Maryland Law Review

Volume 19 | Issue 3 Article 2

The Warren Court Under Attack: the Role of the Judiciary in a Democratic Society

J. Patick White

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

 Part of the Courts Commons

Recommended Citation

J. P. White, *The Warren Court Under Attack: the Role of the Judiciary in a Democratic Society*, 19 Md. L. Rev. 181 (1959)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol19/iss3/2

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Maryland Law Review

VOLUME XIX SUMMER, 1959 NUMBER 3

THE WARREN COURT UNDER ATTACK: THE ROLE OF THE JUDICIARY IN A DEMOCRATIC SOCIETY.

J. PATRICK WHITE*

More than most institutions of American government, the judiciary has commanded the respect and reverence of the American nation. Yet, on four occasions in the past history of the United States the role of the courts in American life has been an issue of bitter controversy: in the early years of the nineteenth century when Chief Justice Marshall's nationalistic pretensions and assertions of judicial authority aroused the ire of President Jefferson and his followers; on the eve of the Civil War when the Supreme Court attempted to resolve the slavery question on terms unsatisfactory to the popular majority; during the progressive era from 1901 to 1917 when the decisions of the state and federal courts threatened the movement for social justice; and during the mid-1930's when much of the economic and social legislation of the New Deal temporarily foundered on the rock of judicial conservatism.

At the present time the place of the judiciary in a democratic society is once again the subject of widespread public debate. The principal cause of this concern is the deep-rooted dissatisfaction of various elements with recent decisions of the United States Supreme Court concerning desegregation and civil liberties. The beginning of the agitation can be dated almost precisely with the handing down, on May 17, 1954, of the Court's decision outlawing racial segregation in state-supported schools. Speaking for a unanimous bench, Chief Justice Warren held that the previously acceptable doctrine of separate-but-equal school facilities for white and Negro children — a doctrine which since 1896 had served as the legal basis for segregation in public schools — was no longer compatible with the con-

* A.B., 1949, M.A., 1950, Ph.D. 1957, University of Michigan; Instructor in History, University of Maryland.

stitutional guarantees afforded by the Fourteenth Amendment. In so doing the Court did not overrule previous decisions holding that the Fourteenth Amendment failed to outlaw segregated school facilities. The fundamental issue, the Chief Justice argued, was society's changed view of the importance of public education. Since the available evidence amply justified the conviction that educational opportunity was "a right which must be made available to all on equal terms," the Court concluded that separate educational facilities were inherently unequal and therefore unconstitutional.[1]

The desegregation principle enunciated in 1954 — a principle subsequently applied by the Supreme Court to public beaches and bath houses, golf courses, and municipal transportation facilities[2] — had been foreshadowed by earlier Supreme Court rulings outlawing the white primary and covenants restricting the sale of residential housing on the basis of race.[3] And in 1950 the Court significantly anticipated its educational decree of 1954 by holding that separate law-school facilities for Negroes in a state-supported university, no matter how equal from a physical standpoint, were inherently discriminatory and thus illegal.[4]

The South, nevertheless, evinced shock and surprise at the sweeping desegregation orders of 1954. Leaders of Southern opinion were quick to launch an assault upon both the principle of desegregation and the Court which had enunciated that principle. "The South," Senator Eastland of Mississippi declared emphatically, "will not abide by nor obey this legislative decision by a political court."[5] Dire warnings that racial friction would increase and that the educational progress of both Negro and white would suffer were frequently voiced. The University of Virginia student newspaper charged that Southerners were justifiably bitter because desegregation undermined the traditional Southern "way of life" and the "way in which [southern men] have thought since 1619." A Jackson, Mississippi newspaper editorial predicted that "human blood may stain southern soil in many places because of this decision," but assured its readers that responsibility for "the

[1] Brown v. Board of Education, 347 U.S. 483, 493 (1954).
[2] Baltimore City v. Dawson, 350 U.S. 877 (1955); Holmes v. City of Atlanta, 350 U.S. 879 (1955); Gayle v. Browder, 352 U.S. 903 (1956).
[3] Smith v. Allwright, 321 U.S. 649 (1944); Shelly v. Kraemer, 334 U.S. 1 (1948).
[4] Sweatt v. Painter, 339 U.S. 629 (1950).
[5] The New York Times, May 18, 1954.

dark red stains of that blood will be on the marble steps of the United States Supreme Court . . . ."[6]

Undoubtedly accounting for much of the South's indignation, especially at the advent of desegregation by judicial action, is the ironic knowledge that the Supreme Court has been the chief bulwark of the South's public policy of racial segregation in all forms. Historically, one of the objects of Northern "radical" policy after the Civil War had been to secure for the Negro the same fundamental rights enjoyed by other citizens. A variety of measures had been enacted to this end, chief among them being the adoption of the Fourteenth and Fifteenth Amendments to the Constitution. Yet, once the North's crusading zeal had abated, the Supreme Court began to restrict the meaning of the civil and political rights supposedly guaranteed by these amendments. In 1876, for instance, the Court held that the Fourteenth Amendment did not preclude the infringement of a citizen's rights by another individual acting privately. The federal government, the Court held, had been authorized by the amendment to prevent only direct state interference in the enjoyment of personal rights.[7]

In 1883 this doctrine was applied to void the Civil Rights Act of 1875 by which Congress had attempted to prevent discrimination against Negroes in public inns and theaters and on public transportation facilities.[8] In decisions rendered in 1896 and 1899 the Court elaborated the doctrine that separate railroad and school accommodations for Negroes, provided they were physically equal to those afforded white persons, did not constitute discrimination.[9] Since the Court did not for many years seek to ascertain whether the separate facilities provided for Negroes were in fact equivalent to those granted white persons, legal standing was extended for several decades to the South's double educational standard. As late as 1935 the Court unanimously ruled that political parties were purely private organizations and thus entitled to bar Negroes from primary elections.[10] Such an extended history of judicial sanction for white supremacy makes the South's hostility toward the Supreme Court after 1954 more understandable.

[6] *Ibid.*, May 19, 1954.
[7] United States v. Cruikshank, 92 U.S. 542 (1875).
[8] Civil Rights Cases, 109 U.S. 3 (1883).
[9] Plessy v. Ferguson, 163 U.S. 537 (1896); Cumming v. Board of Education, 175 U.S. 528 (1899).
[10] Grovey v. Townsend, 295 U.S. 45 (1935).

Leaders of Southern action have adopted a dual strategy of resistance to the Supreme Court's desegregation decisions. Within the South itself, they have cultivated the idea that although a complete reversal of those decisions is unlikely, it is nevertheless possible to postpone almost indefinitely compliance with the substance of the Court's orders. Technically legal but morally questionable devices have been employed to further this belief. Negatively, the law and legal processes have been used to harass anyone attempting to implement desegregation. The National Association for the Advancement of Colored People has been the special target of this tactic, the object being to keep its leaders so preoccupied maintaining the legal status of their organization that they will have neither the energy nor the funds to institute desegregation proceedings.

A more positive strategy is inherent in the rash of state laws adopted since 1954 which seek to find some legal basis for side-stepping the implications of desegregation. Typical of this approach have been: (1) laws establishing pupil placement programs, whereby racial segregation is screened behind rules allowing the assignment of pupils on the basis of ability, health, aptitude, or what is euphemistically termed socio-economic circumstances; (2) statutes requiring the automatic closing of public schools threatened with integration; (3) measures permitting the withdrawal of state financial aid from school districts which enroll Negro students; (4) laws creating nominally private school systems, to be financed by public tuition grants; and (5) ordinances repealing compulsory school-attendance laws.[11]

Although often motivated by a blatant mood of defiance, such laws proceed from the undoubted right of the citizen in our legal system to probe for shortcomings in the Court's original desegregation decisions.[12] The likelihood that this

[11] These laws are ably analyzed in Miller, *The Strategy of Southern Resistance*, 19 The Reporter 18-20 (Oct. 2, 1958).

[12] An example of the operations of this principle is afforded by the Alabama pupil-placement law of 1957. This law established eleven different standards which local school districts might use in determining the assignment of pupils. Included were such factors as home environment, the possibility of a breach of the peace, and social and psychological criteria regarding student relationships. Nowhere was race cited as a legitimate consideration in making school-assignment decisions. A suit instituted in federal district court on behalf of a Negro girl denied admission to a white school contended that the constitutionality of the law should be judged against the background of the state's record of resistance to desegregation, the adoption of a state constitutional amendment abolishing free public schools, and the refusal of the local school board to act on the petition of the plaintiff within the time specified by the Alabama legisla-

approach will secure school arrangements at once satisfactory to Southern segregationists and acceptable to the Supreme Court is not great. But it serves the South's immediate purpose of frustrating for the indefinite future total compliance with the law of the land. It also means that the present constitutional turmoil will inevitably be of long duration.[18]

Outside the South a more subtle strategy of resistance to desegregation was devised. Although some Southerners apparently hoped that the North might — as it had after the Civil War — ultimately lose interest in the Negro's fate and concede the merit of the South's attitude toward integration, little or no real effort was made to defend the principle of segregation. Instead a bold campaign was launched to undermine the prestige and power of the Supreme Court and the reputations of its justices. The segregationists seemingly believed that if doubts could be planted in the public mind respecting the finality of the Supreme Court's interpretations of the Constitution, doubts might similarly be raised regarding the wisdom and conclusiveness of its pronouncements on segregation.

Governor Talmadge of Georgia set the stage by protesting that the Court's school decisions of May, 1954, had reduced the Constitution to a "mere scrap of paper." The Court had, he continued, "ignored all law and precedent and usurped from Congress and the people the power to

---

ture. The district court, and subsequently the Supreme Court, refused to invalidate the statute, however, on the ground that the statute was not "on its face" designed to evade racial desegregation of public schools. But both courts warned that if the law was so administered to discriminate on the basis of race or color, it would subsequently "be declared unconstitutional in its application." See Shuttlesworth v. Birmingham Board of Education, 358 U.S. 101 (1958). For a discussion of the case, see The Washington Post and Times Herald, November 25, 1958.

[18] The continuous and very considerable publicity surrounding the operation and legal status of the various Southern plans of resistance to desegregation has left the impression in many areas that, short of being supported by force as in Little Rock, the Supreme Court has been largely unsuccessful in securing adherence to its decrees in the educational field. This is, however, not altogether the case. In a very considerable area outside the deep South, where segregation still persisted in 1954 — in Kansas, Missouri, Maryland, Delaware, and the District of Columbia — the Court's order was decisive in bringing about an immediate end to segregation in education. Farther South, in Kentucky, Tennessee, Arkansas, and North Carolina the Court's order inspired the beginning of an end to total segregation. Of the 3,113 school districts segregated at the time of the Supreme Court decision in 1954, 764, or one quarter of the total, involving nearly two million children, had moved toward integration by the opening of the school year in September, 1958. In approximating the effectiveness of the Supreme Court's actions in so turbulent an area, the standard of success must be relative, not absolute. See FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE (1958) 40-41.

amend the Constitution . . . ." The only task left for the justices, he jibed, was to decide "whether to cut off our heads with a sharp knife or a dull one."[14]

Various organs of Southern opinion denounced the alleged usurpation by the Supreme Court of powers reserved to the states. The resolution adopted by the South Carolina legislature is typical. This document argued that the national government possessed only delegated powers, that nowhere in the Constitution was authority granted to the Supreme Court to alter the division of powers established by the Constitution, that the Fourteenth Amendment in no way disturbed "the right of each of the States to maintain . . . racially separate public schools," and that the Supreme Court had itself upheld this view prior to 1954. The South Carolina resolution contended that the Supreme Court's desegregation decisions made it apparent that henceforth "the current political and social philosophy" of the justices rather than "the sanctity of past decisions" was to determine the law of the land. Such "a deliberate . . . and dangerous attempt to change the true intent . . . of the Constitution," the resolution admonished, destroyed the basis of constitutional government. Accordingly, the resolution asserted that henceforth South Carolina was entitled to judge for itself as to the constitutionality of Supreme Court rulings and to take action "to protect its sovereignty and the rights of its people."[15] Thus was the ancient doctrine of interposition, first devised by Jefferson and Madison in defense of human rights and subsequently modified by Calhoun to defend the institution of slavery, resurrected in the twentieth century on behalf of segregation in education.

The Southern Manifesto, issued in March, 1956, by ninety-six Southern Congressmen solemnized the South's attitude toward the high Court. This document charged that "the unwarranted decision of the Supreme Court in the public school cases" constituted an exercise of "naked judicial power" in defiance of Congressional authority and existing law. The Manifesto left the unmistakable impression that, in issuing the desegregation ruling, the Supreme Court justices had been under the influence of "outside agitators" who sought "immediate and revolutionary changes in our public school system." Affirming the South's intention to prevent "meddlers" from destroying "the

[14] The New York Times, May 18, 1954.
[15] *Ibid.*, Feb. 15, 1956.

amicable relations between the white and Negro races that have been created through 90 years of patient effort," the signers of the Manifesto appealed to the nation to join them in a campaign against judicial usurpation.[16]

These sentiments were quickly translated into concrete proposals intended to avenge the South and humble the Supreme Court. Representative Sikes of Florida proposed a constitutional amendment validating all state laws concerning good order, education, and harmonious race relations, thus removing from federal-court jurisdiction cases arising in these areas.[17] This same Congressman introduced legislation making the Senate of the United States a court of final appellate jurisdiction to review any Supreme Court decision involving the reserved powers of the states.[18]

Senators Eastland of Mississippi and Johnston of South Carolina suggested that Supreme Court justices be reconfirmed by the Senate every four years. Through such a process, they apparently hoped to obtain the removal of justices who had become obnoxious to Congress.[19] The Georgia and Alabama legislatures, several Congressmen, and Senator Thurmond of South Carolina advocated that anywhere from six to nine of the justices who rendered the desegregation decision in the school cases be impeached by the House of Representatives and tried by the Senate for exceeding the limits of judicial authority.[20]

Representative Tuck of Virginia projected a scheme in which the chief justices of the states were to serve as a court of final appeal to review Supreme Court decisions involving constitutional questions.[21] And Senator Ervin of North Carolina, together with many other Southerners in Congress, proposed to remedy what he described as the tendency of the Warren Court to rest its decisions "solely upon the basis of psychology and sociology" by requiring that all appointees to the supreme bench have prior service in either the state or lower federal-court systems.[22]

---

[16] *Ibid.*, March 12, 1956.

[17] 103 Cong. Record, 85th Cong., 1st Sess., 10926.

[18] *Ibid.*

[19] *Ibid.*, 10057; The New York Times, June 25, 1957.

[20] 103 Cong. Record, 85th Cong., 1st Sess., 10333-10335; The New York Times, June 25, 1955; Feb. 14, 15, 26, 1957; June 25, 1957; July 8, 1957.

[21] The New York Times, Oct. 11, 1958.

[22] Sam J. Ervin, Jr., "Alexander Hamilton's Phantom," Address to State Bar of Texas, July 7, 1956, in 102 Cong. Record, 84th Cong., 2d Sess., 12778-12781. The contention that there is a positive correlation between prior judicial experience and distinguished service on the Supreme Court has recently been the subject of analysis by Steamer, *Statesmanship or Craftsmanship: Current Conflict over the Supreme Court*, 11 Western Pol. Q. 272-275 (1958), and Frankfurter, *The Supreme Court in the Mirror of Jus-*

Significant as these proposals are in gauging the South's reaction to the Supreme Court's desegregation rulings, there is no indication that any large or influential group outside the South regarded them seriously. The nation as a whole seems too deeply committed to the principle of desegregation to permit such narrowly based measures to succeed. Without exception, the judicial reforms inspired by the Court's integration orders were referred to Congressional committees and promptly forgotten except by their sponsors. Had the agitation against the Supreme Court been limited to Southern discontent, there is every reason to believe that the movement would have withered and died for lack of popular support.

But just as the controversy surrounding the Supreme Court was beginning to decline in 1956 another segment of public opinion was aroused by other circumstances to attack the nation's highest tribunal. Especially since 1956 the Supreme Court has evidenced a particular concern to uphold civil liberties threatened by Congressional, executive, and state interference. The Court's protective role in this sensitive area has provoked the wrath of powerful elements which cannot be, as is the case with the critics of desegregation, easily classified along sectional lines. Rather, a cross-section of conservatives, such as ex-Senators Bricker of Ohio and Knowland of California, and Senators Bridges of New Hampshire and Butler of Maryland — men who believe that practical considerations of national security at times outweigh theoretical conceptions of liberty — have combined to assail the Court. Similarly, militant anti-communists, such as ex-Senator Jenner of Indiana, the late Senator McCarthy of Wisconsin, and Representative Walter of Pennsylvania — men who allege that too strict an adherence to constitutional guarantees only furthers the purpose of the communist conspiracy — have been highly vocal in condemning the Court. Groups sensitive to the relative decline in importance of the states in our federal system have likewise been antagonized, not

---

tices, 105 Univ. of Pa. L. Rev. 781, 786-795 (1957). Both authors point out that such judicial luminaries as Marshall, Taney, Story, Miller, Waite, Hughes, Brandies, Stone, and Warren would have been precluded from appointment to the high bench by a requirement of previous judicial training. Of the justices who had judicial experience before their nomination to the Supreme Court, only three — Holmes, Taft, and Cardozo — stand out as notable figures of the Court. Justice Frankfurter (who had no previous judicial record) concludes that "it would be capricious, to attribute acknowledged greatness in the Court's history either to the fact that a Justice had had judicial experience or that he had been without it." *Ibid.*, 784.

only by the Warren Court's determination to chop down state laws which compromise civil rights, but also by its tendency to bar state action altogether in areas where Congress has chosen to legislate.

Southern Congressmen, having failed in their initial effort to mobilize anti-court sentiment with desegregation as the issue, were quick to perceive that their basic purpose of discrediting the Supreme Court would be served whether the issue was undue concern for civil liberties or softness to communism or states' rights. They simply shifted their ground and joined with fresh vigor in the new attack on the Court.

What is the nature of this broader, more deeply rooted assault upon the Supreme Court? The late Justice Robert H. Jackson observed that the most difficult of all the constitutional balances which the Supreme Court is expected to maintain is that between liberty and authority.[23] Especially in times of crisis, such as that presented by the Second World War and by the post-war threat of communist subversion, are the two concepts likely to conflict. At such times, the legislative and executive branches of government are inclined to emphasize the demands of authority at the expense of individual liberty. Thus, in the period since 1940, public officials have been much concerned with problems of national security, e.g., (1) Congress has enacted the Smith Act, making it unlawful to advocate the forcible or violent overthrow of any government in the United States or to organize any group for that purpose; (2) the Congress and Executive together have elaborated rules aimed at the discharge of government employees deemed national-security risks; (3) at least forty-two of the states have adopted anti-subversion laws; and (4) Congress, through its committees, has engaged in an endless round of investigations aimed at ferreting out communists in government and uncovering the apparatus of communist activity in the United States.

Inevitably, the application of these laws and practices has raised questions of the extent to which government may contravene individual liberties in the national interest. Just as inevitably, given the role assigned to the judiciary in our system of government, the courts have been called upon to resolve these clashes.

During the tenure of Chief Justice Vinson (1948-1953) the Supreme Court was very cautious in accepting civil-

[23] JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955) 75.

liberties cases and prone to uphold legislative interpretations of what the national security required in those cases which it did accept. The Vinson Court thus earned the reputation of being a "passive" branch of the government, the implication being that its decisions sacrificed individual liberty so as to avoid open conflict with the policy-making branches of government.[24]

All this has now been dramatically reversed. Counting the appointment of Chief Justice Warren in 1953, death or retirement of incumbent justices has enabled President Eisenhower to name five new justices to the high bench. The change in personnel has been decisive. The Warren Court in general, but especially a majority consisting of Chief Justice Warren himself, Justices Black and Douglas, originally appointed by President Roosevelt, and Justices Harlan, Brennan, and Whittaker, named by President Eisenhower, has demonstrated an aggressive capacity to protect human rights. In 1958, one writer stated that since 1956 in particular, "the Congress, administrative officials, and the states have received judicial notice that arbitrary action is intolerable under the American Constitution."[25] It is precisely this vigorous assumption of leadership in the realm of civil rights which has prompted conservatives, militant anti-communists, state authorities, and many Southerners — each with somewhat different motives — variously to accuse the Supreme Court of judicial legislation, of being soft toward communists, and of arbitrarily curtailing state activity.

So real is the sense of alarm at certain of the Court's recent decisions that even the highly placed conference of state chief justices has leveled a strong criticism: It has long been an American boast, this influential body remonstrated in August, 1958, "that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at best considerable doubt as to the validity of that boast."[26]

The principal cause of these accusations are the following decisions of the Warren Court:

(1) the *Nelson* decision (1956), in which the Court invalidated a Pennsylvania anti-subversion law (and there-

[24] FRANK, MARBLE PALACE (1958) vii. See also The New York Times, June 23, 1957, and SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT (1957) 239-240.

[25] Steamer, *Statesmanship or Craftsmanship*, 11 Western Pol. Q. 268 (1958).

[26] The New York Times, August 21, 24, 1958.

by similar laws in many other states) on the ground that Congress, by legislating in the field of sedition had preempted the area to the exclusion of state action, even though state sedition laws purported to supplement the federal law.[27] On June 8, 1959,[27a] by a 5-4 decision, the Supreme Court ruled that the *Nelson* case did not bar prosecution under state sedition laws for activity against a state, but merely barred prosecution by state courts on charges to overthrow the Government of the United States. This ruling was made in support of a holding that a defendant could be prosecuted for contempt for refusal to answer inquiries of the Attorney General of New Hampshire (acting under the legislative directions) concerning possible subversive activities related to an organization with which defendant was associated.

(2) the *Cole* decision (1956), which invalidated an executive order issued pursuant to an act of Congress authorizing federal agency heads to discharge summarily any employee found to be a security risk. The Court held that the government, in addition to establishing the "risk" of the employee in question, must prove that the position held by the employee was a "sensitive" one and therefore related to the nation's security.[28]

(3) the *Jencks* case (1957), in which the Court ruled that a defendant in a criminal action was entitled to examine Federal Bureau of Investigation reports which the government intended to use in its prosecution. If the government exercised the privilege of withholding the contents of such reports in the public interest, it must, the Court ruled, also abandon criminal action against the accused.[29]

(4) the *Yates* case (1957), involving an interpretation of the Smith Act of 1940. In this case, the Court freed five convicted communists and ordered a new trial for nine others on the grounds that: (a) the act does not prohibit the advocacy of the violent overthrow of government as abstract doctrine, unrelated to its tendency to incite to action, and (b) the term "organize" in the Smith Act meant the act of original organization. Since the convicted communists had participated in organizing the Communist party in 1945, but had not been indicted for this activity

[27] Pennsylvania v. Nelson, 350 U.S. 497 (1956).

[27a] Uphaus v. Wyman, 360 U.S. 72 (1959).

[28] Cole v. Young, 351 U.S. 536 (1956).

[29] Jencks v. United States, 353 U.S. 657 (1957).

until 1951, the three year statute of limitations had expired and thus the act did not apply to the accused.[30]

(5) the *Watkins* case (1957), in which the Court severely criticized the operations of the House Un-American Activities Committee. Specifically, the Court absolved a defendant convicted of contempt of Congress on the ground that the committee's jurisdiction had been too loosely defined by Congress. In addition, the Court ruled that a witness before a Congressional committee could not be held in contempt for refusing to answer a question put to him unless a valid relationship had been established between the question and the legislative purpose of Congress.[31]

A mass of resolutions have been introduced in Congress reflecting the desire of the anti-court forces that these and certain other decisions of the Warren Court be overthrown. These proposed reforms of the Supreme Court divide into three groups: (1) at least fifteen bills sought to reverse all or part of a particular decision; (2) another group of nine would have curtailed some part of the Supreme Court's general appellate jurisdiction, notably in the fields of health, criminal prosecutions, or education; and (3) a number of bills were aimed at reforming the Court through changes in the qualifications of prospective justices.[32]

In marked contrast to the fate of the reformist measures precipitated by the Supreme Court's desegregation rulings, these latter proposals were accorded a much-publicized hearing by both houses of Congress. What is more significant, the House of Representatives, by substantial margins, approved six of the anti-court propositions. The Senate Judiciary Committee, headed by Senator Eastland of Mississippi, promptly endorsed these six and several other bills as well.[33]

Three anti-court bills were ultimately brought to a definitive vote in the Senate, which became, in the closing days of the Eighty-fifth Congress (August, 1958), the decisive battleground between the defenders and the antagonists of the Supreme Court. The first of these three proposed to modify a Supreme Court ruling holding in-

[30] Yates v. United States, 354 U.S. 298, 318, 303 *et seq* (1957).

[31] Watkins v. United States, 354 U.S. 178 (1957). [EDITORIAL NOTE. But compare Barenblatt v. United States, 360 U.S. 109 (1959), which came to the attention of the Editorial Staff after the author had left for Europe.]

[32] Steamer, *Statesmanship or Craftsmanship*, 11 Western Pol. Q. 269-271 (1958).

[33] The New York Times, August 25, 1958. Senator Eastland denied that his interest in pruning the Court's jurisdiction was related to dissatisfaction with its desegregation orders, but it is instructive that when the Senate voted on the wide-ranging Butler-Jenner anti-court bill, all sixteen

valid confessions which were obtained while federal officers unnecessarily delayed arraignment of an accused person. Although approved by the Senate in principle, this bill was subsequently barred from adoption because of a procedural technicality.[34]

The second bill was directed specifically at the *Nelson* decision outlawing state activity in the subversion field but would have reversed a number of Court decisions proscribing state action in other fields as well. The antagonists of the Court made their most concerted effort in behalf of this proposal, and they were very nearly successful. The bill was defeated by a single vote, 41-40.[35]

The revised Butler-Jenner bill, the third and most sweeping of the measures brought to a conclusive vote in the Senate, sought to overcome the effect of four decisions of the Warren Court, either by altering the Court's appellate jurisdiction or by re-defining the intent of Congress. The Supreme Court was to be denied jurisdiction in cases involving the admission of persons to the practice of law and in cases involving the pertinency of questions asked witnesses by Congressional committees. The legislative intent of Congress was clarified to permit the operation of state anti-subversion laws (thus over-riding the Nelson decision), and the Smith Act was to be amended to allow prosecutions solely on the basis of abstractly advocating the forcible overthrow of government. Finally, the meaning of "organize" as used in the Smith Act was declared to be the continuing process of organization rather than merely the original act of organization, thereby eliminating the Court's interpretation of the manner in which the three year statute of limitations was to apply to persons prosecuted under the Smith Act.[36]

Although the Eisenhower Administration had mildly supported several previous court-reform measures, it worked to defeat the Butler-Jenner bill. Similarly, the American Civil Liberties Union and influential members of the American Bar Association opposed the Butler-Jenner

---

of the Democrats who voted in its favor were from the South, whereas all of the thirty Democrats who opposed it were from the North and West.

[34] 104 Cong. Record, 85th Cong., 2d Sess., 17036-17059, 17075-17084, 17085-17100, 17112-17125, and particularly D899. The disputed case was Mallory v. United States, 354 U.S. 449 (1957), in which the Supreme Court ordered a new trial for a defendant sentenced to death on charges of rape. The Court held that police may not arrest merely on suspicion, but only on probable cause, and ruled that admission in evidence of a confession obtained during a 7½ hour delay between arrest and arraignment constituted denial of procedural rights protected by statute.

[35] 104 Cong. Record, 85th Cong., 2d Sess., 17426-17437.

[36] *Ibid.*, 17125-17126.

proposals.[37] In the last analysis, however, the most effective champions of the Court were a determined band of northern and western liberals of both political parties — Senators Humphrey, Douglas, Hennings, Carroll, Morse, Clark, Javits, and Cooper.[38] Senator Douglas of Illinois struggled to unmask the motives of many anti-court leaders by proposing that the Senate express "its full support and approval of the . . . historic decisions of the Supreme Court . . . holding racial segregation unlawful. . . ." Senator Ervin of North Carolina, who was chiefly responsible for the Southern Manifesto attacking the Supreme Court, immediately objected that Congress ought not to express approval or disapproval of Supreme Court decisions. "What," Senator Douglas retorted, "have we been doing all afternoon? This is all part of a 'reverse the Court' campaign which stems largely . . . from the earlier decision . . . in the Brown case. . . ."[39]

Senator Douglas was outmaneuvered in his attempt to obtain a ballot on the desegregation decision, but his basic purpose was nonetheless achieved: The Senate vote on the Butler-Jenner bill was widely understood to involve an expression of approval or disapproval of the Warren Court and its recent decisions. The supporters of the Court barely carried the day. Forty-nine senators — 30 Democrats and 19 Republicans — voted against the Butler-Jenner measure; forty-one senators — 25 Republicans and 16 Democrats, all from the South — voted in its favor.[40]

The narrowness of the liberal victory amply demonstrates the depth of hostility to the present thinking of the Supreme Court and assures that the current agitation against the Court will not soon abate. Already in the Eighty-sixth Congress, which convened in January, 1959, a number of the hostile reforms considered and rejected by the previous Congress have been revived.[41] There is, however, more than passing significance in the fact that

[37] The New York Times, September 21, 1957, August 24, 25, 26, 1958.
[38] 104 Cong. Record, 85th Cong., 2d Sess., 17125-17127, 17173-17226.
[39] *Ibid.*, 17226-17228, at 17228, 17311-17318, at 17313.
[40] *Ibid.*, 17225-17226.
[41] A sub-committee of the House Judiciary Committee has approved bills overriding the decisions in the Mallory and Nelson cases identical to legislation approved by the House of Representatives in the Eighty-fifth Congress. See The Washington Post and Times Herald, March 6, 1959. On March 5, 1959, Senator Eastland proposed legislation which would have the effect of reversing the Yates, Nelson and Cole decisions. See 105 Cong. Record, 86th Cong., 1st Sess., 3006-3025. Consider the effect of Uphaus v. Wyman, 360 U.S. 72 (1959), on the future of such legislation as related to the Nelson Case.

the 1958 Congressional elections saw the voluntary retirement or defeat of many of the most outspoken critics of the Court. Among others, Senators Jenner, Bricker, Barrett, Knowland, and Malone will no longer have the United States Senate as a sounding-board from which to launch sallies against the Supreme Court.

The present controversy surrounding the Supreme Court, like each of the previous crises in its history, comes ultimately to hinge on not one, but two, fundamental questions. There is raised not only the question of the substantive merit of particular Supreme Court decisions (involving in the present instance the wisdom of its desegregation and civil-rights rulings), but also — and of more permanent consequence — the propriety of vesting the Supreme Court with the authority to pass finally on the meaning of the Constitution. There is presented, in short, a problem within a problem.

Historically, two schools of judicial review have vied with one another for supremacy in the United States.[42] The first school would have the Supreme Court ruthlessly strike down statutes embodying legislative policies which failed to correspond with judicial notions of what was right and appropriate. This doctrine of judicial review, which makes the Supreme Court a third house of the legislature, was aggressively implemented by the high Court during the fifty years prior to 1937.

The second school holds that the Court's job is simply to keep the other branches of the federal government and the states within their proper spheres; to uphold, in other words, any means selected by the legislature which is closely related to a legitimate end, and to exercise a judicial veto only when the legislative purpose is patently prohibited by the Constitution. The constitutional revolution of 1937 is generally thought to have established the supremacy of this second view.

The recent controversy surrounding the Supreme Court raises precisely the question whether the Warren Court, in vigorously using its power of review to invalidate national and state statutes supposedly contravening basic constitu-

[42] SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT (1957) is an excellent recent study of the two approaches to the practice of judicial review with special emphasis on the significance of constitutional changes since 1937. The origins and subsequent use of judicial review in the United States was the theme of the 1958 Oliver Wendell Holmes lectures delivered by Judge Learned Hand at Harvard University. These have since been published as THE BILL OF RIGHTS (1958).

tional rights is not, in fact, abandoning the rule of judicial self-restraint publicly proclaimed by the Court after 1937. Or, put another way, is not the Warren Court returning in principle to the tradition of the pre-1937 Court, wherein the justices used judicial review to thwart legislative programs which did violence to their economic and social theories?

In approaching this question one is struck by the irony that liberals and conservatives have today adopted views completely the reverse of those each held in the constitutional crisis of the 1930's. Thus, in the present situation, liberals, no doubt because of their sympathy for the principle of desegregation and of their concern for civil rights, find themselves defending the principle of judicial review which previously they attacked when used to thwart New Deal legislation. Similarly, conservatives, for various reasons, find themselves assailing the exercise of a power which they defended when used to overthrow allegedly novel legislative experiments.

By its very nature, the problem posed is one which defies absolute resolution. And yet, although the main lines of the controversy follow a familiar historical pattern, certain features of the present crisis are unique and merit special consideration.

(1) Although the current attack on the Supreme Court resembles previous assaults in form, it differs markedly from them in substance. In each of the previous periods of crisis — during the early years of the nineteenth century, on the eve of the Civil War, during the progressive era, and during the New Deal — the Supreme Court arrayed itself against the sentiment of the preponderant majority and in favor of either purely sectional or group interests. No such narrow alignment is today visible. Insofar as integration is the basis for attacking the Court, there is no responsible opinion to the effect that the Court's position does not reflect the attitude of a decisive popular majority. Certainly the nation appears today to be as deeply committed to ending the Negro's status as a second-class citizen as ninety-five years ago it was determined to end the institution of slavery. The state of public thought respecting the relative merits of maintaining civil rights as against the demands of authority is not so easily ascertained. But to the degree that the doctrines of McCarthyism have declined in public favor, the trend of recent judicial decisions may be said to reflect the temper of the times. The Supreme Court under Warren, in short, is under at-

tack not for its lack of democracy, but for its democratic zeal.

(2) It is, of course, not conclusive of their merit to say that judicial decisions are or are not responsive to popular sentiment, for courts are not intended to reflect the verdict of the ballot box. They are, properly speaking, designed as law-enforcing, not law-making, organs of government. Still, the nature of the criticism directed at the Warren Court suggests that the legislative and executive branches of government have either failed or have been prevented from performing their assigned tasks. It is likely that Congress, had it not been paralyzed in such areas by the operation of the seniority system and the rule of filibuster, would have acted to achieve ends consistent with those intended by the Court in its integration rulings. And President Eisenhower's view that the powers of his office are to be interpreted narrowly and exercised deferentially — a view rejected by such of his predecessors as Washington, Lincoln, the two Roosevelts, and Wilson — has scarcely provided the incisive leadership so demanded by the events of the recent past.

Integration and the maintenance of personal liberties in an increasingly authoritarian world are admittedly problems of great import, but they are hardly problems created by the Supreme Court. Nor can such problems be resolved by the Supreme Court alone. Their solution requires the harmonious action of all branches of government. The fact that a crisis has developed suggests a failure of statesmanship at the legislative and executive levels, for courts are the last, not the first, recourse of those who seek to translate social values into public policy.

(3) That the Warren Court has adopted a double standard in its application of judicial review, thus contradicting the trend of the post-1937 Court, cannot be denied. But there is a reasonable basis for the Court's distinction in this matter. No less than their predecessors back to 1937, the present justices have allowed Congress the widest possible discretion in the choice of legislative means to obtain social and economic ends regarded as desirable by society. Only in the relatively restricted field of civil rights has the Warren Court made liberal use of the right to review legislation and administrative practices. This dichotomy is all-important and the logic for it is inherent in the Constitution itself. Nowhere does that document assign priority to one economic or social theory as opposed to another. Long ago Justice Holmes noted that "a constitution is not

intended to embody a particular economic theory, whether of paternalism . . . or *laissez-faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[43] On the other hand, in recent years, some justices and writers have espoused the view that the Constitution quite clearly assigns priority to, and excludes from governmental interference, the freedoms guaranteed by the Bill of Rights. These rights are not absolute and must be exercised so as not to endanger the rights of others. But where the fundamental law is specific, as in the case of civil liberties, the presumption must always be in favor of the individual. The exercise of judicial review on behalf of this presumption can hardly be judged according to the standards applied when evaluating its use in defense of social and economic doctrines nowhere mentioned in the Constitution.

(4) Judicial review should be recognized as an inherently undemocratic device. However, democracy as we know it — government limited by law — necessarily requires that some restraining force be available to protect individuals and minorities from the intemperate excesses of temporary majorities. Although it is quite proper to argue that some device other than judicial review might better serve this purpose, on purely pragmatic grounds it seems clear that the alternatives being currently suggested raise more problems than they resolve. To remove any substantial part of the Court's appellate jurisdiction, however legal this may be, only begs the central problem of federalism – where is the authority to be lodged to resolve conflicts between the states and the nation and between government in general and the Constitution?

The dilemma presented by the practice of judicial review in a democracy is but a reflection of the dilemma which continually confronts the principle of law. By marshalling and defending the best concepts of the past, law affords civilized society the all-essential qualities of stability and order. But if past standards are imposed too rigidly, without allowing for changing ideas and ideals, law ultimately becomes a straight-jacket, immobilizing civilization and stifling progress. So it is necessary that law allow for change. Periodically, it must be prepared to

[43] Lochner v. New York, 198 U.S. 45 (1905), *dis. op.* 74, 75-76.

absorb outside influences if it is to survive and serve a useful purpose. The alternative to such orderly growth is social chaos. The present controversy over judicial review is thus but part, perhaps a necessary essential, of the conflict which inevitably surrounds the infusion of the old with the new.

(5) In a society such as ours, increasingly committed to principles of democracy and social justice, it is axiomatic that all policy-making agencies ultimately respond to what Theodore Roosevelt liked to call the well-thought-out and settled convictions of the preponderant popular majority.[44] To this end, we must ever recognize the necessity of open, free, and untrammeled discussion of all public institutions. One may regret the excessive language and exaggerated allegations of some of those presently disturbed by the role of the judiciary in American life. Yet from this controversy has come an increased popular awareness of the importance of the judiciary to our democratic institutions. It is, in short, difficult to gainsay the late Chief Justice Stone's impatience with "the complaint that criticism of judicial action involves any lack of respect for the courts. Where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."[45]

[44] Essay, "Nationalism and the Judiciary", 19 WORKS OF THEODORE ROOSEVELT (Memorial ed., 1925) 110-140.

[45] Harlan Fiske Stone to Thomas Reed Powell, November 15, 1935, as quoted in MASON, HARLAN FISKE STONE (1956) 398.