

The Warren Court Critics: Where Are They Now That We Need Them?

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I. Introduction

In the 1960's the Warren Court became the object of an intensive barrage of scholarly criticism that pervaded the law reviews and spilled over into both popular legal writing and nonprofessional journals.¹ The critics, eminent constitutional scholars with diverse views, demonstrated not only broad knowledge but also literary excellence. They saw themselves as guardians of the temple of law against the doctrinal invaders and against those who temporarily resided within that temple. Among those invaders were classed most of the Warren Court judges.

Today, the temple is unguarded. Most of the original invaders have vanished, but their replacements have, on occasion, upset icons and raised little or no protest. Where are the sentinels? Why the disinclination to guard the sacred reliquaries against the depredations of the Burger Court? This essay will attempt to answer these questions; for there is something seriously amiss when the practice of informed criticism by the best minds in the profession has fallen into desuetude, as it has in the last six years.

Many eminent scholars played diverse roles as commentators on the Warren Court, at first supportive and later critical as the Court changed complexion.² Although there were numerous critics of the

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1. "[T]he Warren years were marked not only by an increasingly activist Court but also by an increasingly dissatisfied and prolific group of legal scholars." Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 770 (1971). See White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973) [hereinafter cited as White].

2. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) [hereinafter cited as BICKEL, *THE LEAST DANGEROUS BRANCH*]; A. BICKEL, *POLITICS AND THE WARREN COURT* (1965) [hereinafter cited as BICKEL, *POLITICS AND THE WARREN COURT*]; A.

Warren Court, and their criticisms were wide-ranging, the Court also had its staunch defenders, including an ex-member.³ This essay will concentrate upon the careers of four men, Paul Freund, Herbert Wechsler, Philip Kurland, and Alexander Bickel, who were the most eminent and in many ways the most representative of the Court's commentators. Despite their differences, they shared two significant characteristics: an impulse to warn the Warren Court that it should respect certain limitations upon its expansive judicial role, and a subsequent failure to hold the Burger Court to the same professed standards.

II. Commentators

A. The Tenor of the Criticism and its Sources

In order to understand whether critical judgment lapsed after the demise of the Warren Court and, if so, why and how it occurred, we must first ascertain whether the Warren critics should have continued to be disturbed during the Burger years. The four major critics of the Warren Court appeared most upset by the Court's inability to formulate principled and convincing reasons for its decisions, to deal adequately with apparently contradictory precedents, and to pay sufficient respect to the views of dissenting brethren.⁴ Thus, they consistently faulted

BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970) [hereinafter cited as BICKEL, *THE IDEA OF PROGRESS*].

3. A. GOLDBERG, *EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT* (1971); G. SCHUBERT, *THE CONSTITUTIONAL POLITY* (1970); A. COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968); A. LEWIS, *GIDEON'S TRUMPET* (1964); Karst & Horowitz, *Reitman v. Mulkey: A Teleophase of Substantive Equal Protection*, 1967 SUP. CT. REVIEW 39.

4. The classic statement of this critique is to be found in Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). "The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree." *Id.* at 3 (footnotes omitted).

Two years later, Professor Kurland cited this statement favorably in an attack on the Warren Court and added that "recently we have had too many opinions which obfuscate rather than enlighten." Kurland, *The Supreme Court and its Judicial Critics*, 6 UTAH L. REV. 457, 464 (1959) [hereinafter cited as Kurland, *The Supreme Court and its Judicial Critics*]. Five years later Kurland stated that "[t]he Court disregards precedents at will without offering adequate reasons for change." Kurland, *The Court of the Union or Julius Caesar Revised*, 39 NOTRE DAME LAW. 636, 640 (1964) [hereinafter cited as Kurland, *The Court of the Union*]. Later still he lamented that "some of [the Warren Court's] major opinions have been patently disingenuous. It has distinguished precedents on the flimsiest of grounds and frequently ignored those that it would not bother to distinguish." P. KURLAND, *POLITICS, THE CONSTITUTION, AND*

the Court for its inadequate "craftsmanship."⁵ When critics of the critics sought to meet them on that ground, the former were attacked for writing better opinions than the Court itself could formulate.⁶

The "craftsmanship" issue was first raised by Wechsler in his 1959 Holmes Lecture at Harvard Law School.⁷ Although Wechsler was not as consistent a Court analyst or critic as the others, his 1959 foray is important for several reasons: it colored the course of the great legal debate of the 1960's; it conceded that the Supreme Court has great power in our society; and it enunciated a certain apprehension about the reaction of Congress or an outraged public to perceived abuse of the Court's power. These themes also influenced the thinking of Wechsler's academic colleagues for the next decade. The lecture was significant for two other reasons: it was published at the height of a concerted congressional attack upon the Court and it warned the Court that it should give persuasive, principled reasons for its decisions in race relations cases. The lecture cannot be regarded as an abstract discourse on the nature of the Supreme Court's function in our society; rather, it must be viewed in its context, as a plea to all—the Court and its legion of critics—to restore social and political peace in a time of trouble.⁸

In perspective, Wechsler's plea for "neutral principles" is also important for its recognition of the historical dimension of the Court's role, which many of his colleagues ignored. He not only concentrated his

THE WARREN COURT xxii (1970) [hereinafter cited as KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT].

Advocates of "Reasoned Elaboration . . . demanded, first, that judges give reasons for their decisions; second, that the reasons be set forth in a detailed and coherent manner; third, that they exemplify . . . 'the maturing of collective thought'. . ." White, *supra* note 1, at 286. See also *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968).

5. See note 4 *supra*. For criticism of particular decisions, see BICKEL, THE IDEA OF PROGRESS, *supra* note 2, at 63-65; KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, *supra* note 4, at 34-35.

6. See BICKEL, THE IDEA OF PROGRESS, *supra* note 2, at 66-70; KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, *supra* note 4, at 72, 150-52; H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW, at xiv-xv (1961) [hereinafter cited as WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW]; Kurland, Book Review, 37 GEO. L.J. 653-54 (1949).

7. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) [hereinafter cited as Wechsler, *Toward Neutral Principles*].

8. See also WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW, *supra* note 6. "Are there, indeed, any criteria that both the Supreme Court and those who undertake to praise or condemn its judgments are morally and intellectually obligated to support? . . . I am right to state the question as the same one for the Court and for its critics." *Id.* at 15-16.

analysis upon race cases, but carefully chose to scrutinize three—the Texas white primary case,⁹ *Shelley v. Kraemer*,¹⁰ and *Brown v. Board of Education*¹¹—each of which had been decided by a differently constituted Court. The lecture recognized that constitutional doctrine was developing in the race relations area, that this development was presenting certain logical problems, and that future development, while necessary, should be more orderly. Wechsler believed “craftsmanship” would assure orderly development; but it also served the political function of a rejoinder to those charging judicial usurpation. The dichotomy between principle as a value in itself and as a defense against lay critics thus became evident both explicitly and implicitly in Wechsler’s work. This dichotomy was also to become important to Bickel, Kurland, and Freund as the Warren Court moved into newer and even more controversial areas.

The emphasis on “craftsmanship” created significant problems for the critics. For instance, Wechsler argued that the Court was essentially a court of law and, accordingly, was required to decide *all* properly presented cases without evasion, once the requisite neutral principles were satisfactorily established.¹² All of the other major critics believed that the Court was also a policy making organ of government, but that, as an undemocratic body, the Court should not make too much policy, especially in areas that confounded the judgment of other policy making bodies such as Congress. Once the role of the Court was expanded to include such statesmanlike functions, it became difficult to delineate any limitations. General admonitions of judicial self-restraint were not helpful, especially since each of the critics had his own preferred areas of judicial activism.¹³ In addition, some of the restraining techniques urged by the critics raised logical questions of their own.¹⁴

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

10. 334 U.S. 1 (1948).

11. 347 U.S. 483 (1954).

12. Wechsler, *Toward Neutral Principles*, *supra* note 7, at 6.

13. *See, e.g.*, note 140 *infra*.

14. Professor Gunther commented on Bickel’s fondness for endorsing the use of “avoidance devices,” such as summary denials or dismissals of appeals that are within the Court’s mandatory jurisdiction: “A summary disposition . . . does not mean that the Court has avoided adjudication” for it is still a “decision on the merits.” Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 11 (1964). Gunther is not impressed with Bickel’s admonition that “the Court need not and should not listen when Congress exercises its constitutional authority under Article III” to give the Court mandatory jurisdiction. *Id.* at 12. Because for Gunther principles “are principle[s] no less so because they pertain to jurisdiction,” Bickel’s creation of the term “jurisdictional” dismissal “appears to have no basis in the Constitution.” *Id.* at 15. Gunther’s conclusion is that

To complicate matters even further, the critics split on the issue of the Court's mandate. Within the framework of judicial restraint, upon which they agreed, there were substantial conceptual differences about the proper role of the Court. The problem was epitomized by Justice Frankfurter, the critics' patron saint, whose notions of Fourteenth Amendment due process in criminal cases permitted him to reject the exclusionary rule for illegally seized evidence in *Wolf v. Colorado*,¹⁵ to apply it rather arbitrarily in *Rochin v. California*¹⁶ three years later, and to protest vigorously the majority's refusal to extend the rule two years later in *Irvine v. California*.¹⁷

If the quandary between the Court's circumspect legal role and its statesmanlike function could not be readily resolved, the very formulation of the rational elaboration doctrine¹⁸ could serve the useful function of permitting discretionary attack upon particular decisions disfavored by the critics. "Craftsmanship" is, of course, one of those laudable principles that has been attained only rarely in great cases.¹⁹ The

"Bickel's 'virtues' are 'passive' in name and appearance only: a virulent variety of free-wheeling interventionism lies at the core of his devices of restraint." *Id.* at 25. The critics' propensity to judge the Court by standards of "popularity" and "craftsmanship" allowed leeway for ad hoc criticism. "When . . . success by every practical test—compliance, popular acceptance, respect for the institution of the Court is achieved by a decision that purports to be based on broad constitutional principle, realist critics will grumble about judicial method." Linde, *Judges, Critics, and the Realist Tradition*, 82 *YALE L.J.* 227, 243 (1972) [hereinafter cited as Linde]. Bickel's preference for indirect judicial disapproval of disfavored policy decisions by other branches of government without constitutional invalidation did not fool one critic, who observed that "a sufficiently prolonged series of invalidations on nonconstitutional grounds might well be perceived as an attempt to implement an unspoken constitutional judgment." Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *STAN. L. REV.* 169, 207 (1968) [hereinafter cited as Deutsch]. He also found no real distinction between Bickel's approval of dismissals on appeal without opinion and his disapproval of per curiam decision-making, since the latter also functions as a "mediating device." *Id.* at 221.

15. 338 U.S. 25 (1949).

16. 342 U.S. 165 (1952). Justice Frankfurter noted that *Rochin* involved a situation that "shock[ed his] conscience." *Id.* at 172.

17. 347 U.S. 128, 142 (1954).

18. Linde, *supra* note 14, at 243. When the Court "looks to the past decade's most prominent academic criticism, it will often find little there to distinguish it from the popular. Disagreements with the chain of inference by which the Court got from the Constitution to its result, if mentioned at all, have tended to be announced in the most conclusory terms, and the impression has often been left that the real quarrel of the Academy, like that of the laity, is with the results the Court has been reaching and perhaps with judicial 'activism' in general." Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 944 (1973).

19. Freund commented on the Marshall Court's tendency to pronounce doctrines whose "momentum . . . shot beyond its mark" in decisions like *McCullough v. Mary-*

critics recognized that the Supreme Court is a consensual body and that opinions are constructed to reflect the diverse perspectives of a majority of the justices. Under the aegis of Marshall, who controlled his court as no other chief justice has since, a unified, compelling work product could usually be produced. Absent such a towering figure, consistency is almost impossible to achieve. This was especially true of the Warren Court, for the chief justice served with two "great" associates and five "near great" associates, men with strong attitudes and perspectives.²⁰ Marshall, in contrast, led a Court which included only one "great" and one "near great" colleague.²¹

If the plea for craftsmanship was capable of misuse, there is strong evidence that, for some critics the plea served to cloak disagreements with the substantive decisions of the Warren Court. This is not to suggest that the process of transforming procedural disagreements into substantive criticisms is merely pretext. Indeed, the transformation may well be unconscious. While Freund and Wechsler seemed to grow accustomed to the activism of the Warren Court in the later sixties, Kurland and Bickel found that the Court was doing too much. Indeed, as the Warren Court ended, Kurland and Bickel believed that the Court was doing not only too much but also too much of the wrong thing. The Court's activities were encouraging various dissident groups that were threatening the fragile social and political consensus upon which the Republic rested. While Bickel based his criticism upon the presence of too much "principle" and a concomitant absence of accommodation, Kurland inveighed against what he believed to be the particular animating attitude of the Court, egalitarianism.²² As Kurland and Bickel protested the perceived goals of the Warren Court,

land, 18 U.S. (4 Wheat.) 316 (1819), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Freund, *New Vistas in Constitutional Law*, 112 U. PA. L. REV. 631, 639 (1964) [hereinafter cited as Freund, *New Vistas in Constitutional Law*]. Kurland, though not discussing specifics, said of the Marshall Court: "The contribution . . . to the survival of one indivisible nation cannot be gainsaid. Yet, one might 'describe' . . . the achievement of the Marshall Court in less than glorious terms." KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*, *supra* note 4, at 10.

20. Black and Frankfurter were rated as "great" justices by sixty-five scholars in 1970; Douglas, Jackson, Harlan, Brennan, and Fortas earned the "near great" sobriquet. See H. ABRAHAM, *JUSTICES AND PRESIDENTS* 289 (1974).

21. Story was the only "great" justice and William Johnson the only "near great" Marshall colleague. *Id.*

22. Kurland saw the Warren Court as a major contributor to the "egalitarian ethos that is becoming dominant in our society." KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*, *supra* note 4, at xx.

their tone changed from genteel querulousness to outright hostility.²³ The change was apparent to some of their critics.²⁴

Tone must be distinguished from rhetoric, and the latter was generally couched in terms of craftsmanship. Issues of craftsmanship ostensibly can be debated without reference to partisan politics. Presumably, one need not have an ax to grind in order to argue that the Court was not stating reasons but was substituting *ipse dixit*s for rational elaboration, or that it was misstating the clear meaning of precedents to arrive at foreordained results, or misusing history, or failing to meet reasoned dissent.²⁵ The middle-of-the-road commentators often adopted this formulation of the critical postulate, but stood apart from any general attitude of hostility toward the Court's mission.²⁶

In order to trace the growth of such hostility among scholars such as Kurland and Bickel, and to distinguish it from the benign acceptance by Freund and Wechsler, it is necessary to explore carefully the writings of both sets of critics. Only then can one glean some indication of what bothered them, why they became increasingly alarmed, and why their critical stances seemed suspended in the first half-decade of the seventies. Before analyzing the differences between Bickel and Kurland, on the one side, and Freund and Wechsler on the other, it is necessary to analyze their commonalities. Those commonalities, which initially served to unite them, were insufficient bonds during the sixties, but were strong enough to reunite them in a brotherhood of acquiescence in the seventies.

Their commonalities are fairly clear. They were all deeply immersed in the Brandeis-Frankfurter tradition of judicial restraint. Freund and Wechsler had clerked for Justice Brandeis and studied under Frankfurter at Harvard Law School. Frankfurter and Brandeis were the bearers of a tradition, a tradition exemplified by James Bradley Thayer, Thomas Reed Powell, and, overwhelmingly, by Oliver Wendell Holmes. When Frankfurter joined the Court, he was served by Kurland and Bickel as law clerks. They viewed themselves as exponents of a tradition. The tradition was in large part a contradictory

23. See text accompanying notes 179-82, 193-94, 225-28, 258-60, 296-301, 440-43, 464-70 *infra*.

24. "Over time, the tone of commentators' analyses had gradually shifted from one that marks the explications of the critic to one more characteristic of the strictures of the opponent." Deutsch, *supra* note 14, at 169, 204.

25. This is the gravamen of Leonard Levy's criticism of both the Warren and the Burger Courts. L. LEVY, *AGAINST THE LAW* 438 (1974) [hereinafter cited as LEVY]. ←

26. *Id.*

one, for it espoused judicial humility and deference to the democratic process while recognizing that courts do make, rather than find, law.²⁷ To reconcile the contradiction the doctrine of judicial self-discipline was invoked. Thus, legal realism, by its very postulate, required of the Supreme Court a high degree of statesmanship.²⁸

Experience also contributed to the perceived need for statesmanship. To the exponents of self-restraint the ultimate term of opprobrium was "Lochneresque."²⁹ They believed that the substitution of judicially determined values from a silent or ambiguous Constitution should not operate to subvert legislatively decreed choices. As Freund once noted, "[t]he performance of the Supreme Court in the 1920's and early 1930's has had a decisive effect on our thinking about the process of constitutional adjudication."³⁰ That performance consisted of the Court imposing its own values while striking down those of the people and their elected representatives. Judicial review, itself an

27. "For the Progressive realists, the Constitution was not a catechism, and the judges were not priests reciting it. They demanded of the judges an understanding 'of the great industrial and political problems now before us' and 'sympathy with the big movements which have for their aim the promotion of the public welfare.'" BICKEL, *THE IDEA OF PROGRESS*, *supra* note 2, at 19-20.

28. "[T]he new style . . . could . . . bring a new substance in its train. And the upshot would be conflict with political democracy, which was a strongly-held tenet of the Progressive realists, and with the pragmatic skepticism that was also part of their intellectual make-up. . . . [T]hey all . . . put great store by political democracy." *Id.* at 22. The statesmanship theme recurs throughout Bickel's book, *THE SUPREME COURT AND THE IDEA OF PROGRESS*. "The Court in Constitutional adjudication faces what must surely be the largest and the hardest task of principled decision-making faced by any group of men in the entire world." Wechsler, *Toward Neutral Principles*, *supra* note 7, at 20. It has animated the writings of Philip Kurland as well. Thus "strength of character" and "intellectual power" are necessary "if a Supreme Court Justice is to have that breadth of vision, that capacity for disinterested judgment which the task demands." P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*, *supra* note 4, at xxv. He has constantly stressed the overwhelming need for a "sole determinant" of eligibility for nomination to the court, "a breadth of capacity as tested in the crucible of experience" as a statesman. Kurland, *The Appointment and Disappointment of Supreme Court Justices*, 1972 LAW & SOC. ORDER 183, 197 (1972) [hereinafter cited as Kurland, *Appointment and Disappointment*]. "The function of the Supreme Court Justice is governance and the best test of capacity for that office is experience in governance." *Id.* at 198. Kurland has found that most justices have abysmally failed his test. See note 177 *infra*.

29. See A. BICKEL, *THE IDEA OF PROGRESS*, *supra* note 2, at 21, 25, discussing *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* "has probably received more nearly unanimous criticism than any other [decision] in the twentieth century" R. McCLOSKEY, *THE MODERN SUPREME COURT* 279 (1972) [hereinafter cited as McCLOSKEY].

30. Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A.L. REV. 467 (1967).

anomaly in a democratic society, was always reluctantly accepted by the critics; they felt it would cease to command the approval of the American people if it were permitted to run wild.³¹ Indeed, Wechsler's 1959 Holmes lecture was commonly regarded as—and Wechsler admitted this—an answer to Learned Hand's Holmes lecture of the previous year which questioned judicial review and the legal meaning of the Bill of Rights.³² Wechsler, who disagreed with Judge Hand on both counts, advocated judicial self-restraint by recognition of general and neutral principles, while the others, admitting that such self-restraint was difficult if not impossible, argued for what Bickel came to call "the passive virtues."³³

Another commonality was a tradition of hero worship. All of the scholars analyzed herein were unabashed and self-confessed hero worshippers.³⁴ Bickel and Kurland revered Frankfurter; Freund and

31. To Kurland, in 1970, "[t]he sword of Damocles hangs over the Court by the thin thread, today a gossamer thread, of public confidence in the integrity of the judiciary." KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*, *supra* note 4, at xxiii. To Bickel, the contest between the Court and the Congress in 1937 proved that the Court, if it persists in thwarting the majority, must ultimately be the loser. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 93. "The court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it—it labors under the obligation to succeed." *Id.* at 239. Three years later, he spoke of the "insulated, unrepresentative Court." BICKEL, *POLITICS AND THE WARREN COURT*, *supra* note 2, at 12.

32. Wechsler, *Toward Neutral Principles*, *supra* note 7, at 1-5.

33. See BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 49-65, 124-25, 200.

34. Kurland's affection for Jerome N. Frank, for whom he first clerked, was that of "a self-confessed hero-worshiper." Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk*, 24 U. CHI. L. REV. 661, 663 (1957). Notwithstanding his devotion to Judge Frank, Kurland observed that "Cardozo's writing was pellucid and certainly better understood by students and lawyers than the cryptics of Holmes or the jargon of the psychologists whom [Judge Frank] quoted so freely." *Id.* at 662. For Kurland, the realist tradition became a disenchantment with the social sciences and a reverence for pellucid authority. That reverence was not confined to Justice Cardozo; he wrote of Justice Frankfurter in 1965: "For his epigones, like their master, are necessarily mortal, and the unique experience of having known FF is not transferable." Kurland, *Felix Frankfurter*, 51 VA. L. REV. 562 (1965). Alexander Bickel said of Justice Frankfurter: "He was a hero-worshiper who transformed all those he worshipped into real heroes." Bickel, *Felix Frankfurter*, 78 HARV. L. REV. 1527, 1528 (1965). According to Bickel, Justice Frankfurter was not frightened by anything—"not . . . the might of America's foreign enemies or, in the Thirties and Fifties, the menace of her domestic ones." *Id.* at 1528. Bickel revered Frankfurter for his abilities as a great teacher and moral exemplar. "[H]e served human liberty. He would attempt to build few protective shields around it, but strove to secure justice, to educate men, and to cause them to seek and enrich their freedom." *Id.*

Freund characterized Justice Brandeis as "a master with whom I served an apprenticeship . . ." Freund, *The Supreme Court: A Tale of Two Terms*, 26 OHIO ST. L.J.

Wechsler, representing a somewhat older generation, revered Brandeis. One could argue that an attitude of hero worship constitutes a part of the ideological in-breeding of law school.³⁵ The case law method of

225 (1965) [hereinafter cited as Freund, *A Tale of Two Terms*]. This description may unintentionally reveal more than mere idolatry, for in an apprenticeship the master directs the student in certain techniques of craftsmanship and the student then adheres to them, attempting to emulate the master. Such an interpretation is misleading, however, given Freund's later development. Freund may be better characterized by his own tribute to Justice Frankfurter, which, while enthusiastic, took issue with the Justice's overreliance on history: "But when history is called on to furnish a guide to the priority of values, I wonder whether it is being given a burden heavier than it can bear alone." Freund, *Mr. Justice Frankfurter*, 26 U. CHI. L. REV. 205, 214 (1959).

35. John Noonan has recently observed: "Legal education has often been education in the making and unmaking of persons." J. NOONAN, *PERSONS AND MASKS OF THE LAW* 58 (1976) [hereinafter cited as NOONAN]. Although he was referring to the tendency of legal education to deal with people in terms of what they "contributed" to the development of soulless legal rules, others have spoken about the capacity of legal education to dehumanize its students, especially its best students: "Students trained under the Langdell system are like future horticulturists confining their studies to cut flowers, like architects who study pictures of buildings and nothing else. They resemble prospective dog breeders who never see anything but stuffed dogs. And it is beginning to be suspected that there is some correlation between that kind of stuffed dog study and the over-production of stuffed shirts in the legal profession." Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 912 (1933).

Alan A. Stone, a psychiatrist who served on the Harvard Law School faculty for several years, reiterated the point that law school education stresses the acquisition of "virtue through understanding" and the development of a "vision of morality" through "analytic skill." Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 394-95 (1971). His article concentrated on the law professor: "The background of law professors is strikingly homogeneous; almost all were law review, many clerked for Supreme Court Justices or other notable judges, and almost all are brilliant, at least in their capacity for legal analysis. . . . They have internalized a legal standard of perfection . . ." *Id.* at 403. Because of their "need to be invulnerable" to criticism, they play the role of "the omnipotent and destructive critic as one premise after another falls before [their] arguments." *Id.* at 404, 411. This creates in the students an "extraordinarily deferential attitude" and "gratitude for any personal interest." *Id.* at 412. Law review students become more aggressive and identify "with the aggressor—the professor." *Id.* at 422. Willard Hurst found that the Langdell case method was a limited, "static, taxonomic approach to law. The principles . . . were principles defined by tests of logic, by which one could handily classify the otherwise unruly body of case material." Hurst, *Lawyers in American Society 1750-1966*, 50 MARQ. L. REV. 594, 603 (1967). Thomas Bergin found law teachers to possess "extraordinary scholarly skills . . . at rule preaching and case parsing" and to be expert at "rule-mongering." Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 645, 655 (1968). See also Kennedy, *The Law Review Priesthood* 1 LEARNING AND THE LAW 61 (Winter, 1975); Zaremski, *The First Year in Law School: The Intention is to Make You Feel Less Than a Human Being*, 1 LEARNING AND THE LAW 51 (Summer, 1974). The term "formalist" could be readily applied to those "rule-mongers"; formalism stresses the "ruthless desire to analyze the law rigorously in terms of a few fundamental principles" and a "logical, 'mechanical,' or 'fundamentalist' method of judicial decision." Note, *Legal Theory and Legal Education*, 79 YALE L.J. 1153, 1161 (1970). The metaphor of a constantly growing

instruction breeds reverence for and symbolic attachment to the past.³⁶ Perhaps that attitude helps to explain a curious anomaly in the critics' position. Prior to Chief Justice Warren's tenure they had little to say about the general direction of the Court. Their reticence may have been based on a scholarly deference to Justice Frankfurter, who dominated the Court during Chief Justice Vinson's tenure. Although Bickel was clerking for Justice Frankfurter in 1952, the others were already established academics during the Vinson era. Kurland, for instance, managed the considerable feat of reviewing a book about the Court's views on civil liberties without commenting upon those attitudes or indeed mentioning any cases.³⁷ The others were as quiescent about the Court's activities during that period as they have been about the activities of the Burger Court, a body that bears some resemblance to the 1947-54 Court.³⁸

Another important value to the Warren Court critics was federalism. In 1954, Wechsler wrote that "in a far flung, free society, the federalist values are enduring," and that such values are the "sole alternative to tyranny."³⁹ Freund, speaking at the same symposium, found

body of law was attacked in Ritchie, *Education for Professional Responsibility*, 50 MARQ. L. REV. 627, 628 (1967). Noonan observed that "taken for granted in all of these metaphors of growth is the continuity and directedness of doctrinal change." NOONAN, *supra* at 153. Yet the very formulations of the metaphor and its analogy to nature are incorrect, for "the processes of the earth suggest cycles, not interrupted growth. The metaphors based on human development point to old age and death." *Id.* at 154.

36. See generally NOONAN, *supra* note 35. He asserts that "rules cannot be the sole or principal object of legal study, legal history, and legal philosophy without distortion. What is distorted is the place of persons in the process . . ." *Id.* at 17. Noonan criticizes both Justice Holmes and Justice Cardozo for their opinions resolving cases against the interests of justice. He found that Justice Holmes, in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), had rendered an unjust decision based upon a belief that "[i]n the contest for survival, the strongest force prevails, and it is not a judge's business to be tenderhearted to the vanquished or the maimed." NOONAN, *supra* at 70. He also found that Cardozo's decision in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), had ignored justice to the litigants in favor of severe impartiality and strict interpretation of the law of causation in tort. NOONAN, *supra* at 139-144.

37. Kurland, Book Review, 22 U. CHI. L. REV. 297 (1954).

38. See text accompanying notes 333-40 *infra*.

39. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Union*, 54 COLUM. L. REV. 543 (1954) [hereinafter cited as Wechsler, *The Political Safeguards of Federalism*]. "National action has thus always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." *Id.* at 544. It is difficult to ascertain from his tone whether Wechsler approved of the fact that in 1951 Congress refused to require equal congressional population districting, despite the recommendations of President Truman and a committee of the American Political Science As-

at least a potential truth in the observation of Karl Loewenstein that "[a] state with a federal income tax is no longer a genuinely federal state."⁴⁰ Also, Freund justified the *Civil Rights Cases*⁴¹ in terms of a viable federalism: "[T]he *Civil Rights Cases* . . . reflected the sentiment that reunion called for a mitigation of the upheaval produced by the Reconstruction legislation."⁴²

As early as 1958, the decline of federalism was apparent to Kurland. "Some of the causes of the deterioration of state governments . . . are obviously irreversible,"⁴³ he noted, while decrying "the inability or unwillingness of the states to deal with the problems which are properly theirs."⁴⁴ Kurland also deplored the "lack of capacity and a corruption of state officials which have too often been the hallmarks of state and local governments."⁴⁵ Despite this indictment, he still believed that the states were the only bulwark against governmental tyranny over the individual. Although the Court was right in denying the states certain "illegitimate ends,"⁴⁶ such as the maintenance of segregated school systems, Kurland concluded that it had a higher duty, to protect the states from federal power, and that at this it had historically failed.⁴⁷

Despite Wechsler's belief that federalism was the "sole alternative to tyranny"⁴⁸ and the dedication of the other critics to federalism both as an enduring constitutional principle and as a means for circumscribing the growth of the central government and its inevitable threat to the individual, they all placed a high priority upon civil liberties. In

sociation. *Id.* at 551-52. Malapportionment of the House of Representatives explained "why presidential programs calling for the extension of national activity, and seemingly supported by the country in a presidential election, may come a cropper notwithstanding in the House." *Id.* at 552.

40. Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561, 563 (1954) [hereinafter cited as Freund, *Umpiring the Federal System*].

41. 109 U.S. 3 (1883).

42. Freund, *Umpiring the Federal System*, *supra* note 40, at 564. He warned that "[r]eview by the supreme tribunal ought not be precipitate." *Id.* at 575.

43. Kurland, *The Supreme Court and the Attrition of State Power*, 10 STAN. L. REV. 274, 282 (1958) [hereinafter cited as Kurland, *The Attrition of State Power*].

44. *Id.*

45. *Id.* at 283.

46. *Id.* at 284.

47. In *Lochner*, the "old" Supreme Court had state power; "[t]o the states, therefore, was never returned fully the powers of which the Court has deprived them." *Id.* at 285. Neither Wechsler nor Freund was as pessimistic as Kurland. Freund believed that the Warren Court's federalism decisions would be "more apt to center on cementing the states by measures short of congressional occupation of the field." Freund, *Law and the Future: Constitutional Law*, 51 NW. U.L. REV. 187, 192 (1956) [hereinafter cited as Freund, *Law and the Future*].

48. Wechsler, *The Political Safeguards of Federalism*, *supra* note 39, at 543.

line with Frankfurter's decisions in cases such as *McNabb v. United States*⁴⁹ and *Mallory v. United States*,⁵⁰ which limited the power of the District of Columbia police to extract confessions during periods of unreasonable detention, his academic votaries believed that the Court had a legitimate role in protecting the Bill of Rights. Whether this stance was due to Frankfurter's endorsement of activism in this area or to the theory that the essential guarantees of the Bill of Rights were thought of as procedural and thus capable of being supervised by the Court, is irrelevant. Until the end of the Warren period, the major critics substantially endorsed the Court's civil liberties decisions.

Alexander Bickel, for example, was not uneasy about the Warren Court's protectionist decisions in the field of criminal justice. He was satisfied with distinguishing between procedural and substantive decisions and argued that procedural decisions deal primarily with the "how" of governmental action, while substantive decisions deal with the "what."⁵¹ In fact, procedural decisions were, to him, exceptions to the necessity for judicial invocation of the "passive virtues."⁵² "Procedural decisions are consequently less affected by principles of limitation on the exercise of the judicial function, less affected by considerations of restraint."⁵³ In analyzing the balance between social needs and individual freedom subsequent to *Escobedo v. Illinois*,⁵⁴ Bickel anticipated the basic premise of *Miranda v. Arizona*⁵⁵ by noting that "prolonged interrogation in the [atmosphere] of a police station has a tendency to coerce, even in the scrupulous absence of any overt coercion, physical or psychological."⁵⁶ Of lawyerless police interrogation practices, Bickel could grimly ask, "How do we square with our professed principles a practice whose professed purpose is to defeat those [constitutionally guaranteed] principles?"⁵⁷ A supplementary inquiry was, "Should friendless, indigent defendants be supplied with counsel in the station house? That is the burning question."⁵⁸ According to Bickel's moderate position, the defendant or suspect should be warned of his right

49. 318 U.S. 332 (1943).

50. 354 U.S. 449 (1957).

51. Bickel, *Judicial Review of Police Methods Law Enforcement—The Role of the Supreme Court of the United States*, 44 TEXAS L. REV. 954, 955 (1966) [hereinafter cited as Bickel, *Judicial Review of Police Methods*].

52. See text accompanying notes 287-91 *infra*.

53. Bickel, *Judicial Review of Police Methods*, *supra* note 51, at 955.

54. 378 U.S. 478 (1964).

55. 384 U.S. 436 (1966).

56. Bickel, *Judicial Review of Police Methods*, *supra* note 51, at 959.

57. *Id.*

58. *Id.* at 960.

to counsel and of his right not to speak at presentation to the magistrate.⁵⁹ Again, anticipating *Miranda*, he argued for warnings "during any period that is recognizably custodial,"⁶⁰ regardless of location and circumstance.

Freund essentially adopted Bickels' substance-procedure distinction. For instance, in 1963, after acknowledging that the Court had accepted the "essential powers of government,"⁶¹ he found that "[i]t is in the realm of procedure that the Court has now been more insistent."⁶² As government's power, authority, and activities expanded substantively, Bickel argued that the courts became the "special guardians of legal procedures, of the standards of decency and fair play that should be the counterpoise to the extensive affirmative powers of government."⁶³ Because he believed that "governmental intervention in our personal concerns"⁶⁴ would not decrease, he thought that the threat to liberty would escalate, as would the necessity to combat that threat judicially.⁶⁵

Another common perception about the Supreme Court, one which preceded the Warren Court, was that it was overworked. Concern over the Court's willingness to assume great and inappropriate burdens runs throughout the critical literature⁶⁶ and constitutes the backdrop for

59. *Id.* "Well, if a corollary of the right to stand mute is, for the rich, the right to be advised by counsel, then it must be the more so for the poor, who are more easily intimidated and need counsel worse." *Id.* Earlier that year, in commenting upon a District of Columbia Court of Appeals decision, he observed that "counsel should be made available . . . in the station house" and thought it an "excellent suggestion" to videotape all police interrogations. Bickel, *After the Arrest*, NEW REPUBLIC, February 12, 1966, at 16.

60. Bickel, *Judicial Review of Police Methods*, *supra* note 51, at 961.

61. Freund, *The Supreme Court Under Attack*, 25 U. PITT. L. REV. 1, 5 (1963) [hereinafter cited as Freund, *The Supreme Court Under Attack*].

62. *Id.*

63. *Id.*

64. *Id.* at 7.

65. *Id.* at 6. It was essential to Freund that "big" government be responsible government; to insure that Leviathan was representative, "it [was] not hard to appreciate the central importance of the [Warren Court] decisions on freedom of [the] press and assembly on voting rights, and on reapportionment." *Id.* This was not the common critical view, and Freund himself modified it somewhat after 1964, at least insofar as reapportionment was concerned. See Freund, *A Tale of Two Terms*, *supra* note 34.

66. In 1958, Kurland wrote that "the Court grants too many petitions for certiorari rather than too few," and found that during the 1956 term the 132 cases decided with opinion were simply too many. Kurland, *The Attrition of State Power*, *supra* note 43, at 277. Interestingly, Freund noted seven years later that more cases were decided with opinion in the 1932 term than in the 1963 term. Freund, *A Tale of Two Terms*, *supra* note 34, at 229. Henry Hart, Freund's predecessor as law clerk for Brandeis, had formulated the classic attack on the Court's workload in *Foreword: The Time Chart of the*

the role of the critics in the seventies.⁶⁷ The function of the Court was to "maintain the majesty of the law," said Kurland.⁶⁸ For Freund, the task of the Court was to enunciate the great principles of federalism.⁶⁹ This task requires the taking of fewer cases and some relief from the crushing burdens of considering a flood of petitions for certiorari, and would allow more painstaking deliberation and agreement in the critical cases taken and decided.⁷⁰ In the early years of the Warren Court, Freund actually praised the court for not deciding too many cases:

If the Court carries through its present tendency to curtail the number of argued cases and full opinions, there will be greater opportunity for reflection, systematization, consensus, and, it is to be hoped, for the educational function which lawyer-philosophers dis-

Justices, 73 HARV. L. REV. 84 (1959). Both Hart and Kurland attacked the Court's propensity to take Federal Employer Liability Act cases involving trivial questions. *Id.* at 96; Kurland, *The Attrition of State Power*, *supra* note 43, at 289. Some insight into the fact that law is not free from politics, even on tangential issues such as "caseload," and that Supreme Court justices use their former clerks and students to lobby for their views may be found in the recently published writings of Hugo Black, Jr., about his father and Felix Frankfurter: "A Justice who disagreed with FF might well expect an article critical of his position to appear in a law journal, and, strangely enough, the language might tend to resemble the very language FF had used in a private conference in which he had sought to bring the Justice around.

"FF always felt strongly that the Supreme Court should limit its attention to important matters of state, and believed that the Court was accepting and reversing too many cases where a judge had taken away by post-trial order a jury verdict in favor of, say, an injured railroad worker under the . . . F.E.L.A. Hugo was the moving force behind this practice. When FF could not bring about its end, he cast his argument in other terms. He concluded that the Court was overworked largely because of the acceptance of such matters as the F.E.L.A. cases and presented statistics to back up his demand that the situation be remedied. Shortly thereafter, an eminent scholar published an article in the *Harvard Law Journal* [sic] which concluded that the Supreme Court was overworked and presented statistics remarkably like those that had been cited by Justice Frankfurter. FF brought the article down to Daddy and said, 'You see, Hugo, I am not the only one who feels the Court is overworked.'

"Daddy smiled. 'Felix, don't you think I know where that article came from?'" H. BLACK, *MY FATHER: A REMEMBRANCE* 226-27 (1975).

67. Kurland in 1970 hoped that the new Court would recognize that it was overworked and that it should attempt to stem the "deterioration" in opinion writing. Kurland, *Enter the Burger Court*, 1970 SUP. CT. REVIEW 1, 3 (1970) [hereinafter cited as Kurland, *Enter the Burger Court*].

68. Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REVIEW 265, 322 (1971) [hereinafter cited as Kurland, *1970 Term*]. For Bickel's view, see note 325 *infra*.

69. Freund, *Umpiring the Federal System*, *supra* note 40, at 578.

70. See generally Freund, *Why We Need the National Court of Appeals*, 59 A.B.A.J. 247 (1973).

charge when as judges they pronounce the law of the Constitution.⁷¹

It must be noted that the view of the Court as an imperial body consecrated to the enunciation of national law was in fundamental conflict with yet another critical function, its role as protector of "the individual against the incursions of the Leviathan."⁷² Those words come not from the pen of an Arthur Goldberg or an Archibald Cox but were written by Philip Kurland. According to Kurland, "The Court may well be the last governmental bulwark of freedom as well as the schoolmaster of the nation."⁷³ Clearly, a court concerned with broad enunciations is a different body from one grubbing about in the tawdry facts of a criminal prosecution, or a local free speech case. The critics never resolved the conundrum, although for Kurland at least, the values of federalism clearly limited the second role of the Court. He chided the Warren Court for setting itself up as the "supervisor of the administration of criminal justice, for the state courts no less than for the federal."⁷⁴

The critics also shared a common approbation of the activity of the early Warren Court. They found its early record circumspect, except, of course, in *Brown v. Board of Education*,⁷⁵ a decision that was regarded as a moral imperative. Yet, one cannot help but believe that the critics, especially Bickel and Kurland, misinterpreted that Court. They may have been misled by appearances because the early Warren Court did not seem to be particularly radical. For instance, Robert McCloskey depicted the 1955 Term as exemplifying a "Court alive to values such as federalism, but equally alive to the need for protecting and extending the range of individual justice in a world that has recently seen that ideal so gravely challenged."⁷⁶ None of the major decisions, including the semicontroversial ones in *Pennsylvania v. Nelson*⁷⁷ and

71. Freund, *Law and the Future*, *supra* note 47, at 191.

72. Kurland, *1970 Term*, *supra* note 68, at 321.

73. *Id.* Although he attacked judicial "activism," he did argue that the Court "must be free to consider constitutional questions as constantly open for decision." He cautioned, however, that "this country must [not] be burdened with ill-considered or inappropriate constitutional law." Kurland, *The Attrition of State Power*, *supra* note 43, at 278-79. He also disagreed with the proposition that "the Courts have no role in aiding the transitions that are demanded by the ever changing conditions of society." Kurland, *1970 Term*, *supra* note 68, at 344.

74. Kurland, *Enter the Burger Court*, *supra* note 67, at 24.

75. 347 U.S. 483 (1954).

76. McCLOSKEY, *supra* note 29, at 141.

77. 350 U.S. 497 (1956).

Slochower v. Board of Higher Education,⁷⁸ should have alarmed anyone.⁷⁹ Indeed, the Court adopted a “policy of non-substantive scrutiny” which was a “triumph for Justice Frankfurter.”⁸⁰ The Court had almost struck a balance between a body that “abdicates” and “one that rules too strictly,” and that balance was consistent with “the American political tradition.”⁸¹ The rulings of the 1956 term, which eventually led to a congressional onslaught against the Court, still did not evidence the onset of a judicial revolution. Although there were hints that a “future period of fullscale judicial activism” might be in the offing, McCloskey couldn’t be sure.⁸² The decisions in *Watkins v. United States*,⁸³ *Jencks v. United States*,⁸⁴ and *Schwartz v. Board of Bar Examiners*,⁸⁵ which so upset Congress, were exaggerated by the Court’s detractors and clearly represented only a minimal exercise of restraint upon Congress and the states in the interests of fair play.⁸⁶ McCloskey found even Justice Brennan’s decision in *Roth v. United States*⁸⁷ to endorse “a rather wide latitude for [the] suppression of literature.”⁸⁸ War-

78. 350 U.S. 551 (1956).

79. See McCLOSKEY, *supra* note 29, at 143-56.

80. *Id.* at 154. There was a “tendency to confront the smaller questions rather than the larger in each [B]ut the net effect is to cast the Court’s weight on the side of moderating anti-subversive laws.” *Id.* at 152. The technique of interpretation of statutes rather than confrontation with Congress did not discomfort McCloskey, who found it “hard to criticize the Court for assuming that Congress was more sensible than some of the public utterances of its members might indicate, or for requiring it to speak plainly if it means to endorse those utterances.” *Id.* at 152.

81. “The American political tradition does assume, for better or worse, that the judiciary will have a hand in guiding the republic, and a Court that abdicates is no more comfortable with that tradition than one that rules too strictly.” *Id.* at 156.

82. *Id.* at 160.

83. 354 U.S. 178 (1957).

84. 353 U.S. 657 (1957).

85. 353 U.S. 232 (1957).

86. “Congress can still send its committees forth on fishing expeditions, and the pertinency of its questions for the purposes of compulsory process can be established so long as it is clear what particular waters are being fished at any given time!” McCLOSKEY, *supra* note 29, at 173. “In sum, *Watkins* and *Sweezy*, in their strict holdings, leave the legislature’s power to investigate subversion not many millimeters from where they found it.” *Id.* at 176, *citing* *Sweezy v. New Hampshire*, 354 U.S. 234 (1956). “Among all the cases of the 1956 Term dealing with subversion, *Jencks* . . . probably excited the greatest public furor for the smallest cause.” McCLOSKEY, *supra* note 29, at 177, 180. The unanimous decision in *Schwartz* “sounds almost self-evident” and the “flat declaration that freedom of occupation is protected by the ‘due process’ clause” and the “intimation that the ‘privilege doctrine’ is no longer available as a defense for arbitrary state licensing requirements . . . clears up an old and gaping ambiguity in American constitutional law.” *Id.* at 167.

87. 354 U.S. 476 (1957).

88. McCLOSKEY, *supra* note 29, at 164.

ren and Brennan, even as they were being vigorously attacked, stood "closer to the Frankfurter position than to that of Douglas and Black."⁸⁹

Similarly, the 1957 Term gave no cause for alarm, and the judicial "proponents of the more circumspect course seem[ed] now to have won the day."⁹⁰ As late as 1962 the Warren Court still seemed to be only modestly reacting to Congress.⁹¹ Although the 1960 term was "a rather dreary one"⁹² in terms of the Court's willingness to challenge controversial congressional prerogatives, its criminal procedure decisions did indicate greater activism.

During this period, the scholars defended the Court both from its southern critics and from those who were upset by detractors of the decisions regarding subversive activity. In a commencement address at the University of Washington, Freund argued for adherence to the rule of law, which he defined as the "imposing of order on disorder while preserving the creative and spontaneous and nonconforming impulses that prevent stagnation in our society."⁹³ He attacked Orville Faubus, the governor of Arkansas who had attempted to defy the federal courts in the Little Rock desegregation dispute, and found that *Pennsylvania v. Nelson*,⁹⁴ which held that state anti-subversive laws were preempted by the Smith Act and other federal laws, was defensible: "[T]he principle applied by the Court goes back to the decisions of an eminent Virginian named John Marshall and . . . Congress can still have the last word by simply making its intention clear."⁹⁵ Freund

89. *Id.* at 189.

90. *Id.* at 204.

91. McCloskey said that the majority opinions in *Wilkinson v. United States*, 365 U.S. 399 (1961), and *Braden v. United States*, 365 U.S. 431 (1961), were "marred by an evasion." McCLOSKEY, *supra* note 29, at 226. "To be sure, the balancing formula [in First Amendment cases such as *Wilkinson* and *Braden*] cannot be expected to produce certain and precise results. But we can fairly ask that the users of the test weigh realities against realities insofar as imperfect man can discern them." *Id.* "And the net result of these pronouncements is that congressional committees remain unfettered by significant constitutional restraints." *Id.* McCloskey thought that the Court could have engaged in more interpretation and "at least deferred an outright holding that two dubious, repressive statutes are sanctioned by the Constitution." *Id.* at 232. "The Court is probably going to behave unobtrusively in [subversion cases], but it has not yet wholly abdicated." *Id.* at 233.

92. *Id.* at 237. "Perhaps no other field, except racial discrimination, so clearly illustrates the general concord of the judges on a basic ideal of fairness to the individual" as did the criminal justice cases; and "the majority has forged gradually ahead." *Id.* at 242.

93. Freund, *The Rule of Law*, 1956 WASH. U.L.Q. 314, 315 (1956) [hereinafter cited as Freund, *The Rule of Law*].

94. 350 U.S. 497 (1956).

95. Freund, *The Rule of Law*, *supra* note 93, at 316.

feared a "threat to the judiciary" and the elevation of "supine mediocrities for the Bench" in the face of the concerted attack.⁹⁶ When irresponsible critics so consistently attacked the Court, the rule of law was also at stake.⁹⁷ Kurland, while contending that some of the criticism was based upon public ignorance, admonished the organized bar to rally to the defense of the Court.⁹⁸ In 1962, Bickel collected some of his earlier essays into a book with a revealing title, *The Least Dangerous Branch*.⁹⁹

Thus, in retrospect, the commonalities of ideology, assumption, and experience with the Court enabled the critics to unite in its defense, for it had done little by 1960 to warrant censure. Yet, there was an uneasiness, a cautiousness about that defense. The Court was getting close to the line of activism; its major decisions of the fifties, although reasonably principled and generally supported by substantial majorities of the justices, had created a storm of controversy. The vehemence of lay and congressional discontent about even the modest decisions of the fifties was unnerving to the Court's friends.

When the caution of the Warren Court was replaced in the 1960's by an activism that energized old congressional enemies, converted new ones, triggered a positive response from formerly disadvantaged groups, and led to what many perceived as a calamitous social upheaval, the mood of the critics changed. Freund and Wechsler, while still defending the Court, at first cautioned the Court and then retreated from an active scholarly role. Bickel and Kurland grew more embittered as the Court seemed to throw off many, if not all, passive restraints and ventured into new areas. At this juncture, it is necessary to consider the development of each critic individually.

B. Personalities

1. Herbert Wechsler

Wechsler entered the lists, it will be remembered, with his famous lecture in 1959 taking issue with Learned Hand's attack on judicial review the previous year.¹⁰⁰ Wechsler found that the Constitution sanctioned and indeed even required judicial review, and that both the Court and its critics were bound by canons of reason. He observed:

96. *Id.* at 318.

97. *Id.* at 316.

98. See Kurland, *The Supreme Court and its Judicial Critics*, *supra* note 4, at 460.

99. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2.

100. Wechsler, *Toward Neutral Principles*, *supra* note 7.

[A]d hoc evaluation is, as it has always been, the deepest problem of our constitutionalism, not only with respect to judgments of the courts but also in the wider realm in which conflicting constitutional positions have played a part in our politics.¹⁰¹

After excoriating political liberals for inconsistency, he argued that the judicial process should eschew ad hoc resolution of controversies, and “must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”¹⁰² Thus, the main qualities of law, its generality and its neutrality, require that every decision rest on principles of “adequate neutrality and generality.”¹⁰³ Yet by acknowledging that “[t]he basic values of a free society . . . must be given weight in legislation and administration at the risk of courting trouble in the courts,”¹⁰⁴ and that the Bill of Rights constituted an “affirmation of the special values they embody,”¹⁰⁵ Wechsler seemed to be recognizing the primacy of certain values. By admitting that “some ordering of social values is essential; that all cannot be given equal weight, if the Bill of Rights is to be maintained,”¹⁰⁶ he acknowledged that some more important values inherent in the specifics of the Bill of Rights could be judicially enforced. Wechsler’s critique of the Supreme Court’s alleged lack of application of his principles encompassed the tenures of Chief Justices Stone and Vinson as well as that of their successor.¹⁰⁷ Although conceding that the decisions regarding white primaries, racially restrictive covenants, and desegregation of public schools “have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years,”¹⁰⁸ Wechsler nonetheless criticized *Smith v. Allwright*,¹⁰⁹ *Shelley v. Kraemer*,¹¹⁰ and *Brown v. Board of Education*¹¹¹ for doctrinal inadequacies. He posed several questions that were suggested by the implications of the opinions. Could a religious political party preclude non-believers under *Smith*? Why didn’t *Shelley* protect the “legal recognition of the freedom of the individual” rather than another value?¹¹²

101. *Id.* at 12.

102. *Id.* at 15.

103. *Id.* at 14-15.

104. *Id.* at 19.

105. *Id.*

106. *Id.* at 25.

107. See text accompanying notes 7-11, *supra*.

108. Wechsler, *Toward Neutral Principles*, *supra* note 7, at 27.

109. 321 U.S. 649 (1944).

110. 334 U.S. 1 (1948).

111. 347 U.S. 483 (1954).

112. Wechsler, *Toward Neutral Principles*, *supra* note 7, at 29.

Why did *Brown* opt for freedom of association rather than freedom against unwanted association? He found that the Court's decisions could not answer his questions; thus, he reasoned, the holdings were per se "unprincipled."¹¹³ Although the questions were themselves based upon controversial premises,¹¹⁴ and although their very formulation contradicted common law principles of case-by-case adjudication, others seized upon the underlying theory as the ultimate test of Supreme Court decision making.

Five years after his major work, Wechsler reentered the fray. Speaking at the University of Georgia, he raised the twin questions of the "practical political limits" and the "moral limits" upon the exercise of judicial power by the Court.¹¹⁵ Restating his generality and neutrality theme, he argued that the Court should weigh the language of the Constitution, "including the 'postulates,' as Chief Justice Hughes called them, that lie behind the words," in reaching its results.¹¹⁶ Wechsler also admonished that "[h]istory must be weighed, though we must grant that it can rarely be decisive," but that it "must not be fabricated or re-written for the purposes of the decision."¹¹⁷ As with history, so with precedent—it is persuasive but not definitive. Although he discussed only *Shelley v. Kraemer*,¹¹⁸ a decision rendered before the Warren years, and the views of the three "state action" extremists in *Bell v. Maryland*,¹¹⁹ Wechsler informed his southern audience that "[t]he Courts must respect this moral limit on their power or their power in the end will not survive."¹²⁰

113. *Id.*

114. Wechsler's belief that *Smith* would require a religiously based political party not to exclude anyone seems questionable, for the case involved a political "club" (1) open to all, whatever their views, except blacks, and (2) exercising a commanding role in the state electoral process. *Shelley*, whatever its muddled *ratio decidendi*, could be comprehended as an endorsement of the "legal recognition of the freedom of the individual," since it protected both the willing white seller and the willing black buyer. *Brown* need not be viewed as a freedom of association case at all, but can be regarded as limiting the ability of the state to segregate its facilities irrespective of the wishes of actual or potential associators. Perhaps the formulations would raise other substantial issues, but they would not be the somewhat simplistic ones formulated by Wechsler. For other issues raised by Wechsler's categories, see notes 122-29 *infra*.

115. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965) [hereinafter cited as Wechsler, *The Courts and the Constitution*].

116. *Id.* at 1012.

117. *Id.*

118. 334 U.S. 1 (1948).

119. 378 U.S. 226 (1964).

120. Wechsler, *The Courts and the Constitution*, *supra* note 115, at 1014.

Criticism of Wechsler's call tended to be restrained by the rules of logic that animated Wechsler's thinking.¹²¹ Most responses sought to demonstrate the logical impracticability of the tenets involved.¹²² One political scientist saw the standard of neutral principles in decision making as an attack upon Hugo Black's absolutism.¹²³ That critic found it logically sufficient that "a principle is neutrally applied . . . where its nonapplication in circumstances to which it is arguably applicable can be justified by reference to competing principles."¹²⁴ Thus, Wechsler was interpreted as actually demanding adequate generality, and "adequate generality cannot be synonymous with total generality."¹²⁵ As a legal philosopher sympathetic to Wechsler's call pointed out, limited generality depends upon both judicial values and issues—"not each and every rule of law need be 'general' and 'neutral.'"¹²⁶ The philosopher was also uncertain about the "demand that courts decide, on grounds of 'adequate neutrality and generality' and at the same time . . . that courts should decide 'only the case they have before them.'"¹²⁷ Wechsler's "liberal critics" argued that literal application of his test would require the existence of "a Court that could review only after it had constructed a totally coherent system" and that such a Court "would in practice not review at all."¹²⁸ This has continued to be the

121. See Miller and Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MT. L. REV. 123 (1962).

122. See Deutsch, *supra* note 14, at 169, 207. Cf., Snortland & Strang, *Neutral Principles and Decision-Making Theory: An Alternative to Incrementalism*, 41 GEO. WASH. L. REV. 1006 (1973). "It is true that Wechsler's view of the judicial process is so encompassing that it would not enable the process to function at all. If, however, proponents of Wechsler's philosophy would accept the position that the Court's primary responsibility is the systematic resolution of the most important problems, then Wechsler's jurisprudence of reason need not be crippled by paralysis. It is one thing to argue that all judicial decisions should be guided by neutral principles; it is quite another to isolate the most important decisions and to ask that judges analyze and predict the consequences and give convincing explanations for their decisions." *Id.* at 1031.

123. "Black's insistence on 'absolutes' served as the focal point for the 'modest' attack on his views. Yet that insistence eventuates in a call for definite standards in constitutional adjudication that strangely echoes Wechsler's demand for neutral principles." Deutsch, *supra* note 14, at 178. "Thus if Wechsler's universe contains constitutional guarantees judicially enforceable otherwise than by abdication, the very contrast on the basis of which neutral principles were found necessary mandates that those guarantees take the form of Justice Black's 'absolutes.'" *Id.* at 182.

124. *Id.* at 188.

125. *Id.* at 190.

126. Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 37 (1963) [hereinafter cited as Golding].

127. *Id.* at 49.

128. Deutsch, *supra* note 14, at 190.

tenor of most criticism.¹²⁹ Wechsler has failed to respond to either his critics or his supporters.¹³⁰

2. *Paul Freund*

Paul Freund viewed the later Warren Court with less severity and apprehensiveness. His role was to explain the Court to law students and to other potential mediators of public criticism. Whatever reservations Freund may have entertained about the role of the Court seemed to have evaporated as early as 1963. He accepted the fact that the Court would emulate its predecessors in discerning certain values in the Constitution:

To Marshall's generation [the Constitution] meant the armament of union, to another age the safeguard of burgeoning wealth, to another the shield of the unorthodox. None of these is wrong; all are encompassed; some become more central as the nagging problems of American life change character.¹³¹

He recognized that the "Court has a responsibility to maintain the constitutional order, the distribution of public power and the limitations on that power."¹³² This characterization earned a vociferous dissent from Kurland.¹³³

129. Thus, the critics of Wechsler, as well as his supporters, have sought to furnish the "neutral principles" he espoused. "[W]hy is not a satisfactory justification for *Brown* simply that, in the concrete situation presented, the right to associate weighed more heavily than that not to associate?" Such a principle would be one of "adequate generality." Deutsch, *supra* note 14, at 191. Golding's somewhat more sophisticated analysis would seem to dispose of Wechsler's problem even more clearly: "The major premise of [*Brown*] is that when a state undertakes a program of public education it must be made available to all on equal terms. This proposition is really the individualization, for the case, of a more general one about state programs: they all must be made available to all on equal terms. . . . [Thus, Wechsler's question whether] the 'evil' of the imposition of association on those who wish to avoid it [is] sufficient to justify the different, and hence, unequal, treatment of equals [is answered] with a 'no' How far can we extend the claim of those who wish to avoid an association that is unpleasant to them? Could this not lead to the invalidation of any form of compulsory education?" Golding, *supra* note 126, at 58. For Freund's reformation of the notion of equal protection in the context of preferential treatment for blacks, see text accompanying note 143 *infra*.

130. See Wechsler, *Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U.L.J. 185 (1968); Symposium, 46 F.R.D. 497, 519 (1968); Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968).

131. Freund, *The Supreme Court Under Attack*, *supra* note 61, at 3.

132. *Id.* at 5.

133. Kurland derided Freund's "message" that "the Court, politically the least responsible branch of government, has proved itself to be morally the most responsible." Kurland, *The Court of the Union*, *supra* note 4, at 642. Undoubtedly, Professor Kurland was displeased by Freund's switch from a "kindly" but firm critic of a court char-

Freund was undoubtedly quicker than his colleagues to acknowledge the creative role of constitutional law. "In a larger sense," he wrote, "all law resembles art, for the mission of each is to impose a measure of order on the disorder of experience without stifling the underlying diversity, spontaneity, and disarray. . . . There are, I am afraid, no absolutes in law or art except intelligence."¹³⁴

By 1965, Freund had essentially endorsed the Warren Court's judicial stance. Noting that constitutional decisions are essentially "moral standards wrapped in legal commands,"¹³⁵ and endorsing the notion that judges help the rest of us think about "social justice and ethical conduct,"¹³⁶ he even began to question the ethical postulate that all should obey the law. "Fidelity to law is an obligation based on reciprocity, on the right of participation."¹³⁷ Although the Court was required to limit itself as an example to the society, and although simple-minded solutions were not desirable, Freund found no difficulty in endorsing *New York Times Co. v. Sullivan*¹³⁸ and the school prayer decisions.¹³⁹ Indeed, earlier he had found the *New York Times* opinion well reasoned, and his views on separation of church and state had always been strongly separatist.¹⁴⁰ Of *Mapp v. Ohio*¹⁴¹ he noted that provisions "for a civil action against the local government for redress

acterized by a "tendency toward overbreadth" and lacking in ability "for refinement and adaptation of principle" to a more conciliatory stance. See Kurland, *The Supreme Court and its Judicial Critics*, *supra* note 4, at 465.

134. Freund, *New Vistas in Constitutional Law*, *supra* note 19, at 646.

135. Freund, *Constitutional Dilemmas*, 45 B.U.L. REV. 13, 21 (1965) [hereinafter cited as Freund, *Constitutional Dilemmas*].

136. *Id.* at 22.

137. *Id.* at 21.

138. 376 U.S. 254 (1964). Freund did express some uncertainty about extending the *New York Times* rule to encompass an involuntary public figure and argued that the "tendency of public debate [is] to go after character and reputation, rather than after the issue, [and this tendency] seems to me endemic . . ." *Judicial Conference—Third Circuit*, 42 F.R.D. 491, 495-96 (1966).

139. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

140. Freund's own version of "preferred freedoms" surfaced in connection with the establishment clause of the First Amendment. "Ordinarily I am disposed in grey-area cases of constitutional law, to let the political process function. Even in dealing with basic guarantees I would eschew a single form of compliance and leave room for different methods of implementation [citing the exclusionary rule, free press, and self-incrimination problems]." The religious guarantees, however, are of a different order because "political division on religious lines is one of the principal evils that the First Amendment sought to forestall." Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1691-92 (1969).

141. 367 U.S. 643 (1961).

against searches and seizures might have forestalled the exclusionary rule."¹⁴²

He even offered a constitutional rationale for granting blacks greater rights than whites under the equal protection clause. Rejecting the classic Harlan formulation that the Constitution should be "color blind," Freund argued a version of affirmative action:

Equal protection, not color blindness, is the constitutional mandate Measures to correct racial imbalance are like those to correct an imbalance in the bargaining position of labor. At least as transitional measures they may serve to promote, not to deny, the equal protection of the laws.¹⁴³

Citing issues such as the right to assigned counsel, the exclusionary rule, and reapportionment after *Baker v. Carr*¹⁴⁴ but before *Reynolds v. Sims*,¹⁴⁵ Freund asked that critics "recognize that although there has been highly significant movement in constitutional doctrine that has to be assimilated rapidly, it has not come as suddenly or as drastically as the more vehement critics assert."¹⁴⁶ After all, he argued, if *Baker* "was an extraordinary decision, it was a response to an extraordinary problem" and a "particularly insistent case. . . . [T]he default of the lawmaking machinery [in Tennessee] had special relevance, for the very structure and processes that are presupposed in representative government had become distorted."¹⁴⁷ He also defended the school prayer decisions as nonabsolutist.¹⁴⁸

Although he had several opportunities to do so, Freund never dealt in detail with the "one man, one vote" mandate of *Reynolds*.¹⁴⁹ In a civil liberties lecture delivered two years after that decision, he indirectly endorsed it, along with the Warren revolution in general:

In our time the principles of an open society, as they have been elaborated by the courts, show a basic coherence: freedom of political speech and writing; equality of access to public institutions;

142. Freund, *Constitutional Dilemmas*, *supra* note 135, at 19.

143. *Id.* at 20.

144. 369 U.S. 186 (1962).

145. 377 U.S. 533 (1964).

146. Freund, *The Supreme Court Under Attack*, *supra* note 61, at 6.

147. Freund, *New Vistas in Constitutional Law*, *supra* note 19, at 638, 639.

148. *Id.* at 645.

149. He cautioned against the "simplistic criterion of one man, one vote," but noted that *Baker* involved "a formulation of the complainants' legal rights [which] may ultimately have to probe deep into the foundations of political philosophy." *Id.* at 638, 639. A year later, he briefly criticized *Reynolds*: "The disparity is not between individuals, but between groups, between constituencies;" and he hoped for "room for accommodation, for a test of reasonableness." Freund, *A Tale of Two Terms*, *supra* note 34, at 236.

equal and fair treatment in criminal trials; equality of legislative districts in a state. All but the last of these were launched in the 1930's, by the Court presided over by Chief Justice Hughes. This has been a remarkable evolution.¹⁵⁰

Freund hailed the civil rights movement, which he felt had "produced a number of important reforms that go far beyond the racial claims that inspired them."¹⁵¹ He condemned the states for their traditional rejection of meaningful reapportionment, the exclusionary rule, and criminal procedure reforms in coerced confession cases, arguing again for recognition that the obligation to obey the law must be reciprocal with political access to meaningful participation in the political process.¹⁵²

Perhaps his failure to join others in condemning *Reynolds* lay in an understanding that malapportionment was a cause of state malaise in our federal system.¹⁵³ He may well have felt that federalism would be revived rather than stifled by *Reynolds*. Since he also had argued that criticism of the Court by state governments could be partially attributable to malapportionment,¹⁵⁴ his indirect endorsement of "one man, one vote" (following, of course, a pre-*Reynolds* admonition against it) may have constituted a recognition that neutral principles would be almost impossible to apply in this realm and that technical electoral equality might be the only feasible solution.

If the logic of events or the persuasiveness of the Warren Court converted him on the question of proper legislative apportionment, the Court's First Amendment decisions may have contributed to his changed views about freedom of speech and press. Again, the retirement of Justice Frankfurter in 1962 may have eased the transitional path, for Frankfurter and Freund were both inextricably connected to the Vinson Court's balancing test in First Amendment cases.

Among all of the theories behind which the advocates of judicial restraint united, none is more dubious than the balancing test espoused [hereinafter cited as Freund, *The Challenge of the Law*].

150. Freund; *The Challenge of the Law*, 40 TUL. L. REV. 475, 480 (1966)

151. *Id.* at 483.

152. *Id.* at 484.

153. Freund had alluded to this connection throughout the fifties. See, e.g., Freund, *Storm Over the American Supreme Court*, 21 MODERN L. REV. 345 (1958). "There are signs . . . that the strength of the resistance movement [against the Court] is more largely in the state capitals and rural areas whose representation predominates in state government than in the major cities. . . . Like so much else in the American Federation, the problem reverts to the structure of politics, in particular the over-representation of rural areas and small towns as compared with the municipalities." *Id.* at 355.

154. Freund, *Storm Over the American Supreme Court*, 21 MODERN L. REV. 345 (1958).

in free speech cases. It led to such unfortunate results as Chief Justice Vinson's "tortuosities" in *American Communications Association v. Douds*.¹⁵⁵ McCloskey stated the formula succinctly:

The judge estimates the probability and seriousness ("gravity") of the evil; he calculates the repression necessary to prevent it; and he weighs the one against the other. This is the "balancing test"; it is Freund's "weighing of values"; it is Frankfurter's "justification for curbing utterance where that is warranted"¹⁵⁶

McCloskey found it to be little more than a "roving commission to make judicial guesses on a wholesale basis."¹⁵⁷ He preferred the Holmes "clear and present danger" test, which, "what ever its faults, has some color of objectivity and definition about it."¹⁵⁸ Indeed, he went so far as to criticize the Warren Court for not adopting it.¹⁵⁹

Freund had been in complete agreement with Frankfurter on First Amendment issues. He was unhappy with the decision in *Lovell v. Griffin*¹⁶⁰ that local governments may not prohibit distribution of non-commercial handbills.¹⁶¹ He derided the notion that prior restraint of speech or press was particularly evil: "The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis."¹⁶² Freund went on to ask: "Is there any ground in reason for treating differently experiments in social and economic legislation and experiments in the control of speech and assembly and religious observances?"¹⁶³ Rejecting the "preferred position" doctrine, he warned against a "clash of absolutes."¹⁶⁴

155. 339 U.S. 382 (1950). See McCLOSKEY, *supra* note 29, at 75.

156. McCLOSKEY, *supra* note 29, at 80. In *Dennis v. United States*, 341 U.S. 494 (1951), "the judicial inquiry becomes . . . as broad and as conjectural as the legislative process itself." McCLOSKEY, *supra* at 81.

157. McCLOSKEY, *supra* note 29, at 81.

158. *Id.*

159. See *id.* at 282. McCloskey unfortunately died in the same year that the Court re-adopted the "clear and present danger" standard in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

160. 303 U.S. 444 (1938).

161. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 535-36 (1951) [hereinafter cited as Freund, *The Supreme Court and Civil Liberties*].

162. *Id.* at 539.

163. *Id.* at 546. Although he approved of the Court's unanimous decision in *Niemotko v. Maryland*, 340 U.S. 268 (1951), reversing the conviction of a preacher for speaking in a public park in violation of a city council's arbitrary determination that he could not, Freund blandly opined that "[t]here is nothing surprising about the case except the fact that the Court of Appeals of Maryland had declined to review the conviction on the ground that the issues were not 'matters of public interest.'" Freund, *The Supreme Court and Civil Liberties*, *supra* note 161, at 541.

164. *Id.* at 546. He cautioned the Court to weigh claims of national security against those of freedom of speech. "For the Court the problem is the fearful one of

Yet, even then, his position was not inflexible. Rejecting Black's celebrated dissent in *Adamson v. California*¹⁶⁵ that only the first eight amendments of the Bill of Rights were incorporated into the Fourteenth, Freund argued:

The concept of liberty in the Fourteenth Amendment is hardly adequate if it is limited to the specific substantive guarantees of the first eight Amendments and to procedural guarantees. . . . Jefferson apart, our preceptors in civil liberties have tended to be judges¹⁶⁶

Despite this rhetorical willingness to recognize the strength of the claims of individual freedom, Freund's pessimism about the absoluteness of the First Amendment continued into the third year of the Warren Court. He even took issue with Holmes' view that the First Amendment protected the ability of an idea to receive acceptance, because that view disregarded the question of truth and validity.¹⁶⁷ He thought that the "preferred position" argument had taken an "excessively dramatic form."¹⁶⁸ "To subordinate all other guarantees to those of the First Amendment is to smuggle into that amendment the whole concept of the individual as an end in himself, which is more naturally a composite of the entire Bill of Rights. And to exalt one guarantee is to denigrate others."¹⁶⁹

Yet, this was the same Freund who could later call *New York Times Co. v. Sullivan*¹⁷⁰ "a significant advance in the constitutional protection of the press."¹⁷¹ This was the same Freund, who, on reflection, found the balancing test of the First Amendment to be inadequate, and "an unfortunate concept at best," which detracted from the necessity to "delimit—not the same as to limit—the right itself."¹⁷² Clearly, in the realm of the First Amendment, where his deepest ideological commitments had lain, his universe of discourse had changed. The reality of that change was even greater than its rhetoric.

so measuring the tensions, or so reviewing the measurements made by others, as not to appear absurd in the sight of history." *Id.* at 545.

165. 332 U.S. 46, 68-92 (1947) (Black, J., dissenting).

166. Freund, *The Supreme Court and Civil Liberties*, *supra* note 161, at 547, 552.

167. Freund, *Law and the Future*, *supra* note 47, at 190. His comments anticipated Alexander Bickel's later views. See text accompanying notes 446-60 *infra*.

168. Freund, *Law and the Future*, *supra* note 47, at 190.

169. *Id.* at 191.

170. 376 U.S. 254 (1964).

171. Freund, *The Challenge of the Law*, *supra* note 150, at 483.

172. Freund, *Mr. Justice Black and the Judicial Function*, 44 U.C.L.A.L. REV. 467, 471 (1967).

The essential moderation that had characterized his career had not deserted Freund. In 1954 he could require that "one who sits in judgment on legislative acts . . . be a philosopher,"¹⁷³ could posit the danger of "needlessly divisive influence of abstract philosophic premises," and could make an "appeal to the process of accommodation and adjustment for the business of living which is exemplified in the adjudicating function of a constitutional judge."¹⁷⁴ Eleven years later, during the storms, he could speak optimistically:

Precisely in a time of warring ideologies there is an opportunity that ought to be embraced for the law to demonstrate its search for underlying points of agreement and to work out accommodations that will be tolerable because they recognize a core of validity in more than one position of the combatants.¹⁷⁵

Despite Freund's reservations about method and rhetoric, he could incorporate the Warren Court's accomplishments into this consistent formula and find that it had labored to "encourage responsible and responsive government."¹⁷⁶

3. Philip Kurland

While Freund took an accommodating, perhaps cautious position toward the Warren Court, Philip Kurland at first approved, very quickly became wary, and, before the others, grew increasingly hostile. It seemed as if the Court continually and perversely refused to learn the lessons of humility and wisdom, as taught by Frankfurter and Kurland, and that perversity increasingly angered at least the latter. Because in Kurland's estimation most justices on the Court were only barely competent, he thought that they ought to derive whatever wisdom they were capable of absorbing from their betters, both on and off the Court.¹⁷⁷ Again, Kurland's acerbic contempt for many of the justices,

173. Freund, *Umpiring the Federal System*, *supra* note 40, at 572.

174. *Id.* at 575.

175. Freund, *Constitutional Dilemmas*, *supra* note 135, at 23.

176. *Id.*

177. Kurland's standards for admission to the Court were high. Since the function of the Court was to govern, he felt it should be composed of platonic philosopher-kings. All extraneous factors, such as geography, race, religion, and especially partisan politics, were to be ignored. The latter were, he opined, usually based upon "parochial demands of an actual or potential constituency." Kurland, *Appointment and Disappointment*, *supra* note 28, at 197. In that article he was particularly embittered by the roles of labor and blacks in defeating Judge John J. Parker for appointment to the Supreme Court in 1930. "His defeat resulted partly from his apparently unfortunate habit of following Supreme Court decisions." *Id.* at 211. Whatever the merits of Kurland's argument, his analogy to the great Nixon-Senate battle of 1969 is far-fetched: "In 1969, President Nixon had two nominations defeated, largely by the same forces that caused the rejec-

and his own substitution of fiat for analysis in his impatience to demonstrate that the Court was meddlesome and stupid, demonstrated the existence of certain fundamental attitudes that underlay his rhetoric.

tion of Judge Parker and essentially for the same reasons." *Id.* To equate Nixon's nomination of Harold Carswell with Hoover's selection of Parker, by any standards, is stretching things a bit. "The evidence of Carswell's racism was irrefutable," as was "his lack of candor before the Senate Judiciary Committee." LEVY, *supra* note 25, at 44-45. Thirteen senate republicans voted against confirmation despite Nixon's claim that personal loyalty to him was involved. *Id.* at 44. For some reason, Kurland could not even concede that Nixon's later choices of Mildred Lillie and Hershel Friday were faulty. He seemed most upset by the role of the American Bar Association in preliminarily vetoing them, calling that body an unrepresentative political entity. Kurland, *Appointment and Disappointment*, *supra* note 28, at 212. His studied ambiguity on the merits—"some think that at least some of these vetoes were warranted"—is also peculiar, unless he believed that no lobbying pressure should be exerted in the nomination process. *Id.* at 214. Yet, if such is true, his failure to mention the disgraceful conduct of the organized bar in the famous Brandeis confirmation battle seems even more peculiar. See A. TODD, *JUSTICE ON TRIAL* 158-63 (1964).

Kurland's *choler* about the circumstances under which certain appointees were not confirmed is exceeded by his scorn of many who were. He challenged the premature "secular canonization of the great man," Earl Warren, and contended that "it is too early to sanctify him." Kurland, *Earl Warren, the "Warren Court," and the Warren Myths*, 67 MICH. L. REV. 353 (1968) [hereinafter cited as Kurland, *Earl Warren*]. "There is no evidence that Warren's influence has extended beyond the power of the one vote that is conferred upon him as a member of the Court. . . . [T]he Court has formed him . . ." rather than vice-versa. *Id.* at 354. "Under Warren's presidency, the Court has been the most divided, if not the most divisive, in American history." *Id.* at 355. Finally, if "reliance is to be placed on Warren's individual contributions to American jurisprudence as revealed in his opinions, it will be difficult indeed to justify such laurels." *Id.* at 353. For Kurland's own earlier assessment of Warren, see notes 310-11 and accompanying text *infra*.

Of Black and Douglas, he cryptically noted that they "think it important to wrap themselves in their judicial trappings. One can only speculate as to the reasons." KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*, *supra* note 4, at 8. His eulogy upon the death of Justice Black was confined to an "impact" analysis. "Almost never was he successful in selling the Court on his doctrine. Almost always was he successful in bringing the Court around to the conclusions he would reach by way of his doctrine." Kurland, *Hugo LaFayette Black: In Memoriam*, 20 J. PUB. L. 359, 361 (1971). He blamed the influence of Black's broad First Amendment notions for *New York Times Co. v. Sullivan*, noting "the destruction of the concept of libel . . . [and] what was once considered obscene . . . is . . . now protected as within the proprieties of ordinary discourse." *Id.* at 361. Finally, "[f]or better or worse, our Constitution reads today pretty much as Mr. Justice Black has always wanted us [to] read it." *Id.* at 362. Justice Douglas particularly rankled Kurland because he refused to play the role of platonic guardian and actually mingled in the nether regions of politics and world affairs. "[T]hat a Justice should treat the business of the Court as a part time occupation, and that he should enter the arena of politics and public controversy, was demeaning of the Court's function in our society." Kurland, *Appointment and Disappointment*, *supra* note 28, at 236. Goldberg, another liberal Warren Court Justice, was dismissed as "always a joiner." KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*, *supra* note 4, at 134.

Kurland's warnings were voiced earlier than those of the other critics. In a speech delivered to the Utah Bar Association, answering the attack on the Court by the 1958 Conference of Chief Justices of the States, he warned that "in the forum of public opinion, the wrongs of the Supreme Court cannot be deemed expiated by the equal or grosser errors on the part of the courts over which the Chief Justices of the States preside."¹⁷⁸ Despite the relatively modest record of the Warren Court at that time,¹⁷⁹ Kurland warned against judicial activism: "It is hard to distinguish between the judicial and legislative functions on the basis of this activist . . . philosophy."¹⁸⁰ He admitted, however, that "[t]his is not a novel theory of judicial power."¹⁸¹ In contrast to Wechsler, Kurland regarded the Court as a political rather than a legalistic body, but it is hard to understand just what he meant. In 1959 he found that the Court must "sustain the powers of the responsible branches of government" unless the exercise of a particular power "patently infringes" the Constitution.¹⁸² Later he disagreed with those who believed that "the courts have no role in aiding the transitions that are demanded by the ever changing conditions of society"¹⁸³ and even endorsed the notion that "[t]he function of the Supreme Court Justice is governance and the best test of capacity for that office is experience in governance."¹⁸⁴ If the later Kurland statement was to be taken literally, he sounded like a later Warren, and it is indeed difficult "to distinguish between the judicial and legislative functions on the basis of this . . . philosophy."¹⁸⁵

To be fair, Kurland did not confine his contempt for the intellectual capabilities of the justices to the liberal Warren majority. He found Chief Justice Burger to be something less than an intellectual giant. "And the notion, for example, that the Chief Justice of the United States can improve the qualities of the opinions of judges of other courts would have more credibility if his own opinions were models of excellence. What he cannot accomplish by example, he is not likely to bring about by precept." Kurland, *1970 Term, supra* note 68, at 272. In addition, his warning to Douglas was recapitulated in one to Burger: "The Chief Justice of the United States is not particularly well equipped to supervise substantive or procedural law reform throughout the nation." *Id.* at 271. Burger's reformist zeal "suggests that the job of a Supreme Court Justice is only a part-time effort. . . . The shoemaker, even the chief shoemaker, should stick to his last." *Id.* at 271-72. Just as Kurland's views about Warren changed over time, so did his skepticism about Burger.

178. Kurland, *The Supreme Court and its Judicial Critics, supra* note 4, at 458.

179. See text accompanying notes 76-90 *supra*.

180. Kurland, *The Supreme Court and its Judicial Critics, supra* note 4, at 464.

181. *Id.* at 463.

182. *Id.* at 464.

183. Kurland, *1970 Term, supra* note 68, at 321.

184. Kurland, *Appointment and Disappointment, supra* note 28, at 198.

185. Kurland, *The Supreme Court and its Judicial Critics, supra* note 4, at 464.

However, Kurland had earlier enunciated the major themes of the critics: (1) "too many opinions which obfuscate rather than enlighten,"¹⁸⁶ (2) the undemocratic nature of judicial activism,¹⁸⁷ and (3) "the burdens [of] the amount of work which [the Court] must handle every year."¹⁸⁸ He cautioned that the Court required popular respect, if not necessarily approval. Respect was to be gained, of course, by an understanding that could come about only through the intellectual persuasiveness of judicial opinions.¹⁸⁹ Five years later Kurland returned to this final theme in a symposium on certain proposed constitutional amendments to curb the Court.¹⁹⁰ After quickly deriding the idea of a Court of the Union to review Supreme Court decisions touching questions of federalism, he spent most of his analysis on the question whether "the Court's behavior invite[s] its own destruction."¹⁹¹ Most of this discussion consisted of unanalyzed siftings of lengthy excerpts from dissenting opinions to show that there was substance to much of the criticism. He concluded, as might be expected, that "[t]he Court disregards precedents at will without offering adequate reasons for change [and writes] advisory opinions or, what is worse, advisory opinions that do not advise."¹⁹²

At that time he went beyond the scope of his previous criticism in two crucial ways, which were significant in terms of his increasing political distemper. For apparently the first time, he showed apprehensiveness about the civil rights movement. One item on his bill of particulars against the Court was its propensity to write or rewrite law "for the purpose of conferring benefits on Negroes that it would not afford to others."¹⁹³ He was impatient with Freund's acceptance of the Court's new role and questioned the message that "the Court, politically the least responsible branch of government, has proved itself to be morally the most responsible."¹⁹⁴ Kurland, as juror, was still out on the issue of activism; his decisive verdict of "no" would come later.

Kurland's ambivalence was engendered by a dilemma; democratic institutions often did not work, and the Court wanted to take up the

186. *Id.*

187. *Id.* at 466.

188. *Id.* at 465. This was written at a time when the court received 2,000 applications and decided approximately 150 cases with opinion each year.

189. *Id.* at 466.

→ 190. Kurland, *The Court of the Union*, *supra* note 4.

191. *Id.* at 637.

192. *Id.* at 640.

193. *Id.* at 639.

194. *Id.* at 642.

slack but could not and should not do so. State legislatures, he observed in 1964, were "concerned with their war on Robin Hood and similarly dangerous radicals,"¹⁹⁵ and "[t]here can be little doubt that the other branches of government have failed in meeting some of their essential obligations to provide constitutional government."¹⁹⁶ If this were true, and if, as he was later to say, "[a]n insistence by state legislators on flouting their own laws, more than any novel legal theory, may well be what moved the Court to action"¹⁹⁷ in *Baker v. Carr*,¹⁹⁸ then why did he find judicial activism so distasteful? Indeed, if "centralization of power in the national government has made state legislatures all but redundant,"¹⁹⁹ then why all the fuss about "one man, one vote"?

The answer is that Kurland's displeasure extended far beyond the activities of the Court; his pessimism is directed at the Court only as an immediate, perhaps symbolic, target. The events of the sixties showed him that "[t]he herd is regaining its ancient and evil primacy; civilization is being reversed . . ."²⁰⁰ He feared the pressure of institutional breakdown in an era of incessant demands upon government, demands that the representative branches could not fulfill because of various incapacities. The Court, he believed, was sanctioning and contributing to the breakdown, and ultimately its controversial activities could contribute to its own breakdown as a vital institution. Indeed, the vital institution of federalism was under siege long before the Warren Court; John Marshall "spent almost thirty-five years on the supreme bench in doing little else" than engaging in "a constant attrition of state power."²⁰¹

Kurland's judgment of doom was reinforced by the apocalypses of the late sixties, even before he wrote *Politics, the Constitution, and the Warren Court*. Everywhere he looked he found indications that government itself, shorn of vitality by the steady diminution of federalism, was *in extremis*.²⁰² He pronounced the attenuation of separation

195. *Id.* at 637.

196. *Id.* at 642.

197. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*, *supra* note 4, at xvii.

198. 369 U.S. 186 (1962).

199. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*, *supra* note 4, at xix.

200. *Id.* at 16 (quoting Learned Hand).

201. *Id.* at 57.

202. Kurland, *The Importance of Reticence*, 1968 DUKE L.J. 619 [hereinafter cited as Kurland, *The Importance of Reticence*]. "[F]ederalism is moribund if it is not

of powers a "disease" that "would appear to be terminal," at least in relation to effective congressional control over foreign policy.²⁰³ He blamed the Hughes Court for the insupportable doctrine that the president represents the nation in international affairs: "It remained for Mr. Justice Sutherland and the Supreme Court to 'discover' that the presidential powers over foreign affairs derived not at all from the Constitution but rather from the Crown of England."²⁰⁴ Institutional restraints by Congress upon the president, not the "dubious . . . power of judicial review," were absolutely necessary.²⁰⁵ Not that such redress would soon be forthcoming, for Congress, he believed, had failed, and "[t]he failure of Congress [was] the failure of democracy. The alternatives [were] not pleasant to contemplate."²⁰⁶ The extension of his despair to the people merely underscored the depth of his pessimism.²⁰⁷ He seemed not to notice the contradiction between this view of an imperial president riding roughshod over Congress and what he later perceived to be the imperial cowardice of President Nixon in bowing to political pressure from Congress to sign the eighteen-year-old vote bill.²⁰⁸

In a sense, "the people" had always been a problem to Professor Kurland. In a tribute to Justice Frankfurter in 1958 he proudly observed: "Neither as a teacher nor as a jurist has he been a 'man of the people.'"²⁰⁹ Twelve years later, he quoted another hero, Learned Hand:

dead." *Id.* at 620. Its demise or decay was caused in part by the "nationalization of our economic and social life, . . . abuse of the doctrine by reactionaries, . . . pressure by liberals to place power where they thought they could control it," and state unwillingness or inability to use power. *Id.* at 621.

203. *Id.* at 621. In describing a session of the Senate Foreign Relations Committee on Vietnam, Kurland noted: "The scene epitomized the arrogance of the executive branch and the . . . nature of the legislative branch of our national government." *Id.* at 620.

204. *Id.* at 622, referring to *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Apparently it did not make much difference, for Kurland felt that "the United States has no foreign policy." Kurland, *The Importance of Reticence*, *supra* note 202, at 622. "Our policy is to react rather than to act." *Id.* at 623.

205. *Id.* at 627.

206. *Id.* at 636. He condemned Congress for passing too many private bills. *Id.* at 634. Arguing for "minimal decency" in congressional investigations, he found them to be "not very amusing spectacles, of which the House Committee on Un-American Activities is the worst example." *Id.* at 633.

207. "Ultimately, however, the fault lies with the people." *Id.* at 635.

208. See text accompanying note 347 *infra*.

209. Kurland, *Mr. Justice Frankfurter*, 26 U. CHI. L. REV. 1, 2 (1958).

[I]t is possible to convert [the individual] into a fanatical zealot, ready to torture and destroy and to suffer mutilation and death for an obscene faith, baseless in fact and morally monstrous.²¹⁰

Compared to the references to the breakdown of American civilization that are strewn through his later works,²¹¹ Kurland's criticisms of the Warren Court are small jabs indeed. Why, then, did he concentrate upon the Court in particular when, according to his world view, the entire society was *in extremis*?

The magnitude of his general concern for society and his discomfort about the specific role of the Court prevented civil liberties problems—the concern of the Court since at least the forties—from commanding his deep attention. Before the era of the Warren Court, as has been noted, Kurland had neither pronounced theories of the Court's role in this realm nor very much to say about its performance.²¹² Unlike Freund, who found freedom of speech to be an important value and specifically endorsed *New York Times Co. v. Sullivan*,²¹³ Kurland from the beginning found no independent value to a free press. The freedom of the press should be conditioned on its function as a “means of keeping the people informed of the truth,”²¹⁴ Kurland thought. He disapproved of *New York Times*;²¹⁵ and in view of his

210. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, *supra* note 4, at 16.

211. “The fact of the matter is, of course, that the areas of government in which the states are sovereign have been reduced almost to nonexistence.” KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, *supra* note 4, at 53. “The Court may well be the last governmental bulwark of freedom” Kurland, *1970 Term*, *supra* note 68, at 321. “If I read the political scene correctly, the Supreme Court . . . is the lone element of national government committed to the individual.” Kurland, *The Privileges and Immunities Clause: “Its Hour Come Round at Last?”*, 1972 WASH. U.L.Q. 405, 420 (1972) [hereinafter cited as Kurland, *The Privileges and Immunities Clause*]. The failure to comprehend that men and institutions are different “may very well prove fatal to the basic American concept of democratic government.” Kurland, *The New Supreme Court*, 7 JOHN MARSH. J. PRAC. & PROC. 1 (1973) [hereinafter cited as Kurland, *The New Supreme Court*]. The federal government's failure to adhere to principles of checks and balances and separation of powers “has resulted in the inordinate loss of individual freedom from which we suffer today and which is likely to be exacerbated tomorrow.” *Id.* The executive has not only overridden Congress but has reduced executive departments to a “menial status.” *Id.* at 3.

212. See text accompanying note 37 *supra*.

213. 376 U.S. 254 (1964). Freund, *Constitutional Dilemmas*, *supra* note 135, at 17-18.

214. Kurland, *The Supreme Court and Its Judicial Critics*, *supra* note 4, at 461.

215. “But it must be apparent that what [*New York Times*] means is a greater protection for the defamer and a diminution of the very small protection that was available

belief that "media control[s] . . . the American mind,"²¹⁶ his thesis is not surprising.

Kurland also disparaged the significant issues of criminal procedure adjudication in his 1970 summary of the Warren Court's decisions. He admitted that criminal procedure decisions differed from other judicially initiated reforms because they confronted administrative officials rather than coequal branches of government or state legislatures, but he also found too great an activism in this realm. Although the "crudities of criminal procedure in the states were deep and dangerous cancers in our body politic,"²¹⁷ calling for drastic action, and although the Warren Court "inherited this movement from predecessor courts,"²¹⁸ federalism nevertheless dictated that judicial intervention, no matter how modest, was an inappropriate solution.²¹⁹ Moreover, because those cases required that "precedents both hoary and young were felled with the precision of modern lumberjacks cutting through a forest,"²²⁰ the results were per se displeasing to him. In his only substantive comment upon *Miranda v. Arizona*,²²¹ Kurland disdainfully insisted that it was "a highly overrated opinion, by those who approved it no less than by those who condemned it."²²² *Mapp v. Ohio*²²³ agitated him not so much for its holding as for its willingness to overturn precedent; it departed from the case-by-case, fair trial approach to sanction an intrusion into state policy making, and it fed "the Court's intoxication with its own power."²²⁴ In the interests of a viable federalism, Kurland felt that the Court should not formulate prophylactic rules, but should only adjudicate the few cases that reach it. The cancer, though "deep and dangerous," should be excised only in those particular cases and should not be regarded as symptomatic of a more widespread malignancy that

to the defamed." KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, *supra* note 4, at 64.

216. *Id.*

217. *Id.* at 83.

218. *Id.* at 73.

219. "In one sense, the furor that the Court has aroused over the criminal cases is difficult to comprehend. After all, the only thing that the Warren Court has done is to demand that the State criminal processes come up to the same standards that are being imposed on federal criminal processes. But then, that is what federalism is all about." *Id.* at 82.

220. *Id.* at 90.

221. 384 U.S. 436 (1966).

222. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, *supra* note 4, at 80.

223. 367 U.S. 643 (1961).

224. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, *supra* note 4, at 78.

afflicts state criminal justice systems. Cases the Court could not or would not review ought to be left to local systems. Kurland did not consider the possibility that a case-by-case approach would make it difficult for other judges to understand and to follow the Court's mandates.

Unlike other critics, Kurland formally disavowed the civil rights movement. He lamented the Court's role in sparking and sustaining "the Negro social revolution that engulfs us at this very moment."²²⁵ Although he admitted that *Brown v. Board of Education*²²⁶ "was a return to the understanding of the *Slaughter-House Cases* concerning the use for which the [equal protection] clause was framed,"²²⁷ he found that *Brown* and its progeny had cast a deep knife into "the fabric of society," with mixed results.²²⁸ According to Kurland, *Brown* also raised difficult questions of state action, as well as the scope of congressional power under the commerce clause to reach private, discriminatory conduct.²²⁹ Whether Kurland was bitter about the engulfing black revolution for its own sake, for its excesses, for the incidence of badly reasoned judicial opinions considering its legality, or because of his belief that it was the entering wedge for the "egalitarian ethos that is becoming dominant in our society,"²³⁰ is a question that will be considered later. There is no doubt that he felt that enough had already been done.

4. *Alexander Bickel*

Alexander Bickel was the youngest and most publicly known of the critics. He was a contributing editor to the *New Republic* for many years, wrote often for other popular publications, including the *New York Times Magazine* and *Commentary*, lectured frequently, and participated in active politics, endorsing and campaigning for liberal candidates such as Robert F. Kennedy.²³¹ He was the same combination of personal reformer and professional skeptic as his mentor, Felix

225. Kurland, *Earl Warren*, *supra* note 177, at 358.

226. 347 U.S. 483 (1954).

227. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, *supra* note 4, at 111.

228. *Id.* at 122.

229. He admitted that the Civil Rights Acts of the 1960's had not extended the reach of the commerce clause. "The reach of Congress had been equated with its grasp by the Supreme Court a score of years earlier." *Id.* at 139. Nor were the Court's decisions upholding congressional authority impeded by any strong judicial precedents. *Id.*

230. *Id.* at xx.

231. For a bibliography of his writings and his political alliances, see A. BICKEL, *THE MORALITY OF CONSENT* 143-50 (1975).

Frankfurter. Bickel's interests were protean and extended far beyond the realms of constitutional law, history, and politics.²³² He argued the Pentagon Papers case²³³ on behalf of the *New York Times*, espousing the moderate First Amendment position that eventually carried the Court, and thus repeated the experience of Wechsler, who, almost a decade earlier, had made the winning argument in *New York Times Co. v. Sullivan*,²³⁴ espousing a moderate view of the First Amendment. Bickel's death late in 1974, at the age of forty-nine, can only be regarded as a profound loss to the profession. However, it is appropriate to consider him as a Warren Court critic who did not become a Burger Court critic, for the years before his death were extremely productive ones.

Bickel's development through the decade of the sixties was complex, much more strained than Kurland's, and yet led to a disillusionment so profound that, like Kurland's, it spread far beyond questions of judicial role and capacity and led to a fundamental examination of the nature of American democracy. Bickel's caution about the function of the Court is well known. He consistently and cogently argued that its role in most areas was neither to strike down legislation it did not like nor to legitimate it. Prudence and its educational function required that the Court often decline cases so that "the political processes [could be] given relatively free play."²³⁵ He found it legitimate for the Court to develop "techniques that allow leeway to expediency without abandoning principle."²³⁶ As a result,

the integrity of the Court's principled process should remain unimpaired, since the Court does not involve itself in compromises and expedient actions. When it does not forbid them on principle, it should withhold intervention altogether, trusting to previously announced principles to exert their influence on tendency.²³⁷

Ironically, Bickel's general approval of the early Warren Court's use of

232. He helped draft the War Powers Act of 1973 (50 U.S.C. §§ 154 *et seq.* (Supp. 1976)), and wrote the introduction to J. JAVITS, *WHO MAKES WAR?* (1973). In addition he wrote extensively about the Warren Commission Report. See, e.g., Bickel, *CBS and the Warren Report*, *NEW REPUBLIC*, July 15, 1967, at 29; Bickel, *Re-examining the Warren Report*, *NEW REPUBLIC*, January 7, 1967, at 25; Bickel, *Failure of the Warren Report*, *COMMENTARY*, October, 1966, at 31.

233. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

234. Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 *VA. L. REV.* 1187, 1197-98 (1975).

235. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 70.

236. *Id.* at 71.

237. *Id.* at 95.

what he termed the "passive virtues"²³⁸ was qualified by a discomfort with certain decisions that seemed to sanction oppressive congressional investigations,²³⁹ some aspects of the federal government's hunt for subversives,²⁴⁰ the Connecticut birth control statute,²⁴¹ and capital punishment.²⁴² Apart from his strong caveat on *Baker v. Carr*,²⁴³ the more

238. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) [hereinafter cited as Bickel, *The Passive Virtues*].

239. The decision in *Barenblatt v. United States*, 360 U.S. 109 (1959), "placed the crown of principled legitimacy upon the modestly inclined head of the House Un-American Activities Committee." Bickel, *The Passive Virtues*, *supra* note 238, at 67. He resurrected the old delegation of powers formula and argued that it "should be as applicable to the relationship between Congress and one of its committees as between Congress and the administrative [sic]." *Id.* at 68. "The sum of it is that the power to investigate operates of necessity under a suspension of many otherwise applicable rules," *id.* at 69, and, when combined with the often inevitable invasions of privacy, requires that Congress closely supervise its committees. *Id.* at 67.

240. While praising *Kent v. Dulles*, 357 U.S. 116 (1958), for its statesmanlike action in referring the matter of passport issuance restrictions back to Congress, Bickel was upset by *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886 (1961), which permitted summary dismissals of nonsensitive employees under a federal security program for private industries: "A short-order cook, after all, should have as much right to her humble job as Mr. Greene had to his career." BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 168, referring to *Greene v. McElroy*, 360 U.S. 474 (1959). "The Court should have required a responsible policy decision to be made, as it did in *Greene*." Bickel, *The Passive Virtues*, *supra* note 238, at 74.

241. *Poe v. Ullman*, 367 U.S. 497 (1961). Bickel quarreled with Frankfurter's contention that the dispute was academic, for the "matter was not academic at the time of the argument; it became so by decision of the Supreme Court." Bickel, *The Passive Virtues*, *supra* note 238, at 60. "The statute does not speak the present will of dominant forces in the state. It represents at present a deadlock of wills, from which the Court was asked to extricate the state." *Id.* at 61. Bickel even flirted with the European idea of ignoring statutes when "normal enforcement" of law is absent. *Id.* at 63. The danger of unenforced legislation, he found, lay in its potential capacity to be utilized for harassment purposes: "The books are full also of more sinister enactments, which are used to prosecute only with exceptional, discriminatory selectivity, and are used most often administratively, short of prosecutions, to blackmail and harass and cajole people." BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 153. He noted that the consequences of *Ullman* "must be that a prosecution of persons [like the plaintiffs] would fail on the ground of desuetude." Bickel, *The Passive Virtues*, *supra* note 238, at 64. He argued that "[i]t is quite wrong for the Court to relieve [Connecticut] of this burden of self-government" by not requiring the state to decide whether its law was still enforceable. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 156.

242. "[T]he Court has missed or has wilfully passed up its most signal opportunities to shape and reduce the issue." BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 242. Commenting upon *United States v. Rosenberg*, 346 U.S. 273 (1953), he chastized the Court for lending "its acquiescence, if no more, to a proceeding of grisly speed, consummated in an atmosphere of the tumbril rolling to the guillotine and the heads being showed to the mob." BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 242. He also was repelled by "the equally unspeakable *Chessman* case" in which the state of California found that "the only way to stop him was to kill

liberal Warren Court decisions fit comfortably within Bickel's jurisprudential scheme.

He was aware of the Court's "statesmanlike" role. In a provocative law review article that he published in 1955, he stated that the Court had admirably fulfilled that role in *Brown*, a decision that was in turn consistent with the long term beliefs of the framers of the Fourteenth Amendment.²⁴⁴ Whatever his reservations about the role of the judiciary, he consistently endorsed the cause of congressional civil rights action.²⁴⁵ His interest in civil rights causes led him to qualify his usual cautionary advice to the judiciary in the controversial realm of state action. He concluded that in *Garner v. Louisiana*,²⁴⁶ a civil rights sit-in case, the Warren Court had acted wisely in reversing a conviction on technical grounds and avoiding the larger issue of whether the use of state officers to enforce private segregation practices constituted impermissible state action.²⁴⁷ Although he found the broad issue to be "delusively simple,"²⁴⁸ he thought an expansive reading of the concept possible: "[A] private policy of segregation on privately owned premises may differ from a state-enforced policy in degree only; the effectiveness of both may finally depend on the police power of the state."²⁴⁹ The idea of attacking the applicable statute on grounds of vagueness appealed to him, for that theory has a "respectable lin-

him." *Id.*, discussing *People v. Chessman*, 52 Cal. 2d 467, 341 P.2d 679 (1957). His comments about the *Rosenberg* case at this time were mild in comparison to his bitterness in 1966. "The *Rosenberg* case was nevertheless an unforgivable disgrace to the American administration of justice." Bickel, *The Rosenberg Affair*, COMMENTARY, January, 1966, at 69. The death sentence was "a ghastly and shameful episode." *Id.* at 72. "The sentence was carried out, in effect, in retribution for their silence. This action is disgusting." *Id.* at 74. The Supreme Court's vacation of a stay ordered by Justice Douglas in the matter was "a sin against the Court's very reason for being." *Id.* at 76. Bickel was proud of the fact that Frankfurter dissented from denials of certiorari and from the lifting of the stay of execution. *Id.*

243. 369 U.S. 186 (1962).

244. Bickel, *The Original Understanding and the Desegregation Decision*, 69 HARV. L. REV. 1 (1955).

245. See, e.g., A. BICKEL, *THE MORALITY OF CONSENT* (1975); Bickel, *Civil Rights Act of 1963*, NEW REPUBLIC, July 6, 1963, at 9, 146-47; Bickel, *Civil Rights Boil-up*, NEW REPUBLIC, June 8, 1963, at 10; Bickel, *Civil Rights: The Kennedy Record*, NEW REPUBLIC, Dec. 15, 1962, at 11; Bickel, *Next President and Civil Rights*, NEW REPUBLIC, October 31, 1960, at 17.

246. 368 U.S. 157 (1961).

247. "[A] denial of certiorari would have been indicated, except that it would have been extremely harsh on the defendants . . ." BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 177.

248. *Id.* at 175.

249. *Id.*

eage,"²⁵⁰ but he was satisfied that the result reached in *Garner* "may thus be regarded as a colloquy with the trial court."²⁵¹ Whatever reservations Bickel may have had about the authority of the Court to find state action, his caution was considerably reduced when Congress had already chosen to act, as in the sit-in situation.²⁵²

Bickel was much more a democrat in 1962 than he was a decade later. Although conceding the necessity for judicial review, he recognized that "it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."²⁵³ Moreover, he believed the democratic process itself was one of "holding to account—all through the exercise of the franchise."²⁵⁴ Because that process was vital and because judicial review may have "a tendency over time seriously to weaken the democratic process,"²⁵⁵ judicial activism should be discouraged. The great exception to this generalization was judicial protection of the Bill of Rights from legislative intrusion: "The real question may be whether [such legislation] is good."²⁵⁶ Bickel conceded that in addition to traditional Bill of Rights cases an occasional pressing matter, such as desegregation, may require judicial intervention, but "[g]iven the nature of a free society and the ultimate consensual basis of all its effective law, there can be very few such principles."²⁵⁷

Bickel's disenchantment with the Warren Court commenced about a year after *Baker v. Carr*.²⁵⁸ In a popular article he asserted that the Court's avoidance of "any comprehensible goal" produced an indefinite result that would render *Baker* "perhaps the least likely [decision] to play a substantial and enduring role in shaping our society."²⁵⁹ Con-

250. *Id.* at 177. Kurland, on the other hand, deems the "void-for-vagueness cases" to be "vague-for-voidness" ones. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, *supra* note 4, at 166.

251. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 179.

252. See generally Civil Rights Act of 1964, 42 U.S.C. § 2000(a); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

253. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 17.

254. *Id.*

255. *Id.* at 21.

256. *Id.* at 39.

257. *Id.* at 59. He agreed with Wechsler's criticism of *Brown v. Board of Education*, 347 U.S. 483 (1954), and interpreted it to mean that "[r]ace is a proscribed ground of legislative classification, except that it may be used sometimes." BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 59. Bickel believed, however, that "neutral principles" did not tell us what values were important and deserving of judicial protection. *Id.*

258. 369 U.S. 186 (1962).

259. Bickel, *Reapportionment & Liberal Myths*, COMMENTARY, June, 1963, at 483.

trary to Frankfurter's impassioned dissent in *Baker*, Bickel conceded that abstention from the "political thicket" was unsatisfactory insofar as "willy-nilly, the Court was helping to entrench the status quo."²⁶⁰ Although he approved of the basic decision in *Baker*, Bickel found that certain language in Justice Brennan's opinion was being taken by lower federal courts to mean that recent apportionments were invalid because they were "somehow irrational and unconstitutional."²⁶¹ For him, constitutional rationality, in itself a perfectly valid principle, meant "the absence of demonstrable irrationality."²⁶² Since most malapportionments "favor rural interests over urban, allocate more strength proportionately to sparsely populated areas than to densely populated ones,"²⁶³ he wondered what standard of rationality could be applied. After all, he analogized, antitrust policy favored the small competitor, farm policy favored farmers, and First Amendment judicial policy favored distasteful ideas; so what was particularly evil about malapportionment? He concluded that "the conventional test of rationality cannot generally lead anywhere in this field—no more than it could lead anywhere in the field of racial discrimination."²⁶⁴

As in racial discrimination cases, issues of rational apportionment must inevitably involve the choice of values. Curiously, Bickel's answer was not that all distinctions among voters must be discarded, but rather that no principle can be applied. He concluded that "we cannot look for any enduring result from this particular enterprise in judicially-directed reform."²⁶⁵ The idea of "one man, one vote" was not novel, but it did not seem to Bickel to have the degree of public support necessary for the Court to undertake a major, long-term reform effort. Bickel's belief that democracy was not best served by "one man, one vote" contributed to his unease:

Government by consent requires that no segment of society should feel alienated from the institutions that govern. This means that the institutions must not merely represent a numerical majority—which is a shifting and uncertain quantity anyway—but must reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices, that all their diverse characteristics, were brought to bear on the decision-making process.²⁶⁶

260. *Id.* at 484.

261. *Id.*

262. *Id.* at 485 (emphasis in original).

263. *Id.* at 486.

264. *Id.*

265. *Id.* at 487.

266. *Id.* at 488.

It is difficult to comprehend why malapportioned legislatures reflected "the people in all their diversity" while the principle of "one man, one vote" did not, but Bickel embraced this formulation. He contrasted the presidency, a majoritarian institution essentially elected by the people, to the legislature, a reflective institution that represents other interests: "The political arena is messier than the judicial, to be sure, but that is where all of us who feel under- or mis-represented should be, exerting every ounce of power and influence we can command."²⁶⁷ This was the old Frankfurter cry to "sear the conscience" of the legislature,²⁶⁸ but of course issues of organization that touch on the jobs of incumbents and on traditional practical arrangements require a somewhat different approach from that taken for principled resolution of substantive issues. Bickel argued for concentration upon other debilitating evils, such as seniority and committee systems, without noticing that such problems often reflect the fundamental difficulties caused by malapportionment.²⁶⁹

Earlier, Bickel had conceded that the rationale of *Colegrove v. Green*²⁷⁰ was no longer acceptable and had granted that "[g]overnment by eight or twelve percent is an extremity that the Court would be justified in viewing as arbitrary"²⁷¹ At that time he had felt that a

267. *Id.* at 491.

268. *Baker v. Carr*, 369 U.S. 186, 270 (Frankfurter, J., dissenting).

269. "[S]uburban districts appear to have become more competitive over the decade. By the late 1960s, suburban House seats were substantially more likely to be hotly contested than were the big-city districts. . . . By 1968 . . . contests in the suburban districts that had been created in the South were tending to be more closely fought than those in other southern districts" Cummings, *Reapportionment in the 1970s: Its Affects on Congress*, in REAPPORTIONMENT IN THE 1970s, 209, 227 (N. Polsby ed. 1971). "[T]he suburban districts in the North, which in 1962 were fairly heavily Republican, were by the end of the decade more closely balanced between the parties." *Id.* at 230. At least some students of the subject have concluded that, irrespective of the election results, "reapportionment is associated with important policy changes in the 1960s." Hanson & Crew, *The Policy Impact of Reapportionment*, 8 L. & SOC. REV. 69, 72 (1973). See also I. SHARKANSKY, SPENDING IN THE AMERICAN STATES (1968); Sharkansky, *Reapportionment and Roll Call Voting*, 51 SOC. SCI. Q. 129 (1968). The noticeable liberal trend in the congressional elections of 1972 and 1974 may well be attributable, in part at least to redistricting.

270. 328 U.S. 549 (1946).

271. Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39, 43 (1962). In this article he found Frankfurter's rationale in *Colegrove* to be unpersuasive as there was "no readily apparent reason why the fourteenth amendment's guarantee of the equal protection of the laws should not similarly [to the fifteenth's guarantee against racial discrimination] cut across [malapportionment issues] and similarly authorize judicial intervention." *Id.* at 39. "The disadvantaged voters in *Colgrove* were injured, their claim had all the desirable immediacy, and no more suitable plaintiffs are imaginable." *Id.* at 40. Frankfurter's finding of lack of judicially manageable standards in *Colgrove* was, Bickel found, "rather flatly and generally stated." *Id.*

rationality test sounded "good, but . . . chases its own tail," and fearing that the Court might sanction bad apportionments, found himself as confused about the Court's ultimate role as were the justices themselves.²⁷²

In 1965, Bickel noted that Frankfurter's retirement three years previously "alters the entire judicial landscape."²⁷³ He feared the existence of "too much of stark ideological struggle, too much forcing of choices between mutually exclusive ideological ultimates, especially with respect to problems as to which no satisfactory choice between such ultimates seems possible."²⁷⁴ Although he let stand his earlier argument that "one man, one vote" went too far,²⁷⁵ Bickel did not modify his judgment that Supreme Court inaction in this realm, before *Baker*, had come at too high a price.²⁷⁶

Bickel's attitude toward the civil rights movement changed substantially between 1965 and 1972. Before the advent of the new left and black power movements he was sanguine about the revolution in the streets²⁷⁷ and argued that extra-legal demonstrations are "justified

272. *Id.* at 44.

273. BICKEL, *POLITICS AND THE WARREN COURT*, *supra* note 2, at 162.

274. *Id.* at 164.

275. "It is enough justification for unequal districting that it *sometimes* serves legitimate ends." *Id.* at 185. "The remedy for malapportionment lay with "the majoritarian executive." *Id.* at 190. "It is at least as important that the largest possible variety of interests in this immense country be reflected in the House, have access to it, have some share . . . of power and thus gain . . . a sense of common venture in government" *Id.* at 194-95. At the beginning of the book, he invoked his customary appeal to judicial self-restraint: law, to be effective, needed "widespread consent . . . by political means." *Id.* at x. He found the desideratum to be "principled *self-government*." *Id.* at ix (emphasis in original). He feared the dangers of exclusive reliance on law. *Id.* at x. "Equality of representation is one goal, and the only principled one, among many." BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 192.

276. Although Tennessee's malapportionment was the result of "inertia and oligarchic entrenchment," it would be "a grave error" to go beyond *Baker*. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 196-97. "But experience has demonstrated that perfectly sane men assembled in democratic legislatures are also capable of making choices that are demonstrably irrational." BICKEL, *POLITICS AND THE WARREN COURT*, *supra* note 2, at 179. By previous refusal to consider apportionment issues, the Court had "in actual effect len[t] an aura of Constitutional validity to existing malapportionments." *Id.* at 176. Bickel was skeptical about organizations that Kurland was wont to take more seriously. Thus, after noting that state legislatures were "secret places," he found the Council of State Governments to be an organization "dedicated to high and worthwhile purposes, of which regrettably little is known." *Id.* at 150. He dismissed the proposals of the Council of Chief Justices for curbing the Court as "not a little simple-minded," "somewhat fatuous," and evidence of "a generalized desire to be let alone." *Id.* at 158.

277. See BICKEL, *POLITICS AND THE WARREN COURT*, *supra* note 2, at 77.

because [they are] right, because behind the force of numbers is a moral force”²⁷⁸ Street encounters in a good cause required that society “subject itself to some inconvenience and risk” to prove its good faith toward blacks.²⁷⁹ Although he was worried about young blacks’ increasing “affinity to nihilism,”²⁸⁰ he found mere homilies of obedience to law insufficient²⁸¹ and believed that “[w]e cannot, by total reliance on law, escape the duty to judge right and wrong.”²⁸² He found the difference between pro-segregationist disruptions and Martin Luther King’s street demonstrations to lie “in the moral difference in the ends.”²⁸³ In 1965 Bickel went to Mississippi to participate in a symposium on the theme of southern justice.²⁸⁴ He forthrightly argued that “Jim Crow justice” was a “not inaccurate phrase.”²⁸⁵ Among other reforms of a system that could not protect civil rights workers, he proposed congressional supervision of jury selection procedures in local courts and a congressional declaration that the failure of local officials to punish certain classes of crime constituted a denial of equal protection by the state.²⁸⁶ He was not at all troubled by the problem of federalism.

Throughout the sixties Bickel adhered to his expansive position on the Bill of Rights.²⁸⁷ He found, moreover, that his distinction between substance and procedure remained viable. The distinction appears in his view of the criminal law:

[I]ts prime function is to encourage and sustain civilized conduct, to declare and confirm the basic moral code, then the justice and evenness of its administration, the decent and civilized, calm and self-consistent manner in which it is brought to bear are crucial to the attainment of its objectives, and are of a much higher order of importance than considerations of the speed and effectiveness [of enforcement].²⁸⁸

Thus, he was under no illusions about the ability of the criminal law and its processes to deter crime. Rather, he believed that society “must rely on other institutions to remove the conditions that breed”

278. *Id.* at 82.

279. *Id.* at 84.

280. *Id.* at 85.

281. *Id.* at 87.

282. *Id.* at 88.

283. *Id.*

284. Bickel, *Justice and Protection*, 37 *Miss. L.J.* 407 (1966).

285. *Id.*

286. *Id.* at 411.

287. See text accompanying note 256 *supra*.

288. Bickel, *Judicial Review of Police Methods*, *supra* note 51, at 963.

crime.²⁸⁹ Again, in anticipation of a wisdom that was to become popular a decade later, he saw that "confinement in prison leads to more criminal conduct than it prevents."²⁹⁰

For Bickel, the ability of the criminal law to function both fairly and properly created no conflicts. "[T]he values that are just now playing a dominant role in the case law will be shown to be decisive values, not only compatible with the objectives of a sensible criminal code, but fairly indispensable to their attainment."²⁹¹ Although Bickel's *New Republic* writings of the late sixties reflected a growing ambivalence, he continued to support the Warren revolution in criminal justice. In July of 1969, he still believed that the Court's role lay in its ability to be an "effective instrument for ensuring fairness and justice in the government's dealings with the individual" and in at least raising, if not deciding, issues of principle.²⁹² Within the next few months, he deplored a Nixon drug bill,²⁹³ attacked the Senate's ideological opposition to Clement Haynsworth's nomination to the Supreme Court,²⁹⁴ and argued passionately against student participation in control of universities.²⁹⁵

Bickel's decisive shift into the camp of substantive critics was marked by the publication of his 1969 Holmes lecture, *The Supreme Court and the Idea of Progress*.²⁹⁶ While not quarreling with the Warren Court's criminal justice decisions, including *Miranda v. Arizona*,²⁹⁷

289. *Id.*

290. *Id.* at 964.

291. *Id.*

292. Bickel, *Close of the Warren Era*, NEW REPUBLIC, July 12, 1969, at 15.

293. "[C]ondemnation and jail alone have not worked. The theory of the Administration's new bill is that more condemnation and more jail will work." Bickel, *How to Beat Crime*, NEW REPUBLIC, Aug. 23 & 30, 1969, at 10-11. The bill's proposal of a mandatory minimum five year sentence for possession or transfer of marijuana would involve "the administration, not of justice, but of injustice." *Id.* at 11. Preventive detention was constitutionally dubious, and given the impossibility of prediction of future criminal conduct or of establishment of meaningful standards, "King Hunch" would reign. *Id.* at 12. Bickel proposed the traditional liberal solution of more money and more social programs to benefit the poor. *Id.*

294. Bickel, *Does it Stand Up?*, NEW REPUBLIC, Nov. 1, 1969, at 13. The nomination was "ideologically . . . within that area of tolerance in which the Senate defers to the President's initiative," but Haynsworth's ethics were a suitable ground for skepticism and possible rejection. *Id.* at 15.

295. Bickel, *Student Demands and Academic Freedom*, NEW REPUBLIC, Sept. 20, 1969, at 15.

296. BICKEL, *THE IDEA OF PROGRESS*, *supra* note 2.

297. Bickel believed that the "basic matters of criminal procedure were ultimately the province of judges." *Id.* at 32. *Miranda* he regarded as a "radical, if justifiable, departure from prior practice." *Id.* at 49. But it was a "soundly . . . principled decision." *Id.* at 96.

he argued that it had reached "a natural quantitative limit to the number of major, principled interventions the Court can permit itself per decade" ²⁹⁸ After criticizing some individual Warren Court decisions for their apparent lack of rigor, he concluded that the egalitarian goal of the Court might be unachievable, given certain social trends. ²⁹⁹ Bickel's attachment to the First Amendment led him to condemn bitterly the obscenity decision in *Ginzburg v. United States*. ³⁰⁰ His strong stance against capital punishment led to the statement that the decision in *Witherspoon v. Illinois* ³⁰¹ was improvident, even though it held that exclusion of principled jurors opposed to capital punishment violated the defendant's right to a fair trial. Bickel felt that the ruling indirectly approved the death penalty. His gentle language about the liberal Warren Court decisions betrayed disquiet, rather than the burning resentment so characteristic of Kurland. The resentment would come later; for the moment, the criticism was that the Warren Court's notion of progress, although perhaps laudable, had failed to move the society because it was imposed upon that society by an elite group with no authority to define general social goals and no power to implement them. ³⁰²

C. The Critics Compared

Thus, the Court's critics followed somewhat divergent paths through the turbulent sixties, and the deepest beliefs of some were shaken or at least modified. Wechsler, the man who started the scholarly commentary, had almost vanished from the scene. Freund had found some of his deepest convictions tested and found wanting. Graciously admitting this, he still maintained some skepticism about the judicial process. Kurland, who was disappointed by most of the justices over whom Warren presided, was embittered not only by the Court but also by the state of society. Bickel was ambivalent, denigrat-

298. *Id.* at 94.

299. He feared that the reapportionment decisions would be reduced to triviality with the passage of time. *Id.* at 111. *Brown*, he thought, would lead to a "dramatic centralization of control over the public schools." *Id.* at 135. Praising what he thought was the separatist movement among American blacks, he noted that other courts had engaged in social engineering, but that "most of its prior enterprises [had] not worked out." *Id.* at 176.

300. 383 U.S. 463 (1966). *Ginzburg* was a "grim episode in the temple of justice." BICKEL, *THE IDEA OF PROGRESS*, *supra* note 2, at 51. In that case, "the Court punished a man under a rule applicable to no one else, past or future." *Id.* at 54.

301. 391 U.S. 510 (1968).

302. "[B]y right, the idea of progress is common property." BICKEL, *THE IDEA OF PROGRESS*, *supra* note 2, at 181.

ing the twin drives of the Court toward desegregation and greater governmental responsiveness, but believing that the criminal justice revolution was worthwhile.³⁰³ All four men had been through a time of trial, as had society, and their universe of discourse had changed, as had that of society.³⁰⁴

Of the four, Freund alone seemed never to attack the Court. He accepted the tenets of the Warren enterprise and was concerned to defend it from its numerous lay critics. He was, however, only an occasional participant in the commentary. They all worried about whether the Court's battles with influential institutions—especially Congress—could be won, and at what cost. Kurland, who had changed the least throughout this period, still felt that the principles of federalism had been violated, that the Court was not one “of errors and appeals,”³⁰⁵ but was a “symbol of the majesty of the law and of the never-ending but never-accomplished quest for justice.”³⁰⁶ He could not reconcile himself to what he had once called “institutional schizophrenia”³⁰⁷ and could not, consequently, delineate the role the Court should play. He could write that activism—the “demand that the Court undertake to provide a solution of its own making for each of the primary social and economic issues of our time”—was wrong, but that the “duty of the Court was to keep the [political] ring free.”³⁰⁸ He came to abhor the name of Earl Warren and retrospectively to play down his role in *Brown v. Board of Education*,³⁰⁹ although earlier he had written: “History will find an important place for [Warren] because of his deeds rather than his words.”³¹⁰ Indeed, he could exult that *Brown* was to Warren as *Dred Scott* had been to Taney, except that “time has proved

303. Whether in fact there was a “revolution,” as perceived by friends and foes alike, in a lawyer's perspective is dubious. See generally LEVY, *supra* note 25, at 7-12; Blasi, *Observation: A Requiem for the Warren Court*, 48 TEXAS L. REV. 608 (1970). For Bickel's view that the Warren Court constituted the culmination of certain historical developments, see text accompanying notes 464-68 *infra*.

304. “In 1950 who would have believed that anyone in American politics would ever again speak of right and wrong rather than security and plenty.” Shapiro, *Foreword to McCloskey*, *supra* note 29, at vi. Freund viewed the Warren Court's response to problems of American life as a natural development of the Court's function. See text accompanying notes 131-34 *supra*.

305. Kurland, *The Supreme Court and Its Judicial Critics*, *supra* note 4, at 465.

306. Kurland, *Appointment and Disappointment*, *supra* note 28, at 184.

307. Kurland, *The Supreme Court and Its Judicial Critics*, *supra* note 4, at 463.

308. Kurland, *Appointment and Disappointment*, *supra* note 28, at 193, quoting Felix Frankfurter.

309. 347 U.S. 483 (1954). See Kurland, *Earl Warren*, *supra* note 177, at 356.

310. Kurland, *Book Review*, 27 U. CHI. L. REV. 170, 171 (1959).

Taney wrong; it will vindicate Warren."³¹¹ A decade later, that judgment would change dramatically and bitterly, and with no mention of or explanation for the inconsistency.

On June 23, 1969, Warren Burger became the fifteenth chief justice of the United States. Almost immediately the mood changed; there was a sense that the Warren revolution was or soon would be over. Kurland sensed it in *Politics, the Constitution, and the Warren Court*.³¹² The critics seemed to reflect a national mood of reconciliation. Perhaps courts as well as presidents are afforded a "honeymoon period." The Burger Court's honeymoon lasted from three to five years. For several years, Kurland's annual contribution to the *Supreme Court Review* proclaimed a state of indecisiveness in the Court.³¹³ Others, however, perceived greater form in decisions during the first three years of Burger's tenure, at least in civil liberties and, to a lesser extent, in civil rights cases.³¹⁴ Although Burger himself had frequently criticized the Warren Court,³¹⁵ the subsequent appointments of Harry Blackmun and Lewis Powell indicated that conservative moderates would reduce the activist heat generated by the Warren Court without

311. *Id.* In defending Warren from his judicial and political critics (without mentioning the gathering scholarly criticism, including Kurland's own), Kurland asserted that "[h]istory as well as reason will exonerate Warren of the charges levelled against him" and that there was "courage as well as wisdom in [the *Brown*] opinion." *Id.* at 180, 181. In his later work, Kurland opined that *Brown* was "a step that would have been taken even with Fred Vinson still occupying the office of Chief Justice." Kurland, *Earl Warren*, *supra* note 177, at 356.

312. "Certainly the outlook of the Court has already been vastly changed by the substitution of Warren Burger for Earl Warren and Harry Blackmun for Abe Fortas." KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*, *supra* note 4, at 49. Bickel also commented upon the changed atmosphere. See Bickel, *The New Supreme Court: Prospects and Problems*, 45 TUL. L. REV. 229 (1971).

313. His review of the Court's 1969 term concluded that "the Court has not been substantially changed, if at all, by the appointment of a new Chief Justice." Kurland, *Enter the Burger Court*, *supra* note 67, at 91. One year later, though, "a new day [had] dawned in constitutional jurisprudence," and the deaths of Harlan and Black "now assure[d] the change." Kurland, *1970 Term*, *supra* note 68, at 265. "In its third year, the Burger Court continued in a condition of flux." Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REVIEW 181 (1972) [hereinafter cited as Kurland, *1971 Term*].

314. LEVY, *supra* note 25; Dershowitz & Ely, *Comment: Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971) [hereinafter cited as Dershowitz & Ely]; Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249 (1971) [hereinafter cited as Stephens]; Tigar, *The Supreme Court 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970) [hereinafter cited as Tigar].

315. Lamb, *The Making of a Chief Justice: Warren Burger on Criminal Procedure, 1956-69*, 60 CORNELL L. REV. 743 (1975); LEVY, *supra* note 25, at 14-20.

turning it off.³¹⁶ Even William Rehnquist, a controversial criminal justice "hardliner" as Deputy Assistant Attorney General for John Mitchell, was endorsed for the Court by Professor Freund.³¹⁷ Thus, the attitude of quiescence seemed to be necessary, welcome, and justified.

Some of the critics returned to other pursuits. Wechsler seemed to have lost interest in the controversy he had been instrumental in creating. Freund became occupied as editor of a multi-volume history of the Court and began researching his own contribution to the series, a discussion of the Hughes Court. He also accepted an appointment by Chief Justice Burger as chairman of a commission to consider relieving the Court's workload. Kurland and Bickel remained active, but the latter increased his nonscholarly commentary, began to formulate his thoughts about reviving the "conservative tradition" in America, and completed his contribution to the Supreme Court series, a volume on the years of Chief Justice Taft. It was as if these men had been stirred first by the controversy and then by the activities of the Warren Court, and were now returning to the occasional law review pieces on the Court that had characterized their reaction to the Vinson years. Bickel never even answered Judge J. Skelly Wright's 1970 attack on him;³¹⁸ Kurland dismissed it with what had become his usual distemper.³¹⁹

The mood of quiescence, while perhaps initially justified, might have been somewhat inappropriate as the Burger Court began to reconsider Warren Court precedents, especially in the realm of criminal justice. After all, the critics, especially Bickel and Freund, had acquiesced in and even hailed those procedural rulings that helped achieve justice for the accused in criminal cases.³²⁰ It was of course their mentors, Brandeis, Frankfurter, and Jackson, who believed that the true test of a civilization lay in the dignity of its procedures.³²¹ Frankfurter had made an enduring contribution toward assuring fair procedure for the accused, especially in federal criminal cases.³²²

316. Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445 (1972); LEVY, *supra* note 25, at 47-54.

317. TIME, Nov. 1, 1971, at 19.

318. Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1970).

319. "But only for the simpleminded are all things simple." Kurland, *1970 Term*, *supra* note 68, at 267.

320. See text accompanying notes 51-60, 144-46, 287-92 *supra*.

321. "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.).

322. "In the federal cases [where] he was dependable enough," Frankfurter's "abiding repugnance toward procedural irregularity" enabled him to write some of his "most

There was considerable evidence that the Burger Court not only was refusing to extend the Warren Court's development of due process, but was trimming it, discarding many of its most fundamental tenets, and engaging in the kind of activism that would decrease liberty and enhance the power of the state. Some critics thought the Court was committing the very errors of logic, of faulty and even dishonest use of precedents, and of disregard for dissenting views that created such a furor when committed by the Warren Court. Leonard Levy had said:

The Bill of Rights requires an ardently sympathetic if not a liberal activist Court. There is no way for the guarantees of the Bill of Rights to have real meaning if not enforced by unstinting judicial affirmations that keep restraints upon government.³²³

One need not adhere completely to his position to agree with Levy's criticism of the new Court:

It does not confront complicated constitutional questions with appropriate disinterestedness. Its opinions do not provide intellectually convincing explanations for its results. . . . [T]he majority abuses or ignores precedents or refuses to consider fairly and seriously the arguments advanced by dissenting opinions.³²⁴

Thus it might be expected that issues including, but often transcending, craftsmanship would evoke a quizzical, if not skeptical response from men who had become accustomed to dissecting judicial opinions. No such response was forthcoming.

D. The Critics' Response to the Burger Court

1. Philip Kurland

The record indicates that the Burger Court, whatever its perceived shortcomings, formulated certain attitudes and pursued certain paths that appealed to Kurland and Bickel, the only Warren Court critics who continued critical writing. For instance, the new chief justice's evident concern for reducing the Court's workload echoed an old Kurland complaint.³²⁵ Kurland also approved of certain major doctrinal changes, since he had not endorsed the original doctrines in the first place.

brilliant opinions," especially in those cases involving search and seizure. McCLOSKEY, *supra* note 29, at 102, 103.

323. LEVY, *supra* note 25, at 440.

324. *Id.* at 438.

325. See Kurland, *1970 Term*, *supra* note 68, at 272. Bickel shared Kurland's concern and in 1973 wrote a book defending proposals to limit the Court's business. A. BICKEL, *THE CASELOAD OF THE SUPREME COURT AND WHAT, IF ANYTHING, TO DO ABOUT IT* (1973) [hereinafter cited as BICKEL, *THE CASELOAD OF THE SUPREME COURT*].

The Burger Court's willingness to undermine "one man, one vote" was approved without much consideration of the logic or process involved. In 1971, Kurland noted that the Burger Court "seems to have forgotten the forgettable words of Chief Justice Warren himself, in *Reynolds v. Sims*: 'Citizens, not history or economic interests, cast votes.'"³²⁶ He was dubious about Harlan's insistence that "the Court . . . supply an alternative rationale"³²⁷ to majoritarianism, pointing out that Harlan "was hard put, as anyone must be, to discover what that rationale might be."³²⁸ Others might argue that the lack of any adequate alternative rationale would justify the simple "one man, one vote" standard. To Kurland, such a deficiency indicated that the Court should never have entered the political thicket in the first place. Yet he admitted the need "for removing partisanship from apportionment,"³²⁹ although he did not know just how such removal could be accomplished and just how such removal would preclude the judiciary from the mechanics of apportionment.

Kurland, who was as disenchanted with the Warren Court's First Amendment decisions as he was with its reapportionment decision, found the Pentagon Papers case³³⁰ to be an example of the Nixon administration's "capacity for making molehills into mountains and giants out of pygmies."³³¹ The pygmy in the case was Daniel Ellsberg, whose name was not even mentioned in Kurland's four and a half page analysis of the decision.³³² Kurland was not bothered by Bickel's representation of the New York Times in that case, because Bickel and the government both agreed on the basic proposition that, under extreme circumstances, a newspaper could be enjoined. Kurland's hostility to the new left was evinced by his acerbic comment that *Cohen v. California*³³³ protected four letter words often used by "the literati of the universities and the ghettos."³³⁴ He dolefully noted that "[t]he First Amendment decisions

See also Bickel, *The Overworked Court: A Reply to Arthur J. Goldberg*, NEW REPUBLIC, Feb. 17, 1973, at 17 [hereinafter cited as Bickel, *The Overworked Court*].

326. Kurland, 1970 Term, *supra* note 68, at 284.

327. *Id.* at 283.

328. *Id.*

329. *Id.* at 284. Kurland had always believed that *Reynolds* gave political power to the more conservative suburbs and therefore disliked the consequences as well as the principle of "one man, one vote."

330. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

331. Kurland, 1970 Term, *supra* note 68, at 285.

332. The only reference to Ellsberg was indirect: "a person who secured access to [the papers] as a member of the RAND Corporation team. . . ." *Id.*

333. 403 U.S. 15 (1971).

334. Kurland, 1970 Term, *supra* note 68, at 291.

of the Burger Court at the 1970 Term do not show any major departures from the patterns established by the Warren Court."³³⁵

Indeed, as Kurland cast a baleful eye upon Burger's first term, he lamented what he perceived to be the essential continuity of the new Court and the old one. "[T]he Court has not been substantially changed, if at all, by the appointment of a new Chief Justice."³³⁶ He even feared that Chief Justice Burger would become captive of the remaining Warren justices.³³⁷ He reiterated the themes of logical absurdity,³³⁸ judicial pandering to both press and public, and the Court's continued propensity to arrogate power.³³⁹

Kurland saw a continuation of Warren Court principles in Chief Justice Burger's opinion in *Griggs v. Duke Power Co.*,³⁴⁰ holding that the use of tests that were not job related to bar blacks from advancement within a company violated Title VII of the Civil Rights Act of 1964,³⁴¹ but he commented that "the conclusion reached was more cautious than [Earl Warren] was likely to have essayed."³⁴² Another Burger Court case upholding a woman's claim under the equal protection clause of the Fourteenth Amendment³⁴³ was dismissed as "a victory for 'women's liberation.'" ³⁴⁴ He criticized Burger's interest in sentencing inequities and penal reform as "adding this realm to, if not substituting it for [the Court's] already extensive domain."³⁴⁵ He was particularly upset by the Burger Court's continuing recognition of the right to travel³⁴⁶ and by its endorsement of congressional authority to

335. *Id.* at 298.

336. Kurland, *Enter the Burger Court*, *supra* note 67, at 91.

337. "Burger is, however, closer to Chief Justice Warren's jurisprudence and talents than he is to those of a Frankfurter or a Jackson. It is possible that the new Chief Justice, like the old one, instead of molding the Court in his own image will instead be made over in the image of the Court." *Id.*

338. *Id.* at 92, referring to the 1969 Term's reapportionment decisions.

339. The Court, he found, "continued to write a code of criminal procedure for the states. Dissenters found succor in the Court's decisions, as did the press. . . . Precedents were treated cavalierly The domain of judicial authority, if not judicial power, was expanded." *Id.*

340. 401 U.S. 424 (1971).

341. 42 U.S.C. § 2000(e)(2) (1964), *as amended*, 42 U.S.C. § 2000(e)(2) (Supp. II, 1974).

342. Kurland, *1970 Term*, *supra* note 68, at 273-74.

343. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

344. Kurland, *1970 Term*, *supra* note 68, at 274.

345. Kurland, *Enter the Burger Court*, *supra* note 67, at 60.

346. "[I]t has become apparent that the right to travel has become an omnibus category reminiscent of the long-discarded and little-lamented 'freedom of contract.' That all of the Justices except Harlan find meaning in it suggests that judgment by label is likely to continue into the new regime." Kurland, *1970 Term*, *supra* note 68, at 275.

establish eighteen as the minimum age requirement for voting in federal elections.³⁴⁷

Despite his announcement in 1971 that “[a] new day has dawned in constitutional jurisprudence,”³⁴⁸ Kurland was disturbed that the accession of new justices could change constitutional doctrines; he found it to be yet another legacy of the Warren Court and its supporters.³⁴⁹ He did acknowledge that erratic inconsistency was a hallmark of the Court, even prior to the Warren years;³⁵⁰ but he deplored the Court’s continuing tendency to produce divisiveness rather than unified opinions: “During the 1970 Term, the Court was as divided as in the past, but not more so.”³⁵¹ In sum, he viewed the 1970 Term as a transitional one, one during which doctrinal development all but ceased; he forecast that substitution of new for old doctrines was still to come.³⁵²

Kurland’s proclamation of a new constitutional era was somewhat qualified after 1970. Although he exulted that “[t]he Age of Aquarius is dead,”³⁵³ he was not sure what would follow.³⁵⁴ For him, the Warren Court tradition of favoring the claims of certain groups would be continued, although the identities of such constituencies would

347. See *Oregon v. Mitchell*, 400 U.S. 112 (1970). “The Constitution by its terms, as a strict constructionist like Mr. Justice Black should have recognized, clearly distinguished between ‘time, place, and manner’ [of congressional elections, which Congress has ultimate authority to regulate] and ‘qualifications of electors’ [which were left to the states].” Kurland, *1970 Term, supra* note 68, at 277.

348. *Id.* at 265.

349. *Id.*

350. “[T]hose who would recognize no institutional obligations to continuity . . . used to be the ‘liberals’ . . . they will now be the ‘conservatives.’” *Id.* at 266. Liberals, he argued, called “for flexibility, for the adaptation of the ‘central meanings’ to the times” *Id.* The Court ought to be able to say why it is changing a rule. “And when it does say why, it ought to do so honestly and not disingenuously or fraudulently. This has been the burden of my complaint over the years about the Warren Court” *Id.* at 267. Kurland’s implied charge that only liberals had previously demanded that constitutional law retain flexibility to meet changing needs disregards his own prior professed belief that such flexibility was necessary. See note 73 and accompanying text *supra*. Kurland did acknowledge that erratic change “was the essence of [his] mentor’s complaints about Courts that long preceded the Warren Court.” Kurland, *1970 Term, supra* note 68, at 267, referring to Thomas Reed Powell.

351. *Id.* at 269.

352. He noted with insight that the 1970 term “brought the Warren Court movement in Constitutional doctrine to a sudden halt. It did not so much substitute new doctrines—that is still to come—as place limits on the expansion of the old ones.” *Id.* at 272 (emphasis added).

353. Kurland, *The New Supreme Court, supra* note 211, at 14.

354. His uncertainties are to be found in comments such as the following: “The new Supreme Court has not yet taken shape.” *Id.* “The perspective of time will reveal the new Court’s dominant characteristics. They have not yet emerged.” *Id.* at 9.

surely change.³⁵⁵ Given that orientation and given the venturesomeness of the Court in the abortion decision,³⁵⁶ he could only observe despairingly that the new Court "has failed to account properly for its judgments. It has issued decrees but it has not afforded adequate rationales for them; it has attempted to rule by fiat rather than reason."³⁵⁷ Thus, the "primary defect" of the Warren Court was repeated by its successor. Kurland was bothered not by the propensity of that successor to overrule or to limit "bad" Warren Court decisions, such as those in the criminal justice area, but rather by its interest in "governing" in realms such as abortion and women's rights.

Kurland concluded that the most important task for the Burger Court would be "[t]he constitutionalization of the welfare state",³⁵⁸ and because of his evident disenchantment with such a task, he devoted little analysis to the problems and precedents involved. He found the Burger Court's treatment of cases in this area "inconsistent with the trend of earlier decisions, but not inconsistent with their holdings."³⁵⁹ One such case was *Wyman v. James*,³⁶⁰ which permitted states to discontinue benefits under Aid to Families with Dependent Children if the parent refused to allow home visits by a social worker. Kurland noted that the majority opinion in *Wyman* resurrected "language about the right of a donor of charity to condition his grants,"³⁶¹ but he made no comment upon this rather startling revival of the distinction between rights and privileges, a distinction long thought dead, and of its specific application to the poor.³⁶²

Despite reservations about both Warren and Burger Court activism, Kurland and the other critics shared certain strong, particularized feelings about issues such as the juvenile justice system and capital punishment. Kurland had never criticized *In re Gault*,³⁶³ and in the

355. It was as yet unknown "which groups will be selected by the Court as its clientele, its wards, its constituency," except that "[t]hus far the Burger Court seems to have taken only 'Women's Lib' under its protective wing." *Id.* at 10-11.

356. *Roe v. Wade*, 410 U.S. 113 (1973).

357. Kurland, *The New Supreme Court*, *supra* note 211, at 13-14.

358. Kurland, *1970 Term*, *supra* note 68, at 314.

359. Kurland, *1970 Term*, *supra* note 68, at 311.

360. 400 U.S. 309 (1971).

361. Kurland, *1970 Term*, *supra* note 68, at 311.

362. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). For McCloskey, the Warren Court's attack on the distinction between rights and privileges "clears up an old and gaping ambiguity in American constitutional law." MCCLOSKEY, *supra* note 29, at 167.

363. 387 U.S. 1 (1967).

Burger Court's first year he expressly approved it.³⁶⁴ One of the interesting anomalies of Kurland's position is his belief that "[s]ooner or later the death sentence will be abolished."³⁶⁵ Apparently because of his belief in abolition, Kurland reviewed only briefly³⁶⁶ the decision in *Furman v. Georgia*,³⁶⁷ a complex congerie of cases occupying almost 250 pages and consisting of nine separate opinions. If Kurland was imposing his own *ipse dixit* in conflict with the judgments of over thirty state legislatures that re-enacted capital punishment statutes after *Furman*, he was doing what he argued the Warren Court should not do. As Leonard Levy had indicated, there are difficulties in finding that the death penalty per se violates the Eighth Amendment.³⁶⁸

When Kurland's personal beliefs were not at stake, he found crucial procedural issues too complex for meaningful analysis. He could find, in relation to the new Court's Fourth, Fifth, and Sixth Amendment rulings, that "some areas of criminal procedure are sufficiently confused and lacking in doctrinal bases that almost any new rationalization will seem to have merit."³⁶⁹ Fifth Amendment self-incrimination issues, "one of the Court's most intractable problems,"³⁷⁰ were reduced in his estimation to a "doctrinal morass."³⁷¹

Kurland's attention span was distinctly limited when assessing the Burger Court's line of cases that "radically transformed the meaning of trial by jury in American criminal cases."³⁷² He described *Williams v. Florida*³⁷³ as a rather uncontroversial decision: "Few were startled by

364. "Unless and until the juvenile courts can be demonstrated to be really different in their nature from other criminal courts, the road on which the Court embarked in *In Re Gault* is not likely to be abandoned." Kurland, *Enter the Burger Court*, *supra* note 67, at 45-46.

365. *Id.* at 56.

366. Kurland, *The New Supreme Court*, *supra* note 211, at 7-8.

367. 408 U.S. 238 (1972) (holding state death penalties unconstitutional as applied).

368. "The prohibition of the Eighth Amendment against cruel and unusual punishments appears in the same Bill of Rights that clearly sanctions the death penalty." LEVY, *supra* note 25, at 396. Levy thought that both Marshall and Brennan, in *Furman*, had ignored considerable contrary evidence to argue unconvincingly that the death penalty does "not comport with human dignity," a judgment that Levy found both subjective and unsubstantiated. *Id.* at 397. Levy, who appears to favor retention of the death penalty and who is convinced that there are no constitutional grounds for abolition, found that Powell's and Burger's opinions were the best in this difficult case. *Id.* at 409-18.

369. Kurland, *1970 Term*, *supra* note 68, at 298.

370. Kurland, *Enter the Burger Court*, *supra* note 67, at 51.

371. Kurland, *1970 Term*, *supra* note 68, at 306.

372. LEVY, *supra* note 25, at 259.

373. 399 U.S. 78 (1970).

the permission to the states to use juries of less than twelve."³⁷⁴ He did not find it worthy of comment that Justice White found by an exercise of fiat that a jury of six functions in the same manner and serves the same purpose as the traditional jury of twelve, that Justice White's use of statistical evidence was faulty, that it was historically inaccurate to find that the original choice of twelve as the proper jury size was "accidental," or that lack of evidence of the founding fathers' intentions should not necessarily be construed as lack of interest in, or a sign of their assumptions about, the appropriate number.³⁷⁵ Kurland disapproved of the Warren Court's tendency "to treat the jury, especially in criminal cases, as the palladium of justice"³⁷⁶ One cannot be quite sure that the Warren Court ever really sanctified the jury trial, as Kurland opined,³⁷⁷ while it made the right to jury trial binding upon the states by incorporating it into the Fourteenth Amendment, it did the same with virtually the entire Bill of Rights.³⁷⁸ In many situations, the Warren Court regarded juries with some suspicion and refused to countenance certain prejudicial trial procedures that would, the Court believed, deprive the defendant of a fair trial even with the most meticulous limiting instructions by the judge.³⁷⁹ The Court certainly believed that a jury trial was important, if not necessary in every criminal prosecution.³⁸⁰

Because *Miranda v. Arizona*,³⁸¹ like *Brown v. Board of Education*,³⁸² was "more important now as a symbol than as a reality" to Professor Kurland, he did not find particularly troublesome the Burger Court's opinions limiting its application.³⁸³ Thus *Harris v. New York*,³⁸⁴ "one of the most scandalous, extraordinary, and inexplicable [opinions] in the history of the Court" to one scholar,³⁸⁵ completely escaped Kurland's rapidly dulling scalpel. Kurland accepted Chief

374. Kurland, *Enter the Burger Court*, *supra* note 67, at 37.

375. See LEVY, *supra* note 25, at 264-76.

376. Kurland, *Enter the Burger Court*, *supra* note 67, at 35.

377. Kurland, *The New Supreme Court*, *supra* note 211, at 8.

378. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Washington v. Texas*, 388 U.S. 14 (1967); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Pointer v. Texas*, 380 U.S. 400 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

379. *Bruton v. United States*, 391 U.S. 123 (1968); *Jackson v. Denno*, 378 U.S. 368 (1964).

380. *Baldwin v. New York*, 399 U.S. 66 (1970).

381. 384 U.S. 436 (1966).

382. 347 U.S. 483 (1954).

383. Kurland, *The New Supreme Court*, *supra* note 211, at 10.

384. 401 U.S. 222 (1971).

385. LEVY, *supra* note 25, at 149.

Justice Burger's majority conclusion that only dictum in *Miranda* disapproved the use of impeachment evidence obtained without the appropriate warnings.³⁸⁶ Yet the principle of *Miranda* was broad and unequivocal; it had been restated by Chief Justice Warren several times in the clearest possible language.³⁸⁷ Whatever one may think of the wisdom of deciding the case on such a broad principle, it constituted the rationale of the decision. Five United States courts of appeals and the appellate courts of nine states had so held.³⁸⁸ As two other critics of *Harris* observed, "a pervasive and unambiguous aspect of *Miranda* was its explicit rejection of distinctions based on the manner in which a statement is used by the Government or the degree to which it is helpful to it."³⁸⁹ In addition to misreading *Miranda*, Kurland emulated Burger's citation of *Walder v. United States*³⁹⁰ as authority for the proposition that illegally obtained evidence could be used for purposes of general impeachment.³⁹¹ *Walder* permitted introduction of evidence seized in violation of the Fourth Amendment, not the Fifth, as had occurred in *Harris*, only when the defendant took the stand and denied

386. Kurland, 1970 Term, *supra* note 68, at 301-02.

387. *Miranda* held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinctions can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. . . . The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." *Id.* at 476-77.

388. *United States v. Fox*, 403 F.2d 97 (2d Cir. 1968); *Blair v. United States*, 401 F.2d 387 (D.C. Cir. 1968); *United States v. Pinto*, 394 F.2d 470 (3d Cir. 1968); *Gros-hart v. United States*, 392 F.2d 172 (9th Cir. 1968); *Wheeler v. United States*, 382 F.2d 998 (10th Cir. 1967); *Velarde v. People*, 171 Colo. 261, 466 P.2d 919 (1970); *State v. Galasso*, 217 So. 2d 326 (Fla. 1968); *Franklin v. State*, 6 Md. App. 572, 252 A.2d 487 (1969); *People v. Wilson*, 20 Mich. App. 410, 174 N.W.2d 79 (1969); *State v. Cat-rett*, 276 N.C. 86, 171 S.E.2d 398 (1970); *State v. Brewton*, 247 Ore. 241, 422 P.2d 581, *cert. denied*, 387 U.S. 943 (1967); *Commonwealth v. Padgett*, 428 Pa. 229, 237 A.2d 209 (1968); *Cardwell v. Commonwealth*, 209 Va. 412, 164 S.E.2d 699 (1968); *Gaertner v. State*, 35 Wis. 2d 159, 150 N.W.2d 370 (1967). *See also* *Breedlove v. Beto*, 404 F.2d 1019 (5th Cir. 1968); *People v. Luna*, 37 Ill. 2d 299, 226 N.E.2d 586 (1967); *Spann v. State*, 448 S.W.2d 128 (Tex. Crim. App. 1969); *Kelly v. King*, 196 So. 2d 525 (Miss. 1967).

389. *Dershowitz & Ely*, *supra* note 314, at 1209.

390. 347 U.S. 62 (1954).

391. Kurland, 1970 Term, *supra* note 68, at 301.

any prior criminal activity. The evidence in *Walder* had been illegally seized years earlier in a totally unrelated case; its use was permitted only because the defendant testified on a collateral issue, and the decision itself constituted a limited exception to a venerable precedent, *Agnello v. United States*.³⁹² Even had *Walder* been relevant to impeachment of the defendant's denial of guilt of the crime for which he was now being tried, both Burger's opinion and Kurland's commentary left unanswered the remaining question of whether the use of illegally obtained, but nonetheless probative, evidence under the Fourth Amendment could be equated with a questionable confession under the Fifth. If *Miranda* meant anything, it meant that station house interrogation was inherently coercive,³⁹³ a rationale that played no part in Chief Justice Burger's analysis. The Chief Justice also misstated the record by denying that voluntariness in the pre-*Miranda* sense was at issue. New York had conceded that it had the duty to afford defendant a hearing on that issue, even if the evidence was to be introduced solely to impeach.³⁹⁴ It is difficult to quarrel with Levy's outraged characterization of *Harris*:

'Monstrous' was the right word to describe the fundamentally immoral opinion by Burger. It was based on deceit and distortion. . . . [It] was an apostolic message to the police and prosecutors throughout the land that the courts would cooperate in condoning deliberate misconduct and excesses.³⁹⁵

Kurland's equanimity about *Harris* can only be attributed to his general disenchantment with Warren Court precedents. Although he was never particularly agitated by *Miranda*, he relegated it to the nether-region of ad hoc decision making, a sort of limbo in which many Warren Court decisions resided. Given that perspective, it did not surprise him that "the life span of [*Miranda*] may be even shorter than most of the constitutional precedents of recent origin."³⁹⁶ Indeed, by 1973, *Miranda* had become "infamous"³⁹⁷ and he remained placid in the face of the Burger Court's restrictive attitude toward it.³⁹⁸

Yet, it is necessary to inquire whether *Miranda* was *only* a symbol that had no effect upon the reality once eloquently described by Bickel,

392. 269 U.S. 20 (1925).

393. Bickel had recognized as much at a much earlier date. See text accompanying notes 58-60 *supra*.

394. Dershowitz & Ely, *supra* note 314, 1206-08.

395. LEVY, *supra* note 25, at 161.

396. Kurland, 1970 *Term*, *supra* note 68, at 303.

397. Kurland, *The New Supreme Court*, *supra* note 211, at 8.

398. *See id.*

and whether symbols do not often play social roles quite as important as reality. Was Kurland's bland contention that there had been "no noticeable improvement in police behavior" as a result of *Miranda* really true?³⁹⁹ Was his impatience with the jury system justified, or did that system, when introduced or extended by virtue of the Warren Court's decisions, validate the integrity of criminal proceedings?⁴⁰⁰

Because Kurland is not a simple man, it would be unfair to characterize him as being totally unconcerned about the drift of the Burger Court's criminal justice decisions. For instance, he was mildly disturbed about the holding in *United States v. White*⁴⁰¹ that evidence obtained through a microphone concealed on a friend of the defendant, who was actually a government agent, could be used in court, despite *Katz v. United States*.⁴⁰² Although the holding commanded a clear majority, Justice White's reasoning did not, and the plethora of opinions reassured Kurland "that the resolution of the problem is still some distance away."⁴⁰³ The case aroused his "fears of Orwell's *1984*, which may not be as frightening to some as it ought to be."⁴⁰⁴ One case that stimulated the famed Kurland capacity for scorn was *Mayberry v. Pennsylvania*,⁴⁰⁵ an otherwise little-discussed 1971 case involving a conviction for contempt of court. He noted that "the Court did contrive to restrict further the powers of a court under the contempt rubric in keeping not only with the precedents but with the direction of the Warren Court."⁴⁰⁶ *Mayberry* admittedly involved a conviction "for patently contumacious conduct,"⁴⁰⁷ but Kurland failed to note that the Court unanimously reversed a startling prison sentence of eleven to twenty-two years. *Mayberry* was an unusual case but hardly justified the implied conclusion that defendants could thereafter safely insult trial judges.

In sum, it was clear that Kurland approved of some of the thrusts of the Burger Court, and this mitigated any inclination to hold it to the

399. *Id.* at 7.

400. "The experience in New York City after *Baldwin* argues for an extension of the right to trial by jury even in cases where the maximum possible penalty is less than six months, validating the Black-Douglas position in that case." LEVY, *supra* note 25, at 266, referring to *Baldwin v. New York*, 399 U.S. 66 (1970).

401. 401 U.S. 745 (1971).

402. 389 U.S. 347 (1967).

403. Kurland, 1970 *Term*, *supra* note 68, at 301.

404. *Id.*

405. 400 U.S. 455 (1971).

406. Kurland, 1970 *Term*, *supra* note 68, at 307-08.

407. *Id.* at 308.

strict standards demanded of the Warren Court. Perhaps the Burger Court could restore some vitality to the moribund concept of federalism; it was Kurland's ongoing commitment to federalism that underlay his praise for new decisions limiting the applicability of the state action concept for judicially mandated desegregation purposes. Because the Warren Court dealt with the problem in terms of ad hoc resolutions,⁴⁰⁸ and because its decisions were and "remained unprincipled, except to the extent that it be regarded as a principle to expand the concept even if rational justification is not forthcoming,"⁴⁰⁹ the Burger Court's narrowing constructions were justifiable. Indeed, Kurland felt that *Moose Lodge No. 107 v. Irvis*⁴¹⁰ was more than justifiable; it was "closer to the original understanding, whatever weight that should be given in constitutional adjudication."⁴¹¹ He observed that "[o]nce more the Burger Court seems to have marked the end of a long road created and traveled by the Warren Court."⁴¹²

In the fourth year of the Burger tenure, federalism remained in atrophy. The federal income tax, the incompetence of local government, and the "grasp for power by the central government"⁴¹³ all continued to trouble Kurland. The states had "become moribund as agencies of government."⁴¹⁴ Much of the blame, in his opinion, lay with the Warren Court; he said of *Mapp v. Ohio*⁴¹⁵ that "the Court was prepared to impose on the states its own expansive notions of a code of criminal procedure"⁴¹⁶ In *Baker v. Carr*,⁴¹⁷ "the Court was prepared to prescribe the proper form of government for the states."⁴¹⁸ Significantly, he did not include the Burger Court in his indictment, although he was not sure that it could entirely resist the pressures brought by a

408. Kurland, *1971 Term, supra* note 313, at 187.

409. *Id.* at 190.

410. 407 U.S. 163 (1972).

411. Kurland, *1971 Term, supra* note 313, at 190.

412. *Id.* *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), has always rankled Professor Kurland. The expansion of "state action" to encompass leased facilities in a public place was accomplished by "a rather murky opinion" which failed to isolate "the factors that transmuted the action of the restaurateur into state action." KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, *supra* note 4, at 127. On the other hand, Freund had no difficulty with *Burton* because "state owned facilities [were] involved, through lease or similar arrangement." Freund, *New Vistas in Constitutional Law, supra* note 19, at 640.

413. Kurland, *The New Supreme Court, supra* note 211, at 2.

414. *Id.*

415. 367 U.S. 643 (1961).

416. Kurland, *The New Supreme Court, supra* note 211, at 6.

417. 369 U.S. 186 (1962).

418. Kurland, *The New Supreme Court, supra* note 211, at 6.

“‘new breed’ of constitutional lawyers”⁴¹⁹ to gain sanction for “the proposition that constitutional law is not a creator of society but a creature of it.”⁴²⁰

Kurland’s analysis of *Wisconsin v. Yoder*⁴²¹ was especially revealing in this context. He derived some pleasure from the Court’s denial of Wisconsin’s authority to apply in full its compulsory school attendance laws to the Amish.⁴²² He was pleased by the fact that, in *Yoder*, “the concept of the importance of secondary education [had] received such

419. Kurland, *The Privileges and Immunities Clause*, *supra* note 211, at 406.

420. *Id.* at 418. He found that the new Court had not yet repudiated “conceptions of equality that in recent years have been the most potent, if not the most cogent, forces in giving new meaning to the basic test.” *Id.* at 405. One Warren Court decision, *Shapiro v. Thompson*, 394 U.S. 618 (1969), “did not say that there was a constitutional right to welfare, but it was only one step from doing so. And the means to that end was the right to travel, a central ingredient of the privileges and immunities of American citizens.” Kurland, *The Privileges and Immunities Clause*, *supra* note 211, at 417. He found the slogan “right to travel” to be a “substitute for both the words and the meaning of the Constitution” *Id.* See also note 346 *supra*. In acknowledging that the techniques of Madison Avenue” had ritualistically replaced “judgment and reason as guides to constitutional meaning,” he condemned not only the Warren Court but its predecessors. Kurland, *The Privileges and Immunities Clause*, *supra* note 211, at 417. He was not sanguine about the Burger Court’s ability to resist a “privileges and immunities” claim to “adequate and appropriate educational opportunity.” *Id.* at 419. He should have been more optimistic, for the Court did resist such a claim, at least on equal protection grounds, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

421. 406 U.S. 205 (1972).

422. Kurland, *The Supreme Court, Compulsory Education and the First Amendment’s Religion Clauses*, 75 W. VA. L. REV. 213 (1973) [hereinafter cited as Kurland, *The Supreme Court, Compulsory Education and the First Amendment’s Religion Clauses*]. As was true of Freund (see note 140 *supra*), Kurland was extremely tolerant of the Warren Court’s decisions on the religion clauses of the First Amendment. He defended *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963), as supported by precedent and correctly decided. See KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT, *supra* note 4, at xvii-xviii. Kurland’s first reaction to *Engel* was approbative, for he found that “[t]he holding of the Court was, indeed, a narrow one.” Kurland, *The Regents’ Prayer Case: Full of Sound and Fury Signifying . . .*, 1962 SUP. CT. REVIEW 1, 15. Some of his usual reservations, like the lack of “governing principle,” were disregarded. *Id.* at 13. Although on the standing issue he wished that the Court would give a “fuller explanation of what it is doing,” he found it “perhaps desirable [to permit] a very limited class to exert the powers of a watchdog to keep the schools, the most vulnerable area, free from the imposition of religious indoctrination.” *Id.* at 22. In a tone remarkably reminiscent of Warren’s opinion in *Brown*, he opined that “[h]istory is a useful tool to help find an answer; it is seldom an answer in itself.” *Id.* He denied that “‘due process’ is static and does not change with the development of the country.” *Id.* at 24. The year before, Kurland had written an article analyzing the Stone Court’s religious decisions and had, after reformulating their rationales, approved them as being consistent with his notion of the First Amendment, a notion that stressed “that

a blow from the judiciary."⁴²³ His usual complaints against the Court were instead directed against public education: "more and more schooling seems to produce less and less education for those subjected to the process";⁴²⁴ but he noted that if educational success was measured by "egalitarian" and "quantitative" standards,⁴²⁵ then "[w]hat is the justification for compulsory secondary education . . . ?"⁴²⁶ The state's proffered justification, Kurland mused, had traditionally prevailed over "the religious preferences of some citizens."⁴²⁷ He had little substantive quarrel with this opinion although it discarded both *Brown v. Board of Education*⁴²⁸ and *Brown's* paean to the civic virtues of education, rejected the notion "that religion is a divisive force that can and frequently does fragment the larger community,"⁴²⁹ and "transferred the power over the individual from the government to the church."⁴³⁰ He duly commented upon the irony that Chief Justice Burger, in demanding that Wisconsin demonstrate a compelling interest in enforcing its compulsory attendance laws, was contradicting his own views in equal protection cases.⁴³¹ Whether Kurland's mild reservations would be resolved by future decisions or merely evinced a benign acceptance of some bad craftsmanship by the Burger majority, his conclusion was almost jaunty:

A critic finds it difficult to be hard on a Court that dealt so gently with the Amish and their virtues The result of *Yoder* then is to be applauded, on humanitarian grounds if no other. Maybe it is really an ecology case and not a religious case. The worry remains whether bad law is made by easy cases more often than by hard cases. But *stare decisis* having become even more outmoded than the Amish seventeenth century way of life, perhaps the implications of *Yoder* ought not to concern us unduly. For certainly it may be said that the ways of the Court, too, are wonderful to behold.⁴³²

government cannot utilize religion as a standard for action or inaction because [the religion] clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden." Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 6 (1961).

423. Kurland, *The Supreme Court, Compulsory Education and the First Amendment's Religion Clauses*, *supra* note 422, at 229.

424. *Id.* at 214.

425. *Id.*

426. *Id.* at 230.

427. *Id.* at 231.

428. 347 U.S. 483 (1954).

429. Kurland, *The Supreme Court, Compulsory Education and the First Amendment's Religion Clauses*, *supra* note 422, at 234.

430. *Id.* at 241.

431. *Id.* at 232.

432. *Id.* at 244-45.

Kurland apparently was content to share the Burger Court's nostalgia for a better, simpler way of life, a way uncluttered by the demands of competitiveness and educational achievement, a way that preceded and transcended the egalitarian drive of both the society and the Court. Perhaps it was also Kurland's way of making peace with the Burger Court, for, in the 1974 *Supreme Court Review*, he announced that he was abandoning the practice of reviewing all of the Court's decisions during a given term in favor of more "studies in depth."⁴³⁸ There is unlikely, therefore, to be a *Politics, the Constitution, and the Burger Court* in the future.

2. *Alexander Bickel*

If Kurland made his peace with the Burger Court, it can be said that Bickel never engaged it in any form of real combat or analysis. Although he continued to write prolifically until his death, he alluded only fleetingly to the new Court's activities. Since many of that Court's criminal procedure opinions stirred controversy, and since Bickel had been an enthusiastic supporter of the Warren Court's revolution in this realm, something more than the occasional brief comment might have been expected.

That substantive comment did not come may have stemmed from several interrelated factors. Bickel's long-time characterization of the Bill of Rights decisions as procedural may have made him less attentive to judicial glossings of those rights. Even in his supportive commentaries he had not devoted much analytical energy to the details of the Warren Court decisions. It seemed sufficient to pose the general problem, to assure himself that the Court was dealing with it, and even to endorse more expansive judicial interpretations than he would have approved at one time. Although Bickel's interest in civil liberties was sincere, it ran deeply only in First Amendment cases, so that some of the Burger Court modifications may not have readily provoked his concern. The great irony lies in Bickel's complete comfort with judicial activism in this realm. It was almost as though having found an area of broad competence for the Court, he had sighed in relief and exercised a critical moratorium of his own; he deemed criminal justice questions to be reverse political questions, not fit for the kind of analysis he liked to render in other areas. Additionally he was devoting a substantial amount of energy to his major work on the Taft Court, the development of a

433. Kurland, *Prefatory note*, 1974 SUP. CT. REVIEW, at ix.

new conservative philosophy, and the raising of public alarms about the state of American life, especially during the Watergate period.

Yet, even taking account of these factors, it is difficult to understand his casual endorsements of the Burger Court decisions in *Johnson v. Louisiana*⁴³⁴ and *Kastigar v. United States*,⁴³⁵ a case that gave even Professor Kurland some trouble.⁴³⁶ Was *Kastigar* "wholly persuasive,"⁴³⁷ when the decision confounded and abused the precedents in an area where, even during the contentious sixties, "the Court had not been divided, although other Fifth Amendment issues [were] showcases of controversy . . .?"⁴³⁸ Bickel's uncharacteristic lack of analytical rigor for the holding in *Kastigar*, that "use" immunity for compelled testimony was constitutional, may be attributable to his high regard for Justice Powell's abilities, and to a belief that the justice had donned the Frankfurter-Harlan mantle of responsible conservatism.⁴³⁹ At the moment there is not much evidence that Justice Powell is the true successor to that tradition, which held the federal government to high standards of conduct.

Although in the sixties Bickel had been content to permit a reprint of some earlier essays on reapportionment, without amending them to include any commentary upon *Reynolds v. Sims*,⁴⁴⁰ in the early seventies he again castigated the Warren Court for not asking whether a particular districting scheme

tends to enhance minorities rule, whether it tends to include or to exclude various groups from influence, and whether, if it assigns disproportionate influence to some groups, they are the ones which are relatively shortchanged elsewhere, so that the total effect is the achievement of a balance of influence.⁴⁴¹

Bickel argued that the Court should have exercised a limited role in

434. 406 U.S. 356 (1972).

435. 406 U.S. 441 (1972).

436. In the context of commenting that there is an "ambivalence on the part of the new Court about the privilege against self-incrimination," Kurland noted that in *Kastigar*, "[t]he opinion marched to its answer." Kurland, 1971 Term, *supra* note 313, at 298, 303.

437. Bickel, *Powell's Day*, NEW REPUBLIC, June 10, 1972, at 12 [hereinafter cited as Bickel, *Powell's Day*].

438. LEVY, *supra* note 25, at 179.

439. Bickel, *Powell's Day*, *supra* note 437, at 11. Bickel found Powell's opinions to be "deliberate, thoroughly professional." *Id.* at 12. For other early looks at Mr. Justice Powell, see authorities cited in note 316 *supra*.

440. 377 U.S. 533 (1964).

441. Bickel, *The Supreme Court and Reapportionment*, in REAPPORTIONMENT IN THE 1970s, at 60 (N. Polsby ed. 1971) [hereinafter cited as Bickel, *The Supreme Court and Reapportionment*].

compelling reapportionment; he found authority for that role in the guarantee clause, a rather startling innovation in itself.⁴⁴² He updated his criticism to incorporate within it a concern that "one man, one vote" would perpetuate the social disorder within the nation:

At a time when division among groups and interests is as marked and deeply felt as ever; when unity is something to be striven for, to be painstakingly constructed and perhaps attained, but not to be taken for granted; when the call for functional decentralization in government is insistent; at a time, in sum, when the participatory aspect of our democracy needs the greatest emphasis and when, therefore, the device of federalism should be available for the freest and most imaginative use, the Court has virtually outlawed it.⁴⁴³

Bickel thus returned to his earlier emphasis upon group rather than individual representation as being the crucial value to be protected in apportionment. He did so without revealing how groups could be sufficiently represented, by what principles the existence of such a group could be determined, and whether his principle was any better than the "plainly wrong" principles adopted by the Warren Court.⁴⁴⁴

Bickel's citation of Madison for the proposition that political activity emanates from groups rather than through the medium of individual acts is ironic, for if *Federalist Number 10* stands for anything it is the proposition that factions are inherently evil, that they "are united and activated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community,"⁴⁴⁵ and that their activities should be mitigated. Madison's attempts to enunciate methods for controlling factions run directly counter to Bickel's desire to recognize them. One method of nullifying the effects of factionalism is to create a political environment that would diversify citizens' political interests, thereby fragmenting

442. *Id.* at 61, referring to U.S. CONST. art. IV, § 4. The proposition is startling because the guarantee clause has long been held to involve political questions not appropriate for judicial resolution. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Baker v. Carr*, 369 U.S. 186 (1962).

443. Bickel, *The Supreme Court and Reapportionment*, *supra* note 441, at 72.

444. *Id.* at 60. Professor Carl T. Auerbach, commenting upon Bickel's concern with group rights, noted that "direct representation of group or interest is undesirable in a democracy. The values sought by such representation are inconsistent with those promoted by geographic districting. While the former exacerbates the clash of different groups and interests by politicizing them, the latter mutes the clash by emphasizing the role of the individual voter as citizen. . . ."

"In any case, the systems of apportionment and geographic districting [before *Baker*] were hardly designed to insure a 'balance of influence' of all groups and interests." Auerbach, *Commentary*, in REAPPORTIONMENT IN THE 1970s, at 77-78 (N. Polsby ed. 1971).

445. THE FEDERALIST PAPERS 78 (C. Rossiter ed. 1961).

them and inhibiting a commitment to any one faction that could overwhelm the public interest. Bickel's vague prescription would freeze groups in much the same way that Tennessee froze its "factions" prior to *Baker* and would diminish the ability of men to form new factions, to perceive new interests, and to diversify their political activities, because the existing structure would penalize them for such activity. What is interesting in Bickel's analysis, however, is his reluctance to accept the Warren Court's conception of man as a unique, non-group-joining, or at least multi-group-joining, entity. If group rights are the focus of his concern about reapportionment, then they are critical to an understanding of his later philosophical development.

Perhaps nothing was as characteristic of that philosophical development in the seventies as his reconsideration of the First Amendment. His representation of the New York Times in the Pentagon Papers case,⁴⁴⁶ argued and won on traditional "prior restraint" grounds, was apparently at some personal cost. Yet free press and free speech issues were, for him, quite different. In January, 1971, in *Commentary* magazine, he analyzed the Chicago Seven trial, probably the most symbolic of the new left-government confrontations of the late sixties, and devoted most of the piece to an attack on a book sympathetic to the defendants.⁴⁴⁷ That book happened to be written by the "Godfather" of the *New York Review*, a magazine as earnestly dedicated to support of the new left (especially in its opposition to the war in Vietnam) as *Commentary* was to its destruction. To view Bickel's piece as only a part of the *Commentary* vendetta—a vendetta that extended far beyond the new left itself—would be misleading; the article expressed Bickel's honest and deeply felt quandary about the function of speech in perilous times.⁴⁴⁸ He argued that the very substantial advances in social justice of the preceding twenty-five years had made the intensity of the defendants' attacks upon the system ludicrous; he did not acknowledge the irony of his attribution of those advances to the Supreme Court, many of whose decisions he had challenged and which, a year earlier, he had harshly criticized.⁴⁴⁹

446. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

447. Bickel, *Judging the Chicago Trial*, COMMENTARY, Jan. 1971, at 31 [hereinafter cited as Bickel, *Judging the Chicago Trial*], attacking J. EPSTEIN, *THE GREAT CONSPIRACY TRIAL* (1970).

448. The battle was a cultural as well as a political war. See P. NOBILE, *INTELLECTUAL SKYWRITING* 125-86 (1974).

449. Bickel, *Judging the Chicago Trial*, *supra* note 447, at 35-36.

Although he doubted the fairness of the Chicago Seven trial, he posited something akin to a theory of waiver by the defendants of that particular right: "For defendants committed to . . . a revolution, interest in the legality of the Chicago trial was spurious . . ." ⁴⁵⁰ Despite the admission that the defendants had negotiated in good faith for permits to use various Chicago parks to speak out at the 1968 Democratic Convention, he found merit in that city's decision to deny the permits because of threats of drug use, barricade-jumping, and lovemaking in the parks, ⁴⁵¹ a form of prior restraint which had little legal basis. ⁴⁵² Positing a peculiar version of the clear and present danger test, Bickel distinguished between the "constitutional duty to grant a permit for a peaceable and lawful demonstration" and "constitutional authority to deny a permit for a demonstration that looks to be disorderly and unlawful. . . ." ⁴⁵³ The phrase "looks to be" raises more questions than it answers. Based apparently upon defendants' reputations and conduct subsequent to the denial of the permits, Bickel's conclusion was that the prosecution was plausible. ⁴⁵⁴

Bickel's disenchantment with what he perceived to be the consequences of absolutist free speech became evident in another *Commentary* article. ⁴⁵⁵ Fearing that "[d]isastrously, unacceptably noxious doctrine can prevail, and can be made to prevail by the most innocent sort of advocacy," ⁴⁵⁶ he questioned the Holmesian concept of a "marketplace of ideas." ⁴⁵⁷ He had always been troubled by Holmes' ethical relativism, and found it inapplicable to ideas such as segregation. To allow such ideas to compete would turn the marketplace into a bullring, and to encourage these ideas and to abandon humanitarian notions of social justice "is to commit moral suicide." ⁴⁵⁸ Just how this doctrine was to be institutionalized, especially for one who four years earlier had

450. *Id.* at 36.

451. *Id.* at 38.

452. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Gelling v. Texas*, 343 U.S. 960 (1952); *Hague v. CIO*, 307 U.S. 496 (1939).

453. Bickel, *Judging the Chicago Trial*, *supra* note 447, at 38.

454. *Id.* at 39.

455. Bickel, *The "Uninhibited, Robust and Wide-Open" First Amendment: From "Sullivan" to the Pentagon Papers*, COMMENTARY, NOV. 1972, at 60 [hereinafter cited as Bickel, *From Sullivan to the Pentagon Papers*].

456. *Id.* at 64.

457. *Id.* at 66.

458. *Id.*

argued that obscenity should not be regulated by the criminal law,⁴⁵⁹ was never spelled out. Bickel's increasing affinity for the conservative notion of the organic nature of society precluded any concern about the inadequacy of specific social, political, and legal arrangements to protect the good and to outlaw the worthless idea. Thus, the beginning of the article was a paean to the nineteenth century, when limits of speech were undefined and appeared to be boundless; he concluded with a plea to the government and to the press in the late twentieth century to accommodate informally each other's needs in order to "contrive to avoid most judgments that we do not know how to make."⁴⁶⁰ It is a great burden on the twentieth century philosopher to attempt to restore the values of the past century in a world that has so irrevocably changed. The drive to do so, whether in the form of Chief Justice Burger's opinion in *Wisconsin v. Yoder*⁴⁶¹ or Bickel's own work, is based on the questionable premise that great social conflicts, giving rise to difficult constitutional problems, simply did not exist.⁴⁶² The opposite premise is that conflicts existed but were unrecognized or unacknowledged.⁴⁶³

Bickel's major foray into the causes of social unrest and the Warren Court's role in creating or stimulating that unrest was contained in *Watergate and the Legal Order*, a 1974 *Commentary* article.⁴⁶⁴ Bickel reviewed the sixties, arguing that the roots of Watergate lay in the civil disorders of the previous decade "including the most peaceable and legitimate ones of all," which "carried the clear and present danger of anarchy."⁴⁶⁵ All civil disobedience was an "attempt to coerce the legal order" and "an exercise of power."⁴⁶⁶ Although he cautioned that it

459. "However else obscenity might be controlled, it should not be punishable criminally." Bickel, Book Review, *COMMENTARY*, Nov. 1968, at 100.

460. Bickel, *From Sullivan to the Pentagon Papers*, *supra* note 455, at 67.

461. 406 U.S. 205 (1972).

462. See J. ROCHE, *SENTENCED TO LIFE* 269-308 (1974); J. ROCHE, *SHADOW AND SUBSTANCE: ESSAYS ON THE THEORY AND STRUCTURE OF POLITICS* (1964).

463. See L. WHIPPLE, *THE STORY OF CIVIL LIBERTY IN THE UNITED STATES* 261-324 (1927).

464. Bickel, *Watergate and the Legal Order*, *COMMENTARY*, Jan. 1974, at 19 [hereinafter cited as Bickel, *Watergate and the Legal Order*].

465. *Id.* at 24.

466. *Id.* at 21. Bickel was somewhat ambivalent, even at this point, about civil disobedience. "Neither the vote nor speech . . . sufficiently differentiates needs and interests, or expresses intensity." Hence, the "legitimacy" of civil disobedience must be recognized. *Id.* This is of course a reiteration of his earlier views. But, for reasons he did not explain, he felt that the civil rights and anti-war movements transgressed the limits of civil disobedience and that "Watergate is a replica of the transgressions." *Id.* at 22. He may have been thinking of violence, which of course exceeds the morally

was "vulgar" to "attempt to turn Watergate into a reproach to liberal opinion,"⁴⁶⁷ five pages after this sensible pronouncement he did just that, arguing that Watergate "was a leaf from the Warren Court's book"⁴⁶⁸ He cited the reapportionment decisions in support of his thesis that the Warren Court had encouraged a sort of "populism of the day."⁴⁶⁹ It was the Court's approval of the "assault upon the legal order by moral imperatives"⁴⁷⁰ that engendered Nixon's assault. It is difficult to analyze the hidden assumptions, the fiats, the lack of "passive virtues" in this bitter diatribe. Underneath it all is a certain naïveté, accepting Nixon's explanations for his actions—the protection of something called "national security"—as the unquestioned truth.

Thus, on reflection, trivia and irrelevancy were no longer, for Bickel, sufficient to describe the consequences of the Warren Court revolution. Rather, complicity or at least encouragement of the disintegration of the social fabric—evidenced by both the new left and the

acceptable boundaries of civil disobedience, but if so, he surely could not have meant to tar the movements with that broad and sticky brush. That he may have been concerned with something else is apparent from a lecture delivered the preceding year. See Bickel, *Civil Disobedience and the Duty to Obey*, 8 GONZAGA L. REV. 199 (1973), where he notes that civil disobedience may be a "part of the process of law formation, even if an extraordinary and risky part." *Id.* at 200. He was uncomfortable about the "freedom rides" of the early sixties but settled for calling them a "disorderly method of verifying the observance of federal law," rather than civil disobedience per se. *Id.* at 201. He did note that although civil rights demonstrations had been generally peaceful, some "were just out and out, illegal civil disobedience." *Id.* at 211. He unequivocally condemned Martin Luther King's defiance of an illegal court order enjoining a march in Alabama, for such defiance "questions the very legal order itself." *Id.* at 213. Somewhat undercutting his later thesis that the Warren Court encouraged civil disobedience, he noted that the Court had upheld the contempt conviction involved. *Walker v. City of Birmingham*, 388 U.S. 307 (1967). The transition between his earlier view that civil disobedience was often justified and his 1974 condemnation of even the most peaceable and legitimate demonstrations appears at the end of the article. Since civil disobedience always threatened "anarchy" because it is habit-forming, there "must be few" occasions for its exercise. Bickel, *Civil Disobedience and the Duty to Obey*, *supra* at 214. As with earlier First Amendment theory, a balancing test between the importance of the issue involved and the threat of anarchy was required prior to the decision to undertake any act of civil disobedience. He concluded that the imbalance lay "on the side of obedience." *Id.* The article was significant for some other reasons, including Bickel's disenchantment with any purist view of the First Amendment, as he argued that a speaker can be silenced "to prevent a violent disaster. Even such a lawful activity as the freedom rides may be stopped under emergency circumstances of this sort." *Id.* at 216. His disenchantment with the "liberal contractarian view" of Locke also surfaced, as did his affinity for Edmund Burke. *Id.* at 209, 216.

467. Bickel, *Watergate and the Legal Order*, *supra* note 464, at 20.

468. *Id.* at 25.

469. *Id.*

470. *Id.* at 24.

reaction to it by the Nixon administration—were added as additional, more significant, charges. Indeed, Bickel's disillusionment with the Warren Court was to extend to a more profound criticism of the general direction American society had taken in the twentieth century.⁴⁷¹ Despite his increasing pessimism, there nevertheless remains something mysterious in his failure to assess the changes in direction of the Burger Court as it completed its third significant year at the time of Bickel's death.

3. Paul Freund

Paul Freund not only did not question Warren Burger, in the seventies he went to work for the new chief justice. He chaired a commission that, at Chief Justice Burger's behest, investigated the problem of Court overload and rendered a report recommending the creation of a National Court of Appeals.⁴⁷² That report, perhaps prudently not endorsed by the chief justice, immediately became the focus of a controversy about the Court's fundamental role in our society. Reactions to the report followed what many perceived to be political lines. The remnants of the old Warren majority, both on and off the Court, found that its recommendations undermined the Court's role as a sanctuary for minorities.⁴⁷³ A moderate justice of the Court was cautious about its far-reaching implications.⁴⁷⁴ The academics were divided on the issue of its constitutionality.⁴⁷⁵ Bickel, whose conception of the Court's function approached that of Freund, endorsed the report as being workable, harmful to no one, and helpful to everyone.⁴⁷⁶ He answered

→ 471. A. BICKEL, *THE MORALITY OF CONSENT* (1975).

472. FEDERAL JUDICIAL CENTER, *REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT* (1972). Bickel was also a member of the study group.

473. Cf. Brennan, *Chief Justice Warren*, 88 HARV. L. REV. 1, 4 (1974); Goldberg, *One Supreme Court*, NEW REPUBLIC, Feb. 10, 1973, at 15; Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951 (1973) [hereinafter cited as Gressman].

474. Justice Stewart is quoted as saying, "The very heavy caseload is neither intolerable nor impossible to handle." He viewed the Freund Commission's proposal "with some misgivings." N.Y. Times, Jan. 7, 1973, § 4, at 6, col. 2.

475. See BICKEL, *THE CASELOAD OF THE SUPREME COURT*, *supra* note 325; Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974); Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUDIES 339 (1974); Freund, *Why We Need the National Court of Appeals*, 59 A.B.A.J. 247 (1973); Gressman, *supra* note 473; Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, 1973 U. ILL. L.R. 615; Symposium, *Should the Appellate Jurisdiction of the United States Supreme Court Be Changed? An Evaluation of the Freund Report Proposals*, 27 RUTGERS L. REV. 878 (1974).

476. Bickel, *The Overworked Court*, *supra* note 325, at 18.

former Justice Goldberg's complaint that the proposed National Court of Appeals would be insensitive to doctrinal development, especially in criminal justice cases, by observing that experienced judges will know that "the Supreme Court sometimes reverses itself, sometimes upsets seemingly settled law, sometimes strikes out in new directions."⁴⁷⁷

III. The Burger Court and Changing Directions

Although the Warren Court critics have professed to be puzzled by the mixed trends of the Burger Court, others perceived some doctrinal directions more clearly. To Levy, "[t]he trend of decision . . . by mid-1972 was abundantly clear;"⁴⁷⁸ and a political scientist found as early as June, 1971, a "disposition to check, if not reverse, some trends of the Warren Court in the broad domain of criminal justice."⁴⁷⁹ William F. Swindler, an eminent student of the Court, could write in 1974 that "in the course of its fifth term, the Court . . . has assumed some distinctive characteristics which lend themselves to analysis."⁴⁸⁰

Some analysts viewed certain types of cases as barometers of developing trends; the Burger Court's decisions in confessions and search and seizure cases raised, for one political scientist, the possibility of "direct modification of the Mapp case."⁴⁸¹ To another commentator, the Court's disinclination to disturb the plea bargaining process meant that "the influence of exclusionary rules, as [delineated] in *Weeks*, *Mapp* and *Miranda* can be expected to remain slight."⁴⁸² He felt that the "*Harris* decision might well foreshadow a full reappraisal of the [*Miranda*] interrogation standards."⁴⁸³ Perhaps a slow movement was developing to return to a test of the voluntariness of confessions based not upon the particular personal characteristics of the defendant but upon the reasonableness of police conduct. There was also a warning that even *Chimel v. California*⁴⁸⁴ "no longer commands the firm sup-

477. *Id.* See also BICKEL, *THE CASELOAD OF THE SUPREME COURT*, *supra* note 325.

478. LEVY, *supra* note 25, at 421.

479. Stephens, *supra* note 314, at 250.

480. Swindler, *The Court, the Constitution and Chief Justice Burger*, 27 *VAND. L. REV.* 443, 444 (1974) [hereinafter cited as Swindler].

481. Gangi, *The Supreme Court, Confessions, and the Counter-Revolution in Criminal Justice*, 58 *JUDICATURE* 68, 72 (1974), *citing* *Mapp v. Ohio*, 367 U.S. 643 (1961).

482. Stephens, *supra* note 314, at 256, *citing* *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

483. Stephens, *supra* note 314, at 259, *citing* *Harris v. New York*, 401 U.S. 222 (1971).

484. 395 U.S. 752 (1969) (7-2 decision).

port of a Court majority."⁴⁸⁵ One critic thought that the Sixth Amendment confrontation clause and the decision in *Bruton v. United States*,⁴⁸⁶ which expanded it into a meaningful right, were being undermined both by the state courts of Florida and by the Burger Court, which had "collaborated to issue a virtual rubber stamp marked 'Harmless Error' to be used whenever a possible violation of *Bruton* rears its ugly head."⁴⁸⁷

Intense scrutiny of the Burger Court's activities has not been limited to its criminal justice decisions. Professor Michael Tigar found a dilution of the equal protection standards of the Warren Court, at least in the realm of welfare equity, when a 1969 decision refused to apply the strict scrutiny test to a Texas scheme for reduction of the benefits in various categories.⁴⁸⁸ Professor Tigar's fear that "the Court may arbitrarily refuse to expand any further the circle of fundamental interests," has been realized.⁴⁸⁹ Even Swindler, whose view of the Burger Court was benign, conceded that it had substituted for "one man, one vote" a doctrine of fair and effective representation—wherein "gross population variations might constitute prima facie evidence of calculated malapportionment [*sic*]."⁴⁹⁰ If, as Swindler maintains, "Mathematical equality itself [is now] but one of several factors that state districting plans should take into account,"⁴⁹¹ then, in the absence of any indicators of what new or developing principles might give substance to these generalities, serious questions of judicial goodwill are raised.

Although one cannot be particularly comforted by Swindler's bland assertion that a "definite dichotomy has developed in the freedom of expression cases,"⁴⁹² one can readily agree that the Burger Court has made a difference in the realm of constitutional jurisprudence. The difference did not receive much attention from our most eminent scholars. Indeed, it appears that the broad trend of Burger

485. Stephens, *supra* note 314, at 262.

486. 391 U.S. 123 (1968).

487. Comment, *The Right of Confrontation and the Use of Non-Testifying Codefendant's Confessions: Constitutional Law in Microcosm*, 26 U. MIAMI L. REV. 755, 775 (1972).

488. Tigar, *supra* note 314, at 64-65, citing *Dandridge v. Williams*, 397 U.S. 471 (1970). For later developments in equal protection analysis, see Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

489. Tigar, *supra* note 314, at 65. See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

490. Swindler, *supra* note 480, at 454.

491. *Id.*

492. *Id.* at 467.

Court decisions, in both the criminal justice and civil rights areas, presages a return to the fragmented and doctrinally inadequate jurisprudence of the Vinson Court. Even the Warren Court critics had focused their considerable ire on the Vinson Court's role *vis-à-vis* the Stone Court. The harmless error rule in criminal cases,⁴⁹³ Powell's Harlanesque anti-incorporation views in the Sixth Amendment jury cases,⁴⁹⁴ the relaxation of the "one man, one vote" principle,⁴⁹⁵ and the indications that the free speech balancing test may be revived⁴⁹⁶ constitute some evidence of that trend. Although there is, of course, some contrary movement,⁴⁹⁷ in many areas there appears to be a revival of ambiguity. Unfortunately, unlike the Stone-Vinson situation, the historical period is now different. Doctrinal development was new in the forties and early fifties and ambiguities were almost inevitable. Today, ambiguity may well constitute retreat, and that retreat itself will be vague, aimless, and of little value to the development of a comprehensive body of constitutional law that can provide guidance to lower court judges. Perhaps Bickel's silence and Kurland's hesitancy about the directions of the Burger Court mirrored that increasing ambiguity, but also perhaps reflected recognition of the impending retreat. The maintenance of ambiguity may be more important to the Warren Court's critics than their professed goal of doctrinal certainty. It is true that, for all of its controversy, the Warren Court did solidify the development

493. "That the harmless error doctrine will grow as a means of containing the novel doctrines of the Warren Court in the criminal procedure field has long been anticipated. The resulting combination of prophylactic rules and harmless error doctrine will make each case *sui generis* with an additional and continuing burden on the Supreme Court to supervise the administration of criminal justice in the state courts." Kurland, 1971 Term, *supra* note 313, at 288.

494. See LEVY, *supra* note 25, at 277.

495. See *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973); *Abate v. Mundt*, 403 U.S. 182 (1971).

496. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970). An indication of the Nixon appointees' view of some of the major Warren Court doctrines is often to be found in dissenting opinions. See, e.g., *Rosenfeld v. New Jersey*, 408 U.S. 901, 902-03 (1974) (Blackmun, Burger, and Rehnquist, JJ., dissenting); *New York Times Co. v. United States*, 403 U.S. 713, 748, 759 (1971) (Burger and Blackmun, JJ., dissenting).

497. *United States v. Nixon*, 418 U.S. 683 (1974); *United States v. United States Dist. Court*, 407 U.S. 297 (1972); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Baldwin v. New York*, 399 U.S. 66 (1970). The first two cases, it should be noted, involved executive-judicial confrontations in which the fundamental role of the courts was at stake. The last two involved the expression of the right to counsel at trial and trial by jury, both popularly supported rights.

of modern doctrinal trends. The critics may well believe that complexity, rather than simplicity, should be the predominant characteristic of the law. They may even believe that, as a political matter, any strong and relatively unambiguous stance by the Court on controversial issues per se exposes it to criticism. Therefore, quite apart from the critics' own political quarrels with the Warren Court, the Court's gathering together of the loose strands of constitutional doctrine may, ultimately, have been the most upsetting phenomenon to the critics.

This hypothesis is supported, if not entirely confirmed, by the relative inattention to the historical perspective in analyses by the Warren Court critics. They did not stop to consider whether the nature of the Court had anything to do with some of the developments that seemed to startle them. Except for desegregation, they did not undertake any close analysis of the development of legal doctrine before the Warren Court, especially previous interpretations of the guarantees of the Bill of Rights. They did not even consider whether the Court was truly revolutionary or undertook as its great function to consolidate the development of inconsistent, perhaps vague, doctrine. When a precedent was broadened, the tendency was to state that it was misconstrued; when a precedent was overruled or distinguished, the critics made no real inquiry into whether or not it had previously been undermined, how far it had already been attenuated, or whether it was totally irresponsible to substitute one fiat for another. Because, as political scientists and some law professors recognized, most precedents are inconclusive or variable, the Court could choose to develop one view of constitutional law rather than another.

It is not necessary to assume that historical perspectives will engender a resounding acceptance of all that the Warren Court accomplished or tried to accomplish. It is sufficient to assert that they will invariably mitigate the severity of the criticism, will render comprehensible some of what was incomprehensible, and will even provide a perspective from which to judge the Burger Court meaningfully. As one critic of the Burger Court activism noted, the Warren Court, "by and large . . . attempted to defend its decisions in terms of inferences from values the Constitution marks as special,"⁴⁹⁸ and succeeded. This is especially significant in the realm of civil liberties and civil rights, because no one, including conservative members of the present Court,

498. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 943 (1973) (emphasis omitted). ←

doubts that the Supreme Court today functions to protect the criminal justice process and the rights of politically helpless minorities.⁴⁹⁹

One critic who applied both rigorous standards of craftsmanship and a historical perspective to the activities not only of the Warren Court but also of its immediate predecessors was a political scientist, Robert McCloskey. He placed the Court in a twenty-five year perspective and found much to commend. He traced the roots of the Warren Court back to the Stone and Hughes Courts and concluded: "On the whole the Stone-Vinson era was a creative one But it was also . . . an era of groping readjustment, of ambivalence and uncertainty about the judicial role."⁵⁰⁰ McCloskey noted that under Chief Justice Warren, "the creative impulse becomes unmistakably dominant. The jurisprudence of civil liberties becomes more symmetrical."⁵⁰¹ He posited the existence of a greater judicial continuity than the other critics were willing to admit, but he recognized that the activism of the Warren Court had expanded its role:

[The Warren Court] has claimed a part in the governing process more imposing and more daring than any court of the past has ever claimed. And it has played that part with enough success to suggest that our traditional ideas about the range of judicial capacity may require reappraisal.⁵⁰²

In retrospect the great divisions between the justices, which so offended the critics, were evident from the beginning of the Stone Court. Yet the concurrences on certain civil liberties cases were remarkable. The white primary decisions did not bother McCloskey as they did Wechsler, because *Grovey v. Townsend*⁵⁰³ "had been a strangely unrealistic" precedent.⁵⁰⁴ Although the Stone Court was fairly consistent in civil rights cases, McCloskey remarked upon "some notable advances" and some "notable refusals to advance" in the realm of civil liberties.⁵⁰⁵ He found that the "tangled course of doctrine and rationale"⁵⁰⁶ in coerced confession cases evinced at least an attempt by the justices to discipline the police.

499. Powell referred to the Court's protection of the "constitutional rights and liberties of individual citizens and minority groups against aggressive or discriminatory government action" as the "irreplaceable value of [its] power" in our system of government. *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

500. McCLOSKEY, *supra* note 29, at 9.

501. *Id.* at 10.

502. *Id.*

503. 295 U.S. 45 (1935).

504. McCLOSKEY, *supra* note 29, at 34.

505. *Id.* at 36.

506. *Id.* at 38.

McCloskey had not been impressed with some Vinson Court landmark precedents that were later to be demolished by the Warren Court. Thus, *Wolf v. Colorado*⁵⁰⁷ was a "strange opinion to come from a judge who had written so eloquently on behalf of the right to privacy in federal court cases" and marked a regression in Fourth Amendment standards.⁵⁰⁸ The qualification of the right to assigned counsel in *Betts v. Brady*⁵⁰⁹ had not impressed Professor McCloskey, and he agreed that it was experiencing a languishing death until "Justice Frankfurter restored it to visible life in that memorable first term of the Vinson Court."⁵¹⁰ McCloskey found somewhat irrational and doctrinally inadequate the fair trial rule of *Betts*, and noted that the Court could anticipate a deluge of petitions from prisoners.

His review of the Vinson Court concluded that the doctrinal withdrawal was more pronounced and less qualified in civil liberties cases than in any other major area.⁵¹¹ He believed that the "political climate, the changes in personnel, the Frankfurterian preachments about self-restraint had combined to retard doctrinal progress."⁵¹² Indeed, McCloskey contended that the existence of malapportionment related importantly to civil liberties. *Colegrove v. Green*,⁵¹³ the Gibraltar upon which the critics stood before *Baker v. Carr*,⁵¹⁴ hardly seemed a solid precedent to McCloskey, who found judicial tradition on the subject to be ambiguous.⁵¹⁵ Thus, in his view the Vinson Court served only a transitional function: "It kept the light of freedom alive through a dark hour in the country's history; that light could now be passed on to the care of its successor."⁵¹⁶ McCloskey was not the only scholar to accept the Warren revolution. Swindler concurred, noting that "the Warren Court rounded out a cycle of constitutional change which has ranged over three decades and completed a revolution in national history which began in the crisis of the New Deal and moved forward log-

507. 338 U.S. 25 (1949).

508. McCLOSKEY, *supra* note 29, at 101. McCloskey attributes the judicial zigzag in Fourth Amendment cases to the replacement of Justices Murphy and Rutledge with Justices Clark and Minton after the 1948 term. *Id.* at 97.

509. 316 U.S. 455 (1942).

510. McCLOSKEY, *supra* note 29, at 101.

511. *Id.* at 121.

512. *Id.* at 124. He intoned: "The literature of political science almost universally condemned the injustice of malapportionment and blamed it for the rurally oriented backwardness of our political system." *Id.* at 122.

513. 328 U.S. 549 (1946).

514. 369 U.S. 186 (1962).

515. McCLOSKEY, *supra* note 29, at 122-23.

516. *Id.* at 126.

ically and inexorably to the present."⁵¹⁷ Whether or not the revolution was completed before 1970, when Swindler made this observation, it is clear that if we are regressing to the Vinson Court, we are regressing far indeed.

It would be unfair to argue that the critics had no historical perspective; they did, but it was fleeting and symbolic. For instance, Bickel conceded that the Warren Court was not unique; "it is more nearly true that the Court has traveled the main highway of the institution's history."⁵¹⁸ He also admitted that historians may well view the accomplishments of that body through different lenses from those of its contemporary critics: "Historians a generation or two hence . . . may barely note, and care little about, method, logic, or intellectual coherence"⁵¹⁹ Did this excuse or at least explain the Warren Court's failures? Bickel sternly admonished that "intellectual incoherence is not excusable and is no more tolerable because it has occurred before."⁵²⁰ Kurland agreed and added that the Marshall Court had more leeway than did one confronting a solid body of precedent. John Marshall, Roger Taney, William Howard Taft, and others notwithstanding, history for the critics was a distant and abstract consideration; it was never combined with an appreciation of its relationship to doctrinal development in our time.

But beyond disinclination to view the Warren Court in historical perspective, there is also a pervasive equanimity toward the Burger Court; much of that equanimity may be attributed to the critics' endorsement of both that Court's political mood and its judicial role. Certainly, an affinity for the latter seems indisputable. The Burger Court has generally evinced great tolerance of both Congress and the state legislatures and has endorsed the good faith attempts of both to resolve policy difficulties. That judicial sympathy has extended to the police and other executive agencies of government, and the activities of those agencies have been approved frequently enough to justify Levy's characterization of the Burger Court as "conservative activist" rather than merely restrained.⁵²¹ Perhaps, ironically, the new Court's deference to legislative initiatives is due in part to the respect for a new responsive-

517. Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205, 206 (1970).

518. BICKEL, *THE IDEA OF PROGRESS*, *supra* note 2, at 2.

519. *Id.* at 11.

520. *Id.* at 47.

521. LEVY, *supra* note 25, at 20. "In his willingness to reassess and even root out much that the judiciary took for granted, [Burger] was a 'radical' in the literal sense of that word." *Id.* "Burger is no more a strict constructionist than Douglas. The

ness, and perhaps that responsiveness is a legacy of the Warren Court's reapportionment revolution. But even if this is true, it cannot be the entire story.

A similarity in mood between Court and critic, a shared sentiment that it was time to begin to trust other branches of government, that the nation was inherently stable or at least capable of being stabilized, and that some semblance of authority could be restored after the sixties, is not surprising. These attitudes were shared not only by the Court and its critics but by a large segment of the American people.

To understand fully what those critics were talking about at one time and what they are talking about now, it is necessary to underscore the ineluctable truth that legal criticism, no less than any other intellectual activity, is a product of its time. Attitudes are not formed in a vacuum; the Warren Court critics were as affected as the Court itself by the larger issues of the superheated sixties and the disillusioned seventies. Yet, that generalization tells us little of how they were affected, of what was distinctive in their reactions, or of just how much who the critics were would determine what they said.

The last question has already been at least partially answered. They were advocates of a particular philosophy; they were hero worshippers of justices like Frankfurter and Jackson. They matured intellectually in the thirties and forties when there was little or no question that the Court was a nondemocratic institution. The concept that the Court's very existence violated every political precept upon which America was based ran strongly through their writings; the counter-theme, that Americans seemed to have a propensity for government by judiciary, seemed almost foreign. The critics seemed to worry endlessly about *Dred Scott*,⁵²² *Lochner*,⁵²³ and other self-inflicted wounds. They constantly teetered on the edge of a paradox: the Court does not and should not govern and yet, even when it performs its proper function, it is always being threatened and is perennially under siege.

Conclusion

The Warren Court's passion for defending human liberty cannot be ignored simply because of certain linguistic quarrels with its rhetoric. It is ironic that men like Bickel, so concerned with liberty, should have

Chief Justice is, rather, a 'judicial conservative' in Nixon's usage of that term." *Id.* at 32.

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

523. *Lochner v. New York*, 198 U.S. 45 (1905).

been most upset with the one institution in America in the fifties that was willing to give content to its great maxims. To understand the origin of the alienation from the Warren Court is neither to excuse some of that body's excesses nor to cavil at its most sensitive critics. To understand may not be to forgive, nor can it justify a disregard for the inherent validity and seriousness of what the critics were doing. Rather, if I have stressed some overt and covert assumptions made by the major critics—Freund, Kurland, and Bickel—it is to offer another perspective, a perspective that emphasizes the inability to translate categories and modes of thought from one era to another.

The Warren Court, for good or evil, did create a new universe of discourse; it did stimulate massive changes in American life. More importantly, we should understand, if we can, why the Court's critics choose to speak in muted terms two decades later, when that universe of discourse has changed. Only if we understand both the strengths and weaknesses of the Warren Court and its critics can we gain the knowledge to judge whether the Burger Court is fulfilling the destiny of the modern Supreme Court or, in some measure, betraying it.