed to criminal rights than its predecessor. Jerald Israel (1983) is a proponent of this interpretation.

He argues that the Burger Court posed no real threat to the legacy of the Warren Court.

Neither the record of the Court nor the tenor of its majority opinions, taken as a whole, really supports a broad movement towards restricting the protections afforded the accused (ibid;100).

Though shared by others, this is a minority position in the literature. Far more prevalent is the view that while the Burger Court did not succeed in actually rolling back the criminal rights revolution, it did set the tone for eroding the rights guaranteed by *Mapp* and *Miranda*.

The position that the Burger Court, led by its four Nixon appointees, was laying the groundwork for future dismantling of the rights of the accused is surmised best by Bernard Schwartz (1990).

The *Elstad* deconstitutionalization of *Miranda* will make it easier for post-Burger justices not only to read new exceptions into *Miranda* but even ultimately to abolish it. Court observers were mistaken when they expected *Miranda* to be a casualty of the Burger Court jurisprudence. But the narrowing of the Warren Court landmark may have laid the foundation for a future overruling of its doctrine (p.370).

Schwartz advances the view that the Burger Court stopped the rights revolution in its tracks and then proceeded to narrow it substantially. From this narrowing, the Court embarked on what might be termed a "slippery slope" which eventually will result in the doctrinal extinction of both

Mapp and *Miranda*. Schwartz's presumption of what may lay ahead for the Exclusionary Rule is echoed by Yale Kamisar (1984) who characterized the Burger Court's jurisprudence in the area of criminal procedure as a war of attrition against the Exclusionary Rule.

In a speech delivered after his retirement, Justice Potter Stewart (1983) agreed with those who saw the Burger Court as being antagonistic toward the Exclusionary Rule. He characterized the "good faith exception" as a catalyst for the weakening of the rule. Wayne La Fave (1983) pushed the point still further by accusing the Burger Court of rendering the Fourth Amendment itself vulnerable (p.1224). He found the *Knotts* decision particularly troubling. According to La Fave, the Court's position that technology does not fundamentally alter the equation in favor of the police is unconvincing. He expressed little optimism for any foreseeable relief in that the drug war would probably continue the deterioration of the Exclusionary Rule.

Steven Duke (1986), writing in the *Yale Law Journal*, summarized the Burger Court's impact on the exclusionary rule as one of transforming it into "chicken broth" (p.1414). By allowing the government to use ever expanding technology without extending proper protections to counter-balance it, the scales have been decidedly tilted away from the accused. He further noted that the "good faith exception" was but the final part of the Court's effort to effectively "gut" the Fourth Amendment (p.1423).

Duke, La Fave, Schwartz, Stewart, and Kamisar each expressed concern that the Fourth Amendment has been severely curtailed by the Nixon bloc's presence on the Court. However, they still contend that something still remains of the Warren legacy. Although it has been watered down considerably and its foundation weakened, the fact remains that *Miranda* and *Mapp* continue to exist as part of the law's fabric.

The third and final view of the Burger Court's legacy in the area of criminal procedure is that for good or ill the effects can not truly be measured. This is due, according to Craig Bradley (1983), to the fact that the law in this area is so murky and confused that no real functional definition of the Exclusionary Rule is discernible. Bradley argued that the Burger Court failed in its attempts to define the law and instead made it an even more confusing and contradictory area for law enforcement officers and lower court judges alike.

Whether it is most accurate to assert that little has changed; the groundwork for later erosion of the Exclusionary Rule has been laid; or the area is more muddled than before - there is little doubt that the voting patterns of the Nixon justices in this area were characterized by a kind of solidarity which they lacked in dealing with other areas of the law.

SEARCHES AND SEIZURES

One of the most important aspects of criminal law pertains to the conduct of the police. Procedures regarding arrest and search and seizure frame the parameters of the relationship between those accused of crime and the state.

As previously noted, the Nixon Administration was eager for the criminal procedure cases which limited the discretion of police officers to be curtailed and more lee-way given to the state. The extent to which the Burger Court succeeded in doing that is a matter for much debate but there is little doubt that the presence of the four Nixon justices at least narrowed the scope of the Exclusionary Rule.

Schneecloth v. Bustamonte

Chronologically, the first case to be decided was *Schneecloth v. Bustamonte*. The case involved six men who were stopped by the police for having a burned out headlight. While questioning the men, the policeman discovered that only one of the occupants could produce any identification. At that point, the officer asked if he could search the vehicle and was given permission by the driver to do so. In the ensuing search, in which one of the occupants actually provided assistance, the officer discovered three checks which previously had been stolen from a car wash. The respondent, Robert Bustamonte, was arrested and his motion to suppress the checks was denied by the trial judge.

Before reaching the Supreme Court, the Ninth Circuit Court of Appeals remanded the case for further hearing finding that the mere giving of consent did not necessarily waive an individual's Fourth and Fourteenth Amendment rights. The individual must know that his consent is not mandatory. There must be a recognition on the part of the individual that he has a choice. The heart of the case is in the definition of a "voluntary" consent.

Schneecloth is an important case in several respects. The strict definition of consent places an additional layer of protection between the individual and unfair implication. It is illustrative of the Jeffersonian liberty principle which decries government coercion as the primary threat to individual freedom. The trial judge's position, on the other hand, approached the issue from the standpoint of the individual taking personal responsibility for understanding the nature of his position vis-à-vis the police. The trial judge's position moved the law away from the spirit of *Miranda*.⁵ All four Nixon

⁵ *Miranda* placed the onus of responsibility on the police. They were responsible for ensuring whether or not the suspect was fully cognizant of his rights. The trial judge's position reversed that and placed more of the burden on the suspect.

justices voted to narrow Fourth Amendment protections.⁶ The dissenters in the case represented what was left of the liberal wing of the Court - Brennan, Marshall, and the aging Douglas.

Justice Stewart, the majority opinion's author, began by pointing out that the Court had already spoken on the question and decided that consent authorized a search to take place.⁷ The difficulty, however, was in precisely defining just what it means to give consent to a police officer.⁸ Justice Stewart answered that question when he declared,

Similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent (*supra*, at 227).

For at least one of the Nixon justices, Lewis Powell, the argument that the defendant retained some grievance because he was not aware of his option to decline the officer's request, represented an unprecedented extension of constitutional guarantees. Efforts to extend habeas corpus protections were unwarranted extra-constitutional creations which threatened to upset the precarious balance of societal values.

...let us look at the costs of this anomaly - costs in terms of serious intrusions on other societal values. It is these other values that have been subordinated not to further justice on behalf of arguably innocent persons but all too often to serve mechanistic rules quite unrelated to justice in a particular case. Nor are these neglected values unimportant to justice in the broadest sense or to our system of Government. They include (I) the most effective utilization of judicial resources, (II) the necessity of

⁶ Justice Stewart wrote the majority opinion which was joined by Burger, White, Blackmun, Powell, and Rehnquist. Douglas, Brennan, and Marshall all dissented.

⁷ See *Katz v. United States* 389 US at 358 and *Vale v. Louisiana* 399 US 30,35.

⁸ Justice Stewart pointed out that in *Brown v. Mississippi* 297 US 278 a coerced confession was held not to be voluntary. While this case did not present the Court with a coerced confession, it did contain an authorization by the suspect which ultimately led to his conviction without his having the full range of facts at his disposal.

finality in criminal trials, (III) the minimization of friction between our federal and state systems of justice, and (IV) the maintenance of the constitutional balance upon which the doctrine of federalism is founded (412 US at 259).

Powell's concurrence confirmed the expectations of Nixon. He expressed the concern that various efforts to extend added protection to the rights of the accused was less an effort to protect the innocent than obstacles to true justice. They posed threats to the efforts of law enforcement personnel to enforce the laws and therefore create a stable society.

In the first major law and order case of the Nixon bloc era, all four justices demonstrated their adherence to the President's agenda. The Warren Court's rights revolution for criminal suspects would go no further. The egalitarian impulse implicit in so much of the Warren jurisprudence had been considerably slowed by the Burger Court.

United States v. Calandra

The process of rolling back the spirit of the Warren decisions continued in the next major search and seizure case, *United States v. Calandra*. The case, decided January 8, 1974, split the Court along the same lines as *Schneecloth*. The Nixon justices, joined by the Court's centrists - Stewart and White, were again opposed by Brennan, Douglas, and Marshall. In this case, possibly the most important Exclusionary Rule case of the 1970s, the Court seriously redefined the instrumental nature of the Rule.

The Court, led by the Nixon justices, moved away from viewing the Exclusionary Rule as a fundamental right and toward its use on a cost-benefit basis. This was accomplished by holding that an individual could not, when summoned before a grand jury, refuse to answer questions generated by

evidence gained in violation of the Exclusionary Rule.⁹ By so holding, the Court removed yet another avenue open to suspects seeking to avoid indictment.

Speaking for the Court, Justice Powell concluded,

The rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search (414 US at 348).

Powell further argued that the Exclusionary Rule was meant for deterring future law enforcement violations and therefore cannot be used to “redress the injury to the privacy of the search victim.” (414 US at 347)¹⁰ Powell suggested that the Court must effectively weigh the gains in deterring police conduct against the potential damage to the effectiveness of the grand jury. In so doing, he concluded, “Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best.” (414 US 351)

The Court’s opinion in *Calandra* represented the realization of the counter-revolution. The Nixon bloc influenced the direction of the Court in a dramatic way by introducing the necessity of balancing the interests of the state against the protection of the individual suspect. *Calandra* starkly demonstrates that unlike the Warren Court, the Burger Court tilted the scales in the direction of the

⁹ Justice Powell’s opinion relied heavily on the special role of the grand jury in the American legal tradition. “The grand jury’s investigative power must be broad if its public responsibility is adequately to be discharged.” (414 US at 344) citing *Branzburg v. Hayes*, *Costello v. United States* “An indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence.” (414 US at 345) *Costello v. United States*; *Holt v. United States*

¹⁰ Relying on *Linkletter v. Walker* 381 US 618, 637 (1965) “The ruptured privacy of the victims’ homes and effects cannot be restored. Reparation comes too late.” Justice Powell then referred to *Elkins v. United States*, 364 US 206, 217 “The rule is calculated to prevent, not to repair. Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it.”

state in issues of criminal procedure. The value of stability is heralded high above the interests of the individual. The egalitarian impulse of the Warren era is little in evidence in either *Schneecloth* or *Calandra*. By softening the probable ramifications for illegal searches and seizures and creating exceptions to the Exclusionary Rule, the justices were helping Nixon keep his campaign pledges.

Stone v. Powell

Stone v. Powell, decided in 1976, followed the same reasoning put forward by Justice Powell in *Calandra*. In this case, the suspect was convicted of murder based, at least in part, upon a gun held in his possession. Upon finding little redress in lower courts, the respondent filed a habeas corpus petition in Federal District Court. The conclusion, affirmed by the Court of Appeals, was that an individual may not be granted federal habeas corpus relief on the grounds that the evidence convicting him was gained through means of illegal search and seizure.

The Supreme Court, with Powell again delivering the opinion, agreed with the lower courts. Employing his balancing approach once again, the interests of the state were triumphant over the will of the individual. Central to Powell's reasoning was that the Exclusionary Rule had the effect of altering cases which otherwise would render guilty verdicts. Therefore, the Court had to be very careful about what it was willing to allow. Powell argued that a trial's purpose is to find the truth and the Exclusionary Rule can run counter to that. The three other Nixon justices again joined Powell in advancing the law and order agenda.

United States v. Janis

United States v. Janis represented another set back for advocates of an expanded role for the Exclusionary Rule. Justice Harry Blackmun delivered the opinion of the Court which was joined by

the other members of the Nixon bloc. The case involved the arrest of an individual, the confiscation of wagering records and nearly \$5,000 in cash. By the time the case reached the Supreme Court, lower courts had ruled that the evidence in question had been obtained from a defective search warrant.¹¹ The question was whether it was appropriate to extend the Exclusionary Rule to "evidence seized by a state criminal law enforcement officer in good faith, but nonetheless unconstitutionally" to civil proceedings by or against the United States.

In *Janis*, the Court reversed the lower court rulings and allowed the evidence, therefore securing a major qualification to the Exclusionary Rule. The initial tone of Justice Blackmun's opinion echoed the sentiments of Justice Powell in earlier search and seizure cases.

In the present case we are asked to create judicially a deterrent sanction by holding that evidence obtained by a state criminal law enforcement officer in good-faith reliance on a warrant that later proved to be defective shall be inadmissible in a federal civil tax proceeding. Clearly, the enforcement of admittedly valid laws would be hampered by so extending the exclusionary rule, and as is nearly always the case with the rule, concededly relevant and reliable evidence would be rendered unavailable (428 US at 447).

Blackmun moved on to decry the lack of empirical evidence evaluating the effectiveness of the Exclusionary Rule in deterring police misconduct.¹² Lacking social scientific evidence

¹¹ The lower court relied on *Spinelli v. United States* (393 US 410) which had only recently been decided. The Court found that the "affidavit did not set forth, in sufficient detail, the underlying circumstances to enable the issuing magistrate to determine independently the reliability of the information supplied by the informants." (428 US at 438).

¹² Blackmun confessed that the Court was in little better shape than in 1960 when it said, "Empirical statistics are not available to show that the inhabitants of states which follow the Exclusionary Rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled. For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule." *Elkins v. United States*, (364 US at 218.)

demonstrating the Exclusionary Rule's deterrent effect on police officers, the Rule would be extended no further.

In each of the first four search and seizure cases, the Nixon bloc expressed deep suspicion of the Exclusionary Rule. Like Powell's earlier decisions, this suspicion is manifested in Blackmun's position as well. It is clear that unless the extension of the Exclusionary Rule has the definite and well discernible impact of reducing police misconduct, it will not be extended.¹³ The rule is therefore seen not as something to be expanded, but rather a device to be curtailed lest it release an otherwise guilty individual. The lack of empirical evidence makes it difficult to determine whether extension is worth the cost to society as a whole. Absent such empirical evidence, the Nixon justices demonstrated a marked willingness to assume the worst about the rule's effects.

Smith v. Maryland

The Burger Court's determination to reduce the detrimental effects of the Exclusionary Rule reached full flower in 1979 in *Smith v. Maryland*. While the previous cases had signaled a retreat from the Warren Court guarantees, *Smith* represented a wholesale route of the spirit of libertarian privacy so inherent in the Warren Court's jurisprudence. In *Smith*, the Court allowed the police to install a pen register at the central facilities of the phone company to detail the calls going in and out of a given number.

¹³ Even if the extension of the rule does prove to have some deterrent effect, the effect itself must be weighed in light of its impact on law enforcement. Blackmun posed two possible effects of extending the Exclusionary Rule in cases such as *Janis*. The rule may have an impact on conduct but it might not be sufficient enough to counterbalance the concomitant damage done to the cause of enforcing society's laws. Or, the rule may have no effect at all. Either way, an extension of the rule is not warranted.

In an opinion written by Justice Blackmun and joined by both Burger and Rehnquist (Powell did not participate), the Court held that the Fourth Amendment could be invoked only when the individual had a "legitimate expectation of privacy" which has fallen prey to the government's actions.¹⁴ In this instance, Blackmun reasoned that no one has a legitimate expectation to privacy when dialing numbers from their phone since they surely must realize that the phone company has access to the numbers.

... We doubt that people in general entertain any actual expectation to privacy in the numbers they dial. All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long distance calls on their monthly bills (442 US at 742)¹⁵

Blackmun went on to argue that even if there is an expectation of privacy on the part of the individual, the expectation is itself invalid since the reasonable judgments of society at large take the opposing view. By this reasoning, to use the telephone is to undertake a certain risk of losing privacy and therefore abrogate any expectation otherwise.¹⁶

When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business (442 US at 744).¹⁷

¹⁴ Blackmun grounded his argument in *Katz v. United States* (389 US 347). The Court accepted the idea that a search and seizure does not necessarily have to be a physical search to be protected by the Fourth Amendment. Government agents who had acquired evidence using a listening device at a public pay phone were held to be in violation of the Fourth Amendment.

¹⁵ See *United states v. New York Tel. Co.*, 434 US, at 174-175 and *Hodge v. Mountain States Tel. and Tel. Co.*, 555 F.2d 254, 266 (CA9 1977). The courts have routinely upheld the use of pen registers to monitor phone bills and long distance dialing practices.

¹⁶ Blackmun pointed out that the Court has consistently held that turning over information to an independent party reduces the expectation of privacy. *United States v. Miller*, 425 US at 442-444; *Couch v. United States* 409 US, at 335-336; *United States v. White* 401 US at 752; *Hoffa v. United States* 385 US 293, 302; *Lopez v. United States* 373 US 427.

Justice Potter Stewart, along with Justices Brennan and Marshall, dissented in the case. In both Justice Stewart's and Justice Marshall's respective dissents, they took a very different reading of the Court's decision in *Katz*. Both rejected the notion that simply using the telephone company as an intermediary to making a phone call (an obvious necessity when dialing the phone) the individual surrenders all expectation to privacy.

Smith is a profound example of just how far the Nixon bloc was willing to go to prevent the Exclusionary Rule from having an extensive impact on protecting those accused of crimes. It marks a major departure from the Jeffersonian notions of the Warren Court and fully embraces the Burkian philosophy of Nixon by granting wide latitude to the government in its efforts to maintain order and stability. *Smith* must therefore be viewed as a stunning reversal for those concerned about the possible ramifications to individual liberties posed by the war on crime. The very justices concerned with the effects on individuals by intrusive government in the realm of school busing were prepared to sanction government intrusion into private conversations.

New York v. Belton

With the full support of the Nixon bloc, the Court dramatically expanded the warrantless search exception established in the early part of the century. *New York v. Belton*, decided on July 1, 1981, marked a significant broadening of police power when stopping a motorist. The circumstances of the case involved a car with four men, including the respondent, Roger Belton, who were stopped

¹⁷ The petitioner made the argument that the phone company was using electronic equipment and this differs from a live operator in that the equipment is supposed to "remember" only those numbers which are long distance. In this instance, the petitioner was making a local call and therefore had an expectation of privacy. Justice Blackmun rejected such notions. "Under petitioner's theory, Fourth Amendment protection would exist, or not, depending on how the telephone company chose to define local-dialing zones, and depending on how it chose to bill its customers for local calls." (supra, at 745)

for speeding. Upon further inquiry by the police officer, it was discovered that the occupants of the car were smoking marijuana. Thereupon, the police officer searched the automobile and in the process spotted a jacket in the passenger compartment. He unzipped the pocket and discovered cocaine. The respondent claimed that the evidence should be suppressed since the officer had no warrant to search the jacket.

The Supreme Court's decision in the case was written by Potter Stewart. Stewart concluded that the officer, being alone at the time of the arrest, had made a quick search and concluded that there was a sufficient amount of illegal activity already being engaged in and thus the further search was justified.¹⁸ The Court as a whole agreed and the evidence was not suppressed.

Belton stands as yet another instance of the Nixon justices furthering the cause of the state over the individual. The Court demonstrated little patience with the argument that officers were strictly bound by the Exclusionary Rule after coming into contact with initial acts of illegality. The question which posed the greatest doctrinal dilemma was to what extent could the officer search the area in question. *Chimel* established the officer's right to search the area but just how far could he go.¹⁹ Stewart resolved the case in question by concluding,

The search of the respondent's jacket followed immediately upon that arrest. The jacket was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested. The jacket was thus

¹⁸ In *McDonald v. United States*, 335 US 451, 456 the Court stipulated that the normal circumstances of conducting a search (a warrant from a neutral magistrate upon showing probable cause) could be excepted in special circumstances. Stewart also cited the Court's further stipulation that an arresting officer may search the surrounding premises for weapons without benefit of a warrant. (*Chimel v. California* 395 US 752). Justice Stewart, who had dissented in *Smith v. Maryland* based on the violation of the privacy of the individual, in *Belton* upheld police intrusion into an individual's private sphere. The difference was the presence of the value of police safety which was absent in the former case.

¹⁹ In *Chimel v. California*, 395 US 752 the Court ruled that under the circumstances of a lawful custodial arrest, officers may search the suspect's person and the surrounding areas. This exception to the warrant requirement was justified by the Court on the grounds that evidence could be destroyed or concealed weapons might be used to facilitate the escape of the prisoner.

within the area which we have concluded was 'within the arrestee's immediate control' within the meaning of the *Chimel* case. The search of the jacket, therefore, was a search incident to a lawful custodial arrest, and it did not violate the Fourth and Fourteenth Amendments (453 US at 462-3).

United States v. Knotts

Belton was followed by *United States v. Knotts* in 1983. The case involved the use of an electronic beeper by the police to investigate an individual suspected of manufacturing illegal narcotics. A bottle of chloroform, with the beeper inside the container, was sold to the individual and the police then tracked the signal as the man drove to a secluded cabin in an isolated area of Wisconsin. Following three days of visual surveillance, the police obtained a search warrant and, after discovering a chemical factory on the premises, arrested the individual.

The respondent attempted to have the evidence obtained via the beeper suppressed. The Court of Appeals agreed that the lack of a warrant was cause to disallow the evidence acquired from the beeper. Upon appeal to the Supreme Court, the question was whether the beeper did, in fact, violate the respondent's Fourth Amendment rights. Justice Rehnquist, writing for the Court, announced that the defendant's rights were not actually violated by the beeper. Justice Rehnquist, like Blackmun in *Smith v. Maryland*, relied on the Court's decision in *Katz v. United States*. Rehnquist found that the expectation of privacy test outlined in *Katz* was not met in *Knotts*. When an individual is driving down a public thoroughfare, he has relinquished a certain level of his privacy and has no reasonable expectation that what he does is private.

A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the

fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property (460 US at 281-2).²⁰

When *Knotts* and *Smith* are taken together, the zone of privacy around an individual is diminished considerably. Citizens should not expect protection from intrusion when talking on the telephone in an otherwise private conversation, nor should they reasonably expect that they have any privacy when driving down the street.

Rehnquist went on to address the issue of the beeper.

The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case (supra, at 282).²¹

It is significant that again all of the Nixon justices concurred in the outcome of the case but even more noteworthy is the fact that there were no dissents. There were a plethora of concurring opinions with numerous qualifications and reservations expressed by the more moderate justices, but no spirited opposition.²² The Court as a whole seemed to be embracing the stricter view of the Exclusionary Rule consistently being articulated by the Nixon bloc. Along with the earlier Powell and

²⁰ Justice Rehnquist relied on the Court's previous holdings in *Cardwell v. Lewis*, 417 US 583, 590 (1974) and *Rakas v. Illinois*, 439 US 128, 153-154 (1978) to show that the issue of privacy and automobiles had been settled. When an individual drives a car on a public street there is a diminished expectation of privacy.

²¹ To bolster his argument that technology does not necessarily lead to unconstitutionality, Justice Rehnquist cited the Court's decision in *United States v. Lee*, 274 US 559 (1927). That case involved the Court's sustaining the use of a searchlight to detect illegalities at sea. Justice Rehnquist also relied on the Court's recent decision in *Smith v. Maryland*. His conclusion was succinctly summarized by his statement, "We have never equated police efficiency with unconstitutionality, and we decline to do so now." (supra, at 284)

²² Justice Brennan made clear that had the respondent made an argument as to the actual placing of the listening device, he would have found merit in his position.

Blackmun opinions, the Rehnquist opinion in *Knotts* narrowed the zone of privacy for criminal suspects. In this sense, the extent of the Nixon bloc's counter-revolution was such that the individual citizen's position in relation to the government was being compromised to further the cause of stability for the community.

Whereas *Smith*, *Powell*, and *Knotts* demonstrated the extent to which the Court was willing to allow the police to use extraordinary means to investigate suspicious behavior, the 1983 *Illinois v. Gates* decision was even more decisive. It redefined the nature of probable cause. Speaking for the Court, Justice Rehnquist proclaimed the embracing of the "totality of the circumstances analysis" and the abandoning of the "two-pronged" test established in *Aguilar* and *Spinelli*.

Illinois v. Gates

The circumstances of the case involved an anonymous note to the police which claimed that the respondents, Lance and Susan Gates, were drug dealers. The police followed the tip and observed Lance Gates as he flew to Florida and there rendezvoused with his wife. Having witnessed what they perceived to be suspicious behavior, the police submitted a request for a warrant and were issued one.

The case, in which Justices Brennan, Marshall, and Stevens all dissented, had the effect of making it especially easy to gain a search warrant and very unlikely that once acquired, anything subsequently recovered would be suppressed. In Justice Rehnquist's majority opinion,

Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to probable cause may not be helpful, it is clear that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause (462 US 213).²³

²³ Justice Rehnquist based part of his reasoning on *Locke v. United States* (1813) in which Chief Justice Marshall observed that probable cause was less than that which is necessary to condemn.

Following *Gates* the following term were two decisions which illustrated the continuing liberalization of the Court's attitude toward search and seizure procedures.

Massachusetts v. Sheppard and US v. Leon

As Kamisar (1987) noted, up until *Massachusetts v. Sheppard* and *U.S. v. Leon*,

The Burger Court's deconstitutionalization of the exclusionary rule had only narrowed the rule's thrust in peripheral or collateral settings, such as grand jury proceedings, civil tax proceedings, and the use of illegally obtained evidence for impeachment purposes. The rule had not been affected in its central application: the prosecution's case against a victim of a Fourth Amendment violation (164).

Justice White wrote for the Court in *Leon* and was joined by all four of the Nixon justices.

He began his opinion by describing the Court's efforts in the area of criminal law as a balancing act.

On the one hand the Court has an obligation to protect the individual.

This case presents the question whether the Fourth Amendment Exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. To resolve this question, we must consider once again the tension between the sometimes competing goals of, on the one hand, deterring official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth (468 US 897).

In *Leon*, the Court ruled that the Exclusionary Rule is valid only in as much as it poses a deterrent effect on officers who might otherwise trample the Fourth Amendment rights of suspects. The "ferreting out" of crime can be, according to the Court, competitive and personal. One of the primary reasons for having the police acquire the consent of a neutral magistrate is to remove some of this competition and personality from the equation. When the officers have acted in good faith to obtain a warrant, they have demonstrated their willingness to go beyond the immediacy of the event and gain the approval of an objective source.

In this case, the police acted in good faith, believing that the warrant issued them by the judge was valid. Critics of the Court's approach decry what they perceive to be an assault not simply on the Exclusionary Rule but on the heart of the Fourth Amendment itself. Diminishing the need for warrants was regarded with alarm.

Leon did not dismantle the Exclusionary Rule, but it does, when taken in concert with the previous cases, illustrate the Burger Court's retreat from attempting meticulously to micromanage the Fourth Amendment's application. Repeatedly the efforts of the Court to establish a coherent and consistent Exclusionary Rule policy is referred to as a balancing act. Unlike the Warren Court which elevated the value of personal autonomy above that of stability, the Burger Court found the weight of the value of stability to be more convincing than the libertarian principle of earlier cases. Responding to the violence of the 1960s and early seventies, the Court, led by the four Nixon justices, was prepared to reverse the Warren Court's emphasis on the individual.²⁴

Massachusetts v. Sheppard further underscored the Court's determination to diminish the Exclusionary Rule. The case involved the issuing of a warrant for police to search for a blunt instrument and clothing in a homicide investigation. Because it was Sunday, the officers had a tough time locating the appropriate warrant form. Upon locating an illegal substances search form, the officers received assurances from the judge that he would fix the document and their search would be legal. The crux of the case was whether the warrant, despite its clerical errors, should still be viewed as valid and the evidence gained from it admissible. The Supreme Court, with Justice White

²⁴ In a famous exchange with Reagan Attorney General Edwin Meese, William Brennan characterized the situation of being stopped by the police as having one's dignity suspended. In Brennan's estimation, before a democratic government is prepared to do that, there should be safeguards and ways to prevent unnecessary violations of dignity. By lowering the wall of protection enjoyed by citizens through the vigorous interpretation of the exclusionary rule the country was taking a risk it should not. It was exposing citizens to the potential of having their individual autonomy and dignity wrongly infringed.

delivering the opinion, decided that given the fact that the police officers had little reason to doubt the assurances of a judge that the search would be legal, and the fact that they had attempted to comply with procedure, the evidence should be admissible.

The Burger Court, led by the Nixon bloc of justices did not overtly dismantle the Exclusionary Rule during the 1970s and early 1980s. What they did do, however, was redirect the focus of the Court away from the egalitarian impulse of the Warren years and decisively tilted the balance between individual liberty and societal stability back in favor of the latter. The Court's criminal rights counter-revolution continued in the area of interrogation and confessions.

INTERROGATION AND CONFESSIONS

The *Miranda* decision had been the target of countless conservative barbs in the 1960s and early 1970s. The scene, made famous by numerous police programs, of officers reading rights to suspects was quite familiar by 1971. Nixon hoped to have *Miranda* overturned by his appointees but like the Exclusionary Rule cases, he would witness the narrowing of the impact of that important case but not its outright dissolution.

Michigan v. Tucker

Michigan v. Tucker (1974) involved the arrest of an individual who, having been advised of several of his rights but not his right to a court appointed attorney, offered the alibi that he had been with a friend. This friend, Henderson, was later interrogated and in the process disclosed incriminating information about the respondent. The respondent's claim was that had he been advised of his right to an attorney, he would have withheld the information about his alibi. Because of his

ignorance of the law, he had given the police evidence which they would not have otherwise received.²⁵

Compulsory self-incrimination was the primary focus of the Court's concern. Justice Rehnquist's majority opinion, joined by all of the Nixon appointed justices, opened with a brief history of the efforts to protect citizens from compulsory self-incrimination.²⁶ He explained the Court's rationale in *Miranda* as an effort to construct a generally held set of rules to protect citizens against self-incrimination. The *Miranda* rules were designed to aid police officers in avoiding a non-physical coercion of criminal suspects and guarantee that the individual understood the full range of constitutional safeguards to which he was entitled.

In the case in question, Justice Rehnquist found that in the traditional understanding of the term, the suspect was not compelled to incriminate himself. What had occurred in this case was a failure to provide the full range of procedural safeguards spelled out in *Miranda*.

Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in *Miranda*. The question for decision is how sweeping the judicially imposed consequences of this disregard shall be (417 US at 445).²⁷

²⁵ As Justice Rehnquist pointed out in the majority opinion, the respondent did not base his argument on the right to counsel under the Sixth and Fourteenth Amendments. "Respondent's argument, and the opinions of the District Court and Court of Appeals, instead relied upon the Fifth Amendment right against compulsory self-incrimination and the safeguards designed in *Miranda* to secure that right. In brief, the position urged upon this Court is that proper regard for the privilege against compulsory self-incrimination requires, with limited exceptions not applicable here, that all evidence derived solely from statements made without full *Miranda* warnings be excluded at a subsequent trial." (417 US at 438-9)

²⁶ Rehnquist drew on several scholarly works, including Levy (1968) for historical review. The right against self-incrimination grew out of the abuses of the Inquisition and Star Chamber proceedings which placed a premium on individual willingness to recant and confess.

²⁷ The Court had ruled in *Wong Sun v. United States*, 371, US 471 (1963) that evidence gained as a result of police misconduct had to be suppressed. Justice Rehnquist, however, found that the record in this specific circumstance was unclear. Therefore, he made his decision as a matter of principle in the area.

Perhaps the Warren Court would have extended the safeguards against self-incrimination to include a requirement that the individual receive a full accounting of his rights prior to interrogation. For the Burger Court, just as in the area of search and seizures, however, there would be no extension of individual liberty at the expense of the state making a case.

Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serve a valid and useful purpose (446 US at 417).

Rehnquist concluded his opinion by finding no compelling reason to suppress the confession since there was no torture or physical coercion in the case. *Tucker* is consistent with the Court's pattern in search and seizure cases. The Nixon justices did not afford an extension of rights at the expense of societal stability. Again, Nixon was getting what he wanted.

Oregon v. Haas

The Court was more direct in its attack on *Miranda* in *Oregon v. Haas* (1975). The circumstances of *Haas* involved an individual who, upon being informed of his constitutional rights, requested a lawyer. The suspect was then informed that he would not be able to contact a lawyer until the police reached the station. In the interim, the suspect revealed information which later contradicted his testimony in court. The issue, then, is whether the information revealed following the suspect's demand for an attorney was to be admissible as an impeachable source or whether, because of Fifth and Fourteenth Amendment guarantees, the information would have to be suppressed.

Justice Blackmun wrote the majority opinion. Again, the Nixon bloc emerged intact in an important criminal rights case. Based on the precedent set in *Harris v. New York* 401 US 222 the

Court ruled that the information could be used providing it was employed for the purpose of cross examination and not within the main body of the prosecution's case.²⁸ In this case, as in the earlier cases, the Nixon justices balanced the value of deterring police misconduct with the possible negative ramifications for society. They judged that the mechanical safeguards put in place by the Warren Court should not be so rigid as to distort what otherwise might have been a guilty verdict.

We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our constitution (420 US at 722).

The Burger Court demonstrated in *Hass* and other cases, its desire to avoid letting the equation between the state and the individual become altered in favor of the individual. In *Haas*, as in the earlier *Harris* case, the information received in violation of *Miranda* was decisive in gaining a guilty verdict. The Nixon bloc was not about to suppress such decisive evidence. Even though the Court continued to give verbal support to the earlier precedents, the fact that they were being riddled with exceptions and provisos was weakening their impact. Warren era justices Brennan and Marshall dissented in *Hass*. Brennan's dissent points to essential criticism of the Court's decision.

Even after *Harris*, police had some incentive for following *Miranda* by warning an accused of his right to remain silent and his right to counsel. If the warnings were given, the accused might still make a statement which could be used in the prosecution's case in chief. Under today's holding, however, once the warnings are given, police have almost no incentive for following *Miranda* requirement that 'if the individual states that he wants an attorney, the interrogation must cease until an attorney is present' *Miranda*, supra, at 474 (420 US at 725).

²⁸ *Harris* (1971) involved the a two count indictment of an individual for selling heroin. Harris denied the first charge against him and then claimed that the second charge was merely his selling baking powder in an effort to defraud the purchaser. On cross-examination, Harris made statements which contradicted earlier statements he had made to police following his arrest. The judge instructed the jury that they were to pass on Harris's testimony only in trying to establish credibility as a witness and not on his guilt or innocence. The prosecution did not use Harris's testimony in the main body of their case since doing so would have violated *Miranda* in that the defendant had not been advised of his rights. In the opinion of the court, the Chief Justice concluded that the *Miranda* protections were not meant to allow perjury as a means of defense. It was held then that the credibility of Harris could be cast into doubt by his testimony.

The tone of the dissent differs in a substantive way from the majority opinion. Blackmun's opinion is concerned primarily with giving a rationale for why information crucial to the case of the state should not be suppressed. In other words, the place to begin considering the case for Blackmun was to ask just how much will the state have to give up? Brennan's dissent, on the other hand, represents the tone prevalent on the Court prior to the presence of the Nixon bloc - the concern with protecting the individual, above all else, from self-incrimination. While something clearly remains of *Miranda* after *Hass*, the extent to which it may be used to strengthen the trial position of criminal defendants had been greatly diminished.

The next issue to be debated by the Court was the gray area regarding the time period between advising a suspect of his rights and the point at which those rights might actually be employed. The Nixon bloc of justices assisted in providing some definition in *Rhode Island v. Innis*.

Rhode Island v. Innis

The case involved the arrest of a man fitting the description of someone who had robbed a taxi cab driver. The accused was advised of his rights and he then expressed his desire to exercise those rights by retaining an attorney. While being driven to the police station, the suspect overheard a conversation in which two officers expressed concern that given the proximity of the crime area to a handicapped school, the saw-offed shot gun used in the robbery may yet do further damage if found by one of the children in the neighborhood.

Apparently concerned himself, the suspect then interrupted the conversation between the officers and asked to be returned to the area of his arrest where he promised to reveal the location of the shotgun. He was again reminded of his rights but insisted on going back. The shotgun was introduced as evidence. The man later protested that his rights had been violated. Justice Stewart,

writing for the majority, concluded that the constitutional rights of the man in question had not been violated since there was no reasonable expectation the suspect would overhear the conversation and be moved by conscience.²⁹

All four of the Nixon justices agreed with the outcome of the case. The significance of the *Innis* decision is that the Court significantly narrowed the definition of interrogation. The general definition that an individual being appealed to in any way in expectation of a response was replaced by a very formal definition of interrogation where the suspect must actually be queried with overt questions from authorities. Obviously this strengthens the hand of the police vis-à-vis the suspect since it grants added leeway in that gray area following arrest and prior to actual counsel from an attorney.

Edwards v. Arizona

The court paused in its anti-*Miranda* trek the following term in *Edwards v. Arizona*. The Court stopped short of overturning the Warren era precedent and refused to allow the power gap between individuals and the state to widen any further. All four of the Nixon justices agreed that the interrogation of an individual who voluntarily waived his rights to having counsel present is not necessarily an accepted confession. Among the four Nixon justices only Justice Blackmun joined the majority opinion although the remaining three concurred in the Court's conclusion.

The particulars of the case involved a suspect arrested and informed of his *Miranda* rights. The suspect then retained the services of an attorney who was present during the initial questioning. The suspect then waived his right to an attorney when questioned a second time. Despite the voluntary

²⁹ As in the earlier search and seizure cases, "reasonable expectations" are interpreted very narrowly by the Burger Court. There is no "reasonable expectation" to privacy on the highway or when making phone calls. There is no "reasonable expectation" of overhearing a conversation being conducted in front an individual. The Nixon justices were, indeed, subordinating the rights of individuals to the demands of the greater society.

nature of his waiver, the Court unanimously agreed that the information gained was not necessarily admissible. The defendant must have the full knowledge of his right not to cooperate. Delivering the majority opinion was Justice White.

He cited numerous cases to indicate that the Court had settled the issue of interrogation and the invocation of the right to an attorney.³⁰ When the suspect invokes his right to counsel, interrogation must stop and cannot be resumed by the police at a later time without the attorney being present.

...when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police (supra, at 484-5).

Justice White went on to explain that Edwards was well within his rights to drop counsel whenever he wanted. As such, if Edwards had initiated the second meeting without his lawyer being present, that would have been acceptable and any statement made by him could be used to prosecute him.

There are some similarities with the Court's decision in *Schneecloth v. Bustamonte* and White acknowledged that in the opinion. The issue in *Schneecloth*, however, was whether, given the totality of the circumstances, the individual had given proper consent to be searched. Again, the question is presented, to what extent is the defendant to be fully cognizant of his rights and how far does the state have to go to ensure that knowledge?

³⁰ *Rhode Island v. Innis* 446 US 291, 298; *Fare v. Michal C.* 442 US 707 which stated that "an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." (supra, at 719); *Michigan v. Mosely* 423 US 96, interrogation must cease when the defendant requests an attorney.

Schneecloth was a departure from *Miranda* in that it took the position that full knowledge, given the totality of the circumstances, was not necessary. On its face it seemed as though the Court had gone the other direction in *Edwards* but on closer examination perhaps not. In *Schneecloth*, the Court merely backed away from the spirit of *Miranda* while leaving the essential requirement that the suspect be informed of his rights intact. For the Court in *Edwards* to have upheld police interrogation even after the defendant had requested counsel would have meant a blatant disregard not only of *Miranda* but of the Sixth Amendment itself.³¹

Chief Justice Burger concurred in the judgment but offered his own rationale. His concurrence signaled his unwillingness to allow *Edwards* to serve as a signal that the Court was backing away from its tougher stance on interrogation and search and seizure.

The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis but as with all 'good' things, they can be carried too far. The notion that any 'prompting' of a person in custody is somehow evil per se has been rejected (*supra*, at 488).³²

Certainly the Chief Justice's tone is meant to convey his hope that lower courts would not misunderstand the decision to be a sign that the counter-revolution had been derailed.

Justice Powell, joined by Justice Rehnquist, also concurred in the judgment but did so separately. Powell wanted the decision to be clearer. He rejected the whole initiation framework as a means of determining whether renewed conversation with the police was permissible or not.

Edwards represents only a speedbump in the Court's counter-revolutionary route. *Miranda* protections were, yet again, reaffirmed but with the exception of Blackmun, the tone of the Nixon bloc is less than enthusiastic. Burger took the opportunity in his concurrence to decry the efforts to expand *Miranda* guarantees as going too far. Powell and Rehnquist argued on behalf of clarity when deciding

³¹ The Sixth Amendment guarantees the right to counsel.

³² The Chief Justice then refers to the Court's then recent decision *Rhode Island v. Innis*.

under what circumstances an individual gives up his right to counsel. When the Court handed down its decision in *New York v. Quarles* shortly thereafter, the short-lived pause in the counter-revolution was over.

New York v. Quarles

The Burger Court's by now consistent refrain that the rights of society and the rights of the individual must be balanced was again articulated in *New York v. Quarles* when the Court forwarded an exception to the Exclusionary Rule known as the "public safety exception." In the case, an officer cornered a suspect in a grocery store. While frisking him, he discovered a holster and, at that point, before the rights were read, the officer asked his prisoner where the gun was. The suspect then replied, "Over there," nodding in the direction of some boxes. The question, then, was whether the Court would allow the gun as evidence since the individual spoke before being advised of his *Miranda* rights.

Justice Rehnquist wrote for the majority. Of the Court's five members in the majority, the Nixon justices accounted for four of them. Rehnquist argued that the possible effect of having to read the suspect his rights before ascertaining the whereabouts of the gun would pose a potential risk to the public safety. Suppose the officers read the rights and the defendant was then deterred from revealing the location of the gun. There is always the possibility that an accomplice could then utilize it; a customer could find it later, or an employee might discover it. Thus, the potential effects of deterring the suspect from answering the question could possibly cause not just damage to the case against that individual but may have even more immediate repercussions. With these possible ramifications, Justice Rehnquist justified the question and its timing by pointing out that the price for strictly interpreting *Miranda* was, in this circumstance, too high.

Oregon v. Elstad and Moran v. Burbine

The further weakening of *Miranda* occurred the following term in *Oregon v. Elstad*. In this case, the defendant was at his home when officers arrived and informed him of their suspicion that he had been present at the scene of a burglary. Elstad replied that indeed he had been present. At this point he was taken to the police station and was "Mirandized." He then waived his right to legal counsel and confessed. The Court recognized that Elstad's initial statement to the police made at his home was a violation of *Miranda*. Elstad charged that the confession should itself be disregarded since it was clearly connected to the earlier testimony given at his home. This "fruit of the poisonous tree" approach to the *Miranda* decision was rejected by the Court.³³

Justice O'Connor wrote the majority opinion in which the Nixon bloc joined in her refusing to extend *Miranda* rights to protect the "fruit of the poisonous tree." In the eyes of Justice O'Connor, the nature of neither the initial contact nor the second interrogation at the police station were coercive in nature. As in *Harris v. New York*, the prosecution must bar information received in violation of *Miranda* from the main body of the case but that does not mean that every statement made (all of the fruits, as it were) can be denied by the defendant during cross examination. Justice O'Connor explained the Court's position.

Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made (105 S.Ct. at 1293).

³³ Justice O'Connor characterized the respondent's arguments as being based upon two metaphors. "The fruit of the poisonous tree" and "the cat being out of the bag" by the first statement. The Court rejected both as adequate defenses. The *Miranda* rights are not in and of themselves constitutional guarantees but merely efforts to guarantee that constitutional rights are not violated during interrogation. Citing *United States v. Washington* 431 US 181, 187, Justice O'Connor reiterates the Court's position that even the most damning confessions are the proper role of the police to collect.

In *Moran v. Burbine* the following year, Justice O'Connor again wrote for the majority which included the four Nixon justices. In the last major police interrogation case participated in by all four of the Nixon justices, the Court ruled that the failure to inform a defendant of calls from an attorney retained by his sister did not necessarily violate the defendant's right to counsel.

Events occurring outside the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Under the analysis of the Court of Appeals, the same defendant, armed with precisely the same police conduct, would have knowingly waived his Miranda rights had a lawyer not telephoned the police state to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in decision whether to speak or stand by his rights (106 S.Ct. at 1141)

As the last criminal procedure case in which the Nixon justices sat as a bloc, it is fitting. It yet again demonstrates the fulfillment of Nixon's intention to reverse the egalitarian impulse in the area of criminal procedure. The power gap between the police and the suspect would remain as a yawning chasm. The Nixon justices consistently refused to narrow it any further than it had been under Warren. The Court in *Burbine* took a position of requiring less than full disclosure of options available to the suspect. The tone of the case is one in which the need for a conviction outweighs the commitment to protecting the liberty of the individual.

THE NIXON JUSTICES AND CRIMINAL RIGHTS

It can be concluded that while the Nixon justices did not perhaps go as far as President Nixon and his Southern constituency would have liked, they did significantly narrow the Warren legacy and shifted the debate away from protecting the accused and toward maximizing the power of the State. In so doing, the Nixon justices formed the right wing of the Burger Court and were decidedly more inclined than their colleagues to vote consistently to restrict the legacies of *Miranda* and *Mapp*. In this sense, Mr. Nixon received much of what he desired in a Supreme Court justice - a consistently pro-law and order voting pattern.

The *Miranda* decision attempted to narrow the power gap between a suspect and police officers. The Court in *Miranda* recognized that there is a very real danger of police misconduct if there are no safeguards to prevent such activity. Further, the Court recognized that individuals under interrogation were in a particularly vulnerable position and questioning creates,

compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely (384 US, at 467).

President Nixon chose Supreme Court justices whom he felt would be most instrumental in bringing about the reversal of the spirit of *Miranda*. What he got from his nominees was largely consistent with that desire. The Nixon justices insisted on an approach to the Exclusionary Rule which relied on balancing the relative gains and losses to individuals and society. This balancing approach was used time and again to justify curtailing the effects of the *Miranda* safeguards.³⁴

The Nixon justices demonstrated that there would be few occasions when they would be willing to elevate the value of protecting the liberty of a suspect when that might mean denying the State what otherwise would probably have been a conviction.

³⁴ *Calandra, Powell, and Gates* for instance.

This willingness to place the value of gaining a conviction above the rights of the individual, even if *Miranda* was violated, is most prevalent in the interrogation cases of *Rhode Island v. Innis* and *Oregon v. Elstad*. In *Innis*, the Court interpreted the definition of interrogation very narrowly. Even though the suspect was a third party to a conversation between two police officers and therefore subject to being moved and manipulated by their conversation, the Court extended no protection. In *Elstad*, the Court ruled that information gained as a result of violating *Miranda* would not necessarily be kept from being used in cross-examination. With interpretations and exceptions as large as these, there is a clear signal that *Miranda* is to be taken much less seriously by officers on the street.

Edwards v. Arizona is often pointed to as evidence that even the Nixon Court had its limits in curtailing the effects of *Miranda*. On closer examination, however, the violation of the Sixth Amendment in that case was so blatant that to have decided any other way would have struck a direct blow to constitutional safeguards. Even in this case, however, Chief Justice Burger's concurrence sounds more like a dissent as he gruffly warns that protections afforded to the accused can easily go "too far."

Miranda protections were designed with one main goal in mind, to secure for the suspect a full knowledge of their options and defenses. *Moran v. Burbine* directly ran counter to that notion. Justice O'Connor insisted that the police have no responsibility to inform suspects of attorneys who are present to assist them. The distinction is a fine one. *Miranda* warnings deal with constitutional rights in the abstract. O'Connor and the Nixon bloc suggested in *Burbine* that the State has satisfied its obligation to the accused when it has warned the individual that these rights exist. There is little responsibility to actual assist the accused in realizing the right.

The Court's willingness to allow the police to exercise their power without the individual's knowing the full extent of their rights to protections was illustrated early on in the Court's decision in

Schneecloth. The Court was not impressed by the argument that *Miranda* guaranteed that individuals were to be informed about the full range of their options before the police could conduct a search. The definition of a "voluntary consent" was read very broadly in *Schneecloth*. Despite the contention that the suspect did not understand that his consent was not necessarily mandatory in the searching of his car, the Court let stand the search.

The "good faith" exception was introduced to allow the police to gather evidence even if the warrant was faulty. Interpreting the need for a warrant as simply a procedural safeguard, the Court allowed the police to act on warrants which were not germane to the cases at hand. Again, this "good faith exception" underscores the Court's balancing attempts. This same theme was present in *New York v. Belton* when the Court broadened the warrantless search exception. It interpreted the "immediate surroundings" of a crime area broadly.

The area of Nixon bloc jurisprudence which affected the most damage on the Exclusionary Rule dealt with the question of enhancing policing power through technology. The Court refused to take into account the fact that the police can greatly enhance their power through the use of listening devices. The *Knotts* decision allowed the police to use a beeper to gain information to combat the drug war. Justice Blackmun concluded that individuals have no legitimate expectation of privacy when using a telephone in *Smith v. Maryland*. This unwillingness to allow *Miranda* to follow the increasing advance of technology is the most important aspect of the Court's criminal procedure jurisprudence.

Richard Nixon campaigned on a platform of bringing about a reversal of the Warren era extension of equality to those accused of crimes. His justices approached the earlier Warren era precedents with a balancing scheme which for the most part favored the state. They restricted the spirit of *Miranda* with its demand for full knowledge and so riddled the Exclusionary Rule with

exceptions and provisos as to render it but a shadow of what it had been under the previous Warren led Court. In no other area did Nixon or Reagan receive such conclusive support for their agenda than in the area of criminal rights.

CHAPTER FOUR: BUSING AND THE END OF COURT CONSENSUS

The words “all deliberate speed” are more ambiguous and prone to obstruction than the members of the Warren Court could possibly have imagined in 1954. The initial turbulence following the Court’s *Brown* decision was followed by widespread resistance toward implementation. Some Southern states, Virginia, Mississippi, Arkansas, Georgia, and Alabama being the most blatant, openly flouted their non-compliance with the Court’s order.¹ Other states instituted integrationist policies only reluctantly and with the intentional design of minimizing the challenge to historical racial assumptions.

The Warren Court’s early consensus regarding integration was complicated by the difficult task of defining the nature of segregation in the 1960s. The state-mandated racial policies of the post-*Plessy* years were clearly what the Court had in mind when it unanimously struck down school segregation in 1954.² Invalidating state laws, however, is rather straightforward when compared to the more complex task of dealing with racial separation stemming from residential patterns. This de jure/ de facto dichotomy was the center of the integration debate in the late 1960s. In response to the strategies of local school boards, many of which were thinly veiled attempts at non-compliance, the

¹ As discussed in Chapter Two, Governor Lindsay Almond of Virginia instituted what he termed “massive resistance” and urged other Southern governors to close their public schools rather than bow to the Court’s integration decree. Governor Ross Barnett of Mississippi denounced the Supreme Court decision and only the threat of federal troops, such as happened in Arkansas convinced him to soften his rhetoric. Governor Orval Faubus of Arkansas made a national name for himself by obstructing the integration of Central High School Little Rock in 1957. Georgia Governor Marvin Griffin traveled around the South urging regional solidarity while first John Patterson and then George Wallace, used the governor’s mansion of Alabama as a forum to vent their frustration with the Supreme Court. For a full discussion, see Carter, 1995.

² In the late Nineteenth Century, following *Plessy v. Ferguson*, states across the South reimposed race segregation in nearly all facets of life. This official or de jure segregation was the target of the Court in *Brown*. Later segregation was more difficult to deal with, however, since it was presumably the result of voluntary residential patterns.

Court became increasingly involved in mandating remedies from above. One of the primary tools used by the Court was busing.

Busing involved the effort to achieve racial balance in school systems by transporting children to integrated facilities. The public response to busing was intense. Alabama Governor, George Wallace, was able to ride a crest of public discontent over busing to a strong presidential bid in 1972.³

A HISTORICAL OVERVIEW OF THE FEDERAL GOVERNMENT AND SOUTHERN RACIAL POLICIES

At the end of the nineteenth century, the Supreme Court condoned the reinstitution of race-based separation in *Plessy v. Ferguson* and, for over a half century after that, refused to intervene on the part of discriminated blacks. The Court's 1954 *Brown* decision, however, represented a fundamental shift in the Court's thinking. It retreated from its strict adherence to federalism and began applying a national standard to race relations. The Court came to regard state imposed segregation on the basis of race as a denial of the equal protection of the laws so the Court ordered segregated systems to begin integration with "all deliberate speed."

This shift occurred as a result of the vast political changes which had taken place due to the Great Depression and World War II. The federal government, led by Franklin Roosevelt, had centralized authority and severely tempered the Tenth Amendment. Although the Roosevelt Administration's expansion of the role of the federal government was largely motivated by economics, some liberal reformers hoped to use the federal government as an instrument to improve the nation's social structure. This desire naturally raised opposition from those groups with a prevailing stake in the status quo.⁴

³ Wallace's campaign against busing also invoked the class issue, a favorite tactic of southern populists. He blamed the dislocation and chaos in the South on Northern intellectuals. For a full discussion see Leshner, 1994; Carter, 1995 and Scher, 1992.

The Truman Administration's effort to devise a more equitable racial system could be traced to the New Deal. Opposition was centered around groups hoping to contain the government's pervasive involvement in their "local affairs."⁵ Although Truman's success rate in Congress was well below Roosevelt's, the fact that he even attempted many of his policy initiatives illustrated the New Deal's impact on the average American's view of the role of government.

The pre-Depression view that the role of the federal government was to be confined to regulating the money supply, guaranteeing the borders, and providing for the common defense was replaced with a far more expansive concept. Government intervention into the everyday affairs of the nation's economic and social life was no longer seen as illegitimate on its face. The Roosevelt and Truman Administrations together helped to create an atmosphere where the Court's 1954 *Brown* decision could be accepted as appropriate by the American people.

Nineteenth Century Parallels

In retrospect, events leading to *Brown* paralleled the Nineteenth century. When the republic was being formed, the federal constitution guaranteed slavery's continued existence through the so called Three-fifths Compromise.⁶ The compromise was so effective that the race debate did not resurface in earnest until well into the next century. The threat to the South's "peculiar institution" emerged from an unlikely source, the election of a Southern slave owner, Andrew Jackson.

⁴ Business interests united with Southern conservatives throughout the 1930s in an effort to thwart New Deal legislation.

⁵ Since the 1790s elements of the South's leadership have argued that the federal government should be kept out of the affairs of the states. Initially, this was an effort to control the rising power of northern industrialists (see Sharp, 1993 for a full discussion). From the early republican era until the Civil War Southerners depended upon respect for federalism to protect slavery (Peterson, 1987). Since *Plessy*, the South relied on states rights to protect Jim Crow. (see Woodward, 1960; Cohodas, 1993; Carter, 1995)

⁶ Blacks were considered 3/5 of a person for purposes of taxation and representation.

Jackson wielded power in an unprecedented fashion. In direct violation of the Marshall Court, the President forcefully removed Native Americans from the southeast. He waged a successful war against the national bank, ultimately bringing it and its president, Nicholas Biddle, to ruin. He even vetoed bills without regard to their constitutionality.⁷ Late in his first term he stood poised to invade the state of South Carolina to enforce the tariff of 1828.⁸ By the time Jackson left the presidency in 1837, he had been dubbed "King Andrew" by his opponents who themselves had taken the name "Whigs" in an effort to connect with the English republican tradition.⁹

Andrew Jackson legitimated the use of executive power.¹⁰ The fact that the united Whig forces were unable to prevent his free use of power left the office of the presidency forever strengthened. The institutionalization of presidential power, however, had an unintended consequence. Opponents of slavery observed how effectively the federal government was bringing about the industrialization of the Northeast and the development of internal improvements in the rest of the country. If the powers of the federal government, so decisive in economic affairs, could be effectively harnessed in the area of social policy, slavery could be abolished.

⁷ Jackson vetoed the "Mayesville Road Bill" in his first term. Unlike previous uses of the presidential veto, Jackson did not exercise his right based on constitutional reasons. In what was a disturbing realization to his political enemies, he was vetoing a measure that would have helped the state of his primary political opponent Henry Clay of Kentucky. The blatantly political use of the veto was unprecedented. For a full discussion see Latner, 1979 and Watson, 1990.

⁸ The state of South Carolina opposed the tariff bill of 1828 referring to it as the "Tariff of Abominations." The Congress passed the so called "Force bill" giving the President the authority to use federal power to crush opposition to the tariff in South Carolina.

⁹ The Whigs were a heterogeneous lot. Some felt Jackson's use of power was too personal. Others, mainly Southerners, were concerned that the federal government itself was too powerful. Still others felt that he was not using the powers of the presidency enough. See Howe, 1979.

¹⁰ The extent to which Andrew Jackson was able to successfully wield executive power while predecessors such as the Adams' were largely unable to has been a matter for considerable debate. If the rhetoric of Jeffersonian Republicans of *Tertium Quid* are to be believed, the Federalist Adams and his son, the National Republican, were intent on using executive power for the benefit of the North at the expense of Southern interests while Jackson was more inclined to use power on behalf of "the people."

Various agencies such as the American Colonization Society lobbied for federal support in deporting slaves.¹¹ Abolitionists urged the government to abandon the neutral stance it had adopted at the constitutional convention and work to dismantle slavery. The panic which gripped the South in 1860 following the election of Abraham Lincoln was in direct response to the realities of power introduced to the presidency by Jackson. If Jackson was capable of defying the Supreme Court, defeating the nation's banking system, and crushing the will of individual states, then surely Abraham Lincoln, occupying the same office, could abolish slavery.

The federal government abandoned its historically neutral position in 1862 and the Civil War was transformed into a war against slavery.¹² The conclusion of the war settled once and for all the issue of officially denying blacks their citizenship and freedom. The Reconstruction era, however, marked a new fissure in public opinion. The question of slavery settled, the issue after the war was whether or not the resources of the federal government should be mobilized to combat the de facto social slavery of freedmen.

Before his assassination, Lincoln seemed unwilling to go beyond the immediate gains of ending slavery. In the interest of national unity he seemed willing to forsake the battle over social equality in favor of "malice toward none and charity to all."¹³ Left to their own governance, there was

¹¹ The Colonization Society opposed slavery as it was being practiced in the first half of the nineteenth century but they feared the results of leaving a large population of freed blacks on American soil. They therefore supported the relocation of the slave community to the western coast of Africa. Notables such as Abraham Lincoln and Henry Clay were prominent supporters of the Colonization idea. See Burns, 1982.

¹² In an effort to make the Civil War something more than just a mundane political fight for the right to the free navigation of the Mississippi and the end to the "compact theory" of government, Lincoln elevated the rhetoric of the war by issuing the Emancipation Proclamation. From that point on, it was something of a holy war for both blacks and abolitionists. See Donald, 1995

¹³ Quoted from Lincoln's second inaugural address. Lincoln favored soft pedaling the race issue and an easy reconstruction in order to resurrect the old Whig coalition he had been a part of before the war. He did not want the Democratic Party to become the "Southern" party. As in other matters, Lincoln seemed to have been motivated less by concerns for blacks and more out of concern for the Union. For a full discussion, see Stamp, 1965.

little doubt in the minds of Radical Republicans that Bourbon Democratic regimes would reinstitute the practice of relegating blacks to the bottom of the social ladder.¹⁴ With Lincoln gone from the scene after April 1865, Radical Republicans had an opportunity to put their ideas into practice.

The period between 1866-1876 was a remarkable time in American history. During that span, the federal government committed itself to such endeavors as the Freedman's bureau and political guarantees for freed slaves.¹⁵ The collapse of public support in the North, however, facilitated the withdrawal of federal troops in 1876 and the South did, indeed, again resort systematically to denying blacks their rights. By the end of the century, the federal government returned to its position of neutrality in *Plessy v. Ferguson*. Abolishing official state practices was as far as the government was willing to go and for the time being, the fight over ending social segregation was over.

The twentieth century seems to have followed something of the same pattern. During the 1930s President Roosevelt embarked on a concerted effort to use the federal government as an instrument to alleviate the effects of the Great Depression. The emergence of the New Deal brought about a dramatic expansion of the federal government into unprecedented areas of American life. Many Southern leaders resisted Roosevelt's initiatives. They realized that to grant the government wide sweeping powers in economic matters could logically lead to a clamor from social reformers to use the government to alter the South's social relations.

Like Jackson before him, Roosevelt's administration demonstrated that used to advance a particular end, the power of the executive was difficult to resist. By 1948 liberals in the Democratic

¹⁴ So called "Radical Republicans," included members of congress like Thaddeus Stevens and Charles Sumner. They favored impressing upon the South the need for an egalitarian acceptance of blacks. In their minds, the war was fought over moral principles which should not be compromised (Foner, 1988).

¹⁵ The Freedman's Bureau was designed to aid blacks in combating social slavery by providing them food, shelter, and jobs.

Party, like nineteenth century abolitionists, were demanding that the power of the government be used to aid blacks in their struggle against discrimination. Just as both the Whig and Democratic Parties split over the issue of slavery, the question of rights for Southern blacks created deep schisms within the Democratic and Republican parties of the 1950s.¹⁶

In 1954 the Supreme Court handed down its famous *Brown* decision. From that moment on, the federal government abandoned the neutrality to which it had clung for over a half century. The Eisenhower Administration, though reluctant, had little choice but to enforce the law and strive to bring about an end to the discriminatory policies of state governments. Like the Civil War a century before, *Brown* settled the issue of official discrimination. States were not to sanction the systematic denial of black rights. But, like Reconstruction, the *Brown* decision gave way to the much more difficult question of social equality.

Like the era of Reconstruction, the decade and a half following *Brown* was intensely unpopular in the South. Many in the region hoped to resist federal efforts until the nation as a whole tired of the effort. By the early 1990s, liberals were increasingly becoming critical of what they saw to be the retreat of the once adamant Supreme Court.¹⁷

The debate following *Brown* resembled the Reconstruction debate. Just how far should the federal government go in guaranteeing rights for blacks? For the South, the question was just how far should they go in cooperating with the federal government? As the debate over de facto segregation raged, Richard Nixon stepped back onto the political stage.

Like so called Liberal Republicans of the early 1870s, Nixon opposed excessive federal interference into the social policies of Southern states.¹⁸ He supported *Brown*'s effort to end official

¹⁶ The divisions were largely geographical. Both northern Republicans and Democrats were largely in agreement during the 1950s that the federal government should, at least to some degree, become involved in the effort to guarantee rights to southern blacks.

¹⁷ See *Board of Education v. Dowell*

segregation but opposed what he saw as draconian measures such as busing to end de facto segregation. President Nixon's Supreme Court appointments largely shared his view that residential segregation was beyond the reach of federal power. Because of this, liberals and blacks in America worried that like the collapse of public support for Reconstruction, the end result would be efforts on the part of Southerners to reinstitute the practice of encouraging segregation. Their worries were, at least temporarily, assuaged when Nixon's Chief Justice wrote the majority opinion in *Swann v. Charlotte Mecklinburg*.

Different Conceptions of Freedom

The Court's thinking from *Brown* to *Swann* marked a shift from negative liberty to positive, or enabling liberty. This same distinction can be made between the policies of Emancipation and Reconstruction. In the sense that he supported small government and opposed its use in regulating the lives of individuals, Nixon's positions on segregation and busing were consistent. He opposed government constructed impediments to inequality as well as overt federally sponsored remedies to tear down non-official barriers. This opposition to government repression while resisting efforts to correct its practical effects is a classic embodiment of negative liberty.

For Nixon's Southern Strategy to reach fruition, he would need justices who were strong opponents of Court ordered busing but likewise opposed to segregation. Although Nixon was not the Southern ideal (given his opposition to leaving it strictly up to localities to handle their affairs), he was the best the South was going to get from a national politician. Nixon's promise to oppose busing endeared him to many Southerners (at least to the extent that a non-Southern politician could reach that level). For the Nixon justices the de facto/de jure distinction would be fundamentally important

¹⁸ In the 1872 presidential election, so called Liberal Republicans, who favored ending Reconstruction and allowing the South to return to the Union, joined Democrats in supporting Horace Greeley over Grant. See Burns, 1985.

as a means of demonstrating Nixon's opposition to state sponsored segregation as well as his reluctance to use the government to raise the level of blacks in the South.

BUSING AND THE NIXON BLOCK

Warren Burger and Swann v. Charlotte Mecklinburg 402 U.S. 1

When Richard Nixon appointed Warren Burger as Chief Justice, he was hoping for a counter-revolutionary foot soldier. The Court's first decision on the matter of school busing initially came as a shock to Nixon. In *Swann v. Charlotte Mecklinburg*, a unanimous Court, led by Burger, ruled that busing was an appropriate remedy for achieving the goal of desegregating public schools.

The Chief Justice began by declaring student assignment as the central issue in the case. He then identified four problem areas associated with it: (1) quotas to correct previous segregation; (2) the question of whether every same race school must be eliminated; (3) the limits on the rearrangement of school districts as a remedial measure; and (4) the use of busing to correct segregation.

On the first issue, Burger argued that since *Brown I*, the Court was committed to dismantling the dual school system. To do this they may have to employ a limited quota system but that was not the end goal of their efforts. Quotas therefore, were not to be considered a good within themselves; they are simply a starting point.

On the second point, Burger dismissed the idea that schools of all one race are automatically targets for a court imposed remedy. He recognized that schools often reflect the neighborhoods surrounding them but, schools which are composed of a single race must come under close scrutiny. Options for majority students to transfer to schools where they will be minorities are to be made available at no cost to any student desiring to escape the stigma of past segregation.

As for the third problem, the altering of attendance zones, plans which appear to be neutral are not in themselves acceptable just because they appear neutral. Finally, as for the transportation of students, busing may be employed as an acceptable means of enforcing the Court's order to

desegregate. The primary goal is a unitary system and busing is an appropriate tool for the district courts.¹⁹

On one level, this appeared to be a dramatic departure from the Nixon position of attacking only segregation resulting from a state imposed dual system. *Swann* granted the federal judiciary wide latitude in addressing the problem of segregation. An argument can be made that by upholding busing as a remedy, the Court was trading in its position of advocating negative liberty in favor of enabling liberty.

While the Court's decision in *Swann* may appear to demonstrate the fundamental failure of the Nixon Administration to get what it expected from its nominee, the reality is more complex. Burger explained that the Court's decision in *Swann* was to be interpreted as an attempt finally to dismantle the dual school system found unconstitutional in *Brown*.

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil or a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

The Chief Justice stressed that year-by-year adjustments by the school board to maintain a desegregated system was not the intent of the Court's opinion. The entire tone of the opinion, in fact, underscored Burger's reluctance to take the federal government into the minute details of school attendance policy. Clearly, the racial separation in American society resulting in residential patterns and self-imposed divisions are not the targets of Burger's opinion. As Burger makes clear, the opinion should not be judged as a wholesale intrusion by the federal courts into the local affairs of regional school boards.

When viewed in context, it appears that Burger wrote the majority opinion, despite his discomfort with the implied philosophical shift from *Brown* to *Swann*, for reasons largely unrelated to

¹⁹ Chief Justice Burger relied on *Green v. County School Board* and *Alexander v. Holmes County Board of Education* to establish the goal of a unitary school system.

policy. One of the reasons Burger sided with the rest of the Court may have been his unwillingness to break the Court's record of unanimity when deciding segregation cases. Woodward and Armstrong's inside look at the Court, *The Brethren* (1979) reveals glimpses into the thinking of members of the Court.²⁰ In their estimation, Burger was a vain man who desperately wanted to be regarded by posterity as having been an effective Chief. According to this argument, his primary motivation for writing the opinion of the Court in *Swann* was so, like Warren before him, he could be seen as a statesman on this most critical issue.

What appears even more plausible is that Burger's authoring of the majority opinion was an effort to control its content. He was backed into the position when he learned that justices, such as Harlan, who might have been expected to dissent, were unwilling to break the Court's record of unanimity in desegregation cases (Schwartz, 1990). By writing the majority opinion rather than dissenting, Burger was hoping to moderate what otherwise might have been an even more expansive approach. In that sense, he was closer to the Nixon agenda than the opinion itself would seem to indicate.

Swann simultaneously represented the highpoint and the turning point for the Court in the area of desegregation. The 1971 opinion dramatically demonstrated the government's desire to enforce its earlier decision but it also pointed to future difficulties as well. The Court's celebrated solidarity was about to come to an end.

The Nixon Block Emerges and the Court Moves Right

By the time *Keyes et. al. v. School district No.1, Denver, Colorado, et. al.* was decided in 1973, the Court's composition had undergone some changes. Hugo Black, the perennial liberal

²⁰ The Woodward and Armstrong book is useful in gaining broad glimpses into the everyday workings of the Court. The book, however, has often been criticized for being replete with obvious biases, especially against the Chief Justice. Scholars have speculated that Burger's unwillingness to cooperate with the authors may have resulted in their rather harsh assessment of his leadership style.

champion of strict construction, and John Marshall Harlan, one of the Court's most stalwart defenders of judicial restraint, had both retired. The Court now counted as one of its members the staunchly conservative William H. Rehnquist of Arizona, a former Justice Department official. Rehnquist's commitment to Nixon's judicial counter-revolution was unshakable. As such, he would emerge as the leader of the Court's anti-busing wing. The Court's approach to the issue of busing had undergone change the year before *Keyes* in *Wright v. Emporia*. In *Wright*, the Court's celebrated desegregation solidarity had been shattered by the Nixon justices' dissents.

Proponents of Court sponsored busing had reason for concern as the Court listened to arguments in *Keyes*. Like *Brown* before it, *Keyes* came to the Court from an area outside of the South and its ramifications would be felt throughout the country. As the justices sat for oral arguments in the case, they were aware that their decision the previous term in *Swann* had provoked angry and vituperative denunciations from across the country. Nevertheless, the justices continued their commitment to furthering desegregation, although as in *Wright v. Emporia*, gone was their celebrated unanimity which had given *Brown* and *Swann* such weight.

Keyes illustrated the Court's increasing divisions with regard to the issue of busing. The case concerned a group of parents who argued that the Denver school system was operated on a segregated basis.²¹ Despite the fact that the city had never had a statutory provision for the race based separation of its students, the practical effect of their administrative policies had rendered the school system segregated. Among the policies blamed were attendance zones, school site selection and a neighborhood school policy.

Justice Brennan wrote the majority opinion for the Court. He stated the Court's opinion that the lower courts did not, in fact, apply the proper legal standard and the administrative decisions of the

²¹ Two areas in particular within the board's jurisdiction were heavily segregated, the Park Hill area and the so called core city area where non-Anglo ratios reached in excess of 70%.

local school board, while not as overt as those found unconstitutional in *Brown* still resulted in segregation.

It is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designation 'feeder schools' on the basis of race has the reciprocal effect of keeping other nearby schools predominately white (p.201).²²

Brennan further argued that segregation in any meaningful portion of the district placed the burden on the school board of proving that other segregation was not the result of official policy.

...we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions (supra, at 208).

Keyes rather dramatically favored the goal of desegregation over the principle of stability.²³

Like Nixon, most of the justices he appointed were much more in favor of stability. Such a commitment to stability was to be expected from a president looking for justices who shared his dedication to law and order. Accordingly, the only Nixon justice from which Brennan was able to gain total support was Blackmun. For the other justices, this was a marked and sweeping expansion of the Court's interpretation of state imposed segregation. De facto segregation in a district found to have practiced official segregation in one part is enough to taint the entire district. Although Burger concurred in the result and Powell concurred in part and dissented in part the tone of neither justice

²² Justice Brennan's pointing out that the administrative policies have the practical effect of segregating the district relies on *Brown v. Board of Education*, 349 US 294 (*Brown II*) and *Green v. County School Board* 391 US 430, 437-438 the school boards are required to remove "all vestiges of state-imposed segregation." This would include the indirect methods practiced in Denver.

²³ The District court had relied on *Plessy v. Ferguson* to decree that the school board had to make compensatory arrangements for the poorer education received by students in the segregated area. This approach is not nearly as all encompassing as the one handed down by Brennan and the rest of the Supreme Court's majority.

displayed an enthusiasm for the Court's new track. Only Justice Rehnquist, however, was brazen enough to dissent openly.

Despite its being a partial concurrence in the result, Justice Powell's wordy opinion read like a dissent. He declared the need to abandon the *de jure/de facto* dichotomy due to its capricious nature and he expressed concern that the court mandated solutions were beginning to inhibit the ability of local communities to provide educations for their children. Much as Justice Scalia would later perceive the Court's role in the area of abortion, Justice Powell expressed concern that the Court was becoming hopelessly muddled in the issue of school desegregation. Part of the problem was the Court's insistence on clinging to the *de jure/de facto* dichotomy.

There is thus no reason as a matter of constitutional principle to adhere to the *de jure/de facto* distinction in school desegregation cases. In addition, there are reasons of policy and prudent judicial administration which point strongly toward the adoption of a uniform national rule. The litigation heretofore centered in the South already is surfacing in other regions. The decision of the Court today, emphasizing as it does the elusive element of segregative intent, will invite numerous desegregation suits in which there can be little hope of uniformity of result (413 US at 232).²⁴

The Powell opinion was consistent with the increasingly vocal demand of Southerners that they be treated no differently than the rest of the country regarding issues of race. Powell's was the voice of a region tired of being singled out and held to a different standard than the rest of the nation. According to Jacob W. Landynski (1991), Powell's opinion in *Keyes* was nothing more than a belated dissent from *Swann*. Powell made a point of discerning the shift in doctrine undertaken by the Court since its outset in the area a generation earlier in *Brown*.²⁵

²⁴ Justice Powell was disturbed by the *de facto/de jure* dichotomy since it seemed to impose a harsher system of redress on the south than in the rest of the country. He was incredulous that intent would be found to be irrelevant in Virginia but controlling in Colorado. Citing the Court's recent decision in *Wright v. Emporia*, Justice Powell found it difficult to reconcile the language of that case with the intent based language of the majority in *Keyes*.

²⁵ Powell chronicled the Court's involvement from *Brown* to the then current case of *Keyes*. He theorized that there had been a significant shift in thinking away from the largely negative conception of freedom evident in *Brown* to the far more positive and intrusive approach exhibited in both *Swann* and *Keyes*. Whereas at the outset the Court had adopted the posture of forbidding states to actively bar students from various institutions of learning due to their race, the Court was now

Powell cautioned his fellow justices about the possible ramifications of their position. One outcome could be the alienation of many people from the Court's efforts in the area. He likened the situation to public officials barring individuals from voting or speaking. When the Court intervenes in such matters, the burden for redressing these violations rests on the governmental officials in question. In the case of correcting past segregation policies, on the other hand, the burden of remedying the situation falls on large numbers of people who never had anything to do with the unconstitutional policies. This in turn may cause the white middle class to flee to the suburbs leaving the public school systems to bear the brunt of educating the "disadvantaged of both races."

Rehnquist's dissent was the most representative of the future position to be held by the Nixon justices. He opened his dissent by disagreeing with the majority's opinion that segregation in one area of a district necessarily tainted the entire district. This was a radical expansion of the word equitable to hold every school in a given district accountable for acts of segregation which may have occurred in only a few attendance zones. Further, he expressed his concern that the court had radically expanded its role into the affairs of local communities.

The Court has taken a long leap in this area of constitutional law in equating the district-wide consequences of gerrymandering individual attendance zones in district where separation of the races was never required by law with statutes or ordinances in other jurisdictions which did require so (*supra*, at 265).

Rehnquist expressed concerns that school systems would become run by judicial fiat. He was incredulous at the notion that upon finding racial gerrymandering between two schools the whole district is tainted and the Court could then compel the busing of school children over long distances.

embracing a doctrine of redressing the problem via active governmental involvement. Powell cautioned the Court's members about taking such an expansive approach since it could not help but involve the Court in such minute and tedious matters as attempting to discern the intent in the minds of local school board members. From Powell's perspective, such an endeavor could not hope to be systematic. Nor could it avoid being a long and protracted process.

In essence, the task of finding the intent of school board members in drawing attendance zones was a virtual impossibility.²⁶

Whatever regret or disappointment experienced by President Nixon over the *Swann* decision must surely have been at least partially assuaged by *Keyes*. His appointees were beginning their march away from the expansive role of the government in guaranteeing the racial composition of schools. Stability and caution were the thematic watchwords of at least Powell and Rehnquist. Burger seemed not far behind. Only Justice Blackmun seemed still to be clinging to the expansive view of judicial involvement in the area of school desegregation.

The Changing Perceptions of the Problem and The Court's Response in Milliken

The Court's failing ability to reach consensus, illustrated so vividly by the divided opinions in *Keyes*, was due to the changing nature of the race issue by the early 1970s. The race issue in the 1950s and 1960s had been perceived as a Southern problem and as long as the problem was centered in the South, other areas of the country were willing to support an expanded government role. As it became clear that redressing the problem would have to include national busing, the issue was robbed of its clearly defined good guy/bad guy quality (Brest, 1983).

With the introduction of busing, the race issue assumed a much more immediate position in the eyes of parents nationally. Whereas the *Brown* decision seemed to affect only those parents whose children were in racially mandated facilities, parents now realized that the post-*Swann* Court would excuse no area of the country from efforts to achieve racially balanced facilities.

Perhaps responding to the new public attitudes toward Court ordered busing, the four Nixon justices emerged as a block in *Milliken v. Bradley*. For critics of the *Keyes* decision worried that the Court was backing away from its commitment to ending segregation, *Milliken* served as confirmation

²⁶ Rehnquist pointed out that finding the intent of one school board member would be difficult enough but the task is complicated still further by there being multiple members on the board and periodic elections which change the board's composition.

that their fears were well founded. In yet another case outside the South, the Court had to deal with the issue of whether or not a metropolitan solution could be utilized to remedy the problem of racially segregated schools within the city of Detroit. The city itself had a history of purposefully drawing the zoning lines so that schools would remain segregated.

In response to the class action suit filed by parents of children discriminated against inside the city, the District Court ruled that since the state itself was responsible for the segregation in the Detroit school system, it would be appropriate to demand that the outlying school districts be part of the desegregation solution. The court ordered the city of Detroit to purchase school buses to accommodate the busing schedules and directed outlying counties to submit their own proposals for busing.

Had *Milliken* not been reversed, it would have represented a broad extension of governmental power for several reasons. The decisions of the District and Circuit courts, which would have called for interdistrict busing, posed a direct threat to the suburban refuge of millions of white middle class Americans across the country. It further would have demonstrated to opponents of busing that the government was prepared to marshal the full extent of its powers to bring about compliance with the inherent goals of *Brown*.

Instead of this broad extension of powers, the Court picked up where Justice Rehnquist's *Keyes* dissent had left off and reversed the lower courts. Chief Justice Burger fashioned the majority opinion, which included all of the Nixon justices plus Stewart. He argued that the difference between *Milliken* and previous cases was that in prior cases, the Court was being asked to deal with single districts of a,

geographic and administrative school system populated by both Negro and White children. In such a context, terms such as 'unitary and 'dual systems and 'racially identifiable schools have meaning' and the necessary federal authority to remedy the constitutional wrong is firmly established.²⁷

²⁷ The court imposed remedy would have effected 53 outlying school districts - districts which lacked a history of establishing an unitary system. This multidistrict approach, in the opinion of

Burger was clearly uncomfortable with this kind of extension of federal authority. The emergence of all four of the Nixon justices on the side of limiting the reach of *Brown* was significant. Nixon's counter-revolution in the area of busing was underway. Both Powell and Rehnquist had expressed concerns in *Keyes* that extending anti-segregation remedies to include areas without a historical record of discrimination was both wrong and inefficient. The efforts to integrate the greater Detroit area would clearly be a colossal undertaking requiring extensive judicial involvement.

Justice White accused the majority of allowing the state of Michigan, "the entity at which the Fourteenth Amendment is directed" to avoid its responsibility due to the administrative difficulty of achieving what is right. Just because it is difficult does not mean that a remedy should not be imposed. The position of the majority and the minority are distances apart. What is clear from the two positions is that the willingness on the part of the Nixon justices to sanction the use of the government as an utilitarian instrument to achieve racial balance was to be subject to the same sort of balancing approach employed in the criminal procedure area. When society must pay the cost in terms of funds and excessive disruption, the cost of ensuring integrated facilities has become too high.

Milliken was decided in 1974. The time period between *Swann* and this case is significant. The 1972 presidential election had raised the awareness of citizens across the United States about the busing issue. The saliency of the issue had reached, by 1974, a decisive point. The willingness on the part of the majority of the American people to continue to support government sponsored remedies to aid inner city blacks was disappearing. In many ways, the *Milliken* case reflected public opinion. Inasmuch as it did so, it also pointed to the political astuteness of Richard Nixon. The Nixon justices were finally voting as a bloc in 1974. What is more, they were doing so in a way which was consistent with Nixon's expectations.

Chief Justice Burger and the rest of the majority, represented an unwarranted expansion of the judiciary into the affairs of the local school districts.

The case illustrates that by 1974 a very deep wedge was being driven into American society by the flight of middle class whites from the city. They were seceding to the suburbs and they didn't want the federal government bringing them back. The emergence of private schools was the solution for upper middle class and religiously minded whites but for the working class and other whites in the lower echelons of the middle class, they were left having to fight busing. The fact that the Nixon justices congealed in this case points to the fact that they finally were becoming what Nixon had in mind, justices who responded to middle and working class interests.²⁸

Dayton and Columbus

For Nixon, *Milliken* represented a short-lived unanimity among his justices. The late 1970s witnessed two cases which demonstrated their waning consistency. *Dayton Board of Education et al. v. Brinkman et. al.* and *Columbus Board of Education et al. v. Penick et. al.* In both cases, Blackmun sided with the more liberal members of the Court to give majorities for busing in both cases. Burger is split while Powell and Rehnquist dissented in both cases.

The *Dayton* case involved the school system of the city of Dayton, Ohio. According to the students who brought a class action suit against the city, the school board operated a separated system which purposefully kept the races apart. Of the city's sixty-nine schools, fifty-one were either virtually all white or all black. Justice White wrote for the Court's majority. In his opinion, he found that the city of Dayton had operated a segregated system at the time of *Brown* and thus had a duty to eradicate the system since that time. The presence of an all black high school with an all black faculty and principal brought the whole district into question.

²⁸ This was consistent with Nixon's remodeling of the Republican party away from the elitist Eastern Establishment, which he hated, and toward the lower middle and working classes. For a full discussion see Wicker, 1990.

White found that discrimination existed in large portions of the district and this led to an “inferential finding of a systemwide discriminatory intent unless otherwise rebutted...”²⁹ The finding of the Court Appeals which ruled that the school board had failed to act in accordance with the law in trying to desegregate its school system, was affirmed.

Justices Powell and Rehnquist dissented from the Court’s majority. In their opinion the Court was making a grave mistake in continuing to expand its role in busing. They decried what Rehnquist termed as a “heavy handed approach” and warned that increasing involvement from the bench would only muddle the situation on the local level even further. They saved the preponderance of their arguments for their dissents in Columbus.

The *Columbus* case was decided the same day, July 2, 1979. Justice White also wrote the majority opinion for the Court in this case. The facts of the case include the following: the Columbus system had over 96,000 students in 1976 and of that number, approximately one third were black. About 70% of the students attended schools which were at least 80% of one race.

The District Court had ruled that the Columbus School Board had deliberately tried to keep the schools segregated. The school board claimed that they were not intending to operate a discriminatory system. They did not maintain a stated de jure policy of keeping the schools separated by race. Like *Dayton*, the Columbus School Board was in the position of trying to defend the entire system because of portions of the system which were clearly segregated.³⁰

The School Board was found to be in violation of the Fourteenth Amendment by the District Court and the Court of Appeals agreed. The main argument from the School Board was that even if there were segregated schools in parts of the district, this should not require a system wide remedy.

²⁹ Justice White relied on the *Keyes* decision to determine that when a significant portion of a district is held to be segregated, the onus is then on the school board to defend its remaining practices throughout the rest of the district.

³⁰ Again, as in *Dayton*, the school board is under the pressures of the Court’s decision in *Keyes*.

Both the District Court and the Court of Appeals disagreed and ordered a system-wide remedy to be implemented.

The Board insisted that since there was no official policy, they should not be found in violation of the law. Since *Brown II*, however, dual system were required to dismantle their systems, regardless of how disruptive it may seem, and implement a unitary system. Failure to accomplish an unitary system rendered the systems in violation of the Fourteenth Amendment and therefore liable to court intervention to remedy the problem.

White quoted Burger's opinion in *Swann*,

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked... In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system (402 U.S., at 15-16).

When it comes to school assignment, if the system leaves schools with a predominant majority of any race, it is incumbent upon the school to bear the burden of proof that such a school is not discriminatory in practice.³¹

Chief Justice Burger concurred in the judgment but not before offering explanations. He agreed with Rehnquist that the charge that Columbus and Dayton ran dual systems at the time of the 1954 decision placed upon them an affirmative duty, for the past twenty-five years, to desegregate was a "novel legal standard." He went on to point out the merits of Justice Powell's dissent by arguing that busing was perhaps not the most effective remedy. He questioned whether busing, in fact, accomplished what it was supposed to accomplish; namely a desegregated unitary system.

It is increasingly doubtful that massive public transportation really accomplishes the derivable objectives sought. Nonetheless our prior decisions have sanctioned its use when a constitutional violation of sufficient magnitude has been found. We cannot

³¹ The school system argued that even unconstitutional policies in the past did not have system wide impact. Appealing to *Dayton I*, they argued that the scope of the remedy should mirror the scope of the violation. Justice White, however, relying on *Brown II* and the *Green* decision, pointed out that since the Court's original case, the Columbus had an affirmative duty to dismantle their dual system. They had failed to take all of the necessary steps and therefore the courts had broad discretion in mandating remedies.

retry these sensitive and difficult issues in this Court; we can only set the general legal standards and, within the limits of appellate review, see that they are followed (supra, at 469).

Even though Burger concurred in the judgment of the Court, he made clear that he did so only in the interest of consistency with past rulings. One suspects his reluctance to vote to overturn his own majority opinion in *Swann*. He still makes clear his increasing level of discomfort with the idea of Court ordered busing. In a very real sense, the Chief Justice was consistent with Nixon's desire for a "strict constructionist" given his reluctance to overturn precedent.

Justice Powell dissented in *Columbus* and warned that,

...a quarter of a century after *Brown v. Board of Education* the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country (supra, at 480).

Powell, who served on the Richmond School Board, framed part of his argument on the grounds that local officials should have control over their own affairs. He was concerned with the expansion of the role of the federal government, a classic Southern perspective which placed him squarely within the mainstream of Southern thought. This consistency with Southern opinion demonstrated Powells' consistency with President Nixon's Southern Strategy. Powell's dissent echoed the increasingly familiar refrain that the segregation in both the Columbus and Dayton systems was the result of residential patterns.³² The federal government should not presume to tell people where they can and can not live.

Powell stated that the kind of discrimination prompting the Court to rule in *Brown I* no longer existed in the country and any attempt on the part of the federal government to intrude on the residential patterns and the local authority of school boards would breed only resentment and

³² Justice Powell quoted Professor Alexander Bickel, "In most of the larger urban areas, demographic conditions are such that no policy that a court can order, and a school board, a city or even a state has the capability to put into effect, will in fact result in the foreseeable future in racially balanced public schools. Only a reordering of the environment involving economic and social policy on the broadest conceivable front might have an appreciable impact." (*The Supreme Court and the Idea of Progress* 132, and 147) cited at supra, 481.

resistance. Powell also expressed concern that countless cities across the North and Mid-west fit the same patterns as these two systems. To implement extensive busing plans across these other cities would require a massive intrusion by the federal government into the local affairs of numerous cities.

There are unintegrated schools in every major urban area in the country that contains a substantial minority population. this condition results primarily from familiar segregated housing patterns, which- in turn - are caused by social economic, and demographic forces for which no school board is responsible (supra, at 480).

Powell, in an observation clearly consistent with the national experience, predicted continued abandonment of the public school system by suburban whites and the deterioration of inner city schools. He denied that the reaction of the white middle class was in any way motivated by racism, rather, the continued appropriation of authority by the federal government away from local school boards.

Powell urged a renewed sense that desegregation was not the only issue to be concerned with. Society must balance and weigh all of the values at stake in the public schools. For Powell, the attempt by the federal judiciary to restructure the school systems based upon an idealistic notion of desegregation regardless of residential patterns is far more akin to "social engineering" than to interpreting the Constitution. Unlike Burger, Powell felt the time had come to reexamine some of the first principles which were established when the Court entered the business of school desegregation.

Finally, he bowed to what he saw as the reality of democratic theory. The government, regardless of the branch, cannot persistently embark on a desired course without strong backing from a national constituency. In this instance, the government was acting without the express consent of the parents who are involved and the great experiment in educational diversity would be doomed to failure without a reversal of course.

It is now reasonably clear that the goal of diversity that we call integration, if it is to be lasting and conducive to quality education, must have the support of parents who so frequently have the option to choose where their children will attend school. Court, of course, should confront discrimination wherever it is found to exist. But they should recognize limitations on judicial action inherent in our system and also the limits of effective judicial power. the

primary continuing responsibility for public education, including the bringing about and maintaining of desired diversity, must be left with school officials and public authorities (at 489).

Justice Rehnquist was even more outspoken in his denunciation of the Court's actions in both *Dayton* and *Columbus*. He denounced the "dramatic displacement of local authority by the federal judiciary..." and criticized the majority for expanding the role of the federal government to such an alarming extent. Rehnquist was particularly disturbed by the failure on the part of the Circuit Court of Appeals to point out a single system wide violation in either school system. In Rehnquist's estimation, the lack of such a violation precludes the judiciary's restructuring of the entire system.

Rehnquist was alarmed by the prospect that any system which operated a dual system at the time of the *Brown* was vulnerable to federal intervention even if there was only minimal segregation within the school system. For Rehnquist, these two cases represent a dangerous break with past precedent. While prior cases, up until *Swann* dealt with systems historically segregated by law, these cases go a step further in an attempt to remedy residential segregation. Further, *Swann* reiterated the role of the local authorities in fashioning solutions. If the local authorities failed to define effective remedies then, by default, the federal judiciary could step in and articulate remedies which could include busing as a possible solution.

Both the *Dayton* and *Columbus* cases represent the final emergence of what Nixon wanted from his justices on the issue of school desegregation. With the lone exception of Blackmun, the Nixon justices emerged, by 1978, as opponents of the increasingly expansive judicial intervention into local school policy. Harry Blackmun was the only justice to abandon fully the Nixonian principles of arguing in favor negative liberty and preserving a dichotomous view of segregation.

Even Blackmun, however, was at least temporarily a part of the counter-revolution in busing. His backing away from the rest of the Nixon block was consistent with his withdrawal on other issues

as well. Burger remained somewhat tied to his earlier position in *Swann*. Even so, he repeatedly expressed his unhappiness with the pattern of court ordered busing as a remedy.

Nixon's vision of a counter-revolution in the area of busing was best epitomized by Rehnquist with Powell as a close second. Both justices remained true to Nixon's expectations and provided constitutional arguments to bolster the southern position on busing. Despite the fact that the bloc did not consistently vote together on busing cases, the Nixon justices were more conservative toward busing in general. They were far more inclined than the other justices to advance negative freedom viewpoints and advocate tight reins on the power of the federal government in this controversial area.

CHAPTER FIVE: REAGAN AND THE POLITICS OF VIRTUE

Ronald Reagan became president of the United States on January 20, 1981 owing at least some of his success to the segment of the American electorate referred to as the Religious Right. Although religion has traditionally influenced American politics, the intensity of its impact as well as its location on the ideological spectrum has changed with the political tides. The participation of the Religious Right injected a renewed role for the politics of virtue and moral paternalism.

The revival of organized religion's role in the political arena, and its contemporary alliance with the right wing in America was at least partially the result of decisions made by the United States Supreme Court. The Court's striking down of directed school prayer in the 1960s and its legalization of abortion in 1973 served as flashpoints for a movement dedicated to reversing what it perceived to be the encroaching secularism of modern society.¹ Acceptable candidates for the presidency who joined them in their efforts to stem these trends would be supported. In 1980 that candidate was Ronald Reagan.

Like Nixon before him, Reagan was faced with the need to use his Supreme Court nominations as a means of advancing the agenda of a crucial segment of his coalition. In the course of the chapter, this effort will be examined through the nominations of Sandra Day O'Connor, Antonin Scalia, Robert Bork, Douglas Ginsburg, Anthony Kennedy and the elevation of William Rehnquist to Chief Justice. The chapter will begin with an examination of the rise of the Religious Right.

¹ In 1962 the Court handed down its decision in *Engel v. Vitale* which struck down a New York mandate that children be led in a voluntary official prayer. The following year the Court continued raising the wall of separation in *Abington School District v. Schempp* when it struck down organized Bible reading in school.

THE RELIGIOUS RIGHT

Religion and Politics Prior to the Emergence of the Christian Right

From the beginning of the republic, religion has played a major role in American politics. In the first decade of the twentieth century, the prevalent "Social Gospel" called on all good evangelical Christians to do their part in bringing about the kingdom of God on earth. To these city dwelling progressives and rural populists, religious reasons provided the philosophical superstructure for their political involvement.²

By the 1920s Evangelical led reform had run its course. With the successful enactment of prohibition, Evangelical Christianity moved away from reform minded crusades. It became the defender of a rural world view and the primary critic of modernism (Wilcox, 1988). Religiously motivated politicians denounced the prevalence of speakeasies and the teaching of evolution in the classrooms. With the humiliation of William Jennings Bryan in the famous "Scopes Monkey Trial," Evangelicalism went into something of a hibernation. Private schools and seminaries were established and for all intents and purposes, Evangelicals, as an organized force, withdrew from national politics.³

Directly following World War II, many Evangelicals were returning veterans whose socio-economic status was greatly improved through access to higher education and the economic boom of the 1950s. They increasingly employed openly religious rhetoric to stir the country against what they labeled "Godless" communism (Wilcox, 1988). Because of their increasing affluence, Evangelicals

² In the first decade of the twentieth century, early evangelical progressives urged legislatures to pass ordinances against selling alcohol, child labor, and poverty relief. For a full discussion see Cooper, 1990 and Burns, 1985.

³ Randall Balmer, of Barnard College at Columbia, offers an in depth assessment of the role of the Evangelical community in twentieth century America in his book, *Mine Eyes Have Seen the Glory: A Journey into the Evangelical Subculture in America* (1993).

came to share the view of old line conservatives objecting to higher taxes and governmental regulation (Wald, 1987).

The church has always served as a mediating institution in society and by the late 1950s it had begun to sound themes that would echo across the political landscape (Tushnet, 1988). Increasingly, Northern and Southern Evangelicalism began to diverge. In the North, the old Social Gospel still dominated the mainline, liberal, Protestant denominations. In the South, on the other hand, with the resurgence of fundamentalism, spiritual development was to be pursued at the expense of perfecting the greater society (Wald, 1987).⁴

The emerging Southern hegemony within the Evangelical community simultaneously occurred with Southern political conservatism's rise to national attention. The two went together very well. The fundamentalist version of Evangelicalism, with its insistence on the inerrancy of the Bible and conservative politics' stinging critique of the counter-culture both demanded a certain level of conformity. Stability was to be elevated above personal liberty. Together, the two movements served as dual pillars of strength and reassurance to the tradition minded middle class and played particularly well in the South.

Richard Nixon's Southern Strategy was able to tap into Southern political conservatism and served him well in the 1972 election. Nixon, a Quaker, did little, however, to cement a bond between fundamentalists and the Republican party.⁵ Ronald Reagan, a divorced actor who seldom attended

⁴ Fundamentalism is distinct from Evangelicalism. Evangelicalism is usually applied to those Christian groups who openly proselytize for converts. While generally conservative, they need not necessarily be. The most pronounced characteristic of Evangelical Fundamentalism is the adherence to a rigid and literal interpretation of the Bible. See Balmer, 1993.

⁵ Had Nixon been able to forge a connection with Southern Evangelicals, his alliance would have taken on a more intimate character. The primary reason Nixon made few overtures to the South's religious community is that the politicization of the Evangelical church had yet to take place. By the time Reagan took office, abortion, school prayer, and the broad based reaction to the Cultural Revolution of the 1960s were each acting to politicize Christian Evangelicals.

church, would ironically serve as the bridge connecting the emerging Christian conservatives to the Republican party. Political pluralism came to be associated with anti-Americanism for many middle class Americans and liberal Protestantism became highly suspect in the minds of the Evangelical Christian right (Hammond, 1989). Their roughly simultaneous rise contributed to the political marriage between the two movements.

The Formal Emergence of the Christian Political Right

The 1970s was a time of great flux in America. The country had been pummeled for a decade by dramatic and negative events which followed one after the other. The assassination of President Kennedy, the war in Vietnam, the Watergate scandal, and the oil shocks each in their own way seemed to speak to a new geo-political reality. The United States was no longer the world's preeminent hegemon.

America's changing fortunes on the international stage were echoed at home as the culture of the Depression era generation gave way to the decidedly more liberal generation of the Baby Boomers.⁶ In the minds of many Christian Evangelicals, nothing demonstrated the moral devolution of the country more than the Supreme Court decisions banning organized prayer and legalizing abortion. Both seemed to illustrate that the nihilism and relativistic philosophy of the counter-culture had supplanted traditional values and permeated the highest reaches of government.

Kenneth Wald pointed out in his study of the rise of the Religious Right (1987) that three events in the mid-1970s galvanized conservative Christian Evangelicals. The first occurred in Kenawha County, West Virginia. In a scene reminiscent of the Traditionalist v. Modernist debate of

⁶ The Baby Boomer generation (those born between 1946-1964) is the largest in American history. According to many scholars, they share some very general characteristics which have given them an unusually high generational solidarity. A brief discussion of the cohesiveness of the Baby Boom generation can be found in Farber, 1994.

the 1920s, parents organized themselves to protest the selection of certain textbooks which they found to be offensive to the Christian religion. This grassroots effort in West Virginia served as an example for other grassroots efforts by the Religious Right.

The next grassroots effort occurred in Miami, Florida where the passage of a pro-gay rights referendum raised the ire of the Evangelical community. Finally, the broad scale resistance to the Equal Rights Amendment helped to bring about Religious Right organizations such as the Moral Majority and the Eagle Forum. By the time of the 1976 election the Religious Right had already made its presence felt on the local level.⁷

Jimmy Carter, a member of a Southern Baptist congregation, openly employed religious rhetoric and allegories in his speeches. He used the term "born again" to connect himself with Evangelicals across the country. Going into the 1976 campaign, many Evangelicals were not yet politically active. Although the three grassroots movements of the mid-seventies had awakened them to the potential of political mobilization, they had not yet emerged as a potent force. Since the Scopes trial of 1925, many Evangelicals argued that the primary mission of the church was to meet the spiritual needs of its members and proselytize for new members. In fact, many conservative Southern Protestants had accused black churches of betraying their mission by supporting the civil rights movement of the 1960s.

Well into the 1970s, many Evangelicals still thought of themselves as Democrats. Certainly Democrats such as Henry Jackson and George Wallace demonstrated to Southern Evangelicals that there still was room for them in the Democratic coalition.⁸ Those Evangelicals still in the Democratic

⁷ Religious Right organizations had been instrumental in organizing grassroots resistance to the ERA. Ironically, the Eagle Forum was a group of politically active women fighting an amendment to expand women's rights.

⁸ Henry Jackson was one of the last New Deal styled liberals. Like Truman, Humphrey, Johnson, and others, Jackson favored strong social programs, good relations with labor, while also supporting a staunch anti-communist position on foreign affairs. According to E.J. Dionne (1993),

party were drawn to the candidacy of Jimmy Carter. They were comfortable with his religious references and they welcomed the fact that he was from the South. Carter would become the first candidate of the Religious Right.

Carter's candidacy had important consequences for the emerging movement. It mobilized the Evangelical community on a broad scale and finally broke down the reluctance of many Evangelicals to become politically active (Wilcox, 1988). The uneasy marriage of Jimmy Carter and the Religious Right was not to last, however. Carter continued to support the passage of the Equal Rights Amendment and was not overtly hostile to the idea of government funding for abortions. As the 1980 presidential election approached, the newly energized religious activists were in search of another candidate more committed to their agenda. While Carter had the style and temperament they were searching for, he failed to advance their agenda.

The Religious Right and Ronald Reagan

They found their new candidate in Ronald Reagan, a divorced former Hollywood actor. Ironically, Reagan was deemed politically preferable to the Southern Baptist Sunday School teacher. The conservative religious community campaigned vigorously for Reagan and against the man who had helped to bring them onto the national stage. In the end, Southern Baptists, the largest Evangelical denomination in America, overwhelmingly voted for Ronald Reagan, giving him fifty-six percent of their vote. Thirty-four percent voted for Carter while only ten percent sided with former Illinois Congressman John Anderson (Johnston, 1986).

Reagan won by a convincing margin and the conservative right was quick to claim credit for the Republican victory. Although the Religious Right may have been responsible for as much two

Jackson's failure to gain the Democratic nomination in 1976 was the last straw for many old line Democrats.

thirds of Reagan's winning margin, they by no means decided the race (Mueller, 1983; Lopatto, 1985).

Reagan's victory was attributable to the fact that he had shattered the old New Deal coalition.

Farmers, labor, Catholics, and the working class each gave a majority of their votes to Ronald Reagan.

Reagan made inroads into every major New Deal group, with the exception of African-Americans.

The issues raised by the Religious Right, while emotion laden did not exhibit the saliency in the broader population like the issues Nixon used to woo the South. The Religious Right did effectively, however, create a climate in which religious rhetoric could flourish (Mueller, 1983).

Despite the dubiousness of their claim that they were the cause of the Reagan win, there was a general perception on the part of the Reagan Administration that much was owed to this newly mobilized constituency (Lopatto, 1985).

The Religious Right was so integrated into the Republican coalition by the time of the 1984 presidential nominating convention that James Robinson, a famous televangelist and Jerry Falwell, leader of the Moral Majority, were asked to give the invocation and the benediction respectively (Wald, 1987).⁹ The religious convictions of America's Evangelicals had brought them into a coalition of supply side economists, western individualists, small businessmen, and suburban whites. Ronald Reagan was in an unenviable position as he tried to hold this diverse coalition together.

Understanding the Religious Right

Political Scientists, religionists, and sociologists have all attempted to explain the end of the twentieth century reemergence of fundamentalist Christianity. A more relevant question for recent politics is why they chose to enter politics. A number of theories have been advanced. One of the

⁹ For a time in the late 1970s and into the 1980s Jerry Falwell of Lynchburg, Virginia was the leading voice of the Religious Right. His so called Moral Majority often published "score cards" for congressmen listing various "pro-family" votes and how various members of congress voted on the issues. Falwell's power in the Religious Right waned in the late 1980s as the focus of the movement shifted away from fundamentalists and over to Pentecostals such as Pat Robertson.

most common is that the members of the Religious Right were responding to the status displacement of middle class whites. The 1960s was a time of upheaval and social dislocation brought about by the egalitarian impulse which extended power and opportunities to heretofore unprotected minorities.

As a response to the social upheaval, conservative Evangelical Christians mobilized to protect the interests of the middle class (Lopatto, 1985). For many of these white middle class citizens, the parochial school became a place of refuge from integration. The Supreme Court was seen to be the enemy of this solution especially after its ruling against Bob Jones University and other parochial schools (Cannon, 1991).¹⁰

The Court's perceived assaults on traditional middle class values, such as prayer in school and abortion, created a sense that a way of life was under siege. Fundamentalism offered middle class believers a vehicle from which to assault the emerging secular state (Wald, 1987). By its very nature, fundamentalism is a static religious ideology wary of even the most minor of societal changes.

By merging myths about America's founding with the cultural angst left over from the counter-culture of Sixties Liberalism, fundamentalism became an attractive alternative for the middle class (Leege, 1992). The cultural alienation resulting from a country dramatically different from the America of the 1950s, led to an embracing of the most convenient traditional symbols of white middle class childhood - the symbols and rhetoric of conservative religion.

In this interpretation, the reemergence of Evangelical conservatism had less to do with the revival of piety and spiritualism and more to do with reacting to liberalism. It served as a means of linking the present with a culture existing only within the romanticized past of dislocated middle class

¹⁰ Bob Jones University is a private fundamentalist non-accredited college in South Carolina. It has traditionally taken a dim view of race mixing and has attempted to preserve traditional attitudes and values regarding society, race, and religion.

citizens. In this sense, it was not a reawakening of religion as such but was, rather, an effort to recover pre-counter-cultural American society.

This interpretation is somewhat consistent with Modernization Theory. Modernization Theory posits that society becomes more secular as it moves into cultural maturity.¹¹ If this is true, then on the surface, the resurgence of the Religious Right would be a mystery but by viewing it as primarily a political movement, Modernization Theory still has some merit.¹²

If the Religious Right is viewed as a political movement, then its members must be viewed as rational actors whose votes represent a rational interpretation of their best self-interest. Clyde Wilcox discovered that members of the Religious Right do, indeed, have opinion preference patterns which point to a specific world view. He found that the members of the Religious Right were cool toward symbols most often associated with liberalism while at the same time they were generally positive toward symbols of the ideological right.

This consistently conservative world view allowed the Religious Right to expand beyond the base of Evangelical Protestants to accept conservative Roman Catholics as well (Leege, 1992).¹³ Because of this, Ronald Reagan had the opportunity in 1980 of solidifying the allegiance of

¹¹ Modernization theorists of the 1960s tended to argue that the process toward modernization was unidirectional and would profoundly alter the culture, making it more secular as a result. (Coleman, 1968 and Smelser, 1964.)

¹² After the Iranian Revolution of 1979, Modernization theory was forced to make some adjustments to the claim that modernization necessarily brings secularization. Prior to the reemergence of Islamic fundamentalism, a segment of Iranian society had made considerable progress toward modernization. Banuazizi (1987) argued that tradition did not necessarily pose an obstacle to modernization and that traditional religions can play a role. He pointed out that the modernization taking place in Iran tended to accentuate differences among the population and was perceived as antagonistic toward traditional society. The strains created by modernization brought about the reaction. In this view, the reemergence of Islamic fundamentalism was a backlash from a modernization process which had proceeded to rapidly.

¹³ The Religious Right even found itself gaining allies from unlikely places, such as Howard Philips who came from a Jewish background.

Southerners to the Republican party first begun by Goldwater and dramatically accelerated by Richard Nixon. Further, by embracing the agenda of the Religious Right, Reagan had the opportunity of making inroads in the generally Democratic Catholic and ethnic neighborhoods of large cities in the North.

Reagan found it easy to support the agenda of the Religious Right. There was a sentimental and romanticized version of small town America, a view which Reagan enthusiastically embraced (Dallek, 1984). Despite the fact that Reagan had never been a very active churchman and despite the fact that he had signed into law one of the most generous liberalization's of abortion while governor of California, his public references to America's supposedly pre-secular golden days appealed to the Religious Right. Reagan overcame his shortcomings with the Evangelical and conservative Catholic communities by his allegiance to the pre-Great Society America; the America before Affirmative Action, the America of prayer in schools and the America not yet scarred by defeat in Vietnam.

In this sense, support for the pro-life position and for prayer in schools went beyond simply embracing the issues themselves. They served as public symbols of Reagan's commitment to renewing the status of the white middle class. Like Nixon, Reagan committed himself to supporting only those justices whose allegiance to the original intent of the framers, untainted by social engineering, could be relied upon.

THE RELIGIOUS RIGHT AND THE ELECTION OF 1980

Ronald Reagan's entrance into the 1980 presidential race was his third try.¹⁴ He faced an impressive lineup of Republican challengers, all of them younger, and all but John Connally more moderate. Reagan's rhetoric of returning America to the nostalgic golden yesterday had the effect of broadening his appeal beyond the traditional boundaries of the party. This broadening of his appeal would be the crucial and decisive factor in his gaining the Republican nomination in 1980.

The Christian Right, having played only a secondary role in the 1976 election, entered the election year fray in 1980 pledging themselves to the task of defeating their former standard-bearer, Jimmy Carter. The Moral Majority put forward their "Christian Bill of Rights" in 1980. In it they stated,

We believe that, from the time of conception within the womb, every human being has a scriptural right to life upon this earth." (Exodus 20:13; Psalm 139: 13-16) "We believe that all students enrolled in public schools should have the right to voluntary prayer and Bible reading. (Josh. 24:15) (Wald, 1987, p.190-191).

This statement of belief was easily appropriated by Ronald Reagan. He astutely recognized that the issues of abortion and prayer in schools had emerged as populist issues strengthening the overall appeal of the Religious Right (Benson and Williams, 1982).

To connect with this potential windfall of voters, Reagan couched his policies in religious terms and often referred to Supreme Court decisions as weakening the nation's religious traditions (Urbana, 1988). This allowed him to tap into a new host of potential Republican voters and contributed to his eventual triumph in the Republican race (White and Gill, 1981).

¹⁴ Reagan had made a brief attempt at running in 1968 but feared he would weaken Nixon and throw the nomination to a more moderate candidate like George Romney or Nelson Rockefeller. (Cannon, 1991). He made a second try, this one much more successful, in 1976 against Gerald Ford. After getting off to a bad start in the early primaries, Reagan won the North Carolina primary and came within one hundred delegate votes of taking the nomination away from Gerald Ford. See Cannon, 1991.

The problem Reagan faced, however, once he gained the nomination of the party was that the general population did not share the same agenda of the Religious Right. The Evangelical Christian opposition to abortion was not shared by a majority of either men or women. The large majority of American people in 1980 did not favor a right to life amendment to the constitution (Baker, Epstein, and Forth, 1981). In fact, abortion represented an issue causing cognitive dissonance for most Americans. The issue of whether the rights of the fetus or the rights of the mother should triumph was far from resolved in the American body politic. Because of this confusion and dissonance, voters often left the issue unresolved in their minds and tended toward the political middle.

For Reagan, the safest way to satisfy the agenda of the Religious Right without alienating the rest of the electorate was to focus his attention on the Supreme Court. The Supreme Court was still not fully rehabilitated in the conservative mind yet anyway. The legacy of the Warren era, as far as many were concerned by 1980, was still intact. It continued to be too soft on crime, too excessive in attempting to alleviate the problems of minorities, and far too meddlesome overall in the affairs of the average individual. Reagan could not go wrong by attacking the Court as a secular institution whose failed efforts at social engineering had caused the nation more harm than good.

The Court was a convenient target for Reagan for other reasons as well. By appointing members of the Court who were sympathetic with the goals of the Religious Right, he would put a step between himself and those decisions. In other words, it is safer to have the agenda of the Evangelical community advanced by the Court. That way Reagan escapes blame by those opposed to the religious direction while receiving credit from the constituency group.

Finding the Right Kind of Justices

To advance his goal of wooing the Religious Right through appointments to the Supreme Court, Reagan turned to a long time friend, William French Smith, to head the Justice Department.

Smith was perfect to carry out the conservative restructuring of the Court because, like Reagan, Smith was an opponent of judicial activism (Dallek, 1984). For conservatives like Smith, Reagan, and the members of the Religious Right, judicial activism was a catch all term referring to the overturning of local statutes on school prayer, abortion, and the harmful extension of the constitutionally dubious right to privacy.

Robert Dallek described the judicial attitudes of Smith this way:

....he wishes to curb the role of the federal courts in rulings on abortion, school busing, affirmative action, and bans on state sponsored prayer in schools. In Smith's view, the federal judiciary has become the advocate of permissive, liberal ideas serving minorities and women and is unresponsive to traditional beliefs. His policy of judicial restraint aims at restoring old style, conventional values to the place of honor in American life (Dallek, 1984, p.79).

Smith's natural hostility toward the excesses of judicial activism virtually guaranteed that he would have a zealot's commitment to finding the kinds of justices that would satisfy the Religious Right.

President Reagan recognized the fact that the specific goals of the Religious Right did not command the loyalty of the majority of the American people. Because of this he was unwilling to invest any of his personal political capital into directly advancing their agenda (Thompson, 1988). Even though he avoided overt involvement, he instructed Smith to locate a justice who was in agreement with the basic tenets of the conservative social agenda. Like Nixon, he was using his Supreme Court appointments to appeal to a specific constituency group. Unlike Nixon, however, Reagan's overtures were to a constituency group smaller and less typical overall of the average American citizen (Florig, 1992).

The Appointment of Sandra Day O'Connor

When Eisenhower appointee Potter Stewart announced his intention to retire as an associate justice, Reagan turned to Smith to locate an appropriate replacement; someone with the ability simultaneously to reach out to a broader constituency while confirming his political alliances. That choice was Arizona Republican, Sandra Day O'Connor. O'Connor was the perfect blending of conservative and liberal symbolism (Dallek, 1984).¹⁵

In many respects O'Connor's appointment was a safe move. It served to disarm what would surely have been a major political battle had he tried to go in the direction of a stronger male conservative to replace the moderate Stewart (Florig, 1992). Instead of a costly political struggle over confirmation, appointing O'Connor allowed Reagan to hold his early political clout in reserve for upcoming clashes over the budget and in cutting taxes. For many conservatives, however, especially the Right to Life constituency, the choice was less than ideal. They wanted a sure anti-abortion vote like a Bork, Edith Jones, or Scalia (Cannon, 1991).

This dissatisfaction among conservative groups came to surface when O'Connor's appointment was taken up by the Senate Judiciary Committee. "Every Christian should be concerned about the appointment of O'Connor," observed Jerry Falwell (Cannon, 805; 1991). Reagan quickly moved to calm the fears of his allies. When asked at a White House press conference if he was satisfied with O'Connor's views on abortion, Reagan replied, "Yes." When asked if he interviewed her personally, Reagan again replied, "Yes" (WCPD, 7/7/1981; p.811).

Later that same day, Reagan assured a partisan Republican crowd, "I am fully satisfied that her appointment is consistent with the principles enunciated in our party platform this past year"

¹⁵ According to Dallek (1984), Reagan was adept at this strategy of combining the symbols of both conservatives and liberals. For example, Reagan was fond of invoking the memory of Franklin Roosevelt in his speeches and he often touted the fact that he had been the head of a union. All the while, Reagan remained committed to advancing a largely conservative agenda.

(WCPD, 7/7/81; p.601). Throughout the remainder of the summer and into the early fall, Reagan continued to sell his appointment to conservative Christian groups. There was a noticeable shift in his arguments away from O'Connor's feelings regarding abortion and toward much broader conservative themes. "She believes, as she said in her Senate testimony, that a judge is on the bench to interpret the law, not to make it. This philosophy of judicial restraint needs representation in our courtrooms and especially on the highest court in our land." (WCPD, 9/21/81; p.819).

Nixon had used judicial restraint as a code phrase for his opposition to busing. Reagan was clearly relying on the phrase to demonstrate his opposition to abortion without having expressly to say it. For conservatives, the Supreme court's rights revolution and expansion of privacy represented clear overextensions of judicial power. The words, "judicial restraint" had maximum political impact. They were place holder words to which disgruntled traditionalists could ascribe whatever grievance they may have harbored. The president, then, was not in the position of having to articulate his specific opposition to such things as busing and abortion. He could, rather, simply use the phrase and allow constituencies such as the Religious Right to make of it what they wished.

Despite the reservations of anti-abortion conservatives, O'Connor was confirmed by the Republican dominated senate. Reagan used O'Connor's confirmation as a boasting point for his administration. In early October 1981, Reagan, speaking before a predominantly female crowd, reiterated the fact that he was the first president to appoint a woman to the Supreme Court (WCPD, 10/7/81; p.901). In December of 1981, Reagan proclaimed proudly, "I think we can take a little credit for making Sandra O'Connor the first female Supreme Court justice." (WCPD, 12/21/81; p.1174). Reagan had scored points with women while advancing his goals of a conservative court. The protests

of the Right to Life groups was muted when, in 1983, O'Connor joined two other dissenters in refusing to reaffirm *Roe*.¹⁶

O'Connor's nomination and subsequent confirmation represented an early victory for the Reagan Administration. He was successful in advancing several goals simultaneously. It is important to note, however, that because Reagan was seeking to advance a symbolic agenda as well as an ideological and political one, the chances of successfully advancing all three was diminished. O'Connor's later independence can be seen as at least in part, a function of her multi-purposed selection.

Appointments of Rehnquist and Scalia

Following the appointment of Sandra Day O'Connor in 1981, Reagan did not have another opportunity to alter the Court until 1986. The United States was preparing to celebrate the bicentennial of the constitution when Chief Justice Warren Burger, the leader of Nixon's counter-revolutionary vanguard, announced that he was stepping down to lead the following year's national festivities. President Reagan was now faced with the opportunity to alter fundamentally the direction of the Supreme Court.

To succeed Burger, Reagan opted not to go outside the Court itself. He chose to elevate the most consistently conservative member of the Court, Justice William H. Rehnquist. Rehnquist's promotion was especially significant for Right to Lifers. Rather than attempt to use this appointment to build bridges to a broader constituency, Rehnquist was a direct overture to Christian conservatives. He had been one of only two dissenting votes in the *Roe* decision. Because he had already been on the

¹⁶O'Connor joined original *Roe* dissenters, White and Rehnquist in condemning the trimester framework established in 1973. In *Akron v. Akron Center for Reproductive Health*, the Court invalidated a city ordinance that among other things required parental consent and a waiting period before an abortion could be obtained.

Court for a decade and a half, Reagan could point to Rehnquist's record as one of solid conservatism. Rehnquist's record on church/state relations as well as on abortion served to comfort the Christian conservative constituency.

The longer a president serves, the weaker he becomes and this was beginning to become apparent by 1986 (Schieffer and Gates, 1989). Reagan's power was waning slightly but the decline of political strength did not deter him from attempting to replace Rehnquist's associate seat with an equally conservative candidate, Antonin Scalia. The Republicans still controlled the senate so it would be up to majority leader Dole to assure a solid phalanx of Republican senators to assure confirmation.

Adding to Reagan's chances of getting his two nominees confirmed was the fact that Scalia was an Italian-American. Although this was not a major constituency group like African-Americans or women, there were areas of the country where the Italian-American community exerted some political muscle. Fortunately for the nominee, Massachusetts was one such place. This fact alone probably helped to neutralize the otherwise potent criticism of Senator Kennedy (Cannon, 1991).¹⁷

Like Nixon in the early 1970s and just as he had done in the case of O'Connor, Reagan began laying the rhetorical groundwork for the upcoming confirmation struggle. He attempted to stir the conservative faithful when in his August 9, 1986 radio address he stated,

You see, during the last few election campaigns, one of the principle points I made to the American people was the need for a real change in the makeup of the Federal judiciary. I pointed out that too many judges were taking upon themselves the prerogatives of elected officials. Instead of interpreting the law according to the intent of the constitution and the congress, they were simply using the courts to strike down laws that displeased them politically or philosophically. I argued the need for judges who would interpret law, not make it. The people, through their elected representatives, make our laws; and the people deserve to have these laws enforced as they were written. I can assure you we will appoint more judges like them to the federal bench (WCPD, 8/9/86; p.1068).

¹⁷ Kennedy would exercise no such restraint in the Bork nomination the following year. Before President Reagan had effectively mobilized the Republican coalition in America, Kennedy went on the offensive to block the Bork nomination.

Reagan continued his rhetorical efforts by declaring that he would not allow the Supreme Court to become a "supralegislature." (WCPD, 9/17/86; p.1200). All of this paid off. Both Rehnquist and Scalia were confirmed although Rehnquist's nomination did not go through without opposition from the senate's most liberal members.

With the successful appointments of O'Connor and Scalia and the promotion of Rehnquist, Reagan had left his mark on the Supreme Court. His bloc of justices, along with the Nixon bloc served to steer the Court to the right. The conservative hegemony over the Court's agenda was not complete, however. Justices Brennan, Marshall, Stevens, and Blackmun served as an ideological brake for many of the most cherished goals of the Religious Right. Adding to their number on issues crucial to the Religious Right was Lewis Powell.

Powell had come to the Court as part of Nixon's counter-revolution in busing and crime. As a member of that broadly supported conservative agenda, Powell was a loyal and crucial foot soldier. When it came to the social agenda of the Religious Right, however, his commitment was much softer. He had often provided the swing vote to uphold various Warren and Burger Court precedents which the Religious Right so fervently wanted overturned. When, in the summer of 1987 Powell announced his intention to retire from the bench, a battle for ideological supremacy over the Court was joined. Reagan had the opportunity to reshape the Court once and for all in an image acceptable to both Nixon's Southern constituency and his own conservative Christian allies.

Robert Bork and the Failure to Gain Confirmation

Lewis Powell announced his intention to retire in the summer of 1987. From the moment he did so, conservatives and liberals both understood the probability of a major political battle on the horizon. Robert Bork was a favorite of conservatives. He had obliged President Nixon's order to fire Archibald Cox and had a consistent written record of supporting judicial restraint. Reagan had

overlooked him in 1981 in favor of O'Connor and Bork had again been by-passed in 1986. So, by 1987, Reagan felt the time had come.

From the standpoint of the president, who wants to know what he is getting when he nominates a particular candidate for the Court, Bork could not have offered a clearer picture. As a professor, Bork had consistently espoused the kind of social views which Reagan and his Religious Right allies were looking for (Florig, 1992).

Unfortunately for Bork, Reagan was in a much weaker position politically than he had been in 1981 and was even weaker than he had been the previous year. Since the Scalia and Rehnquist nominations, the Administration had experienced two serious setbacks. The first was the loss of the senate in the off year elections of 1986.¹⁸ A whole host of Republican senators, most of them from the unusually conservative class of 1980, were defeated. Therefore, unlike O'Connor, Scalia, and Rehnquist, Bork would face a senate with a Democratic majority.

The second setback for the Reagan administration was the fact that for the first time during the Reagan presidency, Reagan himself was viewed negatively by the American people. The Iran-Contra scandal of 1986 had seriously eroded the President's political capital, even among members of his own party.¹⁹ By the summer of 1987, Bork was the nominee of a crippled president and a party which was definitely showing the signs of having been in power too long (Mervin, 1990).

As in the case of his previous nominees, Reagan made the case to the party faithful that his Supreme Court choice was an advocate of judicial restraint.

¹⁸ The President was particularly disappointed with the loss of the senate in 1986. Many of the Democrats elected to replace the Republican freshmen were liberal stalwarts. Included in their number were dedicated liberals such as Tom Dasle of South Dakota, Kent Conrad of North Dakota, Brock Adams of Washington, and Terry Sanford of North Carolina.

¹⁹ From the outset of Reagan's presidency, critics charged that the president was too old to serve. Ironically, Reagan apologists relied on the presumption of age related impairment to excuse the president from knowledge regarding the arms for hostages swap. see Cannon, 1991.

Judge Bork believes that judges should not make the law; their function is to interpret the laws based on the constitution and precedent (WCPD, 8/28/87; p.986).

In retrospect, Bork made a decision which would prove fatal for his nomination. He chose to engage the members of the Judiciary Committee in a spirited debate over the nature of constitutional interpretation.

His testimony before the committee was the most extensive of any candidate since 1955 (Carter, 1994). The hearings did not go well for the nominee. To critics, Bork was an extremist who seemed determined to undermine the last half century of constitutional jurisprudence. By the fall, liberal pressure groups had mobilized in unprecedented strength to block the confirmation of the Supreme Court nominee. On the other side, Religious Right groups, believing that Robert Bork would be their much vaunted fifth vote to overturn *Roe* attempted their own all out effort to push the senate to confirm the conservative jurist.

In the end, the Reagan administration's efforts to push the nominee went the same way as Nixon's efforts to push Carswell and Haynesworth (Schieffer and Gates, 1989). Moderate Republicans, such as Pennsylvania's Arlen Specter, Rhode Island's John Chafee, and Oregon's Bob Packwood, and even moderately conservative Virginia Senator John Warner voted "no."²⁰

Reagan was livid. He angrily vowed:

My next nominee for the court will share Judge Bork's belief in judicial restraint - that a judge is bound by the Constitution to interpret laws, not make them (Shieffer and Gates 1989; p.311).

Despite the inability of President Reagan to gain confirmation for his controversial choice, the battle over Bork did serve a useful political purpose. It demonstrated to the Religious Right that even

²⁰ The Reagan administration had hoped to gain the support of conservative Southerners. Senator Howell Heflin (D-AL) former Chief Justice of the Alabama Supreme Court was a member of the Judiciary Committee. When he decided to vote "no," there was a sudden avalanche of other Southern Democrats who announced their opposition. In the end, only two Democrats voted to confirm Bork.

though their issues may not have been on the front burner of his legislative agenda, he still had not abandoned them.²¹ It served to reestablish ties with the Evangelical community at a time when Reagan was pursuing a much more moderate foreign policy toward the Soviet Union. This new accomodationist direction in foreign policy served to deny the Religious Right the embodiment of evil in the modern world provided to them by communism. Bork's nomination was an important act in that it reestablished support for Reagan in the Evangelical community.

Douglas Ginsburg and Anthony Kennedy

The failure to win confirmation for Judge Bork was a setback. Reagan quickly turned to find a candidate for the Court who would be just as objectionable to liberals as was Bork (Scheiffer and Gates, 1989). His choice, far from being the bridge to the Religious Right that Reagan desired, would serve as a profound embarrassment for the administration. Douglas Ginsburg was a prim and scholarly looking candidate with strong academic credentials. His fatal flaw, however, surfaced long before any questions about his ideology would have a chance to be asked.

Ginsburg was touted by Reagan as yet another example of a strict constructionist who would exercise restraint (WCPD, 10/29/87; p.1252). This kind of description, like Nixon and Reagan appointees before him, played well within the conservative community. Before the battle over the Ginsburg nomination could begin, however, personal revelations doomed his candidacy. Ginsburg admitted to having smoked marijuana while serving as a law professor.²² This breach of traditional social orthodoxy completely overshadowed his otherwise impressive conservative credentials.

²¹ For a full discussion of the politics surrounding confirmation fights, see Stephen Carter, 1994.

²² Ginsburg's confession sparked something of trend. Within weeks of his admission, several Democratic presidential hopefuls admitted to having experimented with drugs in the 1960s.

Ultimately, Ginsburg withdrew his name from nomination. The Administration had no stomach for another losing battle on the floor of the senate.

Reagan then moved rapidly to fill the void. He announced on November 11, 1987:

Judge Kennedy is what many in recent weeks have referred to as a true conservative - one who believes that our constitutional system is one of enumerated powers - that is we, the people who granted certain rights to the government, not the other way around. And that unless the Constitution grants a power to the federal government, or restricts a state's exercise of that power, it remains with the states or the people (WCPD, p.1321).

Reagan's third and ultimately successful attempt to fill the vacancy left by Justice Powell was expected to be, like his predecessors, a strict constructionist. From the conservative viewpoint, this meant finding only what was originally intended in the constitution. If it does not appear in the text, the power is reserved to the states.

Anthony Kennedy took his place on the Supreme Court along side Justices O'Connor, Scalia, and Chief Justice Rehnquist. The selection of Kennedy had come in the final year of Reagan's presidency. Even as Reagan's administration was winding down, the hope remained that by appointing justices presumably hostile to abortion and in favor of school prayer, the ties between the Republican Party and the Religious Right would be dramatically strengthened.

CHAPTER SIX: ABORTION, THE POLITICS OF DIVISION AND THE JUDICIAL QUEST FOR THE MIDDLE PASSAGE

No other decision in the history of the Supreme Court was more odious to the members of the Religious Right than *Roe v. Wade*. Throughout the 1970s the Right reacted vehemently against the Court's conclusion, viewing it as a harbinger of moral decay and cultural decline. Perhaps no other issue in American politics serves as a such a lightening rod of both criticism and passionate defense as does abortion. Ironically, *Roe* occurred the very month the peace agreements went into effect in South Vietnam. As America was ending one divisive chapter in its history, it was opening another.

Abortion, like its nineteenth century antecedent abolition, does not readily lend itself to compromise. Essentially, it pits those who believe that a woman has a constitutional right to choose the circumstances and the time under which she will have birth against those who view the procedure as murder (Schnell in Goggin, 1993). Again like abolition, abortion attitudes are heavily influenced by religious affiliation.¹ The commingling of religious values and political attitudes further complicates efforts toward accommodation.

Religious fundamentalists tend to hold the most adamantly anti-abortion opinions (Schnell in Goggin, 1993; Guth, et. al. in Goggin, 1993; Cook, et. al. 1992).² For religious fundamentalists, the Bible is an authoritative text whose tenants must be adhered to in a most literal fashion. Because of this, there is little room for political maneuvering. As political views become associated with religious views, the room for compromise diminishes considerably.

Among Christian Evangelicals, only 3% believe a woman should have access to an abortion at her discretion while 21.7% of mainline Protestants believe in a woman's right to choose (Guth, et.

¹ Religion played such an overwhelming part in the debate over abolition that the nation's major Protestant denominations split over the issue in the 1840s. See Smith, 1957 for a full discussion of the role of Protestantism on the eve of the Civil War.

² Protestant fundamentalism is characterized by a belief in the literal interpretation of Biblical texts and rejection of religious pluralism. (Balmer, 1993)

al. in Goggin, p.49, 1993). This division within the Protestant community further complicates the abortion issue as it adds a theological dispute to the existing political one.

Often times when Protestant ministers talk about their opposition to abortion, they do so by appealing to the will of God (Cook, et. al., 1992). They make the argument that to disagree with the fundamental idea that life begins at conception is to be not merely in disagreement but to be actually in conflict with the will of God. This wide gulf helps to explain why traditional efforts at democratic compromise over the issue of abortion are so often doomed to failure. Despite the fact that those who favor a pro-choice position overwhelmingly outnumber those who believe in a total ban, the intensity of feeling displayed by the latter keeps the issue alive (Schnell in Goggin, 1993).

Going into the election of 1984, Ronald Reagan was not as popular with the Religious right or conservatives in general as he had been in 1980 (McKeegan, 1992). According to the *Conservative Digest* magazine, 42% of the readers did not intend to work for the Republican ticket with the same fervency as they did in 1980 (ibid, p.96). Reagan recognized this weakness and began resorting to more explicit anti-abortion rhetoric in an effort to rebuild bridges to the Christian Right.

As noted in the previous chapter, Reagan's first appointment to the Supreme Court was Sandra Day O'Connor. Her presence had already had a significant effect in *Akron v. Akron Center for Reproductive Health* where she had taken a critical position toward *Roe*. For the members of the Religious Right this was not enough. Other justices were needed who would deliver the five votes necessary to overturn the 1973 decision. By 1988 Rehnquist was Chief Justice and both Justices Scalia and Kennedy had taken their places on the Court as well. The full Reagan bloc was prepared to hear their first abortion related case.

ABORTION AND THE REAGAN BLOC

Frisby v. Schultz 487 US 474

On April 20, 1988 the Court heard the case of *Frisby v. Schultz*. In response to frequent demonstrations in front of the private home of a doctor who performed abortions, the town passed an ordinance making it “unlawful for any person to engage in picketing before or about the residence or dwelling of any individual.”³ From the perspective of the town’s lawmakers, the ordinance was necessary to protect the right of individual’s to retreat to the privacy of their homes.

While the case presented what essentially was a First Amendment issue, the relevance of the case to the abortion question cannot be overlooked. If the Court upheld the ordinance, then a tactic being frequently employed by anti-abortionists - picketing before the private homes of doctors performing abortions - would be taken out of the pro-life arsenal. To strike down the ordinance would then leave that option for anti-abortion activists.

Justice O’Connor wrote the majority opinion. Joined by all three of the remaining Reagan justices, she reversed the lower court and upheld the constitutionality of the ordinance.⁴ After finding the ordinance to be within the bounds of the Equal Protection Clause and content neutral, she then went on to defend the sanctity of the home and the right of a homeowner to seek that sanctity without harassment.

³ The flat ban was preceded by a partial ban in which all picketing, with the exception of labor picketing was prohibited. The town attorney, after reviewing the Court’s decision in *Carey v. Brown*, 447 US 455, discovered that such a ban had already been struck down. The partial ban was then repealed and replaced with the absolute ban.

⁴ Justice O’Connor placed the entire picketing debate in context by citing previous Court decisions such as *New York Times Co. v. Sullivan*, 376 US 254, *Boos v. Barry*, 485 US 312, *United States v. Grace*, 461 US 171, and *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 US 788. In these cases the Court found that speech can be limited depending upon the location of that speech. The public streets of Brookfield, Wisconsin, despite their being narrow, are to be viewed as legitimate public fora. From this point, the Court had to judge whether or not demonstrations take place within the context of limiting speech in a public forum.

Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different.... a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect freedom (supra, at 484-5).⁵

In a bit of a setback for anti-abortion protesters all four Reagan justices voted to remove this option from them. Justices Brennan and Marshall, both staunch abortion rights defenders, voted, on First Amendment grounds, to affirm the lower court ruling. The first abortion case had seen unanimity from the Reagan justices but against the position preferred by the pro-life movement.

Frisby was only a minor set back for the Reagan agenda. While failing to deliver for the president's constituency group, the opinion, in many ways, was consistent with conservative ideology. Conservative critics of government intervention had long made the case that when it came to such things as the home, gun ownership, and property rights the individual had the right to privacy. *Frisby* was an embodiment of that conservative sentiment. The case reveals that the Reagan justices elevated the value of stability over that of the right to protesters to demonstrate.

Bowen v. Kendrick

The next case which offered the Reagan bloc an opportunity to demonstrate their commitment to the anti-abortion agenda was *Bowen v. Kendrick*. A group of federal taxpayers, clergymen, and the American Jewish Congress filed suit against the Adolescent Family Life Act (AFLA), a government funded program providing grants to private and non-profit agencies concerned with the sexual behavior of adolescents. The purpose of the act was to unite both government and the private sector in an effort to control the rate of teen pregnancies and other societal harms rendered by teen sexual activity.

⁵ Justice O'Connor relied on *FCC v. Pacifica Foundation*, 438 US 726, 748-749 (offensive radio broadcasts); *Kovacs v. Cooper*, 336 US 77, 86-87 (sound trucks).

The Act further stated that no grants may be given to organizations providing or encouraging abortion. Upon request, however, the organizations can refer families and teenagers to family planning agencies. The appellees charged that the program violated the Establishment Clause since it involved the use of government funds to aid religiously based organizations in their work. Further, the idea that these agencies would be able to restrain themselves from appealing to religious principles while counseling was held by the District Court to be "unrealistic."

Chief Justice Rehnquist wrote for the Court. In considering whether or not the AFLA violated the Establishment Clause on its face, he concluded that it did not. "We have concluded that the statute has a valid secular purpose."⁶ The federal government's goal of minimizing the harmful effects of pre-marital relations between adolescent boys and girls, was held to be primarily a secular one and not the advancement of religion.

In *Bowen* the Court, led by its Reagan appointed members had struck a double blow in favor of the Reagan agenda. It had lowered the wall between church and state by rejecting a stringent interpretation of the *Lemon* doctrine as well as sending the message that abortion was not to be encouraged. By upholding the AFLA, the Court was sending an unambiguous message that the Court was backing away from its heretofore consistent support of a woman's right to choose.

Frisby had been a less clear choice given its strong First Amendment ramifications. The line up of the Court's justices in *Bowen* is telling. Justice Blackmun, a consistent defender of abortion rights and author of the Court's original decision in the area, was joined by Justices Brennan, Marshall, and Stevens. They fully recognized that the Act was granting a government funded role to religious organizations in their efforts to discourage not only teen sexual activity but abortion as well. For the Reagan justices, provided there is no intervening value (such as the value of privacy in one's own

⁶ Determining that the Act had a legitimate secular purpose meant that it passed the first prong of the *Lemon* test. As pointed out in Chapter Seven, the other two prongs of the so called *Lemon* doctrine were also met inasmuch as the Chief Justice determined that the Act did not have the primary fact of advancing religion nor did it create an excessive entanglement of church and state.

home or the all important value of stability both posed by *Frisby*), the Reagan appointed justices were prepared to taper the effects of *Roe*.

By 1989, the Rehnquist Court had not yet firmly delineated itself from the Burger Court on the issue of abortion. Due to their tangential relationship to *Roe*, *Bowen* and *Frisby* gave general definition to the Court's direction but neither actually revealed whether or not the Reagan justices would be prepared actually to overturn the Burger Court's record in the area of abortion rights jurisprudence. The case which promised to offer some definite answers was argued before the Court on April 26, 1989.

Webster v. Reproductive Health Services.

The case involved a Missouri law which declared that, "the life of each human being begins at conception." The law, one of the most restrictive anti-abortion laws in the country, declared that unborn children were to be afforded the same constitutional rights and privileges as all other persons. It further required that all abortions past the twentieth week of pregnancy be preceded by viability tests.⁷ Public employees and facilities were barred from abortion, except in the case of the mother's life and finally, public facilities, workers, and funds were barred from even counseling abortion to prospective patients.

The law was unambiguously designed to discourage abortions from taking place in Missouri. Of particular note was the preamble of the law which quite forcefully voiced the conviction that life begins at conception and the state has an interest in protecting that life. The Court's opinion in the case would signal whether or not the Reagan bloc was headed toward an eventual overturning of *Roe*. The District Court struck down each of the provisions as being in violation of the Court's findings in *Roe*. The Court of Appeals agreed with the District Court. The Supreme Court then took the case.

⁷ Tests would include examinations of weight, gestational age, and lung maturity.

Proponents on both sides of the issue hoping to see the Court definitely move in one direction or the other were to be disappointed. The Court was extraordinarily divided by the case. Chief Justice Rehnquist spoke first. The tone of the opinion was set when he declared that the lower courts were incorrect when they struck down the preamble of the act.

The preamble does not, by its terms, regulate abortions or any other aspect appellee's medical practice.⁸

The Chief Justice then went on to declare that the state's decision to withhold the use of its facilities from abortion practices did not preclude a woman's access to an abortion.⁹ The fact that the state's actions clearly favored childbirth over abortion was not in violation of *Roe*.

The Chief Justice then approached the issue of viability testing. Rehnquist began by questioning the rigid trimester system imposed by *Roe*.

In the first place, the rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles as ours does. The key elements of the *Roe* framework - trimesters and viability - are not found in the text of the constitution or in any place else one would expect to find a constitutional principle (supra at 518).

Rehnquist's critique of the trimester framework is reminiscent of the strict constructionist tradition.

Where the Constitution speaks, there the law has tremendous weight. Where the Constitution is silent and inferences have been made from the various "penumbras" of the Bill of Rights, the legislature is in much more of a position to legislate.

The goal of constitutional adjudication is to hold true to balance between that which the constitution puts beyond the reach of the democratic process and that which it does not (supra, at 521).

⁸ The Chief Justice stressed that the Court had decided in *Maher v. Roe*, 432 US, at 474 that *Roe v. Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion." Rehnquist ruled that the preamble could be read as a simple expression of the state's reasonable value judgment that birth takes precedence over abortion.

⁹ The Chief Justice relied on *DeShaney v. Winnebago County Dept. of Social Service*, 489 US 189, 196 to argue that the Due Process Clause did not create an affirmative right to governmental aid for the purposes of securing an abortion. He also cited the Court's upholding of the most restrictive aspects of Hyde Amendment restricting abortion in the case *Harris v. Mcrae*, 448 US 297.

Justice O'Connor concurred with Chief Justice Rehnquist's opinion, stressing the necessity of avoiding any broader constitutional questions than were presented in the specific case. For Justice O'Connor, this was not the vehicle by which the Court should again take up the entire question as to the validity of the claim that a woman has a constitutional right to an abortion.

O'Connor and Rehnquist went nowhere near far enough for Justice Scalia. In his estimation, the Court was in error due to its involvement into the issue of abortion in the first place.

The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike to needlessly prolong this Court's self awarded sovereignty over a field where it has little proper business, since the answers to most of the cruel questions posed are political, and not juridical -- a sovereignty which therefore quite properly, but to the great damage of the court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive (*supra*, at 532).

Clearly Justice Scalia felt as though his conservative colleagues needed scolding. The Court, in his estimation, was in an area best left to the legislative bodies of the country. Therefore, the only proper course for the Court to take was to overturn the misguided opinion of *Roe* and return the issue to the states.¹⁰ Such a position was the fear of pro-choice groups across the country. The fact that the Court refused to go that far was little comfort given the willingness to uphold rather restrictive measures.

Justice Blackmun, the author of the majority opinion in *Roe*, offered an unusually personal defense of the Court's 1973 opinion and his fear that the basic precepts of that decision were being undermined. "Today, *Roe v. Wade*, and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure." Justice Blackmun further vents, "Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and our standing decisions."

¹⁰ Justice Scalia identified four possible courses open to the Court in this case - "reaffirm *Roe*, to overrule it explicitly, to overrule it sub silentio, or to avoid the question - the last is the least responsible." (*supra*, at 537) Justice Scalia was incredulous that the Court would choose to embrace a "no-broader-than-necessary" approach to the case as was articulated by Justice O'Connor. He urged the Court to be decisive and end their involvement in the whole issue.

Justice Blackmun accused the plurality of wanting implicitly to outlaw abortion while Justice Scalia, alarmingly enough for Blackmun, wanted to outlaw it explicitly. Given the rather desperate quality of Justice Blackmun's remarks, it might be expected that pro-life groups were satisfied with the decision. They, no more than their pro-choice counterparts however, were placated. Only Justice Scalia had committed himself to the overt goal expressed by pro-life groups since 1973 - the outright overturning of *Roe v. Wade*.

The *Webster* decision illustrated the essential dilemma faced by the Nixon bloc in the 1970s and the Reagan bloc in the late 1980s and early 1990s. Both were supposed to restore what their respective presidents perceived to be the balance of the law. In their estimations, earlier decisions had gone too far in the way of social engineering and judicial activism. Therefore, the conservative response, repeated by both Nixon and Reagan ad infinitum, was to declare the need for jurists committed to judicial restraint.

This commitment to judicial restraint while at the same time condemning various historical decisions provided the predicament. Just as the Nixon justices would have found themselves up against *Stare Decisis* by overturning various Warren era rulings, so too did the Reagan justices face the same problem. Even more pronounced for the Reagan justices, to have overturned *Roe* in *Webster*, the Rehnquist Court would have reversed the jurisprudence of two previous Courts. The Warren Court, with Justice Douglas in the lead, had laid the foundation for abortion rights in the mid-sixties. The Burger Court had merely extended previous Warren era interpretations of the right to privacy to their logical conclusions.

The conservative strategy was at cross purposes with itself - finding justices who were willing to overturn precedent while still characterizing themselves as advocates of judicial restraint. *Webster* illustrates vividly the tension in the Reagan strategy. While Rehnquist, O'Connor, and Kennedy were lectured by Scalia for their excessive restraint, a good argument can be made that they were really in keeping with the overall style of justices articulated by Scalia. Although Scalia was in accord with

Reagan's policy objective, his willingness to overturn better than a decade and a half of Supreme Court jurisprudence does place him a bit at odds with the concept of judicial restraint.

Webster was perhaps the most important abortion decision of the decade (Stephens and Scheb, 1993) and yet the issue was still not satisfactorily settled for either side. In the first three abortion decisions in which all four Reagan justices sat together as a bloc, they, like their Nixon appointed predecessors had narrowed the scope of the primary issue to which they had been sent to reverse. Also like their Nixon counter-parts, however, they had left the central facets of the judicial doctrine which they had inherited intact. Abortion was still legal.

For both defenders and critics of abortion, *Webster* had two significant outcomes. The Court had, contrary to the fears of pro-choice advocates, failed to overturn *Roe*. Second, the Court had, on the other hand, approved of various obstacles and provisos to obtaining a legal abortion. The *Webster* decision was correctly perceived by the two sides as an invitation by the high court to impose other stumbling blocks as well.

Hodson v. Minnesota

As state legislatures across the country became battle grounds, challenges to various restrictions began filtering their way through the legal system. The first post-*Webster* case the Court accepted was *Hodgson et. al. v. Minnesota*. The case came before the Court in late 1989 and the decision was announced on June 25, 1990.

According to the Minnesota law, teenagers wishing to obtain an abortion had to have the approval of both parents. In the event that both parents were unable due to such circumstances as family dysfunction, abuse, or absence of contact, minors had the option of seeking remedy from a judge. Following permission from parents, guardians, or the relevant judge, minors were still required

to wait forty-eight hours before the procedure could take place.¹¹ The Court accepted the case to clarify what would be considered acceptable state interference with the right of a woman to obtain an abortion. Justice Stevens, generally very friendly to the concept of choice, wrote the majority opinion.

Just as in *Webster*, the Court was badly divided and numerous opinions were filed. Justice O'Connor concurred with the decision of the Court but filed her concurrence separately. It is in *Hodgkin* that the beginning of the "middle way" composed later by the troika of O'Connor, Sutor, and Kennedy begins to emerge.

Hodgson was the first case which required two parents to give their consent. Therefore, it served as an example of the states "raising the bar" so to speak. Just how far was the Court willing to allow the states to go to protect the state interest of protecting the unborn. Justice Stevens opened his opinion by observing that the state was putting obstacles in the way of minors obtaining abortions. In order for the Court to uphold such obstacles, there must be a legitimate state interest involved.

Justice Stevens found that the forty-eight hour waiting period did advance a legitimate state interest. The delay,

...provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the parent to inquire into the competency of the doctor performing the abortion, discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision on her future (supra, at 448 and 449).¹²

Further, Justice Stevens concluded that the delay posed only a minimal burden on the minor. As to the two parent notification requirement, however, Justice Stevens, joined by Justice O'Connor,

¹¹ The district court struck down the statute. The bypass clause was not strong enough and the forty-eight hour waiting period often ran into a week or better due to scheduling conflicts. This created an undue burden on a woman's right to an abortion.

¹² Justice Stevens relied on *Ginsberg v. New York* 390 US 629, 639 (1968) to say that the state may pass laws to assist a parent or guardian who has assumed "primary responsibility" for a minor's well-being.

found it to be unreasonable.¹³ Justice O'Connor joined Justice Stevens in upholding the constitutionality of the judicial bypass procedure as such but with modifications on the two parent provision.

Justice Scalia's dissent, reminiscent of *Webster*, denounced the whole prospect of a judicial remedy for the abortion issue.

The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that the tools for this job are not to be found in the lawyers -- and hence not in the judge's -- toolbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have the ability to do so (*supra*, at 480).¹⁴

Justice Kennedy concurred in part and dissented in part. He advanced the argument that the two parent notification requirement of the Minnesota law was correct. In Kennedy's estimation,

The Court errs in serious degree when it commands its own solution to the cruel consequences of individual misconduct, parental failure, and social ills (*supra*, at 501).

In essence, Kennedy's opinion appeals to the ideal family; one in which the parents form a supportive compassionate environment for the child. The failure of reality to meet this ideal at all times is not sufficient grounds to excuse the state from trying to foster such an ideal.¹⁵

¹³ Both Justices Stevens and O'Connor quoted statistics which suggested that fewer than fifty per cent of minors in the state of Minnesota reside with both parents. The two parent notification requirement is further complicated by the presence of such social problems as abuse and incest which effectively make two parent notification unworkable.

¹⁴ To illustrate his frustration with the Court's jurisprudence in the area, Justice Scalia makes much ado about the plethora of differing opinions in the case. He cites Justice O'Connor's finding that two parent notification is unconstitutional without judicial bypass but passes muster with it. Justices Blackmun, Brennan, Marshall, and Stevens are opposed to two parent notification in any event. Justices Kennedy, Scalia, White, and the Chief Justice support two parent notification with or without bypass. Justice Scalia concludes his review of where the Court is on the issue of parental notification by decrying the fact that there is no chance there will ever be a systematic standard. "One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions..."(*supra*, at 480)

¹⁵ Justice Kennedy relied on *Santosky v. Kramer*, 455 US 745, 753-754 (1982); *Caban v. Mohammed*, 441w US 380 (1979); *Stanley v. Illinois*, 405 US 645 (1972) to show that the Court has already declared that parents have a right to participate in the decisions of children and the state has the right to do what it can to foster such constructive relationships.

The Reagan justices again emerged as the leading supporters of efforts to reduce the numbers of abortions in the country. While Scalia continued to remain unmoved from his position of total repugnance with the whole issue area, the other Reagan justices, while greatly divided in their rationale, were more than willing to allow states to further increase their regulation of abortion through a variety of means. Although *Hodgson* added to the state's arsenal the means by which they might regulate abortion, it is significant that the intervening variable in *Hodgson*, the focus being on minors, meant that the law was still not fully settled with respect to adults seeking an abortion.

Ohio v. Akron Center for Reproductive Health 497 US 502

Issued on the same day as *Hodgson* was the Court's decision in *Ohio v. Akron Center For Reproductive Health*. Like *Hodgson*, the case involved a parental notification statute. According to the Ohio law, physicians planning to conduct an abortion on a minor were required to notify a least one parent. The law contained a judicial bypass measure in the event that situations did not allow for parental notification.¹⁶

Justice Kennedy wrote for the Court. In his opinion, joined by Chief Justice Rehnquist, and Justices O'Connor, and Scalia, as well as Justices Stevens and White, found the Ohio statute to pose no undue burden on the minor seeking access to an abortion. Echoing his sentiments in *Hodgson*, Kennedy argued that the parental notification component of the law furthered the state interest of strengthening the ties of the family. The state had every right to assume that the minor would be supported by her family.¹⁷

¹⁶ *Akron* represented the Court's sixth effort to address the constitutionality of parental notice or consent statutes. The others were: *Planned Parenthood of Central Missouri v. Danforth*, 428 US 52 (1976); *Bellotti v. Baird*, 443 US 622 (1979); *H.L. v. Matheson*, 450 US 398 (1981); *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 US 476 (1983); *Akron v. Akron Center for reproductive Health, Inc.*, 462 US 416

¹⁷ Justice Kennedy argued that the consent statute in question passed all three criteria set forth in *Bellotti*. The statute in question allowed minors to demonstrate their maturity in making the decision. It allowed for abortion access even if the minor could not demonstrate the maturity to seek

Justice Scalia wrote a concurring opinion but was quick to point out that he still held to the view that there was no constitutional right to an abortion.

I continue to believe, however, as I said in my separate concurrence last Term, in *Webster v. Reproductive Health Services*, that the constitution contains no right to an abortion. It is not to be found in the long-standing traditions of our society, nor can it be logically deduced from the text of the constitution -- not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins (*supra*, at 520).

Justice Scalia's denunciation of the role of the judiciary in trying to fashion an abortion policy is reminiscent of Reagan's long-standing declaration that what is needed on the bench are judges who interpret the law, not make it.

Pro-life members may have found the Court, even with its Reagan appointed members to be tepid when approaching the issue. That view was not shared by the original author of *Roe*, Justice Blackmun. Blackmun decried what he perceived to be the, "particular insensitivity" of the state of Ohio. In his estimation, the judicial bypass provision was clumsy and something of a maze which minors might find particularly confusing.

In concert with *Hodgson, Akron* opened the door for state legislatures to place more obstacles in the way of an abortion. Justice Kennedy's repeated assessments that the state had every reason to try and encourage the family via parental notification provisions, was passing constitutional muster with the majority of the Court. Not a single Reagan justice had joined Blackmun's ringing denunciation of the statutes enacted by the various state legislatures. While falling short of actually overturning *Roe*, the Reagan justices were contributing, much like their Nixon predecessors with law and order issues, to the whittling away of the Court's precedent in question.

an abortion provided it was in her best interest. And finally, the minor's anonymity was preserved in the current statute.

Rust v. Sullivan 500 US 173

The question of abortion counseling was a complex issue for the Court to handle. The abortion debate was further complicated by First Amendment considerations and the extent to which the government should be involved in discouraging doctors from providing and/or even recommending abortion in publicly funded clinics. The case which promised to pit the values of free speech, government control over its expenditures and the right of a woman to receive counseling for elective medical procedures (abortion in this case) all came together in *Rust v. Sullivan*. The case was argued before the Court in October 1990 and a decision was handed down on May 23, 1991.

The case involved the Public Health Service Act of 1970 which prohibited any government funding from being used to advocate, counsel, or refer patients to abortions as a means of family planning.¹⁸ The suit challenged whether the Secretary of Health and Human Services could in fact direct the use of family planning money to go only to those agencies which refrained from using it for abortion counseling. Chief Justice Rehnquist, writing for the majority, found that the Secretary was within his right, given the plain language of the statute in question.¹⁹

Petitioners also challenged the constitutionality of the act, and Title X in particular, as being a prohibition on free speech and thus in conflict with the First Amendment. Chief Justice Rehnquist was not impressed with this reasoning. He cited the federal funding of the National Endowment for Democracy stating,

When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic pineapples, 22 U.S.C. 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism. Petitioners' assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right,

¹⁸ Section 100 of the Public Health Service Act directed that no federal funds allocated under the Act's Title X "shall be used in programs where abortion is a method of family planning."

¹⁹ Under the Court's reasoning in *Chevron*, 467 US, at 842-843, if a statute is "silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute." The Chief Justice, citing the plain language of Title X of the act, held that it was a reasonable construction of the statute's plain language.

it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition (*supra*, at 194).²⁰

Finally, Chief Justice Rehnquist turned in section IV to the question of whether or not the program violated a woman's Fifth Amendment rights to have an abortion. The Chief Justice reiterated past records to argue that the government is not compelled to subsidize an activity simply because that activity is constitutional. In fact, according to Rehnquist, the government, "may validly choose to fund childbirth over abortion ." (*supra*, at 201)

Two of the remaining three of the Reagan appointed justices joined Rehnquist's majority opinion in most of its parts. Justice O'Connor, however, joined Section I of Justice Blackmun's dissent and also filed her own dissent. Blackmun argues that the Court should be very careful in getting involved in statutes which are vaguely worded by the Congress and therefore lend themselves to misapplication in administration.

Justice O'Connor reminded the Court that it should strike down as unconstitutional acts of the other branches only with the greatest care. With that in mind, Justice O'Connor found the statute's interpretation by the Secretary to be an unconstitutional violation of the First Amendment. She confined her dissent on these grounds and did not delve into the Fifth Amendment objections raised by the petitioners.

Rust v. Sullivan, like *Frisby*, intertwines First Amendment issues with the right to privacy. With the exception of Justice O'Connor, the Reagan justices were not moved by appeals to the First Amendment. In *Rust v. Sullivan*, unlike *Frisby*, this construction brought them to the conclusion of supporting the Reagan agenda of narrowing the right to an abortion. Like the Nixon justices before them, however, the Reagan justices were still not quite ready actually to overturn the initial decisions

²⁰ The Chief Justice relied on the Court's decisions in *Maher v. Roe*, 432, US 464 (1977), in which the Court upheld Medicaid funding of services related to childbirth while rejecting similar funding for abortion, and *Harris v. McRae*, 448 US 297 (1980). In the latter case, the Court rejected the notion that failure on the part of government to fund a legal activity is a penalty and obstacle and therefore unconstitutional.

leading to the controversy in their respective areas. The willingness to curb the availability of abortion while refusing to eliminate the right altogether was best summed up by the emergence of a middle ground presented by three justices in *Planned Parenthood v. Casey*. Two of the three justices were Reagan appointees.

Planned Parenthood v. Casey 505 US 833

No abortion case since *Webster* was more greatly anticipated than the *Casey* decision in 1992. Already the Court had let stand waiting periods, parental notification, and other restrictions on the right of minors to obtain abortions. *Casey*'s importance pertains to the fact that several restrictions in the law were applied to women of majority age. The Court had a golden opportunity to strike at the heart of *Roe v. Wade* and dramatically curtail abortion rights.

The *Casey* law required any woman seeking an abortion to be given, within twenty-four hours of the procedure, certain information.²¹ It further stipulated that before a minor could have access to the procedure, at least one of her parents must give "informed consent." Married women seeking abortion were to sign a form indicating that they had informed their husbands of their intentions. Finally, institutions performing abortions were to provide certain information and records of those procedures.

For opponents of abortion, the opening declaration of Justices O'Connor, Kennedy, and Souter was a disappointment.

After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed (505 US 845, 846).²²

²¹ The information to be provided was to allow the woman to grant her "informed consent" to the procedure.

²² The Justices recognized three essential holdings in *Roe*, each of which they upheld. "The first is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State...The second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the

According to the troika, they wanted to avoid the impression that the Court was bowing to public pressure if it reversed two decades of jurisprudence. The three justices recognized that, unlike the issue areas which were important to the Nixon justices, if they reversed the central holdings of *Roe*, they would be withdrawing what had essentially come to be regarded as a fundamental right. With abortion, two generations of women had already become accustomed to having the procedure available. To allow the legislatures to take it away would have led to political civil war. The troika's opinion illustrates that they were well aware of the fact that the Court has external limits imposed upon it from popular majorities.²³

The troika argued that *starre decisis* required them to fall back on precedent.

No evolution of legal principle has left *Roe's* doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking (*supra*, at 857).²⁴

In sum, the Court upheld the central holdings of *Roe v. Wade*. A woman did have the right to terminate a pregnancy although the state also had a right to regulate the practice. Given the latter point, the rigid trimester framework established by the 1973 decision was abandoned. In order to reconcile the seemingly contradictory assessments that women do, indeed, have a right to an abortion

outset of the pregnancy in protecting the health of the woman and the life of the fetus that may be a child." (*supra*, at 846)

²³ The justices explained the consequences of overruling a doctrine which had not been repudiated by time. "As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." (*supra*, at 865)

²⁴ By contrast, the justices compared *Plessy v. Ferguson* and *Lochner v. New York* to the current situation. In both cases, the Court's reasoning had become anachronistic and unworkable given the evolving nature of societal opinion. No such change had taken place in society to warrant a similar change in course for *Roe*.

while the state, too, has the right to regulate it, the Court announced that it would rely on the undue burden test.²⁵

This apparently middle course did not satisfy the whole Court.

On the left, Justices Blackmun and Stevens agreed with the troika that *Roe* should be upheld. They disagreed, however, with the notion that the state can place obstacles in the way of woman's right to choose. From their standpoint, the right of a woman to obtain the procedure is a fundamental liberty right and should not be infringed. Therefore, they opposed all of the provisions which the three justices had left standing.

From the right, two Reagan appointees, Rehnquist and Scalia, were joined by Justice White, an original *Roe* dissenter, and Justice Thomas, a Bush appointee in arguing that *Roe* was itself invalid. The Chief Justice derided the controlling opinion of Justices Souter, O'Connor, and Kennedy for its defense of *Roe* not on the basis of constitutional correctness but as a matter of stare decisis. Rehnquist charged that although the controlling opinion seemed to rely heavily on precedent, in reality it broke significantly with the Court's jurisprudence in the area of abortion rights.²⁶

In the end, having failed to put forth any evidence to prove any true reliance, the joint opinion's argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have ordered their thinking and living around it. As an initial matter, one might inquire how the joint opinion can view the 'central holding' of *Roe* as so deeply rooted in our constitutional culture, when it so casually uproots and disposes of that same decision's trimester framework (supra, at 957).

²⁵ The three justices determined, under the undue burden test, that the parental notification component, the record keeping provisions, and the waiting period all passed constitutional muster. The spousal notification aspect of the law, however, was invalidated.

²⁶ Rehnquist argues that the Court's decisions in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 US 416, and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 US 747 were overturned by the decision of the three controlling justices. What is left of *Roe*, therefore, is not the original finding of that decision but a revised form which is far more restrictive and less willing to see abortion as a fundamental right.

Chief Justice Rehnquist continued his assault on the reasoning of the joint opinion by questioning the consistency of striking down spousal notification while simultaneously upholding the parental consent component. The reliance on the undue burden test, according to Chief Justice Rehnquist's reasoning, did nothing more than substitute the difficult framework of the trimester system for an equally vexing standard involving the Court in the process of producing a complex abortion code. The Chief Justice then concluded his opinion by upholding, one by one, the provisions of the Pennsylvania law.

Justice Scalia reiterated his by now consistent refrain that the Court abandon its involvement in the whole area of abortion rights. The matter should be left to the states, where, if they wish, they may allow abortion, regulate it, or ban it entirely. It is up to the legislatures to decide for the Constitution does not require legal access to the procedure.

Justice Scalia joined Rehnquist's critique of the undue burden test, claiming that it was incoherent and provided no real basis from which to judge various obstacles state legislatures might impose. It represented an accommodation with the political pressure which the Court has been subjected to by both sides of the abortion debate.

Instead of engaging in the hopeless task of predicting public perception - a job not for lawyers but for political campaign managers - the Justices should do what is legally right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of Law? If the answer to both questions is no, *Roe* should undoubtedly be overruled (*supra*, at 999).

Casey marked a fundamental split in the Reagan bloc. Much to Justice Scalia's dismay, they had let yet another opportunity to finally overturn *Roe* go past them. Much as Eisenhower's endorsement of New Deal programs and Nixon's endorsement of certain Great Society measures had lent them bi-partisan credibility, the fact that two of the four Reagan jurists were committed to *Roe* created a sense of inevitability for many pro-lifers that the Court, regardless of the number of Republican appointees, was not going to give their cause redress.

Bray v. Alexandria Women's Health Clinic 506 US 263

Roe v. Wade evoked a strong reaction on the part of many Americans, particularly Evangelicals and some Catholic groups. Often, these groups have sponsored rallies to demonstrate against abortion. These have taken the form of marches on Washington and, more troubling for pro-choice advocates, demonstrations in front of abortion clinics where women are often harassed on their way inside. The courts have frequently been asked to intervene in order to decide the validity of such demonstrations. *Bray v. Alexandria Women's Health Clinic* in 1993 was such a case.

The case involved the activities of an organization called "Operation Rescue." The goal of this organization is physically to block the entrances of abortion clinics and chant various religious and guilt inducing epithets in an effort to convince women at the last moment not to undergo the abortion procedure. At times their activities can become rather heated. They do not shy away from confrontational activities and often can be seen in shouting matches with pro-choice advocates (Cook, et. al., 1992).

The argument made by abortion clinicians and pro-choice groups which the District Court upheld, was that Operation Rescue tactics deprived women of their right to due process as well as hindering interstate travel.²⁷ Therefore, the federal government was expected to intervene. Justice Scalia wrote for the majority and dismissed both charges.

He rejected the contention that women seeking abortions qualified as a class.

Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning) women as a class- as is evident from the fact that men and women are both sides of the issue, just as men and women on both sides of petitioners' unlawful demonstrations (supra, at 270).²⁸

²⁷ The district court ruled that petitioners had violated the first clause of 42 USC 1985(3) which reads, "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws....the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

²⁸ Justice Scalia cited *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) in which the Court refused to overturn a Massachusetts law favoring veterans (which in Massachusetts

Finally, Justice Scalia rejected the respondents' contention that rights guaranteed against private interference were being interfered with. Respondents' claimed that federal intervention was warranted since most women in the Washington, D.C. area accessed abortion clinics via interstate travel. For the majority, this was not enough to warrant federal relief.

Justice Kennedy concurred separately. He pointed out that,

The federal balance is a fragile one, and a false step in interpreting 1985(3) risks making a whole catalog of ordinary state crimes a concurrent violation of a single congressional statute passed more than a century ago (supra, at 287).

This was a matter of federalism and the right to access to an abortion was not sufficient enough cause, in Justice Kennedy's estimation, to risk upsetting the balance.

Justice O'Connor dissented. Significantly, in a case dealing primarily with abortion politics, Justice O'Connor is joined by Justice Blackmun, the consistent and resolute defender and author of *Roe*. From O'Connor and Blackmun's perspective, the Reconstruction era statute in question, intended to protect blacks with their new found liberties from intimidation, was applicable in this case.

Like the Klan conspiracies Congress tried to reach in enacting 1985(3), [p]etitioners intended to hinder a particular group in the exercise of their legal rights because of their membership in a specific class (supra, at 349).²⁹

Justice O'Connor's dissent and her co-authorship of the majority in *Casey* suggest that she had moved decidedly to the middle in abortion politics. Justice Kennedy's return to the side of Justice Scalia and the Chief Justice illustrated his unwillingness to decisively break from the Reagan agenda. It must be noted that even though Justice O'Connor is rather conspicuously allied with Justice Blackmun in *Bray*, the Fourteenth Amendment angle must be considered a primary draw. Her dissent

was over 98% male) on Equal Protection grounds. In *Geduldig v. Aiello*, 417 U.S. 484 (1974) the Court refused to extend disability coverage to women suffering from pregnancy related illnesses.

²⁹ The Court had decided in *Carpenters v. Scott*, 463 U.S. 825 that interstate commerce is, in many contexts, protected. To appeal for federal protection based upon a violation of interstate commerce, the violation must be aimed at that right. Justice O'Connor dissented in the case. Justice Scalia relies on it to reach his conclusions that federal intervention is not warranted.

is predicated on supporting Equal Protection claims for women and therefore should not be overly interpreted as a fundamental realignment with the abortion rights bloc of the Court.

After *Bray*, the Reagan justices definitely formed a pecking order in their allegiance to the Reagan agenda. Justice Scalia was the most adamant in his support of the anti-*Roe* sentiment in that he was willing to overturn it outright. Chief Justice Rehnquist, while certainly no friend of *Roe*, and no less outspoken as to *Roe*'s constitutionality, did not display the zealous commitment to removing the Court from the whole area of abortion rights like Justice Scalia. Justice Kennedy was committed to the central holding of *Roe* but was willing to embrace the undue burden test and invalidate some legislative attempts (such as spousal notification in *Casey*). Justice O'Connor seemed to have traveled the furthest way ideologically. She was committed to the central premise of *Roe* and was construing undue burden in a much broader light than her other Reagan appointed colleagues.

Now, Inc. v. Scheidler 92-780 and *Judy Madsen, et. al., Petitioners v. Women's Health Center, Inc., et. al*

The next major abortion case before the Court, *Now, Inc. v. Scheidler*, was argued December 8, 1993 and a decision was handed down January 24, 1994. The case revolved around the complaint lodged by health care clinics providing abortion that a group of organizations calling themselves the Pro-Life Action Network were involved in a national conspiracy to shut down abortion clinics. Petitioners charged that this violated the Racketeer Influence and Corrupt Organizations chapter of the Organized Crime Control Act of 1970. Both the District Court and the Court of Appeals disagreed citing the lack of an economic motive by the anti-abortion groups.

Chief Justice Rehnquist spoke for the unanimous Court. As regards the economic motive being a necessary prerequisite before applying the anti-racketeering statute, the Chief Justice concluded, "We do not believe that the usage of the term -enterprise- in subsections (a) and (b) leads

to the inference that an economic motive is required in subsection (c)."³⁰ Once again, the Reagan justices concluded that the value of stability was a stronger value than free expression.

The issue of just how far anti-abortion demonstrators could go in trying to stop abortions from taking place received less sympathy from the Court than did the question of the constitutionality of the abortion procedure itself. An example of that was the Court's last big abortion decision, *Madsen v. Women's Health Ctr., Inc.* in 1994. Again Chief Justice Rehnquist led the Court's decision.

Anti-abortion protesters in Melbourne, Florida began congregating outside of a clinic providing abortion services. They attempted to hand out anti-abortion literature and to counsel potential patients as they tried to enter the building. Doctors inside the clinic argued that the demonstrations were having a deleterious effect and therefore, there was a need for an injunction against the protesters.

Upon the group's ignoring of the injunction and continuing their demonstrations, the Florida court ordered additional strictures to their original injunction. The response was to charge that the injunction was leveled to discourage the content of the message and was therefore a violation of the First Amendment.³¹ The Chief Justice disagreed stating that the fact that all of the members demonstrating believed the same thing was not why they were being silenced. They were violating the injunction. Therefore the silencing was quite apart from the message. Justice Scalia disagreed and argued that heightened scrutiny should have been applied here.

Ultimately, the Court let stand the injunction against the demonstration and the verbal expressions but they felt the ban on "images observable" was too broad a sweep as was the 300 foot no

³⁰ The Chief Justice held that nowhere in the racketeering acts 1962(c) nor in 1961 was there any economic motive stipulated. Just because the antiabortion protesters themselves were not profiting personally from the protests, they were having a deleterious effect economically on the abortion clinics.

³¹ Respondents appealed to *Perry Education Association v. Perry's Local Educators Association* 460 US 37 and claimed that the injunction against them should be treated to heightened scrutiny since it applied to the content of their speech.

approach zone. Justice Scalia argued that the videotape of the demonstrations used the worst behavior of the demonstrators to justify the injunction. Rehnquist felt that observation to be "gratuitous."

The fact that the Reagan justices again split shows that Scalia is the most consistent opponent of abortion on the Court. He consistently is willing to extend governmental protection to abortion protesters while at the same time admonishing the Court to abandon its efforts to establish an abortion code for the country. Justice O'Connor demonstrates that she has moved a bit ideologically from where she was in *Thornburgh*. Chief Justice Rehnquist illustrated his commitment to the stability principle when it comes to antiabortion demonstrations but is no less committed to the eventual overturning of *Roe*. Justice Kennedy, while striking a middle ground in *Casey*, joined Scalia in *Madsen*. He is the least consistent of the four but even his jurisprudence in the area demonstrates something of a hostility to the whole issue.

CHAPTER SEVEN: CIVIC RELIGION, THE COURT, THE REAGAN AGENDA, AND THE RELIGIOUS RIGHT

In response to the social and cultural revolution which rocked American society in the 1960s, American politics in the 1970s and 1980s began to emerge as a battleground for two diametrically opposed world views. As James Davison Hunter pointed out in *Culture Wars* (1992), these two broad world views began competing against one another for the right to determine the future course of the country. On one side, the largely secular, egalitarian, urban America was pitted against the more religiously based traditional America. Both tend to resort to religious rhetoric but the latter side is particularly concerned with bringing their interpretation of morality back into a position of hegemony within the American body politic.

Allied with the Religious Right is a group calling themselves neo-conservatives.¹ Members of the Religious Right and neo-conservatives have one major area in common, they both perceive the United States to be in a state of cultural decay (Dionne, 1991). Both argue that only the reinstating of traditional values will reverse this decline and lead to social stability. For the Religious Right, these values can only be reintroduced via the stressing of religion in various forums such as the schools and by relaxing the restrictive wall between church and state. Because of this, they support a broader interpretation of the First Amendment as well as a broader reading if not total abandonment of the so called "Lemon Doctrine."²

¹ The traditional side of the debate is not solely composed of the religious right. Neo-conservatives are also very active in espousing a similar agenda. Neo-conservatives, such as Irving Kristol, William Bennett, and Norman Podhoretz are former Democrats who left the party in the 1970s due to the takeover by social libertarians. Neo-conservatives tend to advocate a conservative social agenda and a return to strict community standards. An example of neo-conservative analysis is *On the Democratic Idea in America* (1972) by Irving Kristol who coined the term "neo-conservative."

² The "*Lemon*" test has three prongs: 1) does the act in question have a valid secular purpose; 2) does the act have the primary purpose of advancing religion; 3) is there excessive entanglement between religion and the state. See *Lemon v. Kurtzman*

This "culture war," variously discussed by authors such as James Davison Hunter, E.J. Dionne(1991), Arthur Schlesinger, Jr. (1992), and Mickey Kaus (1992), formed the backdrop to the Supreme Court's efforts to forge a consistent standard of jurisprudence in the area of religion and public life issues. The country was deeply divided by cultural issues in 1981 and President Reagan came into office that year making little effort to hide the fact that in the culture debate, he had chosen sides.

Ronald Reagan came into office espousing the need to return to a time of cultural stability. He seldom offered any policies or language to accommodate the pluralistic model of democracy which emerged during the social upheavals of the 1960s. It was with the idea of returning the country to a time when civic religion and Christianity in particular had a powerful role that Ronald Reagan made his appointments to the Supreme Court. Actually forging a consistent doctrine to return the nation to the days of broadly accepting religion's role would prove to be a difficult task for the Reagan appointees.

Religion in public life issues can be broken down into four broad areas. The first area is the question of taxes as an impediment to religion. Of concern in this area is whether or not the government's collection of taxes imposes a burden on religious organizations and institutions. The second area is the question of government funds and religion. In a society requiring an increasingly complex government, the state finds it necessary occasionally to use private institutions to execute policy. From time to time, that includes religious organizations.

The third area concerns the extent to which government must accommodate religious belief and practice in the society. The First Amendment guarantees the free exercise of religion but it also prohibits the establishment of an official religion. When weighing these two components of the First Amendment, it is necessary to understand how religion is to be accommodated and recognized by the government without placing the imprimatur of establishment on religious life and practice. Finally, the Court has addressed issues pertaining to equal access of religious organizations and public schools.

When viewed from these four areas, it is clear just how complex the whole issue of church/state relations is.

TAXES AS AN IMPEDIMENT TO RELIGION

Texas Monthly, Inc. v. Bullock, Comptroller of Public Accounts State of TX

Coming before the Court in 1988 was *Texas Monthly, Inc. v. Bullock, Comptroller of Public Accounts of State of Texas, et al.* The case involved a publisher who brought suit against the state of Texas claiming that the state's policy of exempting religious periodicals from sales taxes was an unlawful favoritism of the state toward religion. The court struck down the exemption and ordered the state to refund tax money to non-religious publishers. The Court of Appeals, however, disagreed and upheld the exemption finding that it passed constitutional muster. The Supreme Court heard oral arguments in the case on November 1, 1988.

Justice Brennan delivered the majority opinion and was joined by Justices Marshall and Stevens. Justices O'Connor and Blackmun filed concurring judgments. The remaining justices, all Reagan appointees, dissented. The majority rejected the Texas exemption citing the fact that it did, directly, exempt only religious organizations. In Justice Brennan's words,

Texas' sales tax exemption for periodicals published or distributed by a religious faith and consisting wholly of writings promulgating the teaching of the faith lacks sufficient breadth to pass scrutiny under the Establishment Clause (489 U.S. 14).³

Among the Reagan appointees, only Justice O'Connor agreed with the outcome of the Court's decision. She joined Justice Blackmun's concurrence which argued that the Court should

³ Justice Brennan cited several cases to demonstrate that in the past, the Court has upheld aid to religious organizations providing the benefits are not specifically germane only to them. In *Widmar v. Vincent* (454 US 263) the Court upheld equal access to university facilities for religious organizations provided there was a content neutral rule allowing equal access across the board. In *Mueller v. Allen* (463 US 388) the Court upheld a tax deduction for tuition, transportation, and nonreligious textbooks to a dependent by a taxpayer.

overturn the statute in question on the narrowest grounds possible.⁴ Justice Blackmun pointed out that the case presented the difficult task of balancing three different values in the First Amendment, Free Exercise, the Establishment Clause, and the Press Clause. Ultimately, however, Justice Blackmun agreed with the Court on Establishment Clause grounds. To grant only religious organizations tax exemption favors them solely due to their religious content and is therefore an Establishment of religion.

Chief Justice Rehnquist and Justice Kennedy joined Justice Scalia's dissent. Scalia's dissent began with a litany of examples citing the intimate relationship between church and state in America.

....the bold but insupportable assertion (given such realities as the text of the Declaration of Independence, the national Thanksgiving Day proclaimed by every President since Lincoln, the inscriptions on our coins, the words of our Pledge of Allegiance, the invocation which sessions of our court are opened and, come to think of it, the discriminatory protection of freedom of religion in the Constitution) that government may not 'convey a message of endorsement of religion (489 US 29-30).

Scalia's opinion excoriated the opinions of Brennan and Blackmun. He advanced the argument that America's "current practice, tradition, and even our own case law" (489 U.S. 45) was being violated by the Court's findings. The Scalia dissent represents, in a virtually pure form, the sentiments of the conservative Christian community. In their estimation, the barrier between the church and the state should be lowered, not raised and the state should not shy away from favorably treating religion. Religion provides discernible state benefits such as social stability. Because it adds to the security and strength of the state, it should receive encouragement. Only Justice O'Connor was outside the policy area where Reagan would have wanted one of his justices.

⁴ Justices Blackmun and O'Connor felt no need to use this case to determine whether or not the Establishment clause requires tax exemption for the sale of religious material. They confined their concurrence to overturning the statute by holding that a statute which exempts only religious institutions does not pass constitutional muster.

Hernandez v. Commissioner of Internal Revenue

The next major case before the court was *Hernandez v. Commissioner of Internal Revenue* (490 U.S. 680). The case involved the Church of Scientology and the purchase of what were known as "auditing sessions." Members of the church pay for various seminars and programs which are designed to assist them in developing their spirituality. In return, the members are charged a fee depending upon the extensiveness of the auditing session and its level of sophistication. Members felt they should be allowed to deduct the payments from their income taxes. Lower courts disagreed.

Justice Marshall delivered the majority opinion of the Court. He was joined by Rehnquist, White, Blackmun, and Stevens. Justice Marshall affirmed the lower court rulings agreeing that the purchase of these services did not comport with the traditional understanding of a contribution to a religious charity.⁵ Rehnquist was the only Reagan justice to agree. Justices O'Connor and Scalia dissented while Brennan and Kennedy took no part in the case.

In her dissent, Justice O'Connor, joined by Scalia, noted that in the past the government has been faced with the choice of either taxing all charitable giving or ignoring it. Traditionally, they have chosen the latter course. Justice O'Connor argued that the Internal Revenue Service was inconsistent in its application of assessing taxes on questionable charitable giving.

In my view, the IRS has misapplied its long-standing practice of allowing charitable contributions under statute 170 in a way that violates the Establishment clause. It has unconstitutionally refused to allow payments for the religious service of auditing to be deducted as charitable contributions in the same way it has allowed fixed payments to other religions to be deducted. Just as Minnesota statute at issue in *Larson v. Valente*, 456 US 228, discriminated against the Unification Church, the IRS' application of the quid pro quo standard here - and only here - discriminates against the Church of Scientology (490 US 713).

⁵ Relying on the definition of gifts in 26 USC 170, Marshall and the majority concluded that there was an expectation of a quid pro quo in the contributions to the Church of Scientology. The Church established fixed prices for its training programs and therefore members knew that when they gave a certain amount, they would receive a pre-set number of goods and services. Marshall went on to observe that the Court's decision did not violate the Establishment Clause since the Court was not setting the Church of Scientology out specifically for taxation purposes.

She and Justice Scalia would have reversed the lower ruling. The absence of Chief Justice Rehnquist from the dissenting side in this case is striking. The fact does remain, however, that the only dissenters in the case were Reagan justices.

Jimmy Swaggart Ministries v. Board of Equalization of California

The debate over the taxing of religious materials was continued in *Jimmy Swaggart Ministries v. Board of Equalization of California*. The unanimous court, led by Justice O'Connor, disagreed with the contention of Swaggart Ministries that the imposition of California sales tax was an undo burden to their ministry.

The only burden on appellant is the claimed reduction in income resulting from the presumably lower demand for appellant's wares (caused by the marginally higher price) and from the costs associated with administering the tax. As the Court made clear in *Hernandez*, however, to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant (493 US at 391).

The Court further ruled that the imposition of the tax did not excessively entangle the government in the affairs of religion since the tax was not levied based on the content of the material in question. This case represents yet again the refusal of the Court, and this time in unanimity, to carve out a special exemption for a Christian organization.⁶

The fact that O'Connor wrote the majority opinion comes as little surprise. She had already distanced herself from the Reagan agenda's religion and tax issues in the *Bullock* case. Justice Rehnquist had also shown some movement in the area when he joined the majority opinion in *Hernandez*. Justices Scalia and Kennedy simply joined the Court in holding that overt government favoritism still failed to pass constitutional muster.

⁶ Justice O'Connor cited the Court's interpretation of the Free Exercise Clause from *Abington School District v. Schempp*, 374 US 203, 222-223. The Free Exercise Clause, "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."

RELIGION AND GOVERNMENT FUNDS

Bowen, Secretary of HHS v. Kendrick

The Court's first case involving church/state relations was *Bowen, Secretary of Health and Human Services v. Kendrick et. al.* which was discussed in the preceding chapter. Again, as has been pointed out, the Court relaxed its restrictive approach toward church and state interaction to allow the Adolescent Family Life Act to stand. The act granted funds to private organizations, even religious ones, to advise adolescents against pre-marital conjugal relations. The Court found the act to contain a valid secular purpose despite its reliance on religiously based organizations.

The act passed muster with the second part of *Lemon* in that it did not have the primary affect of advancing religion. The coincidence of state and religious purposes can be used to advance the goals of the state. In this case, the reduction of teen sexual activity was held to be a legitimate state goal. The third test of *Lemon* is also met since there is no excessive entanglement of religion and the state.

All four of the Reagan justices joined in protecting the validity of religion's role in advancing a state cause. *Bowen* was a good early indicator for the Reagan Administration that his justices were committed to carving out a very broad area in which religion could play a role. The Court was largely divided along the lines of the Reagan agenda. The only non-Reagan appointee to join the Reagan bloc was Justice White. Each of the others, including three Republican nominees, dissented.

Employment Division, Department of Human Resources of Oregon, et al v. Smith et. al.

Smith was decided on April 17, 1990. The case involved two individuals who were discharged from their jobs and subsequently denied unemployment benefits. The benefits were denied because the two had ingested peyote during religious practices for the Native American church.⁷ The

⁷ Oregon Rev. Stat. 475.992(4) (1987) prohibits the possession of "controlled substances" without a prescription from a doctor.

Supreme Court upheld the right of the state of Oregon to deny unemployment benefits to the men.

Writing for the majority, Justice Scalia concluded that the Free Exercise clause did not protect the individual's in their religious practice.⁸

We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition (494 US at 878-9).⁹

All of the Reagan appointees concurred in the Court's judgment. The case is revealing in that it adds definition to the true goals of the Reagan agenda. Like the president, the Reagan justices favor the elevation of Christian and Jewish symbols and traditions as a means of supporting social stability. They are not necessarily for the extension of rights to minority religions. There is not an agenda of pluralism.

It is telling that Justices Blackmun, Brennan, and Marshall dissented from portions of the Court's opinion. These usually staunch defenders of the separation of church and state and the Reagan coalition look as though they are switching sides. The question, however, is cultural pluralism and in that sense the justices were consistent with past opinions.

⁸ Justice Scalia quoted Justice Frankfurter's opinion in *Minersville School District Board of Ed. v. Gobitis* (310 US 586, 594-5). "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."

⁹ Justice Scalia relied on *Reynolds v. United States*, 98 US 145 (1879) in which the Court first refused to allow the practice of polygamy simply because it was commanded by certain religious traditions. In *Prince v. Massachusetts*, 321 US 158 (1944) the Court ruled that a mother could not claim exemption from child labor laws when employing her children to distribute religious literature on the streets. In *Gillette v. United States*, 401 US 437 (1971) the Court sustained the Selective Service Act against a claim based upon religious reasons. The Court rejected the claim that the Amish were necessarily exempt from Social Security taxes simply because their faith prohibited participation in a government program. Finally, Justice Scalia cited the Court's recent holdings in *Hernandez*, *supra* in which the Court rejected the argument against taxation based upon its making the proselytizing of a religion more difficult.

GOVERNMENT ACCOMMODATION OF RELIGION

County of Allegheny et. al. v. ACLU, Greater Pittsburgh Chapter, et. al.

Allegheny et al v. ACLU was argued before the Court in February 1989 and decided on July 3, 1989. The case remains one of the most important cases in recent Court jurisprudence in the area of religion in public life. The case demonstrated a solid break within the Reagan coalition of justices as Justice O'Connor departed from the Reagan agenda. Justice Blackmun delivered the opinion of the court which was perceived as a setback for the Religious Right.

The case involved the city of Pittsburgh's display of a menorah and a nativity scene at Christmas.¹⁰ The ACLU filed suit claiming that such a display on city property violated the Establishment Clause of the First Amendment made applicable to the states through the Fourteenth Amendment. The Court's majority found the nativity scene crèche to be clearly outside the bounds of permissibility. It was a clear endorsement of the Christian message given the announcement "Gloria in Excelsis Deo." The Menorah, accompanied by a Christmas tree and a sign proclaiming "A salute to liberty" were permissible since this seemed to convey a pluralistic celebration of the season.

The Court was badly fractured in *Allegheny County*, reflecting the difficult nature of trying to balance the free exercise of religion and the establishment of state sponsored religious faith. For Justice Blackmun, the crèche violated the Establishment Clause given its patent endorsement of the birth of Christ. The state had gone beyond simply marking a cultural holiday and was endorsing religion since it was encouraging citizens to praise God for the birth of Christ. Blackmun then argued that the fact that the city and county had historically celebrated the holidays was not enough to justify violation of the Establishment Clause. Justice Blackmun's dismissal of history as a legitimating factor

¹⁰ The menorah was owned by a private Jewish organization and displayed outside of the City-County building. The crèche was displayed inside the Allegheny County Courthouse before the Grand Staircase.

placed him at odds with Justices Kennedy, Scalia and Rehnquist who depended heavily on the traditionality of the practice to accomodate it.

Justice Kennedy was joined by the Chief Justice, and Justices White and Scalia in dissenting from the majority's opinion. They argued that the display of the nativity scene, quite apart from being an endorsement of religion, was simply the historical antecedent to the holiday and it is within the purview of government to display it.¹¹ Finally, Justice Kennedy argued that for the government to be compelled to ignore the religious aspects of a holiday while celebrating only the secular would divorce the government from a very important area in the life of the country. This narrow reading of the Establishment Clause, celebration of tradition, and elevation of religion was in accord with the goals of the Reagan agenda but the concurring opinion of Justice O'Connor was clearly not.

Justice O'Connor concluded that,

the crèche displayed on the Grand Staircase of the Allegheny county courthouse, the seat of country government conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community (492 US 626).¹²

Justice O'Connor's opinion does not represent the strict adherence to the cultural hegemony of Jewish and Christian symbols in public life, rather, it embraces a pluralism which is virtually devoid in the agenda of the Religious Right.

Allegheny County is an important case in many respects. First, it demonstrated the difficulty of trying to balance the competing interests involved in determining the relationship between tolerance and endorsement of religion in public life. From Justices Scalia and Rehnquist's point of view, there is no escaping the historical truth that Christmas is a holiday steeped in religious tradition. To

¹¹ Justice Kennedy, like the District Court, relied on *Lynch v. Donnelly* 465 US 668 in which the Court upheld the right of a city to display a holiday crèche. He also cited *Marsh v. Chambers*, 463 US 783 in which the employment of a legislative chaplain was held to be permissible.

¹² Justice O'Connor admitted that this did not represent coercion as such but a violation of the Establishment Clause need not include coercion. She relied on *Abington School District v. Schempp*, 374 US 203 to illustrate the use of symbolic forms of coercion to uphold the dominance of Christianity by the state.

acknowledge that fact does not represent the endorsement of religion since it is just adhering to historical fact.

For the majority in the case, Justice Kennedy's position represents an insensitive failure to recognize that religion has been used to standardize the country's culture to the point of diminishing the role of minorities in public life. Because of that historical truth, the Court must be very careful to protect the interests of those in the minority.

The case also demonstrates the failing consistency of the Reagan justices in the area of church/state relations and religion in public life issues. Justice O'Connor openly embraced the pluralistic ideal of American society. Her refusal to condone the crèche on public property is illustrative of her concentrated effort to extend the notion of democratic plurality to the area of religion. Rehnquist, Scalia, and Kennedy, on the other hand, take a different tact than O'Connor. Theirs is the position closer to the Reagan agenda in that it is sensitive to the recognition of religion. To celebrate a religious holiday by only recognizing the secular side of that holiday is, in the eyes of the three dissenting Reagan justices, a callous disregard for religion's place in American society.

Lee v. Weisman

Like *Casey* and *Webster*, *Lee v. Weisman* offered the Reagan bloc of justices an opportunity to fulfill the ultimate expectations of President Reagan's agenda. *Lee v. Weisman* could have served as a vehicle for overturning the Court's earlier pronouncements on prayer in schools and the wall separating church and state could have been significantly lowered. A message could have been sent by the Court that official religion would again be broadly tolerated. But again, like *Casey* and *Webster* in the area of abortion, the Court refused to retreat from a generation of jurisprudence.

The issue concerned the practice of the local principals of Providence, Rhode Island inviting members of the clergy to deliver "nonsectarian" prayers at commencement exercises. Deborah Weisman's class was to be led in prayer by a rabbi who had been invited by the principal. Her father

filed suit claiming that the practice violated the Establishment Clause. Lower courts agreed. If the Supreme Court reversed the lower decisions, the strictures between church and state would have taken on a more porous character. The Court affirmed the lower court rulings, agreeing that the invitation of clergy members did, indeed, violate the Establishment Clause.

Of the four Reagan justices, Kennedy and O'Connor voted to uphold the lower court rulings while Scalia and Rehnquist both dissented. Justice Kennedy, in fact, delivered the Court's majority opinion. He pointed out that the attendance at graduation ceremonies was "obligatory" and therefore, individuals in attendance were, in many instances, a captive audience.

Even for those students who object to religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma (505 US at 586).

Kennedy cited the Court's precedent in *Engel v. Vitale* (370 US 421) to argue that the state cannot mandate a prayer for clergy leaders to follow. Even though the punishment for not following the prayer was simply the threat of not being invited back, it was still a way to regulate the prayers of independent clergymen. The fact that the board was attempting to make the prayer non-sectarian and therefore as general and inoffensive as possible, was not the real point, according to Justice Kennedy. The whole enterprise of state regulated prayer was the point.¹³

The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercises which students, for all practical purposes, are obliged to attend (505 US 589).

This regulation of the content of the prayers to be given served to make "it clear that the graduation prayers bore the imprint of the State and thus put school age children who objected in an

¹³ Among the many cases referenced, Justice Kennedy cited *Buckley v. Valeo* (424 US 1), *School district of Abington v. Schempp* (374 US 203), and *County of Allegheny v. Ameircan Civil Liberties Union, Greater Pittsburgh Chapter* (492 US, at 661) to demonstrate that the Court has consistently found that "what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." (505 US at 592)

untenable position.” (505 US 590). For the majority of the Court, this was unacceptable. The fact that the students were in a situation where they were forced to conform violated their constitutional rights. The state was, in effect, mandating the practice of religious faith.¹⁴

Justice O'Connor joined the concurrence of Justice Blackmun who argued that the government should not only refrain from compelling religious participation but should, in fact, avoid the sponsoring of religion at all.¹⁵ The Kennedy and O'Connor opinions in *Lee v. Weisman* demonstrated the schism in the ranks of the Reagan justices over the issue of religion in American life. Justice O'Connor had already demonstrated a noted independence in the area of church/state relations.¹⁶ The most surprising development in the case was the decision of Justice Kennedy to uphold the lower court rulings. As in the area of abortion rights, Justices Kennedy and O'Connor formed the vital center.

Justice Scalia chose to ground his dissent upon an appeal to tradition. The framework from which a conservative jurist may draw conclusions varies. Tradition is but one possibility. The easiest framework is legal positivism. Ideally, this occurs when the law is codified and the jurist simply applies the general law to the specific situation in a geometric fashion. Clearly, this is an idealized conception but it forms the basis for the original intent hermeneutic of constitutional interpretation. It relies on *stare decisis* and on legislative intent.

Another approach is to appeal to natural law. Justice William O. Douglas did just that in *Connecticut v. Griswold*. He placed marriage above the codified law and ruled that the customs and

¹⁴ Citing the Court's ruling in *Engel v. Vitale*, *supra*, at 424, Justice Kennedy cautioned against the seemingly innocuous notion of a “civic religion.” The idea that the government can escape the risk of recognizing any specific creed by espousing a very general one was viewed as oxymoronic.

¹⁵ Justice Blackmun referenced the court's decision in *County of Allegheny v. American civil Liberties Union, Greater Pittsburgh Chapter*, 492 US 573 to reiterate the ban on state sponsored religious exercises.

¹⁶ *Texas Monthly, Inc. v. Bullock*, *supra* and *Allegheny County v. ACLU of Pittsburgh*, *supra* are examples of Justice O'Connor taking a less permissive approach to religion in public life.

privileges of marriage were beyond legislative tampering. The final approach, and the one employed by Justice Scalia in his dissent, is to rely on cultural tradition. Scalia's dissent is replete with examples purporting to show the traditional nature of prayer at public functions.¹⁷

He chastised his fellow justices for flouting a well established tradition.

In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises (505 US 635).

Finally, Justice Scalia dismisses the Court's interpretation of coercion.

The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty (505 US 640).

He concluded his dissent with an appeal to religion as an unifying force in America's late twentieth century multi-cultural society. Referring to the Founders, "And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration - no, an affection - for one another than voluntarily joining in prayer together, to the God whom they all worship and seek." (505 US 646).

In *Lee*, O'Connor and Kennedy embraced the pluralistic interpretation of American society. Scalia and Rehnquist sided with the old Christian hegemony. Kennedy and O'Connor's opinions in *Lee* should not be taken to indicate a fundamental shift in philosophy such as Justice Blackmun's steady trek from conservatism to liberalism. Rather, both demonstrate a level of discomfort with the idea of strong government. Whereas Scalia and Rehnquist are supportive of using the government to advance the cause of the dominant culture, Kennedy and O'Connor, just as in the abortion cases, are wary of excessive government involvement. In this sense, all four justices exhibit a kind of conservatism. One is more libertarian and the other more Burkian.¹⁸

¹⁷ After citing Rehnquist's dissent in *Wallace v. Jaffree* (472 US 38, 100-3) and Justice Stewart's dissent in *Engel v. Vitale* (supra, at 446-50), Scalia caustically chastises the members of the majority for forgetting the long litany of examples of state involvement with religion set out in the two dissents. He then goes on to recite them over again.

Board Of Education of Kiryas Joel Village School District v. Grumet

Kiryas Joel is a small Jewish village in New York which runs its own school district. The lines of the district were deliberately drawn to allow the village to control their own curriculum.¹⁹ Lower courts found this accommodation to be a violation of the Establishment Clause since religion was used as the determining factor in drawing the lines. The Supreme Court affirmed the lower courts' rulings. Justice Souter announced the majority's decision that New York law ch. 748 violated the Establishment clause since its primary effect was the advancement of religion.

Justice O'Connor concurred with the majority opinion.

On its face, this statute benefits one group - the residents of Kiryas Joel. Because this benefit was given to this group based on its religion, it seems proper to treat it as a legislatively drawn religious classification (No. 93-517; p.6 O'Connor concurrence).

Justice O'Connor cautioned against using only one test to determine the constitutionality of practices. There is more than one test to determine free speech, Fourth Amendment issues, etc. therefore, the Court must take matters in the area of religion based upon the specific situations of the cases in question.

With this in mind, Justice O'Connor made the distinction between laws which actively favored certain religions over others and the practice of government endorsement of religious speech.²⁰

¹⁸ Libertarian political philosophy, often associated with John Stuart Mill, stresses freedom from coercion and liberation from outside restraints. This conception of freedom is well grounded in the American tradition. Indeed, the rebellious colonists of the eighteenth century appealed, at least in part, to libertarian principles such as the right to life, liberty and the pursuit of happiness. In other words, the right to be left alone. Libertarian conservatism stresses an absence of coercion and generally favors a weakened central government. Burkan styled conservatism, on the other hand, stresses social stability over the absence of restraint. Edmund Burke, writing in the late eighteenth century in response to the French Revolution, urged social stability and respect for traditional institutions.

¹⁹ The village population practices a very strict form of Judaism. It was with this in mind that the state of New York passed an ordinance, ch. 748, allowing the school lines to be drawn around the confines of the community. The law allows separate groups to form their own villages with broad powers of self-governance.

Another category is when the government must make decisions about matters of religious doctrine and religious law. These various categories of religious related jurisprudence bespeak of the difficulty in maintaining one set doctrine from which to judge all religion cases. From Justice O'Connor's perspective, the time has come to abandon the unitary and flawed approach of *Lemon* and take cases in a much more situation-specific context.

Justice Kennedy concurred in the judgment as well although he did not join Justice Souter's majority opinion. He differed from the majority opinion in that he did not see why the fact that the legislature may, perhaps, in the future be unable to accommodate all religious groups, precludes it from this particular exception. In his estimation, the Court should simply embrace the narrower doctrine that the school district violated the law by using religion to draw political boundaries.

Justice Scalia was joined by the Chief Justice and Justice Thomas in dissenting. Scalia attacked Souter's contention that the deliberate drawing of the district to favor the Satmar community was an improper investment of state power in a religion.

Justice Souter's steamrolling of the differences between civil authority held by a church, and civil authority held by members of a church, is breathtaking. To accept it, one must believe that large portions of the civil authority exercised during most of our history were unconstitutional, and that much more of it than merely the Kiryas Joel School District is unconstitutional today. The history of the populating of North America is no small measure the story of groups of people sharing a common religious and cultural heritage striking out to form their own communities.

Scalia concluded his dissent with a denunciation of the court's recent jurisprudence in the area of religion and the law. He decried what he saw to be the use of the Establishment Clause to be a "repealer of our Nation's tradition of religious toleration." This again shows how he would lower the wall of separation between church and state.

²⁰ *Lee v. Weisman*, *Allegheny County v. ACLU Greater Pittsburgh Chapter*, *Lynch v. Donnelly*, 465, US 668, and *Stone v. Graham*, 449 US 39 are examples of cases dealing with the government endorsement of religion provided in Justice O'Connor's concurrence.

For Scalia and Rehnquist, much more than the other Reagan justices, the question of the traditional and cultural role played by religion is important to consider. The narrow interpretations of the church/state separation wall for Scalia and Rehnquist represent an effort to preserve the more traditional views society exhibited before the cultural revolution of the 1960s.

EQUAL ACCESS TO PUBLIC SCHOOL FACILITIES/FUNDS

Board of Education of the Westside Community Schools (Dist 66) et al v. Mergens, by and through her Next Friend Mergens, et al.

The School Board of the Westside Community disallowed the meeting of a Christian group on school grounds arguing that it violated the Establishment Clause of the First Amendment.²¹ The Supreme Court did not agree. Justice O'Connor announced the judgment of a splintered Court and delivered its opinion with respect to Parts I, II-A, II-B, and II-C, in which Rehnquist, White, Blackmun, Scalia, and Kennedy joined and an opinion with respect to Part III, in which Rehnquist, White and Blackmun joined. Kennedy filed an opinion concurring in part and concurring in the judgment, in which Scalia joined. Marshall filed an opinion concurring in the judgment in which Brennan joined. Stevens filed a dissenting opinion.

O'Connor argued that a

limited open forum" exists "whenever a public secondary school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time (496 US 235).

In other words, if the school board allows noncurriculum groups (groups with no antecedent courses taught in the curriculum) to meet, then they must allow equal access for everyone.²² The

²¹ The School Board argued that since each club was required to have a faculty sponsor, this would excessively entangle the relationship between the state and the religious organization. Respondents charged, however, that the Equal Access Act prohibited the School Board from denying them access to the facilities since the act clearly bars discrimination on the basis of philosophy or religion when there is a limited open forum.

Court concluded that the Westside school was, indeed, allowing extracurricular groups to meet.

Petitioners argued, however, that even if the meetings fit the extra-curricular definition provided in the act, it still did not matter since the act itself was a violation of the Establishment clause. The Court disagreed.

Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to endorse or disapprove of religion (496 US 249).²³

Justices Kennedy and Scalia concurred in the judgment of the Court. They imposed a two pronged test to decide the case. In the first, they asked whether or not the government was actually establishing an official state religion. Was the government's involvement to the extent that one would conclude that the state was in fact endorsing this as the official religion.²⁴ The second principle applied to the case was whether or not there was mandatory participation of students in the activities of a religious organization. They found no evidence that there was any coercion in the case to participate.

The fact that all Reagan justices were in agreement here is important. It suggests that the religious pluralism factor (present in the peyote case) is the crucial factor. For the Reagan justices, social stability, not egalitarian acceptance of differing traditions is a prime motivating factor in their church/state jurisprudence. When the issue is acceptance of traditional Christian practices and symbols in public, the Reagan justices tend to be far more supportive of relaxing the separation between church and state.

²² Justice O'Connor cited *Widmar v. Vincent* 453 US 263 as precedent. A state university had banned the use of school facilities for purposes of religious exercise. The Court determined that an equal access policy would not violate the Establishment Clause.

²³ Justice O'Connor relied on *Wallace v. Jaffree*, 472 US 38 (1985).

²⁴ Relying on the Court's decision in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 US 573, Justice Kennedy concluded that the state was not, in fact establishing a religion through financial support or symbols.

Lamb's Chapel et al v. Center Moriches Union Free School district et al

The case involved the policy of the Center Moriches Union Free School District's policy of allowing limited access to school grounds after school hours but disallowing religiously based organizations.²⁵ An evangelical church desiring to show a religiously based pro-family film series was denied access and they then brought suit. Both the District Court and the Court of Appeals affirmed the board's policy citing the reasonableness of their ban.

The majority opinion was delivered by Justice White. Joined by Rehnquist, Blackmun, Stevens, O'Connor and Souter, he reversed the lower court rulings. Since the district board specified religious instruction only, this clearly was an effort to block speech based upon its content and was therefore invalid.²⁶ If the district allowed the film series to be shown, the fact that attendance was open to the community, was not during school hours, and was clearly voluntary would not run the risk of being perceived as a government sponsorship of religion.

Justice Kennedy wrote a separate concurrence. He stressed his view that there did not need to be an appeal at all to anything beyond the First Amendment. "I agree with Justice Scalia that the Court's citation of *Lemon v. Kurtzman* 403 US 602, is unsettling and unnecessary." (508 US 397) Justice Kennedy was prepared to find the policy of the school board invalid based upon its being a violation of free speech with no reference to the Establishment Clause.²⁷

²⁵ New York Education Law 414 authorizes local school boards to establish policies relating to after hours usage of facilities. The board has the right to regulate this policy for ten specific purposes not including religious purposes. The School Board argued that the use of facilities was to be open to organizations promoting the general interests of the community. In their estimation, the showing of a religious film promotes only the interests of Evangelicals.

²⁶ Justice White relied on *City Council of Los Angeles v. Taxpayers for Vincent*, 466 US 789, 804 (1984). The "First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense others." (cited at supra, 394)

Justice Scalia was even more animated in his denunciation of the use of the *Lemon* doctrine in this case.

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District (508 US 398).

Scalia railed against the *Lemon* doctrine citing numerous instances where it is either applied (when the Court wishes to strike down a particular practice), ignored (when the Court wishes to maintain a particular practice), or it is simply referred to as a “useful signpost.” He finally concluded that

As for the asserted Establishment Clause justification, I would hold, simply and clearly, that giving Lamb’s Chapel nondiscriminatory access to school facilities cannot violate that provision because it does not signify state or local embrace of a particular religious sect (508 US 401).

Justice Scalia’s separate concurrence is telling as to his views in the area of the Establishment Clause. He singled out a statement by New York Attorney General Robert Abraham for ridicule. According to the Attorney General,

Religious advocacy serves the community only in the eyes of its adherents and yields a benefit only to those who already believe (supra, at 400).

Justice Scalia was incredulous at such a statement and attacked it from an historical perspective.

That was not the view of those who adapted our Constitution, who believed that the public virtues inculcated by religion are a public good (supra, at 400).²⁸

²⁷ He cited his partial concurrence in *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter* 492 US 573, 655 to demonstrate the unnecessary reliance on the Establishment Clause for this kind of case.

²⁸ Scalia also cited historical examples of agents of the state praising the role of religion in public life. The Northwest Territory Ordinance’s Article III was an example, “religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Scalia also referenced several court cases including *Zorach v. Clauson*, 343 US 306, 313-14 (1952) “When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.” (supra, at 400-1)

Scalia's insistence on the good of religion in public life is indicative of his firm agreement with the agenda of President Reagan and the religious right. His concurrence was a veritable apologia for their positions and in that sense, he was fulfilling everything the president intended.

Rosenberger et al v. Rector and visitors of University of Virginia et al

The Reagan bloc emerged in *Rosenberger* to uphold the use of public funds at the University of Virginia for a religious newspaper. All four Reagan justices, joined by Clarence Thomas made the argument that the denial of school funds from the student Activities fund to the Wide Awake organization which published newspaper on Christian views at Virginia did violate first Amendment freedom of speech grounds.

At Virginia CIO's or Contracted Independent Organizations, must be composed of a majority of full time students with all of the officers full-time. They file their constitution with the university and agree not to discriminate or pose as an official body of the university. Once CIO status is accorded an organization and they fall within a stated category of news and information, they are then entitled to access to the student Activities fund to pay outside contractors for whatever services have been requisitioned by the group.

The Court decided that denying Christian organizations money was improper. Clearly, the university was censoring the organization because of the content of its speech. The university attempted to avoid the conclusions drawn by the Court in *Lamb's Chapel* by arguing that this case involved the use of funds not access to facilities. The Court rejected this argument on First amendment grounds. Content cannot be regulated or discriminated against.

The University prevailed in the circuit Court by arguing that the use of funds led to a violation of the Establishment clause but the Supreme court disagreed. Justice Kennedy addressed this argument in his opinion,

The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life (p.19).

Kennedy went on to argue that if the dissent's view of the law became the majority it would be a threat to free speech.

Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question speech or other wise protected by the Constitution- contain too great a religious content (p.24).

For Justice Kennedy, the fact that public administrators were reviewing student opinions and writings, then judging them as to their philosophical and religious content meant nothing more than an abandoning of the state's neutrality toward religion mandated by the Establishment Clause.²⁹

Justice O'Connor wrote a separate concurring opinion in which she too stressed the point that the government cannot treat people differently based on religion. For Justice O'Connor, the main point in question was the distinction between governmental sponsorship of religion and neutrality. By providing the CIOs to the religious groups, like all other groups, the government was treating them the same and not discriminating. The fact that funding is involved does not excuse content discrimination.³⁰ All four of the Reagan justices agreed that the University was in the wrong in denying access to school funds to the religious newspaper. Justices Souter, Ginsberg, Stevens, and Breyer all dissented from the majority's opinion.

²⁹ Justice Kennedy determined that there was little difference between this case and *Lamb's Chapel*. By providing access to facilities as in *Lamb* or in contracting out to others to provide facilities, as in *Rosenberger*, the state is not sponsoring religion.

³⁰ Justice O'Connor cited *Witters v. Washington Dept. of Services for Blind* 474 US 481 (1986) in which the Court upheld a state financial aid grant to pay the tuition of a blind student as a sectarian theological seminary. In that case, the Court likened the grant to a paycheck of a public servant being contributed to a religious charity.

The Reagan justices' impact on religion in public life issues shifted the Court in the direction favored by Reagan's agenda. Their jurisprudence in the area of taxes and religion was mixed but they extended the use of government funds to religious organizations in *Bowen*. The refusal to extend unemployment benefits in *Smith* does little to show that the Reagan justices were not committed to bringing back religion's role in society. There was a commitment to traditional religion - not pluralism.

Perhaps the most disappointing area for advocates of the Reagan agenda was the failure of the Reagan justices to forge a return of civic religion. Despite the best efforts of at least two Reagan justices, Scalia and Rehnquist, there was a failure to sanction a public prayer at a highschool commencement, maintain a Nativity display on public property, and accommodate the religion of Orthodox Jews. The most successful area for the Reagan justices was in bringing about equal access for religious organizations in schools. They went beyond simply extended protection for after school meetings of campus groups in *Mergens* and embraced the actual extension of government funds to aid a religious organization in *Rosenberger*.

Like the area of abortion, the Reagan justices did not accomplish everything they were expected to bring about. Although less successful than the Nixon justices in the area of law and order, they did at least delay the steadily increasing barrier separating church and state.

CONCLUSION: PRESIDENTIAL AGENDAS AND SUPREME COURT PERFORMANCE

When Dwight Eisenhower nominated Earl Warren to become Chief Justice following the death of Fred Vinson in 1953, he had little reason to believe that his choice would be anything other than a conservative advocate of judicial restraint (Ambrose, 1990 and White, 1982). The President could never have guessed that the former California governor and prosecutor would become the champion of the Jeffersonian liberty principle and advocate of social reform. So influential was Earl Warren's tenure on the Court, that for over two decades conservative Republican presidents would reassure their constituencies by solemnly promising to appoint justices who would help to negate his legacy.

For Richard Nixon, Warren had erred in his efforts to extend the egalitarian liberty principle to criminals. By so doing, Warren and his bloc had upset the balance between societal interests and the rights of the accused. President Nixon, goaded in part by the rhetoric of George Wallace, began moving to the right on the law and order issue in an effort to capture the Alabama governor's supporters. He decried effects stemming from such decisions as *Miranda v. Arizona* and *Mapp v. Ohio*. Such cases were threats to the effectiveness of law enforcement agencies as they struggled to maintain peace in the turbulent streets of the late sixties and early seventies.

Nixon also took issue with the increasing use of busing to achieve racial integration in the nation's public schools. Although himself an opponent of de jure segregation, Nixon was appalled at the extent to which the judiciary was interfering with the local affairs of school boards in their efforts to actualize the goals inherent in *Brown v. Board of Education of Topeka*. His call for judicial restraint was well understood by Southern governors who themselves were caught between increasing federal pressure from above and the backlash from their electorates below.

President Nixon's agenda of curbing the criminal rights revolution while stopping the use of busing had widespread appeal in the South. This so called Southern Strategy was his primary motivation when picking potential justices. He replaced Earl Warren with Warren Burger, after reading an article by Burger criticizing the Warren era legacies in the area of crime. Initially, he tried to fill the vacancy left by Abe Fortas with Clement Haynesworth, a South Carolina strict constructionist. When that effort collapsed, Nixon turned to Florida's G. Harold Carswell in what proved to be an even more humiliating defeat for the Administration. Harry Blackmun ultimately won confirmation to fill the vacancy. Within a year and a half, two more Nixon appointees arrived on the bench, the staunchly conservative William H. Rehnquist, a former law clerk for Justice Jackson, and Lewis F. Powell, Jr., a moderately conservative Virginian and past president of the American Bar Association.

When Ronald Reagan was elected in 1980, he benefited from the careful alliance forged between the Republican Party and the South. Nixon's strategy had been so successful, that even an incumbent from the Deep South could not keep the much vaunted "solid" South from deserting him in favor of a California Republican who embraced their agenda.

Reagan also criticized the Warren Court era precedents and pledged, in keeping with his new alliance with the emerging Christian conservative movement, to restore religion to a central place in American life. He further assured the Evangelical community that the rights of the unborn would be protected and abortion would be restricted. To accomplish his tasks Reagan also had opportunity to appoint four justices. Justices Sandra Day O'Connor, Antonin Scalia, and, following the collapse of two separate nominations, Anthony Kennedy. He also appointed sitting Justice Rehnquist to the center chair.

SUBSEQUENT PERFORMANCE

The central questions of this study are these: (1) did the subsequent performance of the Nixon and Reagan blocs reflect the ideological expectations of their appointing presidents; (2) and what variables interact to effect levels of compliance with the stated agendas? Appendix One contains tables summarizing the voting records of both blocs. They indicate that in all four policy areas, the blocs did, in fact, represent a decidedly more positive viewpoint toward their appointing president's stated agendas. There were, however, varying levels of compliance which must be explained.

EXTERNAL VARIABLES

One avenue of explanation is to examine the interaction between internal and external variables. One such external variable is the potential mobilization of interest groups and public opinion either for or against an issue. Especially since the Court's decision in *Roe v. Wade*, the public has become increasingly aware of the central role the Judicial branch plays in their everyday lives.¹ Public protests in the last two decades have repeatedly targeted the Supreme Court. The Justices are well aware of the public's responses and feelings toward various issues and sometimes they explicitly react to them. Other justices feel that responding to public pressure in this way runs counter to the idea of an dispassionate federal judiciary. Occasionally, the justices debate the issue in their written opinions such as happened in *Casey*. As was discussed in Chapter Seven, the realization on the part of Justices Kennedy and O'Connor that overturning *Roe* would cause societal disruption was at least a factor in their decision to reaffirm its central holdings. Justice Scalia excoriated them for considering the popular response.

¹ Even before *Roe* there was widespread protest over the Court's decisions in the early 1960s which were perceived as being anti-religious. The Warren Court's criminal rights revolution also elicited public consternation by the late 1960s. Neither, however, inspired the mass protests which have become customary every January in the Capitol.

Another external variable is the extent to which the nation's general will comports with the policy area in question. The concept of a general will, expounded upon most famously by Jean-Jacques Rousseau, has confounded political theorists for centuries. Research in the area of political culture can be seen as an effort to pin down empirically the general will and make it tangible. Political culture itself has been variously explained as the broad and general contours which govern a nation's political actions, choices, and policies.² It has also been examined as a more immediate disposition toward broad policy ideas.³ It is stronger than public opinion and should be understood to reflect the nation's historical experiences.⁴

In this study, the use of the term "general will" should be understood to draw upon both Enlightenment political theory as well as current ideas concerning political culture. It is the effort to reach not the temporary majority's conception of the good society, but something a bit broader. It is the perceived way in which the traditional values of America's political and historical experience should be ordered to bring about the good society. In this sense, it is rooted in the past but susceptible to sea changes in the current of American political thought.

For example, equality has been a consistent theme in American history (indeed it appears in our founding document) but it has been variously conceptualized. In the 1900s and into the 1910s, equality, as a value in and of itself, had gained some dominance in the nation's general will. By the 1920s, that dominance had passed. Equality was not then expelled from the pantheon of goals, it

² The Comparative Politics literature is replete with examinations of the effects of political culture. Gabriel Almond and Sidney Verba are but two of the most renowned in area which has often been explored.

³ Wildavsky, 1991

⁴ For example, according to Frederick Jackson Turner's famous thesis, the United States remains the only country in the world to have been effected by a "frontier" mentality to the extent to which we have. This has bred within the nation's political culture an allegiance to negative freedom and individual liberty. On the other hand, however, the United States is a nation of immigrants. This has created a legacy of egalitarianism and connectedness. Granted, the latter impulse is weaker than the individualism but it has manifested itself strongly at various times in American history. Among those times would include: the Progressive era, the New Deal, the Great Society, etc.

simply had to share center stage with individualism which made something of a comeback in that inter-war decade.⁵

Generally speaking, Americans have approached liberty, stability, and equality as values to be balanced. Seldom have they exerted one over the others in any meaningful or profound way for very long. The justices themselves, steeped in the values of the American culture, are in the business of balancing these values. A policy option which accents one of those values in an extreme way will have little chance of being advanced by the Court.

External variables are important and they can have a lasting and dramatic impact on the Court's jurisprudence. It might be imagined that an institution so insulated from the popular culture would be unaffected by perceptions of the general will but this is not the case. Justices on the Supreme Court are rational political actors. The members of the institution recognize that the existence and role of the Court is not legitimated in the same way as are the Congress or the Presidency. The Court does not answer to the electorate. This absence of any direct tie makes indirect links between the Court and the public all the more important. While the members of the Court do not simply follow election returns and are not conventional politicians, they recognize that their decisions must be perceived as legitimate and within the mainstream of American political culture.

INTERNAL VARIABLES

The other set of variables are internal variables or factors germane to individuals and the institution itself. The first internal institutional variable is the record of the Court in the policy area in question. The Supreme Court, like any other institution, is at least partially governed by norms. One

⁵ Indeed the "culture of conformity" in the 1920s can be seen as a different conceptualization of equality. The earlier progressive ideas of equality referred to economic and political equality. In the 1920s, that equality principle had come to be held as an almost stifling sameness in the culture. The novels of Sinclair Lewis and F. Scott Fitzgerald are sharply critical of such a conception of equality. See Durnenil, 1995 for a concise social history of the 1920s. Frederick Lewis Allan's *Only Yesterday: an Informal History of the 1920s* remains a classic examination of the decade.

such norm is the adherence to the doctrine of *stare decisis* or attention to precedence. As an institutional norm, all members of the Court are supposed to be at least aware of the Court's jurisprudence in a given area. Opinions and dissents are generally well laced with citations from previous decisions which bare on the facts of the case in question.

Both Presidents Nixon and Reagan advanced agendas which were a bit contradictory. On the one hand, they both exhaustively advocated judicial restraint and condemned the practice of the Judiciary making the law instead of interpreting it. On the other hand, they were asking their respective blocs of jurists to first reverse and ultimately overturn the jurisprudence of (in Reagan's case) up to nearly two decades of precedence.

Some justices elevated the procedural agenda of their respective presidents while disagreeing on the specific policy proposal. For example, the well known three way majority decision in *Casey* was a monument to judicial restraint. Justices O'Connor and Kennedy both refused to overturn *Roe v. Wade* which was, by that time, nearly two decades old. Their fellow Reagan appointees, Rehnquist and Scalia, condemned their colleagues for their unwillingness to overturn even bad precedents. This variable of *stare decisis*, closely associated with the notion of judicial restraint, really depends on the way in which a particular justice interprets the role of a jurist.

The other major internal variable deals with the interaction between the president and the nomination process itself. In other words, has he chosen a jurist who is committed to the ordering of values in the same way in which he is. At times a president can select a nominee who is consistent with the current ordering of values in the society at large, is sensitive to public pressure and larger external impact, is committed to judicial restraint and shares the president's ordering of values. When this occurs, the president receives a satisfying return from the bench. William Rehnquist for Nixon and Antonin Scalia for Reagan stand as paragons of accurate prediction for their respective presidents.

Finding the right nominee who will adhere to the president's expectation while on the Court is difficult enough and as time goes by, the chances of the justice remaining solidly in line tend to

diminish a bit. The justice may come to be affected by the variables in different ways and begin to exhibit alternative approaches to the law. Such was the case with Nixon's appointment of Justice Blackmun. Although Blackmun deserted Nixon's agenda in nearly every area, he remained at least somewhat steadfast on the issue of law and order.⁶ He also remained rather skeptical of busing and returned one major vote against the extension of the practice in *Milliken v. Bradley*.

The internal and external variables rise and fall in intensity according to the justice in question. To understand fully the legacy of the Nixon and Reagan blocs, a closer recapitulation of their records is necessary.

THE NIXON JUSTICES

THE ISSUE AREA OF CRIME

Richard Nixon, as pointed out in Chapter Two, centered his 1968 quest for the presidency around two issues - peace in Vietnam and "law and order." His chance to alter the balance of the Court in favor of the latter issue was presented almost immediately with the retirement of Chief Justice Warren. The president's four ultimate appointees demonstrated no greater cohesiveness as a bloc than in the area of crime. In thirteen out of fifteen major cases dealing with the issues of searches and seizures and arrest/interrogation, the justices emerged as a law and order bloc. In the one case where they failed to deliver a blow to the Warren based precedents, they restrained as a bloc.

What accounts for this remarkable level of unanimity? Much of it can be attributed to a favorable array of positive variables. From the standpoint of the first external variable, the wider political ramifications of their decisions, the public was overwhelmingly supportive of their

⁶ By the time Justice Blackmun announced his retirement from the bench, he had become a firm opponent of capital punishment thus abandoning the last remaining area where he remained consistent with the Nixon plan. (Justice Blackmun announced his firm opposition to capital punishment in a Nightline interview with Ted Koppel on November 18, 1993).

jurisprudence and its outcome. Crime had become an issue with such potent saliency that Richard Nixon relied on it as his premiere domestic issue in 1968. Lyndon Johnson had bowed to political pressure in granting support, albeit reluctantly, to the Omnibus Crime Bill of 1968.

Unlike issues such as abortion or religion in public life, there was no real constituency prepared to mobilize in opposition to the Court's directives. Accordingly, the Nixon justices carried out a campaign to curtail the effects of the Exclusionary Rule in numerous contexts. A notably disconcerted Justice Brennan wrote in his dissenting opinion in *Stone v. Powell*, that the majority, in which all four Nixon justices were a part, was about the process of destroying the Exclusionary Rule for all intents and purposes.

The second external variable was also conducive to Nixon's getting what he wanted from his justices. The state of the nation's general will did not offer broad support to the notion of expanding prisoner's rights to any great extent. The Warren Court's decisions strengthening the Exclusionary Rule and requiring prisoners to be verbally informed of their rights at the time of their arrest were reflective of an era in which the egalitarian impulse was at its apex. The Sixties was a decade in which a host of egalitarian movements such as women's rights, civil rights for African-Americans, justice for Native Americans, student movements, and the anti-war movement all merged to have a broad based impact on the way in which the country felt toward the less powerful. The Warren Court's revolution from the bench occurred in the midst of this cultural revolution.

By the 1970s, however, the country's reformist impulse was spent. As Kevin Philips' book *The Emerging Republican Majority* predicted at the outset of the decade, the Seventies was to be a time of political retrenchment. The middle class was exerting itself in response to the previous decade via such events as the tax revolt in California, the overwhelming reelection of Nixon in 1972 and the rise of national politicians like Governor Ronald Reagan who nearly took the Republican presidential nomination away from an incumbent moderate. The external support for criminal rights expansion was simply nonexistent.

Indicative of this broad based conservative movement, the thin majorities which had sustained the Warren era decisions simply evaporated. Non-Nixon justices who had offered counter-arguments in seminal criminal rights cases in the Sixties witnessed their dissents becoming majorities. In the cases in which the Nixon justices voted as a bloc to diminish the effects of the Exclusionary Rule, Justice Stewart joined them 75% of the time while Justice White joined the Nixon bloc 78% of the time. This ranked them just below Justice Blackmun who voted conservatively 87% of the time in criminal cases.

Given the widespread support for rolling back criminal protections, the question could be posed, why, if the external variables are so high, did other non-Nixon justices not fully join in the counter-revolution. The answer can also be used to explain the remarkable cohesiveness of the bloc itself - internal variables.

Essentially, several of the non-Nixon bloc of justices simply did not order values in the same way in which the Nixon justices did. Justices Brennan, Marshall, Douglas, and Stevens all elevated the value of individual liberty above the societal value of stability. In this sense they were more Jeffersonian and less Burkian. Each of the Nixon justices, on the other hand strongly adhered to the value of societal stability. They demonstrated time and again that the right of the state to obtain a conviction and therefore, presumably, make society safer, outweighed the notions of protecting the individual from having his liberty violated.

The other internal variable, the adherence to judicial restraint and the doctrine of *stare decisis*, also effected the justices differently. Unlike the Court's decisions in the area of equal protection for blacks, the area of crime was a divisive issue for the Court and the record indicates that. Both *Mapp v. Ohio* and *Miranda v. Arizona* lacked what the civil rights cases had - unanimous Court decisions. In the former case, the Court divided 6-3 with strong dissents from Justices John Marshall Harlan, Charles Whittaker, and Felix Frankfurter. In the important case *Chimel v. California*, Justice White characterized the entire area of search and seizure as "unstable."

The Court was deeply divided by *Miranda v. Arizona* where four justices dissented from the central finding of the Court. Even the Warren Court retreated from the broad expansion of rights to criminals in *Terry v. Ohio* when they upheld the frisking of a suspicious individual by the police. In essence, the record of the Court before the Nixon justices arrived was nowhere nearly as settled as other areas. There had been deep division and even hints of reversal by the end of the Warren years.

Rolling back the criminal rights revolution is Richard Nixon's greatest Supreme Court legacy. With public opinion behind the Court and the larger question of the nation's political attitudes in support as well, the external scene was set for the Nixon justices to fulfill the goals of the Southern Strategy. The internal restraints, such as having an area essentially settled, was lacking. The only variable standing between the President and getting everything he wanted was the internal ordering of values of the justices themselves. In that regard, Nixon had chosen wisely for he had selected individuals who shared his general vision. There were no Nixon Justices who shared the patently libertarian emphasis of Justices Brennan, Marshall, and Douglas who were fundamentally committed to the elevation of liberty over stability.

THE ISSUE AREA OF BUSING

As noted above, Nixon had little or no reason to be disappointed in his nominees in the area of crime. Busing, however, was something of a different story. When looked at with no interpretation, busing seems to be the area where the appointing president had the most to regret. With the exception of *Milliken v. Bradley*, the Nixon bloc did not emerge as a bulwark against busing. In fact, Chief Justice Warren Burger had actually written the Court's opinion in the landmark *Swann v. Charlotte-Mecklenburg* case of 1971. Later, in both *Keyes v. School Dist. No. 1 Denver, CO.* and *Dayton v. Brinkman* the Chief Justice refused to take as hard a line toward busing as did Justice Rehnquist.

Only Justice Rehnquist charted an unswerving course condemning as disruptive and overbearing the federal policy of judicially mandated busing. Following *Keyes*, Justice Powell emerged as a consistent and determined opponent of busing as well. Justice Blackmun, however, charted a course that separated him from his fellow Nixon appointees and supported busing in three out of the four major cases. Overall, the Nixon bloc rated a 2.43 on the 3.00 scale as opposed to the near perfect 2.85 in the area of crime. Despite the disparity, Appendix Two demonstrates that the Nixon bloc's jurisprudence in this area too was significantly different than the non-Nixon justices. A comparison of the state of the variables as relates to busing against those relating to crime reveals that the consensus against busing was not nearly as pronounced as it was against crime. With that in mind, the numbers, therefore, should be lower.

As concerns the external variables, they provide strong support for the Nixon position although less than in the area of crime. Unlike criminal rights, there was a very vocal movement supporting the practice of busing to achieve racial integration in the schools. By the 1970s, the Civil Rights Movement of the 1960s had moved in from the streets and established itself as a powerful force in the lobbying halls of congress, the legislatures and the ballot box. The nature of equal protection cases differs from other kinds of cases in that they often present a powerful moral point. There is a tone of "we must do our duty" in the pro-busing opinions of Justices White and Brennan as they repeatedly make the arguments that the Court should not stray from the course upon which it embarked in 1954.

The idea that blacks have been denied the full measure of constitutional protection throughout the preponderance of American history is not an ideological debating point, it is a fact of history. As such, there is the recognition on the part of the justices, especially apparent in the earlier cases, that they labor over the questions of busing from beneath the burdens of history.

The Nixon justices, on the other hand, often took a different approach. Justice Powell repeatedly argued in his dissents that the Court had an obligation not to alienate the masses of

suburban America who were liable to interpret continued Court actions in this area to be tyrannical and intrusive. Powell's busing decisions, like Brennan's and White's, looked outside the Court to prognosticate about the possible effects and ramifications of the Court's decisions. In this sense, like them, he was reacting to external pressures even though he arrived at a different conclusion.

The first external variable - potential for mobilization against or for a proposed judicial remedy - was a far more mixed proposition than the Court's decisions in the area of crime. The second external variable, the state of the general will, also posed some dilemmas for the Nixon agenda. The 1970s was a time of change for the state of the general will. No longer did the egalitarian liberty principle articulated by the Warren Court hold supreme sway in the country. Replacing it was a resurgent individualism but this should not be overstated. While the liberty principle was in retreat in the face of the prevailing desire for stability, there is little escaping the fact that the country's ideas of equality and liberty had been fundamentally altered by the counter culture of the 1960s. There was still an air of commitment toward standardizing the nation's social structure although it was not as powerful as a decade before.

When one examines the external variables affecting the Court's votes on busing, it is clear that there were some cross-pressures. Forces were poised on either side of the issue in the general public. The general will, while definitely moving away from embracing overarching solutions to the nation's social ills, was yet to reach the fever pitch of individualism which would manifest itself in the 1980s. The mixed nature of the external variables helps to explain the fact that Nixon was not as successful in busing as one would automatically assume he would be. Stronger obstacles presented themselves, however. These were the internal variables.

With the exception of Justice Potter Stewart, the Nixon bloc failed to attract the other members of the Court to the Nixon agenda. This was in marked contrast to the area of criminal justice where the variables posing as obstacles to the agenda were very weak. Even one of the members of

the Nixon bloc, for all intents and purposes, abandoned the principles of the agenda which he was sent to uphold. The internal variables shed some light as to why.

In the area of civil rights and equal protection, the Court had demonstrated an unanimous front in the fight against segregation. Earl Warren won enormous kudos from supporters for his much vaunted efforts to achieve total harmony on the Court in *Brown*.⁷ By the time the Court arrived at *Swann v. Charlotte-Mecklenburg*, this legacy of conformity on the bench was so powerful as to discourage Warren Burger from "going it alone" and dissenting.⁸ To control the opinion, he wrote for the majority. In *Wright v. Emporia* and *Keyes*, the pressures against dissenting were still so great as to affect all but William Rehnquist. When the Court has established such a unique consensus in an area, efforts to break away from it are discouraged from inside the institution itself.

A part of this internal pressure against dissenting is the federalist power principle. Since John Marshall occupied the office of Chief Justice, the Court has been conscious of its place within the federal scheme of things. As evidenced in *Marbury v. Madison*, Marshall did not want to over extend himself and be ignored by the citizenry. His worst fears would come to be realized nearly three decades later in *Georgia v. Worcester* when President Jackson ignored the Marshall Court's efforts to protect Native Americans in Georgia.

Over a century later Charles Evans Hughes protested to Senator Burton Wheeler when President Roosevelt sought to impose his Court packing scheme. The point is this, the Court must, like all branches, protect its power against the perception that its power is an illusion. For the Supreme Court to stop abruptly in the early 1970s and reverse itself and therefore come across as abandoning its high profile commitments since 1954 would have sent a message that the Court had reached the limits of its power. The pressure to avoid such a display helps explain why Nixon did not get a perfect outcome from his bloc.

⁷ See Kluger, 1976 for an in-depth examination of the Supreme Court's decision in *Brown*.

⁸ As pointed out in Chapter Four, the failure to illicit the support of Justice John Marshall Harlan convinced Burger that dissenting was not an option.

The point remains, however, that the Nixon justices did pledge themselves to slowing the process of busing and attempted to hand more power back over to the school boards. As a whole, the Nixon justices rated a 2.43 on the 3.00 scale while the non-Nixon justices rated only a 1.25. The rating by the non-Nixon justices in busing was lower than any other policy area. The fact that there was such a span between the Nixon and non-Nixon justices is testimony, however, to the power of the remaining internal variable - the ordering of values.

Presidents recognize that finding the justices who share their values is crucial. As detailed in the introduction, presidents have employed numerous indices in hopes of gaining a glimpse into the ideology of their potential nominees.⁹ While this variable may seem to be intuitive, in reality there is far more to it than that. As Justice Felix Frankfurter demonstrated, simply sharing the ordering of values of the appointing president is no guarantee that institutional considerations, such as the proper role of a judge, will not intervene to render a most unexpected result.

In the case of the Nixon bloc, the internal variable of value ordering was decisive. Rehnquist and Powell both warned that continued judicial interference with local school board policy would result in the white middle class abandonment of the public school systems leaving only the working and underprivileged classes left to the fill public school desks.

Even Warren Burger's majority opinion in *Swann* is cautious and his concurrence in *Dayton* reads more like a dissent. Only Justice Blackmun seems comfortable with federal judicial directives in the area of busing. While Blackmun did start out on the side of the old Warren bloc in *Keyes*, he joined his fellow Nixon appointees in *Milliken* as they rejected a multi-district solution for a one district problem. Why the change in Blackmun's later busing opinions?

Harry Blackmun's time on the Court can not be understood without fully realizing the impact *Roe v. Wade* played on him. From the mid-1970s through to the end of his tenure, his majority opinion and the resulting firestorm seemed to have decoupled him from his fellow members of the

⁹ Presidents have appointed friends, partisan allies, and judges from lower courts in hopes of gaining some insight. See Chapter One.

Nixon bloc. Blackmun evolved from a moderate defender of equal protection to an unmistakable advocate of extending governmental protection to minorities.

Blackmun's would become a record of supporting the notion that race based classifications are not necessarily invalid in *University of California v. Bakke*. He dissented from the Court's retreat from that principle in *City of Richmond v. J.A. Croson Company*, 488 US 469 (1989). Although he had joined the majority opinion in *San Antonio Independent School District v. Rodriguez*, 411 US, 1 (1973) early in his tenure, he joined the Court's majority in declaring that illegal immigrants cannot be denied public school access in *Plyer v. Doe*, 457 US 202 (1982). A partial review of Justice Blackmun's opinions in equal protection matters reveals that following *Roe*, he embarked on a leftward trek which ultimately would lead to him to join O'Connor's opinion in *Bray* that women seeking abortions were a suspect class.

The point is that Justice Blackmun's entire equal protection jurisprudence was altered because he changed the way in which he ordered values. Among the Nixon bloc, such changes were sui generis to Blackmun. His opinions in the area of school busing, when placed within the context of other equal protection cases makes more sense. When the Nixon bloc's jurisprudence in the area of school busing is controlled for Blackmun, it goes from 2.43 to 2.68, making it second only to crime in the four areas considered.

ASSESSING THE BLOC'S CONFORMITY WITH NIXON'S AGENDA

Richard Nixon had little to complain about when reviewing the legacy of his Supreme Court nominees. In the area of crime, without exception, Nixon's justices were the most willing to curb the effects of the exclusionary rule and grant wider discretion to the police. Granted, theirs was an easier task in this area due to both favorable external and internal variables but nevertheless, few presidents have achieved so remarkable a level of consistency and conformity from individual justices let alone an entire bloc.

The area of busing brings somewhat more muted praise. Busing was an issue critical to the success of Nixon's "Southern Strategy" but the variables in this venue, however, made the level of compliance demonstrated in the area of crime much more difficult to imitate. Factors such as a divided public, the transitional nature of the general will, institutional restraints, and the rearranging of value-ordering demonstrated by one justice all left the agenda somewhat unfilled by the Nixon bloc. Even so, in the four major cases examined in the study, the Nixon justices provided eleven of the twelve anti-busing votes cast. This is significant of a gulf separating the Nixon justices from their counterparts on the bench.

THE REAGAN JUSTICES

THE AREA OF ABORTION

Since 1973, no single issue has consumed more of the time of average citizens than whether or not women have a right to obtain an abortion. The Supreme Court has had to deal with a host of issues related to the question such as just how much can the state regulate the access of adult women to the procedure? What standards are necessary for the state to protect its interest in the affairs of minors? Issues such as these form the contours of the national abortion debate.

Ronald Reagan frequently vocalized his opposition to abortion. His efforts to reach out to the Religious Right were often sprinkled with references to what he perceived as the mistaken holdings of *Roe v. Wade*. Even after four Court appointments, however, abortion remained a legally recognized right. His bloc failed to demonstrate the same level of consistency displayed by the Nixon bloc with regard to crime. It was a mixed bag at best for the President. The Court, with two of Reagan's justices leading the way, had legitimized state efforts to place restrictions on access. In this sense, the Reagan bloc did at least curb free and easy access to the procedure.

Unlike the issue of crime, abortion was fundamentally divisive. The heart of its potency as an issue lay in the fact that it pitted age old ethical judgments against the recent trends supporting the emergence of equal rights for women. Washington, D.C. itself became the battle ground for abortion in the 1980s as thousands of supporters and opponents periodically descended on the capital to express their views.

The political parties had chosen opposite sides of the issue as the Republicans proclaimed the need for a constitutional amendment banning abortion while Democrats argued that it was a question of equality and fairness. With this turbulent backdrop for the debate, the Reagan justices assumed their positions to hear, as a bloc, eight major cases dealing with the issue.

The other major external variable is the state of the general will. Perhaps more than in any other area, the general will toward abortion is difficult to discern. On the one hand, the American people have seemed apprehensive at best about the subject. Unlike other rights, such as the right to free speech or religion, rhetoric during the 1980s and 1990s suggested making the right to an abortion a "rare" right. This indicates an ambivalence toward the whole question in the sense that few people would advocate making such rights as freedom to religion or speech "rare."

As reluctant as the American people seem to be when dealing with the issue, they have made it relatively clear that they do not wish to see the option of abortion disappear all together. No election cycle better illustrated this than the 1989 gubernatorial races in Virginia and New Jersey in which prolife candidates changed their positions in an effort to compete with prochoice opponents.¹⁰ The result in both cases was the individual candidate with the consistent record of support for abortion rights was the victor. Efforts on the part of antiabortion groups have failed sufficiently to stir the American people to demand any tampering with the constitution in order to alter the current state of abortion laws.

¹⁰ In Virginia the race was for governor and pitted Douglas Wilder, a defender of choice, against Marshall Coleman who had changed his position on the issue. The New Jersey Senate race was between Jim Florio, a defender of choice, and Jim Courter, who abandoned his pro-life views.

What then can be made of the intellectual and ethical stalemate in the area of abortion. Apparently, the electorate experiences cognitive dissonance when contemplating abortion. As discussed in Chapter Six, those who want to ban abortion outright and those who seek to maintain abortion as a constitutionally guaranteed right under all circumstances are concentrated on either end of the issue spectrum. The great mass of the American people fall in between these two extremes. They seldom actually vote on the issue of abortion but are usually willing to support certain kinds of regulation. In many ways, this somewhat muddled general will was reflected by the record of the Reagan justices, especially Justices Kennedy and O'Connor.

The external factors tend to illustrate the volatile nature of the issue of abortion. There were groups mobilized on both sides of the issue. The extremes were unlikely to be satisfied with any policy route short of the one they espoused. This more or less neutralized the first external factor of potential group mobilization. The general will, or societal ordering of values, did bring the issue somewhat more into focus and provided an avenue of resolution which the Court ultimately utilized. In responding to this general will that a woman had a limited right to an abortion, Justices Kennedy and O'Connor were chastised by their fellow Justices Scalia and Rehnquist. The external factors themselves, however, are not sufficient to explain why the Court adopted the middle posture in the area of abortion. The internal variables also pointed in that direction as well.

The first internal variable to consider is whether or not there were any major institutional restraints which ran contrary to President Reagan's agenda. The most important institutional variable to consider is the Court's precedence in the area. The Court had, of course, begun its actual involvement in the issue of abortion in the landmark 1973 case, *Roe v. Wade*. That opening event, however, has often been misunderstood as sanctioning the unfettered right of a woman to obtain an abortion whenever she deems necessary. That is not accurate. The case established the trimester system and invited state governments to interpose their own restrictions following the first trimester of pregnancy.

Although the Court struck down efforts at regulation in the 1970s, it began backing away from its staunch support of abortion rights in the early 1980s.¹¹ By the time the Reagan bloc began hearing cases in the mid to late 1980s, the question of just how much the state could regulate access to abortion was as yet unsettled. Therefore, the adherence to precedence so strongly stressed in the doctrine of judicial restraint was not in play very much in this instance.

What was consistent about the Court's abortion jurisprudence by the time the Reagan justices sat as a bloc, was that the central tenant of *Roe v. Wade*, that a woman had a limited right to an abortion, had been repeatedly reiterated. In that sense, Reagan Justices O'Connor and Kennedy were well within the established currents of precedent when they participated in the joint decision with Justice Souter in *Casey*.

The state of the general will and the external variable of potential political disruption combined with the state of the Court's jurisprudence in the area of abortion all point to the middle course ultimately adopted by two of the Reagan justices. They have much less explanatory value then for the remaining two Reagan appointees, Justice Scalia and Chief Justice Rehnquist. Their unflagging opposition to abortion rights jurisprudence can only be explained through the final variable of ordering values.

Scalia and Rehnquist supported both parts of the Reagan agenda, a greater tolerance for traditional religion in public life and opposition to abortion. The common value which they heralded in both areas was the Burkian principle of stability. Edmund Burke argued that history must be allowed to take its course. Sudden changes and revolutionary movements have unforeseen consequences which result in chaos and, taken to the extreme, societal collapse and the rise of

¹¹ The Court struck down abortion regulations in *Planned Parenthood of Central Missouri v. Danforth*, in 1976 and in *Bellotti v. Baird* in 1979. By 1983, however, the Court was changing. In *Planned Parenthood v. Ashcroft* the Court upheld a parental consent law which featured a judicial bypass procedure. The Court struck down an Ohio ordinance, however, in *Akron v. Akron Center for Reproductive Health* when it decided that the requirements posed an undue burden on women.

barbarism.¹² Accordingly, changes must be made slowly and carefully so as not to disrupt the order and stability which is so crucial to a properly functioning social order.

One finds this kind of caution echoed in the dissents of Justice Scalia in *Webster* and *Casey*. He repeatedly warns that the Judiciary should not be in the area. It must be left to the states. Whereas one might make an effective argument that O'Connor and Kennedy were the greater harbingers of stability given their efforts not to disrupt the status quo in *Casey*, Scalia's response is that it is the presence of the Court which is fueling the controversy of abortion. When the states were slowly working out the extent to which they would allow abortion prior to the *Roe* decision, there was controversy but not vast societal schisms.¹³

Just as in the area of religion, the Court does not need to interpose itself between the people and the lower mediating institutions. To do so only brings about a heightened sense that a solution is being artificially concocted and pushed down the throats of the American people such as the unfortunate efforts to fashion a judicial solution to slavery in *Dredd Scott*. Such were the foundations to the thinking of Scalia and Rehnquist. This internal ordering of values was enough to push them further to the right than the general will or the precedence of the Court would ordinarily have led them. President Reagan found his ideal justices in Scalia and Rehnquist.

RELIGION IN PUBLIC LIFE

The First Amendment poses quite a task for the Congress. It posits that neither shall there be an established religion nor will the state attempt to interfere with the individual practice of religious conviction. To comply with these two equally compelling aspects of the amendment requires a

¹² Burke of course had in mind the "Terror" which gripped Paris upon the rise of Maximillian Robespierre.

¹³ For a full discussion of legislatures to work out the legality of abortion prior to *Roe*, see Tribe, 1990.

tremendous balancing act which brings the internal variables associated with institutional constraints heavily into play.

The Reagan justices arrived on the Court at a time of great religious change in America. As detailed in Chapters Five and Seven, the traditional mainline Protestant churches were in marked decline while Evangelicalism swept the Christian community. Accompanying this radical shift in American religious life was an increasing politicization of the members in the pew. Awakened by what their ministers lamented as the moral decadence of the country, they strove to fill the ballot boxes with votes favoring a return to a traditional albeit idealized nation. The Supreme Court was a major center of focus for the emerging Religious Right because of its decisions banning state sponsored prayer and Bible reading in the classroom and the legalization of abortion. Like the Nixon justices before them, the Reagan justices were supposed to correct the mistakes of the past.

As in abortion, the Reagan justices failed to match the kind of reversal wrought by the Nixon bloc in the area of crime. In a pattern much more reminiscent of the Nixon bloc's jurisprudence in the area of busing, the Reagan justices failed to secure a place of protected hegemony for traditional religions. They did manage, however, to articulate a favorable position toward that end even if they were largely unable to extend their views to the majority.

The role of religion in public life is a complex issue. On the one hand, philosophers as diverse as Hobbes, Nietzsche, Marx and Plato have recognized that religion has the potential of playing a stabilizing role in society, legitimating institutions and providing a cohesive influence upon society's sometimes diverse populations. This attitude made itself particularly manifest in the 1950s as the so called civic religion of America exerted itself in bringing the nation together in the face of communist competition.

The following decade, however, the country underwent nothing short of a cultural revolution in which the traditional "have-nots" revolted against the status quo. Students, African-Americans, Native-Americans, women, and homosexuals took to the streets as the egalitarian impulse rose to the

fore of the American general will. The resulting pluralism posed a daunting challenge to the traditional mainline Protestant, Roman Catholic, and Jewish influence on the American culture.

The task for the Reagan justices was to get the genie back into the bottle so to speak and return the civic religion to its role as a stabilizer of the American culture. As pointed out in chapters Five and Seven, the battle lines within the contemporary society were drawn with the secular-pluralistic vision on one side and the advocates of increasing the role of traditional religion on the other.

The first external variable, the potential effects on immediate politics, again posed a mixed picture. Both abortion and the role of religion in public life are extraordinarily controversial. When looking out into the nation at large, the Court was presented with the familiar picture of whichever way they chose to direct the country, there would be political mobilization to oppose their actions. The first variable provided them with little direction.

The situation presented was not like abortion, however for unlike that controversial area, the justices were not posed with the unenviable position of reversing what the Court had already determined to be a right. In other words, the Court had already endured the heat of public attack in the early 1960s. Simply to reaffirm those earlier precedents would not be perceived as negatively as a reversal of abortion rights which would have been viewed as an assault on personal liberty.

The second external variable, the broader concept of societal value ordering or the general will, offered at least some direction. Again, as has been discussed in more detail in chapter Five, the rise of the Religious Right and demand for a civic religion is related to the crisis of authority and universal standards following the cultural revolution of the 1960s.¹⁴ Many middle class Americans lamented their loss of status as a result of the Vietnam War era. They longed for the days when social

¹⁴ See E.J. Dionne, 1993, and James Davison Hunter, 1991 for full discussions.

convention and cultural norms were largely unchallenged. This strong desire often exhibited itself as religious revival.

Not all middle class Americans, of course, allowed their frustration with the status quo to become tangled up in religious rhetoric. They were, though, sympathetic to many of the demands of the Religious Right. The resulting mix of values had a unique effect on the state of the general will by the late 1970s and early 1980s. There was a strong desire for order and stability in the realm of cultural issues and a concomitant desire for economic libertarianism.¹⁵ Both can be explained as an embracing of Burkian ideas and Hamiltonian goals.¹⁶

The Religious Right's desire to reassert order through religion produced a dual response from much of the middle class. They embraced the goal of order but remained true to the historical reluctance of Americans to "establish" a religion. The result was that the second external variable of the general will was as muddled as the first external variable of political activism and potential impact. Like the issue area of abortion, external variables were little help in furnishing the Reagan bloc with the needed support in reversing the trends of recent years.

The first internal variable deals with institutional restraints which may have served to impede the Reagan agenda. The most obvious institutional restraint, and one which posed a dilemma in each of the areas under consideration, was whether or not the adherence to precedence was a significant factor. Could the area of religion in public life be perceived as having been settled by the time the Reagan justices took their seats? The answer to that question is definitely no.

¹⁵ An example of this declining interest in the egalitarian social impulse was the failure to pass the Equal Rights Amendment. The tax revolt in California followed ultimately by the massive Reagan tax cuts of 1981 demonstrate a general will moving in the direction of economic libertarianism.

¹⁶ Alexander Hamilton, unlike the early Jeffersonian Republicans, perceived the most likely threat to American liberty to be not the danger of the few but the overpowering effects of the many. He therefore proposed a government of "the wise, the rich, and the well born" to temper the passions of the masses. Accordingly, he urged the federal government to adopt measures which were economically advantageous to the richest citizens and social policies which encouraged passivity among the laboring and agricultural classes.

As a sign of the increasing pluralism present in American culture, the Supreme Court embarked on its controversial journey of maintaining the general separation of church and state with its decision in *Abington v. Schempp*. It fleshed out a judicial test the following decade in *Lemon v. Kurtzman* but by the early 1980s seemed unwilling to abide by it.¹⁷ By the time the Reagan justices sat as a bloc, the issue was open for reconsideration.

Throughout the opinions of Justice Scalia there is a derisive tone reserved for *Lemon*. He even compared it to a "late night ghoul for a horror film" at one point. Yet again, Scalia emerged as the most stalwart advocate of the Reagan agenda of lowering the wall between church and state. Chief Justice Rehnquist was not far behind. As in the abortion area, however, Justices O'Connor and Kennedy reasserted the *Lemon* doctrine and upheld comparatively strong delineation's between church and state.

Justice Kennedy and Justice O'Connor both illustrated a willingness to respond to the short term external impact of their decisions rather than the more permanent adherence to their own ordering of values. They bowed to precedence and avoided a wholesale reversal which would have again elevated traditional religion to its place as the civic religion.

Once Justice Blackmun's opinions are controlled for in the criminal justice area, Reagan's efforts to restore traditional civic religion received the least support from his nominees (2.53). Why did Reagan have less success in his areas of abortion and religion in public life than Nixon had in his area of crime. Clearly, the presence of favorable circumstances for the Nixon agenda aided his bloc in completing their counter-revolution in criminal rights. There was little in the way of public disapproval and in fact widespread bi-partisan support for rolling back the Warren era precedents.

¹⁷ Chapter Seven discusses the so called *Lemon* doctrine. For a succinct discussion of the Burger Court's retreat from *Lemon* in *Marsh v. Chambers* and *Lynch v. Donnelly*, see Stephens and Scheb, 1993.

The general will had altered since the 1960s. The egalitarian ethos was giving way to a sense of middle class frustration with the extent to which attitudes and circumstances had changed.¹⁸ The record of the immediate past on the issue of criminal rights was by no means a unanimous or even one strongly supportive of the expansion. Finally, the Nixon administration did a very competent job finding nominees whose value ordering comported very well with Nixon's. In short, all of the variables pointed to compliance.

In the areas of busing, religion in public life, and abortion, the record was much less clear because the variables were less favorable for the Presidents. Both Presidents found individuals whose value ordering mirrored theirs in these areas but other factors intervened to alter what otherwise may very well have been more favorable outcomes. Even though neither Nixon nor Reagan received all of what they wanted in the three other areas, their nominee blocs, without exception, were more favorably disposed than the other members of the Court toward their agendas.

IMPLICATIONS

Laurance Tribe called it "The Myth of the Surprised President," the idea that presidents at times fail to get what they want. This notion deserves much attention because the appointing of justices by elected Presidents and confirmation by elected senates is the one link the Supreme Court as an institution has with democratic theory. To agree with Professor Tribe's assertion is comforting to advocates of democratization for it indicates that there are links, albeit very indirect ones, among the ballot box, presidential expectations, Court composition, and ultimately policy output.

¹⁸ There are discussions of the dramatic change in economic fortunes since 1973 in a host of works the best of which are Krugman's *Age of Diminished Expectations* (1992), Madrick's *The End of Affluence* (1995), Schlostein's *End of the American Century* (1989), and Philips' *Boiling Point: Democrats, Republicans, and the Decline of the Middle Class Prosperity* (1993). In that year, the American economy seemed to reach its limit with growth. As the middle class came to regard classes below them as economically parasitic, they ceased their benevolent calls equality and instead began thinking in terms protecting their economic influence.

This study concludes with the assessment that it is difficult simply to classify an agenda in concrete terms, compare the output and then give a definitive up or down answer as to compliance. If one holds to the notion that Nixon wanted *Mapp* and *Miranda* overturned and busing as a policy abandoned, then his efforts to shape the Court were failures. Likewise, if one holds to the notion that success for Reagan entails a reversal of *Roe* and a return to an intimate relationship between the state and religion, then Reagan too, was a failure.

These rigid definitions of success and failure do not tell the real story, however. In fact, both Nixon and Reagan did shape the policy direction of the Court. Their respective nominees without exception formed the most solid blocs of support for their appointing president's programs. Granted, they failed to achieve the perfect designs of the agendas but they did have an impact. For Nixon, it was in the area of crime where he could claim the most success. Success rates after that fell as the variables became less favorable.

Presidents make appointments to the Supreme Court based upon ideological expectations. As in virtually every other area, they can expect some level of compliance but perfect accord comes only when external factors provide a favorable backdrop and internal variables sustain no crucial disincentive toward the agendas.

As the members of the Court who were not appointed by either Nixon or Reagan show, favorable external variables alone will not bring about a Court in line with the current president's agenda. As Justices Blackmun, Kennedy and O'Connor illustrate, simply finding someone who shares the general outlook of the president in the ordering of values is not enough. Generally speaking, the Court is linked to the democratic process in that individual justices tend to resemble, at least in approximation, the expectations inherent in the agendas of appointing presidents. Fulfillment of the agenda, however, is dependent upon favorable variables across the board. The Supreme Court, then, must be viewed not as a body on the periphery of the national debate, but as deeply emersed in the

immediate concerns of the nation's politics. It is this relationship, albeit tangential when compared to the other two branches, that allows the Court to maintain legitimacy in a democratic society.

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APPENDIX

3 - In accord with the agenda of Nixon/Reagan

2 - A partial agreement with the agenda of Nixon/Reagan

1 - A vote which represents a disagreement with the agenda of Nixon/Reagan

CHAPTER THREE: THE EXCLUIONARY RULE

Schneecloth v. Bustamonte

Burger	Blackmun	Rehnquist	Powell	Douglas	Brennan	Stewart	White	Marshall
3	3	3	3	1	1	3	3	1

Oregon v. Elstad

Burger	Blackmun	Rehnquist	Powell	Brennan	White	Marshall	Stevens	O'Connor
3	3	3	3	1	3	1	1	3

Moran v. Burbine

Burger	Blackmun	Rehnquist	Powell	Brennan	White	Marshall	Stevens	O'Connor
3	3	3	3	1	3	1	1	3

Edwards v. Arizona

Burger	Blackmun	Rehnquist	Powell	Brennan	Stewart	White	Marshall	Stevens
1	1	1	1	1	1	1	1	1

Rhode Island v. Innis

Burger	Blackmun	Rehnquist	Powell	Brennan	Stewart	White	Marshall	Stevens
3	3	3	3	1	3	3	1	1

Oregon v. Haas

Burger	Blackmun	Rehnquist	Powell	Douglas	Brennan	Stewart	White	Marshall
3	3	3	3	0	1	3	3	1

Michigan v. Tucker

Burger	Blackmun	Rehnquist	Powell	Douglas	Brennan	Stewart	White	Marshall
3	3	3	3	1	3	3	3	3

Massachusetts v. Shephard

Burger	Blackmun	Rehnquist	Powell	Brennan	White	Marshall	Stevens	O'Connor
3	3	3	3	1	3	1	2	3

United States v. Knotts

Burger	Blackmun	Rehnquist	Powell	Brennan	White	Marshall	Stevens	O'Connor
3	2	3	3	2	3	2	2	3

New York v. Belton

Burger	Blackmun	Rehnquist	Powell	Brennan	Stewart	White	Marshall	Stevens
3	3	3	3	1	3	1	1	3

Smith v. Maryland

Burger	Blackmun	Rehnquist	Powell	Brennan	Stewart	White	Marshall	Stevens
3	3	3	0	1	1	3	1	3

United States v. Janis

Burger	Blackmun	Rehnquist	Powell	Brennan	Stewart	White	Marshall	Stevens
3	3	3	3	1	1	3	1	0

Stone v. Powell

Burger	Blackmun	Rehnquist	Powell	Brennan	Stewart	White	Marshall	Stevens
3	3	3	3	1	3	1	1	3

United States v. Calandra

Burger	Blackmun	Rehnquist	Powell	Douglas	Brennan	Stewart	White	Marshall
3	3	3	3	1	1	3	3	1

United States v. Leon

Burger	Blackmun	Rehnquist	Powell	Brennan	White	Marshall	Stevens	O'Connor
3	3	3	3	1	3	1	1	3

CHAPTER FOUR: BUSING TO ACHIEVE RACIAL INTEGRATION*Keyes v. School District No. 1 Denver, Colorado*

Burger	Blackmun	Rehnquist	Powell	Douglas	Brennan	Stewart	White	Marshall
2	1	3	2	1	1	1	0	1

Milliken v. Bradley

Burger	Blackmun	Rehnquist	Powell	Douglas	Brennan	Stewart	White	Marshall
3	3	3	3	1	1	3	1	1

Dayton v. Brinkman

Burger	Blackmun	Rehnquist	Powell	Brennan	Stewart	White	Marshall	Stevens
2	1	3	3	1	2	1	1	1

Columbus v. Penick

Burger	Blackmun	Rehnquist	Powell	Brennan	Stewart	White	Marshall	Stevens
3	1	3	3	1	3	1	1	1

CHAPTER SIX: ABORTION

Bowen v. Kendrick

Rehnquist	O'Connor	Scalia	Kennedy	Brennan	White	Marshall	Blackmun	Stevens
3	3	3	3	1	3	1	1	1

Webster v. Reproductive Health Services

Rehnquist	O'Connor	Scalia	Kennedy	Brennan	White	Marshall	Blackmun	Stevens
2	2	3	2	1	2	1	1	1

Hodgson v. Minnesota

Rehnquist	O'Connor	Scalia	Kennedy	Brennan	White	Marshall	Blackmun	Stevens
3	2	3	3	2	3	2	2	2

Ohio v. Akron Center for Reproductive Health

Rehnquist	O'Connor	Scalia	Kennedy	Brennan	White	Marshall	Blackmun	Stevens
3	3	3	3	1	3	1	1	1

Rust v. Sullivan

Rehnquist	O'Connor	Scalia	Kennedy	White	Marshall	Blackmun	Stevens	Souter
3	2	3	3	3	1	1	2	3

Planned Parenthood of Southeastern Pennsylvania v. Casey

Rehnquist	O'Connor	Scalia	Kennedy	White	Stevens	Blackmun	Souter	Thomas
3	2	3	2	3	1	1	2	3

Bray v. Alexandria Women's Health Clinic

Rehnquist	O'Connor	Scalia	Kennedy	White	Blackmun	Stevens	Souter	Thomas
3	1	3	3	3	1	1	2	3

Board of Education of Kiryas Joel v. Grumet

Rehnquist	O'Connor	Scalia	Kennedy	Blackmun	Stevens	Souter	Thomas	Ginsberg
3	1	3	2	1	1	1	3	1

Rosenberger v. University of Virginia

Rehnquist	O'Connor	Scalia	Kennedy	Stevens	Souter	Thomas	Ginsberg	Breyer
3	3	3	3	1	1	3	1	1

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