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John E. Nowak

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Professor Rodell, The Burger Court, and Public Opinion*

*John E. Nowak***

I must begin with a confession: I am a legal realist. That is a more startling confession than many would suspect. Law professors today generally claim to be realists or, at least, realistic in their assessment of Supreme Court rulings. But most of the same professors react in horror to the suggestion that constitutional principles and decisions turn on the personal political philosophy of the Justices. Instead, they base their analyses on the language of the Constitution, an assessment of the workings of the democratic process, or philosophic values inherent in some societal consensus. These responses to the claim that constitutional law is simply the exercise of political power are in fact rejections of legal realism.

A legal realist does not believe in "the law." Law is simply the exercise of political power; constitutional law is the exercise of power by the Supreme Court's current members. In short, constitutional law is what Justices of the Supreme Court do, nothing more and nothing less. Legal realists do not belittle the efforts of those who would impose normative standards on Supreme Court rulings. We only demand that these moralists admit that their definition of right and wrong is neither demonstrably correct nor an accurate explanation of the Court's rulings. Scholars do the public a disservice when they reject legal realism and pretend that decisions represent anything beyond the personal political philosophy of the justices.

I expect a true legal realist school of constitutional jurisprudence to make headway against formal jurisprudential theories for the first time in a half century. The condition of society today mirrors that of fifty years ago, and the state of "constitutional law" rulings today closely mirrors that during the first part of this century. Though I will provide no citation for the observation, I

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** Professor, University of Illinois College of Law. The author is indebted to Ellyn Dorf, Mary Kay Scott, and Jane Templeton, students at the College of Law, for their assistance with the preparation of this manuscript.

believe that a few minutes of reflection will convince the reader that there is more public recognition of the adverse interest of workers vs. employers, rich vs. poor than there has been at any other time during the past 40 years. Whatever else may be said of the Reagan presidency, it has brought home to Americans the true nature of the economic principle of scarcity. This article will, I hope, help revive interest in the realist position.

I. RODELL'S LEGAL REALISM

Rather than engaging in my own defense of legal realism at this point,¹ I would ask the reader to consider the work of the late Professor Fred Rodell. There are several reasons for my focus on Rodell. First, his writings make for enjoyable reading. The newcomer to legal realism will find *Woe Unto You, Lawyers!*² a most enjoyable introduction to the subject and *Nine Men*³ to be an easily digested realist critique of the Supreme Court.

Second, Professor Rodell was one of the few realists who did not back down in the face of attack by formal jurisprudence and sociological jurisprudence.⁴ Judge Jerome Frank did modify his legal realist position in the face of such attacks. When he wrote the introduction to the 1959 reprint of *Woe Unto You, Lawyers!*, he referred to Professor Rodell's attacks on lawyers and judges as "demonstrably excessive" and thought that Rodell might, after

1. I have engaged in such a defense on other occasions. See Nowak, *Realism, Nihilism, and The Supreme Court: Do the Emperors Have Nothing But Robes?*, 22 WASHBURN L.J. 246 (1983) (reprint of 1982 William O. Douglas Civil Liberties Lecture); Nowak, *Resurrecting Realist Jurisprudence: The Political Bias of Burger Court Justices*, — SUFFOLK U.L. REV. — 1983 (forthcoming reprint of 1983 Donahue Lecture). For an examination of the formal jurisprudence employed by judges and scholars at the turn of the century and the development of the sociological and realist jurisprudential schools, see White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972); and White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973). Both articles are reprinted in G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978). See generally E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY (1973).

2. F. RODELL, *Woe Unto You, Lawyers!* (1939) (1980 reprint) (hereinafter cited as *LAWYERS!*). This book was first published in 1939. A new edition was published in 1959. The only changes made in the 1959 edition were the inclusion of an "Introduction" by Judge Jerome Frank and a second "Foreword" by Professor Rodell. The 1959 edition was reprinted in a 1980 paperback edition by Berkeley Publishing. The Berkeley reprint includes all of the material in the 1939 and 1959 editions without change. All citations in this article will be to the 1980 Berkeley reprint because that is the copy I keep in my office. All editions are out of print, and the reader may have to do some searching for the quoted passages from *LAWYERS!* if he or she obtains the 1939 or 1959 edition.

3. F. RODELL, *NINE MEN* (1955) (hereinafter cited as *NINE MEN*).

4. For an examination of the rise and fall of legal realism including the attacks on legal realists in the 1930's, see White, *supra* note 1; Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961); Nowak, *Resurrecting Realist Jurisprudence*, *supra* note 1.

twenty years, "modify his harsher judgments."⁵ In the foreword to the second edition, Professor Rodell replied to "my friend, Judge Frank" with the statement: "Sorry, Jerome, I wouldn't. Still unreconstructed and unconverted I make no apology for *Woe* as it first appeared and is here reborn."⁶

Third, Professor Rodell was one of the few realists to look closely at the Supreme Court. His work, *Nine Men*, is an enviable attempt to assess the Supreme Court's rulings in terms of the political and economic background of the cases and the forces shaping the thinking of Supreme Court justices.

Fourth, and most importantly, Professor Rodell's writings demonstrate that one can be an honest legal realist without being a philosophic nihilist.⁷ Professor Rodell exposed the fraud of "the law" by demonstrating that correct or incorrect legal decisions cannot be defined by "legal principles." But he did not hesitate to go on and openly impose his own normative standards on Supreme Court justices. He argued that judges should be placed on the Court who would promote the social good as he, and his almost lifelong friend William O. Douglas, saw it.⁸ He did not, however, pretend that the social good as they saw it was enshrined in the law, higher or otherwise.

Rather than summarize Professor Rodell's work, I would ask the reader to consider the following quotations from *Woe Unto You, Lawyers!* and *Nine Men*.

In tribal times, there were the medicine-men. In the Middle Ages, there were

5. LAWYERS!, *supra* note 2, at xiii.

6. *Id.* at xvii.

7. Professor Tushnet has attacked modern legal realists as being "nihilist." Professor Tushnet does not reject the legal realist view of law as being merely the exercise of political power, but only the nihilist variant of legal realism that denies the existence of a normative basis for judging the moral correctness of the exercise of power. See Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1342 (1979); Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809 (1983). See also Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981). Realism of the Fred Rodell type only requires the scholar to deny the myth of the law and to admit that the scholar's normative basis for evaluating judicial actions is neither more nor less demonstrably correct than the Court's. See generally Nowak, *supra* note 1. A realist may go from the analysis of the exercise of political power in the legal system to a condemnation of that use of power by an economic and political class, but when he does so he turns from being a legal analyst to being a progressive or Marxist political philosopher.

8. See LAWYERS!, *supra* note 2, chapters 10&11; NINE MEN, *supra* note 3, foreword & 301-32; Rodell, *As Justice Bill Douglas Completes His First Thirty Years On The Court: Herewith A Random Anniversary Sample, Complete With Casual Commentary, Of Divers Scraps, Shreds, and Shards Gleaned From A Forty-Year Friendship*, 16 U.C.L.A. L. REV. 704 (1969). For a complete listing of Professor Rodell's writings see 89 YALE L.J. 1462 (1980). The Professor did not limit his friendship to those whose political philosophy agreed with his. See Wright, *Goodbye to Fred Rodell*, 89 YALE L.J. 1455 (1980).

the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day.⁹

What The Law purports to be is a tremendous body of deathless truths so wide in scope and so infinite in their variations that they hold somewhere, and often hidden, within their vastnesses the solution of every conceivable man-made dispute or problem. Of course the truths are phrased as abstract principles, and the principles are phrased in the strange lingo of The Law. And so only the lawyers—especially those who have become judges or ordained interpreters of The Words—can ever fish the proper solution out of The Law's vastnesses. . . .

To the lawyer, there is a vast difference between The Law and the laws. The Law is something beyond and above every statute that ever has been or could be passed.¹⁰

The third kind of case [that comes to the Supreme Court]—the most important of all—includes all those disputes in which someone claims that a state law or a federal law—or some action taken under such a law—"offends" the U.S. Constitution. Here the Supreme Court has the final word. What it decides and what it says in these cases make up that holy hunk of The Law known as Constitutional Law.

Here is The Law at its best; here are the lawyers at their most distinguished, their most powerful. Still comparing piles of abstract, indecisive, and largely irrelevant principles as though they were matching pennies on a street corner. Still draping in the longiloquent language of a generalized logic the answers—some good, some bad—to specific social problems. And purporting all the while to be applying the commands and prohibitions of the U.S. Constitution. . . .

And it is worth repeating, and remembering, that the alleged logic of Constitutional Law is equally amorphous, equally unconvincing, equally silly whether the decisions the Court is handing down are "good" or "bad," "progressive" or "reactionary," "liberal" or "illiberal."¹¹

But beyond the hypnotic effects of the show that the Court puts on to look and sound and seem so awe-inspiring, no matter how weak or unwise may be the things it does or fails to do, there are two interrelated reasons, both of them basically myths, that mainly account for the Court's continuing political power. The first myth is that the Court is a sort of single force, an integrated institution, a collective mind that operates as a *unit* of government instead of as nine distinct and disparate human beings. This myth is nurtured by the odd notion that the Justices do not *make* law when they make decisions but merely get together to discover what the law is, and was all along. . . .

The second and related myth, even more deeply embedded in our folklore of government, has it that the men who become Justices become simultaneously—or ought to become if they don't—politically sterile; that they put on, or should put on, with their robes a complete impartiality or indifference toward the nation's

9. LAWYERS!, *supra* note 2, at 1.

10. *Id.* at 16-17.

11. *Id.* at 47, 63-65.

social and economic problems; that they switch, or should switch, their minds to neutral in dealing with every issue outside the verbal needlework of the law. A lawyer who has spent his professional life in the service of corporate clients, to whose interests he has been sincerely sympathetic, is supposed, by the myth, to forget it all, to turn it off like a faucet on appointment to the Court. . . .

. . . .
 . . . The idea that a human being, by a conscious act of will, can rid his mind of the preferences and prejudices and political slants or values that his whole past life has accumulated in him, and so manage to think in the rarefied atmosphere of simon-pure objectivity, is simply a psychological absurdity.¹²

. . . .
 . . . [A]ny attempt to explore and evaluate the Court's role in our national history—past, present, and future—must stem from and come constantly back to the men who really play that role in the Court's name. It must cut through all the falderol of ceremony and sanctimony; it must not be taken in by the quaint notion that words, whether of constitution or statute, can govern, without men to use the words as the men see fit to use them; it must [keep] straight that the so-called reasons the Justices give for what they do, in their long and legal-linguaged opinions, are as often self-justifying excuses, wittingly or unwittingly made, as they are genuine sources of decision. . . .

Only so can the Court as a political institution be seen in its true colors and in perspective. Only so can a light be shined on what the Justices, over the years—good and bad Justices, wise and less than wise, farsighted and astigmatic—have done for the nation and done to the nation. Only so can a long look at the Supreme Court of the United States make sense.¹³

To fully appreciate Fred Rodell's contributions to legal scholarship, we should take a look at the contributions of the Supreme Court to social progress with an eye unbiased by dedication to "the law." Prevailing principles of constitutional law generally correspond to the political philosophy dominant among well-educated lawyers, be they in the Senate of the United States or on the Supreme Court. It is difficult to demonstrate that society as a whole, or any subgroup thereof, has more liberty today than it would if *Marbury v. Madison*¹⁴ had never been decided. The Supreme Court showed virtually no interest in civil rights and liberties until Franklin Roosevelt made it back down from the protection of economic rights so dear to the hearts of lawyers.¹⁵ For

12. NINE MEN, *supra* note 3, at 27-30.

13. *Id.* at 31-32.

14. 5 U.S. (1 Cranch) 137 (1803).

15. The Court, in 1927, for the first time upheld a first amendment challenge to a government prosecution, *Fiske v. Kansas*, 274 U.S. 380 (1927). The Court strengthened the protection of first amendment freedoms in the 1920's, *see Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). But it was not until 1937 that the Court began to actively protect first amendment freedoms. *See De Jonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Hague v. CIO*, 307 U.S. 496 (1939). The religion clauses of the first amendment were not made applicable to the states until the 1940's. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). The Supreme Court in a few cases used a "fairness" test to find that criminal convictions violated due process, but it was not until the Warren Court era

over a generation the Court retarded the progress of federal and state economic reforms.¹⁶ It is amazing that defenders of the Court dismissed so easily the fact that, as Professor McCloskey stated, "a good many laborers were left a little hungrier" because of the Supreme Court.¹⁷ The Court's protection of civil liberties has come mostly in times when its protection was largely unneeded. The Court got around to giving first amendment protection to "subversives" only when the McCarthy era was over.¹⁸ It bravely declared the Sedition Act unconstitutional more than a century and a half after it had passed from the American scene.¹⁹ From World War I to Vietnam, the Court has lent its authority to the prosecution of those who have gotten in the way of military causes.²⁰ The Court's protection of the democratic process is at best a mixed bag: it has endorsed a one-man, one-vote principle but approved other devices to bury political dissent.²¹

The claim that the Supreme Court is a nonpolitical guardian of the "higher law" is sometimes based on the allegation that the Court has protected racial minorities against prevailing political opinion and oppression. If we take the long view of Supreme Court history, we must recognize that the claim is false. We should not disregard the historical effect of a Court that sided with slaveholders,²² invalidated federal civil rights acts after the Civil

that the provisions of the Bill of Rights protecting the rights of defendants in criminal cases were made fully applicable to the states.

16. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating state law setting maximum work hours); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating state minimum wage legislation).

17. R. McCLOSKEY, *THE AMERICAN SUPREME COURT* 151 (1960). *See* J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 83-84 (1980).

18. *See* *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *United States v. Robel*, 389 U.S. 258 (1967).

19. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

20. *See* *Schenck v. United States*, 249 U.S. 47 (1919) (upholding conviction for disseminating anti-war, anti-draft publications); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding internment of Japanese during World War II); *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding prosecution of draft protestor who destroyed his draft registration card).

21. *Compare* *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (upholding use of multimember or at-large voting systems which denied effective representation to minority political interests) *with* *White v. Regester*, 412 U.S. 755 (1973); *Rogers v. Lodge*, 102 S. Ct. 3272 (1982) (invalidating use of multimember or at-large systems when lower court found proof of racially discriminatory purpose in maintaining system).

22. Its activities included not only the well known *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), but also earlier rulings protecting the rights of slaveholders in runaway slaves. *See, e.g.,* *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1853); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). The Supreme Court's pre-Civil War rulings on racial issues are examined in J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 612-16 (2d ed. 1983) (hereinafter cited as NOWAK, ROTUNDA & YOUNG).

War,²³ condoned racial segregation,²⁴ and endorsed the furnishing of separate and *unequal* educational opportunities for black children.²⁵ In the 1930's the Court began to mitigate the effect of its earlier rulings endorsing inequality; in 1954 it began a most worthwhile and justifiable crusade against racial discrimination. But if *Bakke*²⁶ and *Fullilove*²⁷ are prophetic of limits on affirmative action programs, it may well be that we will have had only a twenty-five-year period in which the Supreme Court actively helped the interests of racial minorities.

During those twenty-five years, the growth in the scope of constitutional adjudication has mirrored the explosion of private and public law rulings during the first quarter of this century. A glance at any of the leading constitutional casebooks or treatises will quickly disclose that what is now called "constitutional law" consists of a series of rulings from the Burger and Warren Courts. At one time I believed that Warren Court and Burger Court rulings were related to political philosophies such as the contractarian philosophy espoused by John Rawles and the libertarian political philosophy of Robert Nozick.²⁸ Such a highly theoretical evaluation of Warren Court and Burger Court activities upholds the concept of "law" but fails to account for the political realities of the times. The Burger Court is different from the Warren Court in precisely the same way that today's conservative Senate differs from the "Great Society" Senate of the Warren Court era. The concern of well-educated people, including lawyers, today appears to be with "libertarian" rather than egalitarian goals. The Warren Court era witnessed a brief flowering of egalitarian concern in the legal profession as well as society in general. But if Charles Reich was ever right that America was in the midst

23. The Civil Rights Cases, 109 U.S. 3 (1883). It should be noted that the Court here used the tenth amendment to restrict the fourteenth amendment powers of Congress. *Id.* at 15. The Supreme Court earlier had invalidated a state law prohibiting racial discrimination in common carrier accommodations insofar as the statute applied to interstate carriers. *Hall v. DeCuir*, 95 U.S. 485 (1878).

24. *Plessy v. Ferguson*, 163 U.S. 537 (1896). For an examination of the author of that opinion and the social-political theories it reflects, see Glennon, *Justice Henry Billings Brown: Values in Tension*, 44 U. COLO. L. REV. 553 (1973).

25. *Berea College v. Kentucky*, 211 U.S. 45 (1908); *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899). These decisions undoubtedly retarded attempts to secure basic educational opportunities for black children during this period; only the extent of permanent social and economic harm to black persons resulting from these decisions is open to serious question. See Kousser, *Separate But Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J.S. HIST. 17 (1980).

26. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

27. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

28. Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 HASTINGS CONST. L.Q. 263 (1980).

of a "greening,"²⁹ the economic and social environment has brought about a withering of interest in what used to be known as "liberal" goals.

Because of the changed political environment, the inherently conservative nature of "the law" in general (and constitutional law rulings in particular) again protect the interests of the economically well-to-do with whom lawyers identify. Professor Rodell noted several reasons why "the law" would protect the rich. Not only can the rich afford the services of the always-to-be-admired "lawyer's lawyers," but most of the leaders of the profession, the legislature, and the judiciary come from those "lawyer's lawyers" who have spent a lifetime protecting the political establishment. Professor Rodell did not claim that the rich simply went out and bought the law (though in part he did claim that). Rather the law of lawyers rather than political action would always favor the rich:

There is one more important reason why The Law regularly tends to favor the rich, the conservatives, the people and companies with plenty of money and property who, not unnaturally, want to keep all their money and property and keep on getting more of it in the same old ways. This reason is inherent in the very nature of The Law itself. For The Law, you may remember, purports to be a great body of changeless abstract truths. Times change, and ways of living change, and the facts of human affairs change, but the principles of The Law remain unmoved and steadfast. In short, The Law, by its own definition, is a stand-pat science.

And of course it is the wealthy and well-to-do who are always stand-patters; the poor and the not-so-well-to-do are the progressives and the radicals. The moneyed groups are for the most part very nicely satisfied with the old arrangements of things. . . . And they find in The Law a philosophical and less obviously selfish defense of their resistance to change.³⁰

It is hardly surprising that during virtually all of our history, the Supreme Court has protected the status quo. This is just what one would expect from the backgrounds of the justices. Professor Abraham gave a composite profile of the first 100 justices, which reads as follows:

NATIVE-BORN (there have been but six exceptions, the last, Austrian-born Felix Frankfurter); WHITE, (the first nonwhite, Thurgood Marshall, was appointed in 1967); MALE (there have been no women to date); GENERALLY PROTESTANT (six Roman Catholic and five Jewish Justices); FIFTY TO FIFTY-FIVE years of age at the time of appointment; ANGLO-SAXON ETHNIC STOCK (all except six); UPPER-MIDDLE to HIGH SOCIAL STATUS; REARED IN AN URBAN ENVIRONMENT; MEMBER OF CIVIC-MINDED, POLITICALLY ACTIVE, ECONOMICALLY COMFORTABLE FAMILY; B.A. and LL.B.

29. C. REICH, *THE GREENING OF AMERICA* (1970).

30. *LAWYERS!*, *supra* note 2, at 158. *See also id.* at 156.

DEGREES (usually from prestigious institutions); SERVICE IN PUBLIC OFFICE.³¹

The composite would have to be modified today for the addition of Sandra Day O'Connor merely because she is a woman; she fits the composite in all other respects. The composite would not have to be changed at all to accommodate the appointment of John Paul Stevens. Professor Abraham believed that "most members of the American body politic would not welcome any drastic change" in the type of person appointed to the Supreme Court.³² As Fred Rodell would have countered, they do not demand a change only because they have been sold a fraudulent view of the law and the need to appoint "lawyer's lawyers" or "judge's judges" to the Court, which is really a cover for protecting the dominance of the legal elite over the public.

II. A REALIST PERSPECTIVE ON THE BURGER AND HUGHES COURTS

In support of Professor Rodell's view of constitutional law, I would like to briefly compare the justices of the Supreme Court in 1933 and 1983 and one area in which their rulings are similar. I will close my analysis with some general observations on the relationship of Burger Court rulings both to pre-1937 rulings and to dominant political opinions today. I chose the 1933 Court not only because it was an exact half century before the writing of this article but also because it is the Court whose actions are most often decried as the antithesis of proper constitutional adjudication. In the following section I will compare the nine Hughes Court Justices in 1933 with the nine Justices on the Burger Court today.³³ In a few instances I will also include a comparison of Justices who were recently retired from the Courts at each point in history: Oliver Wendell Holmes from the Hughes Court and Potter Stewart from the Burger Court.

A. THE COURT'S MEMBERSHIP: 1933 AND 1983

Perhaps the most important similarity between the Justices has nothing to do with them individually, but rather with the per-

31. H. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 53 (1974). See also A. BLAUSTEIN & R. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* (1978).

32. H. ABRAHAM, *supra* note 31, at 54.

33. Biographical data on the age, race, economic background and other characteristics of individual justices can be found in 3 & 4 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969* (L. Friedman & F. Israel eds. 1969) (hereinafter cited as *FRIEDMAN & ISRAEL*); 5 *THE JUSTICES OF THE UNITED STATES SUPREME COURT* (L. Friedman ed. 1978).

sons who appointed them. A realist would expect the politics of appointing presidents to be reflected in the persons who occupy positions on the Court. In both the Hughes and Burger Courts, seven of the nine Justices were appointed by Republicans.³⁴ Of the two Democratic appointees on each Court, one was a liberal (Justice Brandeis and Justice Marshall) while the other was a conservative (the arch-conservative McReynolds on the Hughes Court and the neo-conservative White on the Burger Court). Each Court had one token liberal member appointed by a Republican president who really did not understand the appointment process.³⁵

Both the Hughes and Burger Courts can be described literally as chronologically old. The average age of Justices on each of the Courts has been among the highest of that at any point in our history.³⁶ In 1933, the average age of a justice on the Supreme Court was 68.1 years. Franklin Roosevelt was later to campaign against this group of Justices as being too old to meet their responsibilities, either in terms of keeping current with their caseloads or properly evaluating governmental programs. Today's Justices are even older. The average age of Justices on the Burger Court at the end of 1983 will be 68.8 years.

The economic and educational backgrounds of the Justices on the Hughes and Burger Courts also show a significant degree of similarity. Of the ten Justices serving between 1930 and 1933, four could be described as coming from wealthy families,³⁷ three from moderately high-income families,³⁸ and three had a lower-income background.³⁹ Of the ten Justices who have served on the Burger Court during the past three years, three can be described as coming from wealthy families.⁴⁰ The remaining Justices ap-

34. On the Hughes Court there were two Wilson appointees: Justices Brandeis and McReynolds. On the Burger Court, only Justices Marshall and White were appointed by Democratic presidents.

35. President Eisenhower appointed Justice Brennan; President Hoover appointed Cardozo. For an analysis of the Cardozo appointment see Carmen, *The President, Politics and the Power of Appointment: Hoover's Nomination of Mr. Justice Cardozo*, 55 *V.A. L. REV.* 616 (1969).

36. For a chart of the average age of Supreme Court Justices see G. SCHUBERT, *CONSTITUTIONAL POLITICS* 59 (1960). At the close of 1933 the ages of the Justices were as follows: Hughes, 71; Brandeis, 77; Butler, 67; Cardozo, 63; McReynolds, 71; Roberts, 58; Stone, 61; Sutherland, 71; Van Devanter, 74. At the close of 1983 the ages of the justices will be as follows: Burger, 76; Blackmun, 75; Brennan, 77; Marshall, 75; O'Connor, 53; Powell, 76; Rehnquist, 59; Stevens, 63; White, 66.

37. Justices Brandeis, Cardozo, Holmes, and McReynolds.

38. Justices Butler, Roberts, and Stone.

39. Chief Justice Hughes and Justices Sutherland and Van Devanter.

40. Justices Powell, O'Connor and Stewart. The Stevens family, prior to the 1930's, also appears to have had substantial economic resources.

pear to come from upper-middle-class families, although a few may be described as coming from the lower middle class.⁴¹ The similarity in economic circumstances of the families is reflected, as would be expected, in the education of the individual justices. When the members of the Hughes Court entered the profession in the late 19th century, a large percentage of lawyers had not graduated from law school. Of the ten Hughes Justices, three attended Columbia, two graduated from Harvard, and one each graduated from the University of Pennsylvania and the University of Virginia. Justice Sutherland attended the University of Michigan but chose to return to practice law in Utah without receiving a diploma. One Justice attended the University of Cincinnati, and one did not attend law school.⁴² Of the ten Justices on the Burger Court between 1980 and 1983, the Harvard, Stanford and Yale Law Schools can each claim two alumni.⁴³ Justice Powell graduated from Washington and Lee University in Virginia, but received an LL.M. degree from Harvard. Justice Stevens graduated with the highest grade point average in his class at Northwestern. Only two Justices graduated from schools that could not be described as high-status law schools: Justice Marshall from Howard University, and the Chief Justice from William Mitchell College of Law.

The Hughes and Burger Court Justices are as similar in their ethnic and religious backgrounds as they are in terms of their age, wealth and education. In 1933 and 1983 we had six white, Protestant, male Justices. Of course, the Hughes Court was staffed entirely by white males, as would be expected in 1933, but there was some religious diversity as there were two Jewish Justices and one Catholic Justice on that Court.⁴⁴ The Burger Court has one black Justice and one female Justice, enough diversity to satisfy political

41. Chief Justice Burger and Justices Blackmun, Marshall and White may be said to come from working-class backgrounds, but it is difficult to distinguish between economic levels on the Burger Court as none of the justices appear to have been a member of an impoverished family.

42. Hughes and Stone graduated from Columbia. Cardozo chose to leave Columbia and enter practice before completing degree requirements. Justices Brandeis and Holmes graduated from Harvard. Roberts was the Pennsylvania graduate; McReynolds graduated from Virginia. (Perhaps Sutherland's one year at Michigan convinced him of the correctness of the libertarian constitutional theories of Michigan Dean Cooley. *See generally* T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION (7th ed. 1903). Justice Van Devanter attended Cincinnati. Justice Butler did not attend law school, but graduated from Carleton College in Minnesota.

43. Justices Blackmun and Brennan graduated from Harvard. Justices O'Connor and Rehnquist graduated from Stanford, and Justices Stewart and White graduated from Yale.

44. Justices Brandeis and Cardozo were Jewish; Butler was Catholic.

necessity. The Court now has one Catholic Justice but no Jewish Justices.⁴⁵ The legal and political establishment has really yielded no Supreme Court seats to the political necessity for minority representation; the positions for blacks and women have come at the expense of Jewish representation.

The Hughes and Burger Court Justices had different pre-Supreme Court experiences, although virtually all of them held high-status positions before their appointments to the Supreme Court. In 1933, eight of the nine had had very successful practices prior to their appointments. Justice Stone had had a moderately successful private practice, but had then been Dean of the Columbia Law School and Attorney General of the United States. In 1983, seven of the nine Justices can be described as having had lucrative private practices. Social prejudice may have limited the opportunities in this area for the other two Justices: Justice Marshall had an extremely successful career representing the causes of racial minorities, and Justice O'Connor's pursuit of a public sector career may be attributable to the limited career opportunities for women in the 1950's.⁴⁶ Chief Justice Burger and Justice Rehnquist had success in private practice but opted to enter government service at a relatively early age.⁴⁷

The public sector experience of the Justices on the two Courts is also comparable, though not identical. No one on the Court today has had the kind of political career as Charles Evans Hughes had.⁴⁸ The Hughes Court Justices held more prestigious nonjudicial government positions, while the Burger Court Justices have a clear edge in judicial experience. The Hughes Court had two former United States Attorneys General and one senator who had been a local legislator.⁴⁹ The Burger Court can claim only two local political officeholders, three Assistant Attorneys General, and one Solicitor General.⁵⁰ Of the ten Justices who served on the

45. Justice Brennan is Catholic.

46. Because of the recentness of her appointment, the sources listed in note 33 do not include biographical information for Justice O'Connor. Such information can be found in *The Nomination of Judge Sandra Day O'Connor of Arizona to serve as Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary*, 97th Cong., 1st Sess. (Sept. 9, 10 & 11, 1981). For a brief summary of Justice O'Connor's career, see Mann & Fiduccia, *Sandra Day O'Connor: The Making of a Precedent*, STANFORD LAWYER, Fall/Winter 1981, at 4.

47. Warren Burger became an Assistant Attorney General in 1953. Justice Rehnquist became an Assistant Attorney General in 1968.

48. Hughes was a former cabinet member and governor. The only justice in the past quarter century with an arguably similar political background was Chief Justice Warren.

49. Justices McReynolds and Stone were Attorneys General. Justice Sutherland was both a congressman and senator and was a state legislator before his election to Congress.

50. Sandra O'Connor was a state legislator, Lewis Powell was president of a local

Court between 1930 and 1933, however, only three had prior judicial experience and only one had been a federal judge.⁵¹ Seven of the ten Burger Court Justices, by contrast, had prior judicial experience, and five of them had been federal court of appeals judges.⁵² These forms of experience are of course not directly comparable. Perhaps wealthy and successful lawyers in the 1920's were more likely to pursue private sector careers or executive department positions, while financially successful lawyers of the past twenty years may have been more likely to pursue judicial appointments. In any event, these judges were clearly selected from what used to be called "the establishment." They were selected from successful legal practices and high-level political and judicial positions. The appointing authorities have had a good opportunity to determine their positions on legal and social issues. It makes less difference to appointing authorities whether a potential nominee is a Republican or a Democrat than whether that person's views conform to the prevailing political opinions.

Perhaps the most interesting parallel between the two Courts involves Justices Blackmun and Roberts. Both men were chosen as safe nominees following the rejection of a politically unacceptable person. Owen Roberts was appointed by President Hoover after the Senate rejected the Parker nomination because of his racial and ethnic views.⁵³ Justice Blackmun followed on the heels of the Senate rejections of Judges Haynesworth and Carswell. Blackmun and Roberts also had similar backgrounds. Both were raised by middle-class families, Blackmun in Minnesota and Roberts in Pennsylvania. Both went to prestigious schools for college and legal training (Roberts at the University of Pennsylvania, Blackmun at Harvard). Both men had successful corporate practices. Of course, there are differences. Harry Blackmun was older when he was appointed to the Court. Blackmun had followed his successful practice with judicial experience on the Court of Ap-

school board, Warren Burger and William Rehnquist were Assistant Attorneys General, Byron White was a Deputy Attorney General, and Thurgood Marshall was Solicitor General.

51. Cardozo was Chief Justice of the New York Court of Appeals; Holmes was Chief Justice of the Massachusetts Supreme Judicial Court. Van Devanter was a judge on the United States Court of Appeals and was also briefly Chief Justice of the Wyoming Supreme Court.

52. Brennan served on the New Jersey Supreme Court; O'Connor served on the Arizona Court of Appeals. Warren Burger, Harry Blackmun, Thurgood Marshall, John Stevens, and Potter Stewart served on the United States Court of Appeals.

53. See generally Mendelsohn, *Senate Confirmation of Supreme Court Appointments: The Nomination and Rejection of John J. Parker*, 14 *How. L.J.* 105 (1968).

peals while Roberts had only limited government service.⁵⁴

One cannot attribute the wavering between conservative and liberal viewpoints by either of these Justices to a lack of intellectual competence or legal skills.⁵⁵ Rather, both appear to be relatively talented individuals who attempted to avoid injecting personal political philosophy into their decisions. As a realist could have told them, such an effort was impossible and bound to lead to apparent wavering in their voting. It is also interesting to note that both men wanted us to know that their apparent wavering did not stem from a lack of decisiveness but an honest effort to apply what they saw as "the law."⁵⁶ When a decent, intelligent judge believes in "the law," he may actually be torn between ideological pillar and post as he searches for correct answers and seeks to avoid having his vote captured by politically ideological justices with whom he must coexist. This, I am afraid, is certainly the story of Harry Blackmun and, perhaps, that of Owen Roberts.⁵⁷

B. FEDERALISM: 1933 AND TODAY

If Professor Rodell was correct, the similarity of the 1933 and 1983 justices should be reflected in similar rulings. To test this prediction, let us now look at the federalism rulings of the Hughes and Burger Courts. In looking at these rulings we must also take into account prevailing public opinion in 1983. A realist does not have to believe that the Supreme Court "follows" election results, but a realist must recognize that public opinion sets limits on the

54. Roberts served as a special prosecutor in the Teapot Dome and Elk Hill oil scandal cases. See 3 FRIEDMAN & ISRAEL, *supra* note 33, at 2253.

55. Owen Roberts served as the Dean of the University of Pennsylvania Law School from 1945 to 1948, following his service on the Court.

56. Justice Roberts's position was defended by Justice Frankfurter on the basis of a memorandum prepared by Justice Roberts, see Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

Justice Blackmun has defended his positions in press interviews. He recently gave an extensive television interview to Cable News Network and a press interview to the New York Times. See Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. Times, Feb. 20, 1983, § 6 (Magazine), at 20.

57. Here I do differ with Professor Rodell. Professor Rodell believed that Roberts's votes in crucial decisions in the 1933-37 era were influenced by his desire to be selected as the vice-presidential or presidential nominee of the Republican Party, see NINE MEN, *supra* note 3, at 240-41. Based on the slight evidence cited by Rodell at this point I find it easier to accept his alternative view of Roberts's rulings, as those of a lawyer to the rich whose natural tendency was to define principles of constitutional law in a way that favored the rich. *Id.* at 222-42.

I am not so unrealistic as to assume that a justice would not cast his or her vote on the basis of his or her political aspirations. It is possible that Justice O'Connor's views are more political than any scholar would suspect. In a recent press interview Justice Blackmun gave credence to the Washington rumor that Sandra O'Connor has executive branch ambitions by acknowledging the existence of the rumor. See Jenkins, *supra* note 56, at 57.

exercise of power by any branch of government, including the Supreme Court.

The political debate of the early 1980's, like that of the early 1930's, involves a conflict between a conservative, libertarian political philosophy and the progressive political philosophy labeled "liberal" in America. The conflict between these political positions is as evident in the Burger Court as it was in the Hughes Court. In both eras we see Justices divide along the line of these political philosophies, while the Court as an institution reflects the libertarian political philosophy of the class from which the Justices were chosen.

It is important to remember that it is irrelevant whether there are different groups of judges who come together to make up the majority votes of the Supreme Court on different libertarian principles. It is also irrelevant that most Justices believe in "the law" and do not seek to make decisions on a political basis. What is important to the Rodell thesis is that under certain economic and social conditions, the exercise of power by a political ruling class can be predicted in terms of a libertarian-conservative model. Political philosophy and class interests explain Supreme Court rulings more clearly than legal theory.

Before turning to the Supreme Court's restriction of federal legislative powers, we should initially note the congruence between the Burger Court decisions and public opinion. Public antipathy towards government is greatest in the context of government regulation of the marketplace. In 1981, according to a Harris Survey, 59% of the population agreed with the statement that "the best government is the government that governs the least." This poll disclosed that 53% of the population saw "big government" as the greatest threat to their liberty, while only 21% saw big business as a threat to their personal interests. The rejection of federal governmental regulation was more pronounced than rejection of local government activities. In the same poll, 82% of the populace agreed with the principle that local government should be given control over as many services as possible.⁵⁸ Today, by an almost two-to-one margin, the public favors efforts to reduce government regulation of private business.⁵⁹ A clear

58. The Harris Survey, No. 24, March 23, 1981 (provided by the Harris Survey to, and on file with, the author).

59. The Harris Survey, No. 64, August 10, 1981 (provided by the Harris Survey to, and on file with, the author). In this survey a 61%-33% majority favored a "cut back" of federal regulation. It is interesting to note that a majority of persons in the same survey opposed cutting back the Legal Services Corp. or the Consumer Product Safety Commission.

majority believes in the theory that regulating agencies are “captured” by those they purportedly regulate. In 1981, 78% of the population believed that elected officials had lost control of agency decision-making to “bureaucrats.”⁶⁰ The political tenor of the times would seem to favor Supreme Court rulings restricting the exercise of federal power and governmental regulation of the marketplace. We should not be surprised if the Burger Court differs from the Warren Court in the same way that our “new federalism” Congress differs from the “great society” Congress of the 1960’s. The time is ripe for conservative lawyers with judicial power to seek a return to the pre-Roosevelt world.

In 1933, the Hughes Court was on the verge of curtailing the growth of federal power in the name of the tenth amendment. The Court in the era before 1937 developed a principle of state sovereignty that guaranteed state and local governments a role as sovereigns in the federal system. This guarantee required that certain areas of regulation be left to state and local governments. After 1937, this idea seemed to be as totally rejected in Supreme Court decisions as it was in the body politic. But the 1970’s witnessed increasing disenchantment with federal regulation; judges appointed by Republican presidents would bring the new federalism to the Supreme Court even before it came to the White House.

In *National League of Cities v. Usery*,⁶¹ the Court held that the commerce power did not extend to certain activities of state government—a ruling based more on tenth amendment principles than upon an examination of the meaning of the commerce clause.⁶² The majority opinion was written by Justice Rehnquist and joined only by Republican Justices.⁶³ The majority opinion failed to define a legal principle by which one could differentiate the sovereign functions of a state that could not be interfered with by the federal government from state activities that could be subject to federal commercial regulation. Perhaps these libertarian Justices would have been more pleased by a ruling that cut back on federal power to restrict private activities, but such a ruling

60. The Harris Survey, *supra* note 58. In 1981 a 64% majority agreed with the statement: “putting people in charge of regulatory agencies who have spent a good part of their lives fighting regulations is like putting the foxes in charge of the chicken coop.” The Harris Survey, *supra* note 59.

61. 426 U.S. 833 (1976).

62. Although the majority opinion reads as if it would conclude with a ruling that the tenth amendment prohibited application of the federal minimum wage law to state and local governments, the opinion concluded that such application was “not within the authority granted Congress by Art. I, § 8, cl. 3.” *Id.* at 852.

63. The Rehnquist opinion was joined by Chief Justice Burger and Justices Blackmun, Powell and Stewart. Justices Brennan, Marshall, Stevens and White dissented.

seems to have been politically unacceptable. Instead, the Rehnquist majority chose to defend the ability of a state to be free of federal regulations when they perform governmental activities. The closest the majority came to defining a legal principle was a recognition of the need to leave states free to choose how to allocate scarce economic resources for public services.⁶⁴

The Justices in *National League of Cities* demonstrated the same ambivalence as the public at large about cutting back on federal power. Justice Blackmun, the fifth vote in *National League of Cities*, believed that the decision was based upon a judicial balancing of state and federal interests.⁶⁵ As always, balancing permits the exercise of political power under the guise of enforcing legal principles.

We have now entered a period like the 1933-37 period wherein the scope of federal authority depends on the view of one Justice regarding the limits that the tenth amendment places upon federal power, the only difference being that the justice's name is now Blackmun rather than Roberts.⁶⁶ Four of the Republican Justices on the Burger Court believe that the American conservative variant of libertarianism is a constitutional principle which restricts the power of the federal government. The three Democrats, as expected, do not fear the growth of federal power,⁶⁷ while Justice Stevens has recognized that the resurrection of the tenth amendment can be based on nothing but the political position of some Justices.⁶⁸

National League of Cities has been eroded quite simply because Harry Blackmun has sided with the Democratic voting bloc in recent cases. In *FERC v. Mississippi*,⁶⁹ Justice Blackmun wrote a majority opinion, joined only by the dissenters in *National League of Cities*, allowing the federal government to require state regulatory authorities to consider specific approaches to rate structures and to follow specific procedures when considering utility regulatory standards. Justice Blackmun argued that since Con-

64. The majority found this principle sufficient to overrule a Warren Court decision rendered less than a decade earlier. See *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling in part *Maryland v. Wirtz*, 392 U.S. 183 (1968)).

65. See *id.* at 856 (Blackmun, J., concurring).

66. The change in the Supreme Court's position on the scope of the federal commerce power and the tenth amendment was based on the "switch" in the position of Justice Roberts. Compare *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

67. See *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976) (Brennan, J., dissenting, joined by White & Marshall, JJ.).

68. See *id.* at 881 (Stevens, J., dissenting); *EEOC v. Wyoming*, 103 S. Ct. 1054, 1064 (1983) (Stevens, J., concurring).

69. 456 U.S. 742 (1982).

gress could have directly regulated the public utilities, it was not interfering with state sovereignty by conditioning state regulation over this subject area. The concept of conditional non-preemption sounds interesting and may indeed be the technical legal basis upon which *National League of Cities* can be differentiated from *FERC*.⁷⁰ But Justice Blackmun is the only member of the Supreme Court who believes that *National League of Cities* is consistent with *FERC*; the other Justices in the *League of Cities* majority all forcefully rejected Blackmun's argument.⁷¹

In 1983, the Court, again by a five-to-four vote, upheld the application of the Age Discrimination in Employment Act to state and local government employers. In *EEOC v. Wyoming*,⁷² Justice Brennan wrote for the majority and argued that the Court's action was technically consistent with *National League of Cities*. The test he applied consists of three technical threshold requirements and a balancing test. If a federal law (1) governs the "states as states," (2) addresses matters that are "indisputably attributes of state sovereignty," and (3) impairs the ability of states to "structure integral operations in areas of traditional government functions," then the law violates the tenth amendment—unless, of course, the Justices determine that the "federal interest advanced . . . justifies state submission."⁷³

If there is an afterlife, Fred Rodell must now be laughing at this very elaborate and totally meaningless legal double-talk. Eight Justices believe that this test cannot distinguish the application of the Age Discrimination Act to state governments, upheld in *EEOC v. Wyoming*, from the minimum wage provisions that were invalidated in *National League of Cities*.⁷⁴ Indeed, the Brennan majority opinion in *EEOC* appears to ridicule the *National League of Cities* decision. Brennan at several points implies that this three-part test is worthless. We are told in the majority opinion that not every state employment decision that promotes effi-

70. See NOWAK, ROTUNDA & YOUNG, *supra* note 22, at 175-77.

71. See *FERC v. Mississippi*, 456 U.S. 742, 771 (1982) (Powell, J., concurring in part and dissenting in part); *id.* at 775 (O'Connor, J., concurring in part and dissenting in part, joined by Burger, C.J. & Rehnquist, J.). Justice Blackmun's majority opinion in this case was joined by Justices Brennan, White, Marshall and Stevens, all of whom had dissented in *National League of Cities*.

72. 103 S. Ct. 1054 (1983).

73. The tests were developed in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) in which the Court upheld federal statutes regulating strip mining on privately owned land. See also *United Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1982) (state-owned railroad is not immune from federal regulation because this regulation would not impair the state's ability "to structure integral operations in areas of traditional functions").

74. Justice Blackmun is the only Justice who voted in the majority in both cases.

cient management of traditional state functions is an attribute of state sovereignty and that the economic burden of federal regulations on state sovereignty will not constitute an improper federal intrusion into state affairs. In *EEOC*, the majority was not deterred from finding an overriding federal interest by the fact that the federal government had failed to extend protection from mandatory retirement to its own employees.⁷⁵

Although Justice Blackmun did not write a separate opinion in *EEOC v. Wyoming*, it appears that he may not be ready to vote to overrule *National League of Cities v. Usery*. Nevertheless, the worthlessness of "tests" cannot be masked by meaningless distinctions. Justice Stevens is honest in telling us that eight of the nine Justices recognize the inconsistency of *National League of Cities* and *EEOC v. Wyoming*; he would overrule *National League of Cities* as being both incorrectly decided, and more importantly, incapable of being applied in a politically neutral manner.⁷⁶

The real dispute between the majority and the dissent, and the nature of the fight over Harry Blackmun's vote, is best disclosed by the dissenting opinions in *EEOC v. Wyoming*. The Chief Justice demonstrates the strength of his belief in the American libertarian-conservative tradition when he states: "I have re-examined [the Constitution] and I fail to see where it grants to the national government the power to impose such strictures on the states either expressly or by implication."⁷⁷ The Chief Justice, and the Republicans who joined him, may be accused of many things, but being "strict constructionists" of the Constitution or opponents of "judicial activism" should not be among those charges. Justice Powell reads the history of the formation of the Union and the tenth amendment to restrict federal powers in this area almost exactly as did Justices of the pre-1937 era. Powell dispenses with the views of Chief Justice Marshall in a footnote and rejects the argument that the commerce power was a central concern to the drafters of the Constitution.⁷⁸ Presumably, his opinion is a testament to his unshakable faith in the libertarian-conservative creed rather than a total inability on his part to assess primary and secondary historical materials.

These cases make it clear that the libertarian bloc will revise history in any way necessary to enforce their political philosophy. For now the Democrats will pay lip service to tenth amendment

75. *EEOC v. Wyoming*, 103 S. Ct. 1054, 1061 n.11, 1062 n.14, 1064 n.17 (1983).

76. *Id.* at 1064 (Stevens, J., concurring).

77. *Id.* at 1068 (Burger, C.J., dissenting, joined by Powell, Rehnquist and O'Connor, JJ.).

78. *Id.* at 1075 (Powell, J., dissenting, joined by O'Connor, J.)

tests if that is necessary to secure Blackmun's vote. The future development of the doctrine will be determined by the opening of positions on the Supreme Court and the political tenor of the times at which new Justices are appointed.

C. THE COURT AND INDIVIDUAL RIGHTS

The similarity between Hughes and Burger Court rulings is not limited to federalism issues. Public opinion on a variety of political issues has set the stage for the judicial resurrection of pre-1937 principles that favor the established economic class. I have detailed these similarities elsewhere,⁷⁹ and would offer the reader only a few general observations to support this thesis. The Burger Court has limited the scope of Warren Court rulings protecting the rights of criminal defendants and virtually returned to pre-1937 conservative positions on the meaning of fundamental fairness in criminal cases.⁸⁰ The Harris Survey reported that "the evidence in this survey would appear to support the hard-line approach suggested by Chief Justice Burger [in a speech to the A.B.A.]."⁸¹

The Burger Court has also returned to a pre-1937 approach to defining "fundamental rights" when it decreed a woman's right to an abortion. But the Court denied poor women funding for abortions; its rulings have primarily favored upper-class women. The Burger Court's abortion rulings are favored by a two-to-one margin by the public.⁸² In 1979, 70% of lawyers believed that abortion decisions should be left to the woman.⁸³ So much for the myth that the Court challenged public opinion to declare correct principles of "constitutional law" in the abortion cases.

I cannot accuse the Burger Court of returning to the racist pre-1937 rulings of the Supreme Court. On the other hand, the Court has not sought to promote racial equality in the private sector as did the Warren Court. In its rulings on state action, the Burger Court has left states free to allow private sector racial discrimination.⁸⁴ In rulings requiring "discriminatory purpose" to establish racial classifications, the Court has left the states free to

79. See Nowak, *supra* note 28.

80. See generally Nowak, *Foreword: Due Process Methodology in the Post-incorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397 (1979).

81. The Harris Survey, No. 16, Feb. 23, 1981 (on file with author).

82. In 1982, 61% of the public opposed "a constitutional amendment to ban legalized abortions"; only 31% favored such an amendment. The Harris Survey, No. 63, August 9, 1982 (on file with the author).

83. *LawPoll: Attitudes on Abortion and Firearms Control*, 65 A.B.A.J. 1634 (1979).

84. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Cf. *Milliken v. Bradley*, 418 U.S. 717 (1974).

enact economic regulations or welfare distribution systems that especially burden the poor and racial minorities who disproportionately occupy the lowest economic levels in our modern industrial society.⁸⁵

While the Burger Court Justices have not approved governmentally endorsed racial discrimination, it is fair to say that the Burger Court has kept faith with a libertarian-conservative political position when it has examined remedial matters. While the Court has not moved to overturn Warren Court principles restricting racial segregation in school systems, it has prevented lower court judges from creating truly integrated systems by denying federal courts the power to attack *de facto* segregation,⁸⁶ prohibiting judges from using desegregation plans that involved transportation of students between city and suburb,⁸⁷ and upholding a state constitutional restriction on state court orders requiring student busing.⁸⁸

The Court has clearly followed the political mainstream in its rulings on affirmative action programs. Over 60% of the public believes that there should be affirmative action programs in employment and education for women and members of racial minorities so long as those programs do not involve strict "quotas."⁸⁹ The workings of the democratic process sometimes appear to go against such wishes of the populace; minority race interests sometimes have spent political capital in securing affirmative action programs which use quotas to guarantee them a fair share of employment or educational positions. But the majority did not have to worry about the political process because the Court effectuated the libertarian-conservative position in its affirmative action rul-

85. See, e.g., *City of Memphis v. Greene*, 451 U.S. 100 (1981); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

86. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976). The Court has upheld the action of lower courts which the Justices deemed necessary to correct *de jure* segregation. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

87. *Milliken v. Bradley*, 418 U.S. 717 (1974).

88. *Crawford v. Bd. of Educ.*, 102 S. Ct. 3211 (1982). The Court did invalidate, by a 5 to 4 vote, legislation limiting the power of school boards to voluntarily adopt integration plans. This program involved, in the majority's view, the allocation of government power on a racial basis. *Washington v. Seattle School Dist. No. 1*, 102 S. Ct. 3187 (1982).

89. In 1982, 69% of the public supported "federal laws requiring affirmative action programs for women and minorities in employment, provided there are no rigid quotas." The Harris Survey, *supra* note 82. Apart from the need for federal laws, in 1982, 75% of the public agreed with the statement: "After years of discrimination, it is only fair to set up special programs to make sure that women and minorities are given every chance to have equal opportunities in employment and education." The Harris Survey, No. 8, January 28, 1982.

ings. In *Regents of the University of California v. Bakke*,⁹⁰ the Court allowed the consideration of race in educational admissions so long as strict quotas were not used. Justice Powell cast the deciding vote on the basis that educational institutions had an interest in academic freedom which allowed for the consideration of racial factors.⁹¹ His opinion promotes a libertarian conception of academic freedom and a popular conception of the nature of acceptable affirmative action programs. It cannot be said to be one advancing the interest of minority race persons. Only 29% of lawyers polled in 1978 believed that the *Bakke* decision was an endorsement of affirmative action.⁹² True, the Court has allowed Congress to guarantee that a minimal share of public works expenditures will go to minority-owned businesses, and it has refrained from finding private-sector affirmative action programs to be illegal.⁹³ But these rulings only effectuate the popular political position that reasonable government programs designed to remedy past discrimination are permissible, so long as the government does not decree strict employment or educational quotas. The compatibility of these rulings with modern political thought was best expressed by the Harris pollsters as they said: "There has been virtually no change in sentiment favoring affirmative action since 1978, when the United States Supreme Court ruled that rigid quotas were illegal but encouraged programs in industry and education to help minorities and women make up for past disadvantages and discrimination."⁹⁴

III. CONCLUSION

Even this brief comparison of the Burger and Hughes Courts and the relationship of Supreme Court rulings to public opinion demonstrates, I believe, that Professor Rodell's view of constitutional law remains valid today. Professor Rodell's thesis should be considered for both scholarly and practical reasons. If constitutional law scholarship is to be relevant to the solution of societal

90. 438 U.S. 265 (1978).

91. *Id.* at 287-305, 311-20 (Powell, J.).

92. *LawPoll, Bakke's Indecisiveness May Be Its Strength*, 64 A.B.A.J. 1348, 1349 (1978).

93. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). It is interesting to note that by a margin of 49% to 43%, lawyers polled by the American Bar Association opposed *Weber*. *LawPoll; On Affirmative Action, Judicial Selection, and Diversity of Citizenship Jurisdiction*, 66 A.B.A.J. 148 (1980).

94. The Harris Survey, *supra* note 82. Regarding the relationship of the Supreme Court decisions to scholarly opinion see Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs That Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891.

problems, it must be based on a realistic assessment of the Supreme Court. With Professor Rodell, we must recognize that "the law" is a fraud. There is no demonstrably correct set of legal principles that will dictate the resolution of constitutional issues apart from political philosophy and the exercise of political power by Justices. Mark Tushnet, among other progressive and Marxist legal analysts, has demonstrated the irrelevance of traditional scholarship to the resolution of societal problems.⁹⁵ The realities of constitutional issues involve struggles between economically privileged classes and those who would put restraints on economic freedom in the marketplace, struggles between established political groups and minority racial or political groups. These are conflicts between classes that can only be defined in economic and political terms. If legal scholars are to play a meaningful role in society, they must recognize that Supreme Court rulings are part of a dialectic of adjudication. The Court, as a governmental decision-maker, is a part of the political current of the times and responds to societal needs of the day.⁹⁶

Practical as well as scholarly conclusions can be drawn from this comparison of the Burger Court and Hughes Court rulings. Most dramatic of these is the need to evaluate candidates for the Supreme Court in political terms rather than in terms of some vague concept of legal ability. We do the public a disservice when we argue that President Reagan should not choose candidates for the Supreme Court based upon their willingness to vote in a particular way on a particular issue. The President would be remiss in his political responsibility to those who elected him not to evaluate judges in this way. Objections to political tests for Supreme Court appointments are based on the elitism of the legal profession, whether liberal or conservative. Indeed, the rejection of legal realism benefits only lawyers and professors; it does not favor a liberal as opposed to conservative position. The only chance for those who oppose the President's political policies to effectuate their goals is to adopt a realist assessment of the Court and evaluate Supreme Court nominees in purely political terms. Those liberal senators who voted to confirm Sandra Day O'Connor's nomination to the Court because she was a woman of excellent intellectual ability did no favor to their liberal constituencies. She

95. See Tushnet, *supra* note 7.

96. This method of analysis need not be reserved for realists or nihilists. Several scholars have analyzed the vote of the judiciary in terms of a political dialogue with the populace. See, e.g., A. BICKEL, *THE MORALITY OF CONSENT* 101, 111 (1975); White, *The Evolution of Reasoned Elaboration*, *supra* note 1, at 296; Fiss, *Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1 (1979).

did not hide her conservatism during her confirmation hearings. Those senators would have done better to oppose the nomination and try to pressure Reagan to appoint a woman whose views would be more compatible with their own.

I do not expect that the realist position will ever gain adherents among the traditional elites of the profession in academe, private practice, or the judiciary. Professor Rodell was widely attacked by the legal profession in decades past. Legal realism of the Fred Rodell variety asks the profession to give up the mystical hold on the public which we perpetuate through the myth of "the law." Acceptance of Professor Rodell's views might force us to enter the political trenches to fight political wars. But the change would not be without benefits. Acceptance of the realist position will help the public to evaluate the manner in which it is ruled; it will help establish a system whereby the political process can more effectively operate in terms of the selection of Supreme Court justices or political responses to Supreme Court rulings. If we are to participate in the process by which societal problems are resolved, we must deal with the realities of political power rather than the myths of legal doctrine.