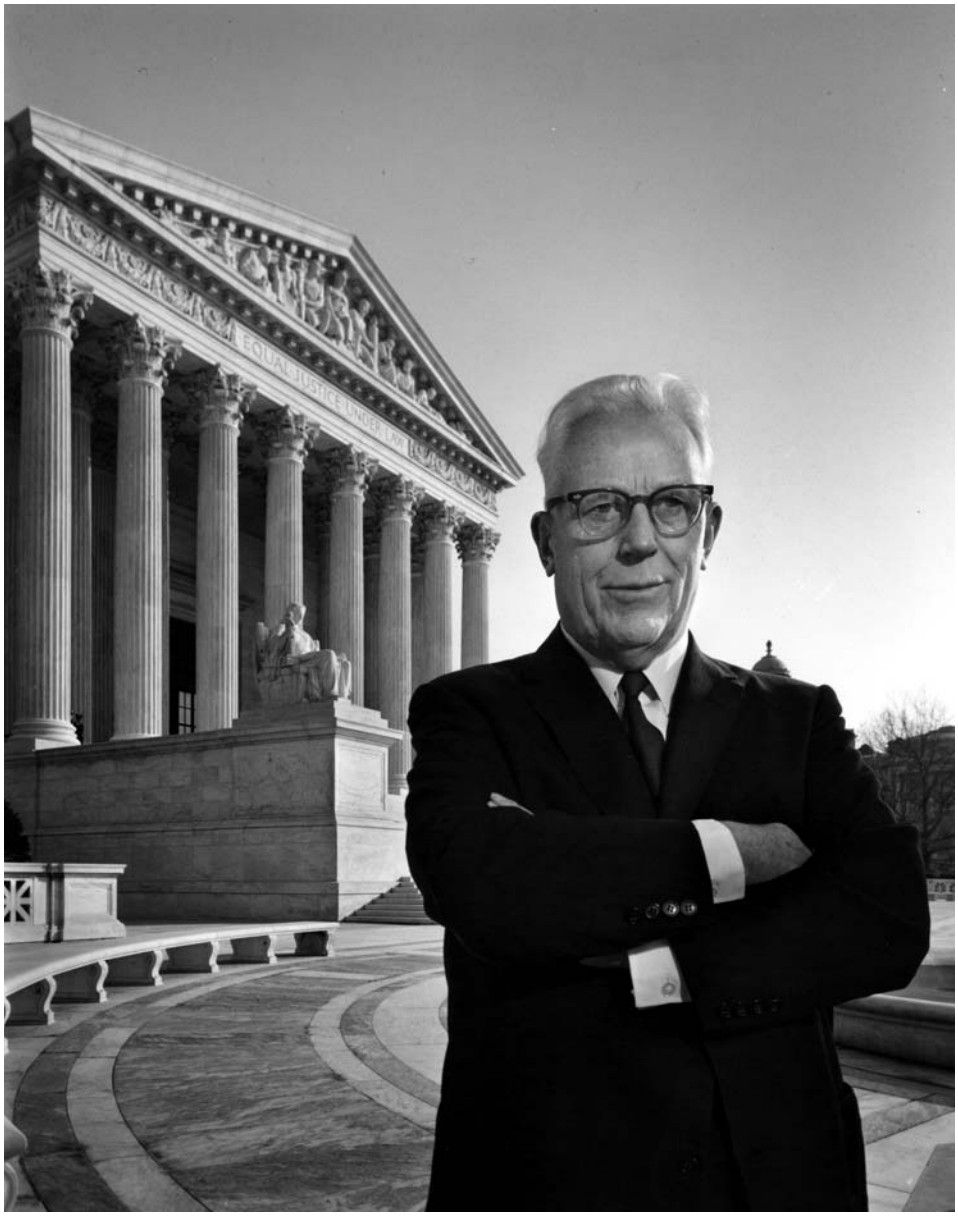

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Congress and the Earl Warren Court

Philip P. Frickey and Gordon Silverstein
Commentaries by Neal Devins and Nelson W. Polsby
Introduction by Harry N. Scheiber

These papers were presented at a conference on "Earl Warren and the Warren Court: A Fifty-Year Retrospect," held at the Boalt Hall School of Law at the University of California, Berkeley, on February 27 – 28, 2004.

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Harry N. Scheiber

Fifty years, almost to the day, after Earl Warren was confirmed as chief justice of the United States in March 1954, the University of California, Berkeley commemorated the Warren Court's legacy with a conference cosponsored by the Academy. The meeting was organized and hosted by UC Berkeley's Earl Warren Legal Institute.

During his sixteen years as chief justice, Warren was instrumental in advancing durable changes in American law in the cause of equal rights and democratic governance. The unique influence of the Warren Court went far beyond its most famous rulings, in *Brown v. Board of Education* and other school desegregation cases. Thus the conference devoted several panels to analyses of the Court's legacy in the areas of free speech and press, criminal law, federalism, and one-person/one-vote doctrine. In addition, Professor Jesse Choper of the Boalt Hall faculty, former Earl Warren law clerk, and three other former clerks – Senior Judge James Browning of the U.S. Ninth Circuit Court of Appeals, UC Berkeley Chancellor Emeritus I. Michael Heyman, and Professor Scott Bice of the University of Southern California – offered their reflections on Earl Warren's character and achievements. (Judge Browning's address is available on the Earl Warren Legal Institute website, www.law.berkeley.edu/cenpro/earlwarren/constlaw.html.)

The Warren Court's impact on the law reached in dramatic ways beyond America's borders, a dimension of global constitutional development that is less well known than is the Court's impact on American life and law. The conference featured a justice of the Greek Supreme Court, Ioanni Dimitrakapolous, and scholars from law faculties in Chile, Japan, Canada, Norway, and Sweden who considered how modern-day changes in foreign jurisprudence and judicial behavior have reflected that wider impact.

Ineluctably the theme of the Warren Court's "judicial activism" cut across all the topical panels. It may be said that in every era of its history, from the days of John Marshall's chief justiceship to William Rehnquist's, the Supreme Court has ruled in an "activist" vein in a variety of causes. Although many of the conference papers at Berkeley were concerned with interpretive questions and case law given little attention in previous scholarship, they reinforced the conclusion of Warren's chief biographer, G. Edward White, namely, that what distinguished the Warren Court from many others was that

its activism "facilitated social change . . . and promote[d] the interests of the disadvantaged" rather than defending established interests and reinforcing the status quo.

The focus of one of the panels at the Berkeley conference was a reappraisal of the relations between Congress and the Supreme Court during Warren's tenure. The Academy is currently assessing the interaction between Congress and the Court today – a collaborative study inspired by the dramatic upsurge in the Rehnquist Court's overturning of congressional statutes in the redefinition and defense of "federalism" and "state sovereignty" principles. Two members of that Academy study, Philip P. Frickey and Nelson W. Polsby (both, UC Berkeley), joined with Neal Devins (William & Mary School of Law) and Gordon Silverstein (UC Berkeley) as principal speakers on the Berkeley panel.

Although these four authors do not agree on how the functional relationship of judicial and congressional power should be interpreted for the Warren Court period, there is a fascinating common ground in that none of them accepts the revisionist idea (popular in some scholarly quarters today) that the Warren Court was only marginally responsible for advances of the 1950s and 1960s in regard to equal protection, civil rights, and democratic governance.

The conference's sponsorship was shared by the Boalt Hall School of Law at Berkeley, where Warren earned his law degree in 1914, and by the University's Jefferson Lectures Endowment, the Institute of Governmental Studies, and the Center for the Study of Law and Society. Additional sponsors of the conference were the UC Berkeley Vice Chancellor for Research and the Robbins Collection and the Sho Sato Program in Japanese and U.S. Law, both of the Boalt Hall School of Law.

Later this year, the Institute of Governmental Studies Press at UC Berkeley will publish under my editorship the full papers from the entire conference.

Philip P. Frickey

Managing Court-Congress Confrontations: Interpretation to Avoid Constitutional Issues

The American Academy of Arts and Sciences has launched a study of the relationship between Congress and the Supreme Court, based on the hypothesis that conflict between the branches has accelerated in recent years.[1] One interesting aspect of this relationship has been the way in which the Court can limit direct conflict with Congress while accomplishing many of the justices' goals. A prime example of this strategy is when the Court avoids deciding whether a federal statute is unconstitutional by interpreting the statute to be constitutionally unobjectionable.

When the Court strikes down a federal statute as unconstitutional, ordinarily Congress has no authority to reenact the statute.

For a host of reasons, this "rule of avoidance" may seem prudent. When the Court strikes down a federal statute as unconstitutional, ordinarily Congress has no authority to reenact the statute. Assuming the Court will not overrule itself at some future point, the only way to overturn the Court's decision is by constitutional amendment. Thus, the arguably awesome, counter-majoritarian exercise of judicial review – whereby as few as five unelected justices with life tenure can displace the judgment of the entire elected Congress – should be very cautiously undertaken. Relatedly, it may seem wise to indulge in the assumption that Congress would prefer the Court retain the statute, even if narrowed by a saving interpretation, rather than strike it down. Moreover, if the Court interprets the statute more narrowly than Congress wishes, Congress can of course amend the statute to make it broader and, in all likelihood, the constitutional question would come back to the Court eventually. For these and other reasons, the rule of avoidance is not a controversial approach among the justices.

As with just about everything else, however, the devil is in the details. In a recent study,[2] I examined a fascinating period, roughly paralleling the McCarthy era, in which application of the rule of avoidance allowed the Court to avoid many direct confrontations with Congress over extremely controversial matters. A brief summary follows.

In 1951, in *Dennis v. United States*, the Supreme Court upheld the constitutionality of the Smith Act, which among other things outlawed the advocacy of overthrowing the national government by force or violence. *Dennis* has come to be understood as a major deviation from the Court's jurisprudence of free speech, for the case allowed to stand a statute that outlawed advocacy of political ideas.

In fairly short order, the Court considered a long string of cases involving alleged political subversives – some prosecuted under the Smith Act, others dragged before legislative investigating committees bent on invading their privacy of thought and association, still others thrown out of public employment or kept out of the organized bar on grounds of disloyalty, and a few threatened with loss of citizenship or deportation. In light of *Dennis* and the apparent capitulation to public pressure suggested by it, one might have expected the Supreme Court to have feared to tread upon these proceedings. Nonetheless, while the Court's actions were somewhat uneven, in many cases a majority of justices made it more difficult for these investigations and loyalty proceedings to be conducted, and provided a measure of justice to persons harmed by them. Rarely did the Court invalidate government action as unconstitutional; instead, using the rule of avoidance, the Court generally found a nonconstitutional ground for setting aside the proceeding. The rule of avoidance, usually thought to be an instrument of judicial restraint, became a narrow but sharp sword of judicial revision. In the space allotted to me, I shall examine a few examples of this indirect judicial technique and then consider its political aftermath.

In 1953, a year before Earl Warren became chief justice, Justice Frankfurter's majority opinion in *United States v. Rumely* provided a textbook example of narrow but effective invalidation of congressional action based on technicalities. Rumely, the secretary of an organization that, "among other things, engaged in the sale of books of a particular political tendentiousness," refused to disclose to the House Select Committee on Lobbying Activities the names of persons who had made bulk purchases of such books. He was convicted of violating a federal statute that criminalized the failure to provide testimony or documents "upon any matter" under congressional inquiry. Frankfurter first acknowledged the serious First Amendment questions at stake when congressional committees engage in sweeping inquiries concerning political expression and association. He also alluded to the "wide concern" that had been raised about the intrusiveness of congressional investiga-

1 Robert Post, "Congress & the Court," *Dædalus* 132 (3) (Summer 2003): 5 – 8.

2 "Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court," *California Law Review* (forthcoming, 2005).

tions. In classic deference to the rule of avoidance, Frankfurter concluded that it would be inappropriate to address the serious constitutional questions before considering whether the House resolution authorizing the committee inquiry had in fact empowered the committee to seek the information Rumely had refused to provide. Frankfurter stressed that the avoidance rule – developed in cases involving constitutional challenges to statutes – was even more appropriate in the context of congressional resolutions, which "secure passage more casually and less responsibly, in the main, than do enactments requiring presidential approval." Frankfurter justified the canon in part as a technique to encourage both congressional responsibility to constitutional obligations and judicial respect for a coequal branch. Frankfurter implemented these policies by an aggressive clear-statement requirement. "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court," he wrote, "it ought only to be done after Congress has demonstrated its full awareness of what is at stake by *unequivocally* authorizing an inquiry of dubious limits." The policies "strongly counsel abstention from adjudication unless no choice is left." For Frankfurter, this judge-driven interpretive approach was justified as "in the candid service of avoiding a serious constitutional doubt."

Measured against this stringent standard, the House resolution, which authorized the committee to investigate "lobbying activities" intended to influence the legislative process, was insufficiently clear to empower the committee to explore general attempts to affect public opinion, such as through the distribution of books. Nor could the discussion of the House in contempt proceedings after Rumely refused to comply with the committee's request provide posthoc ratification of more expansive committee power: "it had the usual infirmity of post litem motam, self-serving declartions."

A wonderful example of the lawyerly undercutting of governmental abuse that arose after Warren became chief justice is *Peters v. Hobby*. In that 1956 case, a prominent Yale medical professor who had worked as a consultant to the Public Health Service on nonclassified matters was barred from further federal employment by a board charged with reviewing agency determinations of the disloyalty of federal employees. The board's procedures were remarkably shoddy, even for the era: after the agency loyalty board had twice cleared him of any disloyalty, the review board on its own motion conducted its own hearing and found him disloyal based upon unsworn statements by unidentified informants who were not available for cross-examination. The case was so fishy that the solicitor general, the Justice Department officer in charge of Supreme Court litigation, refused to sign the brief and appear in defense of the sanction. In an odd coincidence, that task fell to the assistant attorney general for the civil division, Warren Burger, who shortly thereafter was appointed to a federal appeals court and who later succeeded Warren as chief justice.

Relying upon the avoidance rule, Warren's majority opinion ducked the constitutional issues raised by the doctor's attorneys by finding that the review board had no jurisdiction to undertake an investigation on its own motion – an argument not raised until the Court required it to be briefed! Peters's attorneys had sought to forgo that argument to avoid giving the Court a nonconstitutional out, but the strategy failed.

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The Court's somewhat covert undermining of the government's campaign against alleged subversives reached its apotheosis in the 1956 term when the Court decided twelve cases involving alleged subversives – and resolved every one in their favor. The biggest bombshells were dropped on July 17, 1957, a day the Court's detractors called "Red Monday," when four major cases were decided in this fashion. Two of them merit brief mention here.

Watkins v. United States dealt with a challenge to a contempt conviction for refusing to answer questions posed by a subcommittee of the House Un-American Activities Committee concerning whether certain persons had been former members of the Communist Party. Chief Justice Warren's majority opinion began with a long, pointed lecture to Congress about the dangers of "a new kind of congressional inquiry unknown in prior periods of American history," "a new phase of legislative inquiry involv[ing] a broad-scale intrusion into the lives and affairs of private citizens." He then posited serious constitutional problems associated with congressional investigations intruding into individual privacy without a valid public purpose. "We have no doubt that there is no congressional power to expose for the sake of exposure," Warren wrote, responding to counsel's argument, on behalf of Watkins, that the sole purpose for the questions posed "was to bring down upon [him] and others the violence of public opinion because of their past beliefs, expressions, and associations." But the decision ended up rooted in a much narrower rationale: the House had not defined the committee's delegated investigatory responsibilities clearly enough to allow the witness to know whether the questions posed were pertinent to the investigation the committee was allowed to undertake. Pertinency was an element of the criminal statute the witness had allegedly violated, but more to the main point, "[p]rotected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need." In an odd way, Warren invoked the principles of avoidance to duck a range of constitutional issues, but ended up narrowly holding that the sanction of the witness violated due process on the narrow ground of the "vice of vagueness" – that he was "not accorded a fair opportunity to determine whether he was within his rights in refusing to answer."

Of course, if the committee's charge was to investigate communism – which everyone understood to be the committee's task – the questions posed were relevant. Surely Watkins knew what the House wanted the committee to investigate. The force of this contention can be acknowledged without undermining the rationale of *Watkins*, however. Warren used the narrow pertinency holding to shift responsibility to the House to monitor its committees under clear delegations of authority. The Court was in no position to consider the actual dangers of communism to the country, much less how relevant the questions asked of Watkins were to any real dangers, but it could at least call upon the House to undertake that inquiry before authorizing witch hunts and fishing expeditions by a committee.

The other Red Monday avoidance decision of note here was Justice Harlan's opinion in *Yates v. United States*. The central issue in *Yates* for our purposes was whether the Smith Act prohibited "advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy [was] engaged in with evil intent." The statutory text was expansive enough for this interpretation, as one of its provisions reached "whoever knowingly or will-

The criminal procedure revolution of the Warren Court had just begun with decisions that aroused opposition from police and provided more fodder for opportunistic politicians.

fully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence." For Harlan, however, "[t]he distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized" in the Court's First Amendment opinions. "We need not, however," he continued, "decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation." *Dennis* was narrowed down to a case that upheld the Smith Act on the ground that it criminalized advocacy directed at promoting unlawful action "at a propitious time" in the future, not "mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow." The latter form of advocacy, "even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*."

Harlan admitted that "distinctions between advocacy or teaching of abstract doctrines, with evil intent, and that which is directed to stirring people to action, are often subtle and difficult to grasp." Harry Kalven, the venerated legal scholar, put it more colorfully: "at first acquaintance [*Yates*] seems a sort of *Finnegans Wake* of impossibly nice distinctions."[3] Indeed, if in a statutory interpretation case the Court's "duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation," as Justice Frankfurter wrote in another case in the 1956 term, Harlan's opinion in *Yates* (which Frankfurter joined) is an abomination. But of course Harlan was concerned much more with quasi-constitutional creativity than with statutory coherence. *Yates* may have left the Smith Act "a virtual shambles," as one member of the Court of Appeals panel reversed in *Yates* later grumbled, but it simultaneously helped reconstruct the American system of freedom of expression while avoiding any constitutional decision. It was a masterful performance of avoidance theory – all the while illuminating the submerged normativity and judicial power authorized by that approach.

Decisions like these – though carefully crafted to avoid broadly deciding controversial constitutional issues and to ensure that Congress had at least a theoretical opportunity to respond and have the next word on the subject – provoked a firestorm in Congress. By 1957, Southerners in Congress, spoiling for a fight with the Court over *Brown v. Board of Education*, had forged an anti-Court alliance with other lawmakers concerned about national security. The loose coalition railing against the abuse of judicial power started its agitation after the 1955 term and gained significant momentum after Red Monday. They were not alone in their hostility. The criminal procedure revolution of the Warren Court had just begun with decisions that aroused opposition from police and provided more fodder for opportunistic politicians. The Court had also made no friends in the organized bar, which was livid with the direction of the Court in general and with its bar admission decisions involving alleged subversives in particular; nor in the business community, which considered the Court hostile in labor and antitrust cases. State officials considered some of the Court's decisions on alleged subversives to be invasions of state power. In 1957 the American Bar Association failed to pass a resolution supporting the Court, and then its Committee on Communist Strategy issued a report blasting the Court during a meeting in London attended by none other than Earl Warren (who soon thereafter resigned from the ABA). Several major newspapers attacked the Court in vitriolic terms.

Members of Congress engaged in an orgy of proposals countering the Court. In addition to the inevitable calls for impeachment were bills that would remove major areas of the Court's jurisdiction, bills designed to overturn particular decisions, bills giving the Senate appellate jurisdiction over the Court's decisions, bills requiring a unanimous vote of the justices to strike down a state law, bills abolishing life tenure for the justices, bills purporting to require that a justice must have prior judicial experience, and a wonderfully counter-hegemonic measure that would have required lower courts to ignore any Supreme Court decision "which conflicts with the legal principle of adhering to prior decisions and which is clearly based upon considerations other than legal" (read: *Brown v. Board of Education*). To some extent, of course, the Court had itself played into this, by using the avoidance rule and other techniques that did not formally prevent congressional override of its decisions. But although the Court had been careful to leave open the opportunity for congressional response, the other element of the enterprise – admonition concerning constitutionally dubious government acts – had touched a sore spot in many sectors. Moreover, the fine points of procedural or interpretive versus constitutional rulings tended to be lost in the political uproar, never creating much of a safe harbor for the Court once politics came to the fore. As Walter Murphy, the esteemed political scientist, explained, "the general indirectness of the Warren Court's approach [did not] mask from jealous members of Congress the incontrovertible fact that the Justices were setting public policy in major areas of national affairs. That they were doing so more adroitly than had previous judges was an added source of irritation."[4]

The short version of what followed is that both Congress and the Court backed off. It took some legislative legerdemain by Senate Majority Leader Lyndon Johnson to pull it off, but all the major Court-bashing bills failed to be enacted. At about the same time, the centrist justices – Frankfurter and Harlan – led a majority of the Court to avoid any more serious confrontations with Congress. In fairly short order, much of the wind came out of the sails of the antisubversive movement, John Kennedy was elected president, and the Court again changed composition, producing a solid liberal majority. Avoidance of constitutional issues went out of fashion, in favor of constitutional invalidation of illiberal statutes and proceedings.

The series of 1950s decisions using the rule of avoidance and other techniques to move public policy in the direction of a more tolerant stance toward dissenters provides an excellent case study for evaluating the Court's performance on the margin of confrontation with Congress. The Court's behavior might be defensible on descriptive grounds: that it accurately accommodated congressional and judicial preferences in a way less judicially activist than

3 Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (New York: Harper & Row, 1988), 211.

4 Walter Murphy, *Congress and the Court: A Case Study in the American Political Process* (Chicago: University of Chicago Press, 1962), 111 – 112.

constitutional rulings would have been. Alternatively, the decisions might be justified on normative grounds.

In the longer study that will be published, I conclude that descriptive defenses of the rule of avoidance are, at best, indeterminate. Performing interpretive surgery on a statute can be seen as about as judicially activist as striking it down as unconstitutional. This approach still might map on congressional preferences if those were the only two alternatives – but they are not. Obviously, the third alternative is to let the statute stand and mean what it seems to say.

Consider an obscure but interesting case from 1957, *United States v. Witkovich*, a classic avoidance decision by Justice Frankfurter. A deportable alien had refused to answer a host of remarkable questions asked by the Justice Department about whether, for example, he was acquainted with certain persons, had visited certain addresses, or had spoken before or was a member of certain organizations. The questions directly probed what materials he read and with whom he associated, including those from whom he may have asked for help with his legal problems. Among these questions, my personal favorites are, "Do you subscribe to *The Daily Worker*?" "[H]ave you attended any meeting of any organization other than the singing club?" "Have you attended any meetings or lectures [at a certain auditorium]?" "Have you attended any movies [at a particular theatre]?" and "Have you addressed any lodges of the Slovene National Benefit Society requesting their aid in your case . . . ?" The problem for Frankfurter was that the statute in question authorized the attorney general to require deportable aliens in Witkovich's circumstances "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper."

Frankfurter began his *Witkovich* opinion by acknowledging that the language of the provision, "if read in isolation and literally, appears to confer upon the Attorney General unbounded authority to require whatever information he deems desirable." "The Government itself shrinks from standing on the breadth of these words," however, and "once the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative." Frankfurter concluded that the statute as a whole and its legislative history both suggested that the provision only authorized inquiries regarding the alien's continued availability for departure. He then clinched the argument by invoking the rule of avoidance: because supervision of such aliens "may be a lifetime problem," "issues touching liberties that the Constitution safeguards, even for an alien 'person,' would fairly be raised on the Government's view of the statute."

Especially in areas where Congress has wide-ranging power, a checking function in the judiciary seems appropriate in our system of shared powers.

Witkovich cannot easily be defended on descriptive grounds. Frankfurter performed radical surgery on the statutory text, when presumably Congress intended the statute to mean what it plainly said in the first place. To be sure, his decision narrowed the statute down to its probable core purpose; but had supporters of the statute specifically considered whether that was the only purpose they had in mind, or whether the immigration authorities ought to have wide discretion to ask questions beyond that purpose, it seems quite likely the legislators would have endorsed the wide-ranging meaning embodied in the statutory text. Nor can Frankfurter's de facto textual amendment of the statute be justified on the ground that it avoids a judicial invalidation of the law. Based on the precedents in place in the early 1950s, which acknowledged a "plenary power" in Congress over immigration affairs, it seems unlikely that a majority of justices would have voted to strike down the statute.

Nonetheless, in my judgment Frankfurter got it right. It seems to me that the best – perhaps even the only plausible – defense for his decision is normative. Especially in areas where Congress has wide-ranging power, a checking function in the judiciary seems appropriate in our system of shared powers. In effect, Frankfurter said:

> The statute you passed is probably normatively unobjectionable in most circumstances. As for the case of this man, however, the statute seems to allow inquiries that are offensive to our basic liberties of freedom of thought, expression, and association. We doubt that Congress anticipated that the executive authorities in charge of immigration affairs would engage in such abusive treatment. Because immigration affairs involve considerations of foreign policy, national security, and so on, the judiciary rarely believes that it is competent to have the final say even on questions of constitutional dimension in that domain. That does not mean, however, that the judiciary, based on its familiarity with concrete circumstances illuminated in litigation, cannot play a useful role in guiding policy toward what seems to be a more normatively plausible direction. Based on the facts of this case, we therefore cut back this statute to its apparent core purpose. If Congress objects, it can, of course, amend the statute to certify that greater authority should be in the hands of immigration officials. If Congress does so, we cannot respond unless a case comes before us at some future time. What we are doing is providing worthwhile relief in this case, setting a more defensible status quo, and buying time for a potential evolution in national policy.

This cooperative venture for channeling public policy is exceedingly controversial. In the view of many legal scholars, the judicial role should consist of identifying and implementing the most appropriate meaning to the Constitution without consideration of prudential factors. This is a quest for neutral principles grounded in the legalistic methodology of objective textual and historical interpretation. But Frankfurter's technique, as I have described it, would not be surprising to political scientists who study judicial behavior, who generally assume that judicial policy making rather than legalism better explains what justices do. What especially interests me about Frankfurter's approach is the blend of legalistic and policy-making models, with at least a formal acknowledgment that Congress can have the final say if it really desires to. In retrospect, this technique helped the Court, Congress, and the polity to get from Joe to Gene McCarthy – no small feat.

Gordon Silverstein

The Warren Court and Congress: Both Necessary – Neither Sufficient

In many ways, what we think of as the 1960s began fifty years ago, when the U.S. Supreme Court's *Brown v. Board of Education* decision struck down legally mandated racial segregation in public schools. From that moment, many social activists looked to the Court rather than Congress or state legislatures to advance their public policy goals. And a quick review of the Supreme Court over which Earl Warren presided as chief justice from 1953 until his resignation in 1969 seems to confirm their instinct. From civil rights to privacy, from protections for the rights of the accused to reforms of the

electoral process itself – it is the Warren Court that leaps to mind.

Recently, revisionists have tried to demonstrate that when it comes to social policy, the Court may speak loudly but has little real impact.[1] Only Congress and the president, they argue, can really change social policy. Supreme Court decrees may be cathartic, but little more than symbolic.

Who's Right? Neither. And Both.

Many of the most important changes in American public policy, including those in the arena of civil rights, were the product of the Warren Court *together with* Congress. This was not a case of collaboration, but rather a case of two independent builders working on the same structure. Each built on the product of the other, and each was constrained by what the other had done and was likely to do in the future. Their medium of communication and constraint was constitutional and statutory interpretation and precedent – both legislative and judicial.

If we want to understand how Congress and the Court work together with each other, and if we want to understand how and why the Warren Court made a difference, we need to understand precedent, but not in the narrow legal sense that usually comes to mind. Too often we conflate precedent (previous examples used to support current choices) with *stare decisis*, the traditional legal rule for the application of precedent, a rule that previous decisions should govern or determine current similar cases. Although Supreme Court justices may not feel bound by *stare decisis*, the way judges, legislators, and the public think about important policy questions is powerfully shaped by precedent. In this broader sense, precedent is a source of power, influence, and constraint in politics as well as in law, and particularly in the interplay between the two.

Decisions are powerfully influenced by "the formulation of the problem," by the way in which we understand the problem.[2] Students of political psychology have long understood this observation,[3] which has long been applied – consciously and otherwise – in a path-dependent way by legislators and lobbyists as well as by lawyers and judges.

Precedent does not determine the outcome of a particular case and "legal rules do not lay down any *limits within* which a judge moves," Karl Llewellyn once wrote. "Rather, they set down *guidelines from* which a judge proceeds toward a decision." They direct and even constrain decisions, indicating "the experimental basis and the approved direction for developing norms, and thus the foundations of existing law."[4] It is in this sense that we need to think about the cross-institutional role of precedent and about the ways in which the words *together with* apply to the relationship between the Warren Court and Congress, and between the Court and Congress more generally.

Many of the most important changes, including those in the arena of civil rights, were the product of the Warren Court together with Congress.

Litigators and legislators take cues from court opinions, framing their arguments in ways they anticipate will most likely win support from the Supreme Court. These frames set the Court on a path, and future litigation and legislation tends to reinforce and extend that path. New cases that can be linked to existing paths are far more likely to succeed than are cases that require a new path or even the abandonment of an existing path. This does not mean that outcomes are preordained, but there is evidence to suggest that once a case has started down a particular path, some results are far more likely than others – and some become increasingly hard to imagine.[5] As Justice Cardozo put it, the "power of precedent, when analyzed, is the power of the beaten track."[6]

Lobbyists, legislators, and concerned citizens alike pay attention to the courts. They look backward in retrospective efforts to anticipate the frames that will appeal to the Supreme Court, and to identify plausible paths for their objectives. They craft legislation and lawsuits with these experiences in mind. But they also try to anticipate, to shape their efforts prospectively: Where is the Court likely to go? How is the path likely to extend? This process works within the judicial system, between litigators and judges, and it works as well across the legal/political divide, with judicial precedent influencing legislative choices, and legislative precedent influencing judicial strategy.

Court decisions are part of an ongoing process, akin to a tennis match rather than a horse race. Like a tennis match, judicial decisions are part of a back-and-forth process, a multi-iterated game where the players respond to each other's moves over the course of a long volley. Where one hits the ball influences the options available to the player on the other side of the net; the return shot, in turn, influences and constrains the next set of shots.

The Warren Court's experiences with civil rights illustrates both the way in which judicial precedent can serve as a legislative tool (and constraint) and the way in which legislative precedent can serve as a judicial tool (and constraint). Its experiences with civil rights also help us understand the need to view the Court and Congress not as antagonists, but as codependents. But the Warren era also offers a cautionary tale for those inclined to see this interactive process as a model for the making of American public policy. Far from a model for how separate institutions can work together to advance public policies, this was in many ways a rather novel moment of confluence, with just the right people in just the right places at just the right moment in history. But that's getting a bit ahead of the story.

Legislative/Judicial Serve-and-Volley: The Strange Link between Hamburgers and Human Rights

When legislators and members of the Johnson administration decided to push for civil rights legislation in 1964, they faced a dilemma. Even if they could survive a certain filibuster in the Senate, they had to build a law that would also survive Supreme Court review. The problem was that most instances of racial discrimination, particularly those dealing with places of public accommodation, were areas traditionally assumed to lie constitutionally within the exclusive control of state governments, beyond the reach of the national government. To elim-

1 Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

2 Amos Tversky and Daniel Kahneman, "The Framing of Decisions and the Psychology of Choice," *Science* 211 (January 30, 1981): 453.

3 Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (New York: Harpers, 1974).

4 Karl Llewellyn, *The Case Law System in America* (Chicago: University of Chicago Press, 1989), 80, emphasis in the original.

5 See Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *American Political Science Review* 94 (2) (2000): 251.

6 Benjamin Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1924), 62, cited in Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1988), 216.

inate segregation, Congress had to find a constitutional foundation for this assertion of power. But looking back retrospectively at the Supreme Court's doctrine, rulings, and precedent, it became obvious that the most logical constitutional foundations (the Fourteenth Amendment's equal protection and privileges and immunities clauses) were not promising paths to pursue. This was because the Supreme Court had narrowly circumscribed these clauses almost one hundred years earlier in two Reconstruction era cases,[7] and they had steadily atrophied in the years and decades since those decisions.

Looking ahead, legislators had two choices: Ask the Supreme Court to undo almost one hundred years of case law, precedent, and rulings, with a distinct chance that the justices would not cooperate, thereby setting civil rights back yet again; or find another source of constitutional power, another path that the Court might be more willing to endorse. Recognizing how hard it would be to defeat a Senate filibuster and pass this legislation in the first place, the Johnson administration along with members of Congress were determined to rest this legislation on the least assailable constitutional foundation possible. The answer was to turn to America's superhighway of national power – the commerce clause of the U.S. Constitution.

The then solicitor general, Archibald Cox, did not believe there was a majority on the Supreme Court that would support a Fourteenth Amendment argument for the desegregation of public accommodations. Cox, Richard Cortner has noted, felt that "if we went for all or nothing," the result "would have been nothing." Thus, in his brief for the administration, Cox wrote, "We stake our case on the commerce clause."[8]

It was a successful choice. Justice Harlan made it clear that the reliance on the commerce clause was the key to his vote: "It is perfectly clear," he noted during oral argument, "that the government is arguing only that this act . . . is a constitutional exercise of the Commerce Clause power, and that's all we've got; this other [Fourteenth Amendment] debate may be interesting, but hasn't anything to do with this lawsuit." Justice Black said he would have preferred "to

Litigators and legislators take cues from court opinions, framing their arguments in ways they anticipate will most likely win support from the Supreme Court.

have rested the decisions of the Court on the Fourteenth Amendment, but it seemed clear that Congress had relied primarily on the commerce clause."[9]

Though this certainly allowed for a significant expansion of civil rights, it was an expansion of a particular sort. The Court was signaling to members of Congress and the administration that the most efficient and reliable path for the expansion of civil rights was a path that built on the commerce clause. And that certainly offered a lot of potential. But what about civil rights that might not be able to be linked to commerce? Justice William O. Douglas raised this concern in his concurrence in the cases testing the 1964 Civil Rights Act. Future cases, he said, would now turn not on questions of fundamental human rights, but rather "over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler."[10] Justice Goldberg agreed with Douglas. He noted in a draft concurrence that the primary purpose of the 1964 law ought to be "the vindication of human dignity and not mere economics." During the formal reading of the Court's opinion in these cases, a frustrated Goldberg passed a scribbled note to Douglas saying, "It sounds like hamburgers are more important than human rights."[11]

The commerce path was a wide one indeed, but not unlimited. The worries expressed by Goldberg and Douglas began to materialize as early as 1969, when Hugo Black sent an ominous warning that commerce could be stretched just so far and no further.

After the Court upheld the 1964 Civil Rights Act, Euell Paul and his wife decided to turn their segregated amusement park on the outskirts of Little Rock, Arkansas, into a "private club." Membership in the new Lake Nixon Club could be had on a seasonal basis upon payment of a 25-cent "membership" fee. This was a pretty obvious dodge, as the lower courts recognized, but was this small, privately owned recreation center a place of public accommodation? Was it somehow involved in the stream of interstate commerce that would bring congressional control?

Writing for the Court, Justice Brennan had no trouble extending the commerce path, suggesting a number of ways in which the club was linked to interstate commerce. But Justice Black's discomfort level had been reached. To apply these rules to a recreation center in the Arkansas hills that was "miles away from any interstate highway," Black wrote, "would be stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States." This, he concluded, "goes too far for me."[12] In a footnote, he added that this was precisely what he had been worried about in the 1964 cases, where he had warned that "every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local, and therefore controlled by state laws, and what affects the national interest and is therefore subject to control by federal laws."[13]

Was this Hugo Black returning to his Alabama roots, preparing to say of civil rights, "Thus far, and no further"? No. This was Hugo Black saying that the Court and Congress had built this important enterprise on the wrong foundation, that they had selected the wrong path. Expanding the commerce clause may have been an efficient path to some desegregation, but the implications of this expansion could not and would not be limited to integration. Meaning that if Black and the Court did not draw the line somewhere, the cost for federalism would be significant as legislators and litigators interested in expanding national power in other realms hitched their wagons to the expanded commerce path. Black argued that he would be willing to enforce national power over segregation, but he would only do so if the law (and the Court's interpretation of the law) were built on what he thought was the

7 *The Slaughterhouse Cases* 16 Wall. (83 U.S.) 36 (1873) and the *Civil Rights Cases* 109 U.S. 3 (1883), which gutted the Civil Rights Act of 1875 – an act that would have banned virtually all of the racial discrimination in question in the 1964 Act.

8 Richard Cortner, *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases* (Lawrence, Kan.: University Press of Kansas, 2001), 6.

9 Ibid., 102, 145.

10 *Heart of Atlanta Motel, Inc. v. United States* 379 U.S. 241, 280 (1964), Justice Douglas dissenting.

11 Cortner, *Civil Rights and Public Accommodations*, 108, 169, 180.

12 *Daniel v. Paul*, 395 U.S. 298, 315 (1969), Justice Black dissenting.

13 *Heart of Atlanta Motel, Inc. v. United States* 379 U.S. 241, 275 (1964).

more appropriate foundation of the Fourteenth Amendment – the alternative that Congress and the Court had explicitly sidestepped.

While Justices Goldberg and Douglas worried about the power of precedent to shape, constrain, and limit the extension and expansion of civil rights, Black was concerned about the power of the unintended consequences of opting for the most efficient route to a mutually desirable result. Congress, Black agreed, had the power to end segregation, but to do so under the commerce clause was unacceptable because of the consequences of further paving the commerce path to national power. These worries would eventually flower twenty-five years later in Rehnquist Court rulings that the commerce path could only go so far, and no further.[14] But despite the misgivings voiced by Douglas, Goldberg, and Black, the Warren Court together with Congress did follow the commerce path to a significant transformation of American law and a major blow against racial discrimination.

The Case of the Judicial Exploitation of Legislative Precedent: Putting Meat Back on the Bones of Laws Against Private Discrimination

One of the reasons Congress was so eager to find a constitutionally foolproof foundation for the Civil Rights Act of 1964 was Senate Rule XXII – the Senate's filibuster rule. Even if civil rights advocates could break a filibuster once, they certainly did not want to have to do it again, which is what would have been necessary if the Court struck down their efforts.

Until 1975, ending a Senate filibuster required the support of two-thirds of those present and voting. This meant, of course, that even though one side might have had the support of sixty-six out of one hundred senators, the other thirty-four could have blocked action, meaning that a minority held veto power, and therefore disproportionate leverage in negotiating the final contours of any successful legislation. And this meant that to overcome a filibuster, any successful civil rights law would require significant compromise that would water down what a majority in Congress (and in the nation at large) wanted and was willing to support.

This takes us to a second perspective on the way the Warren Court together with Congress used precedent to expand civil rights in the area of the sale and rental of private homes. But in this case, it was the Court that used legislative precedent to put meat back on the bones of civil rights laws that had been significantly compromised and watered down to survive Senate filibuster.

Among the civil rights laws passed during Reconstruction, one (later codified as 42 U.S.C. 1982) sought to ban discrimination in the sale and leasing of residential property. But this provision had been gathering dust ever since the Supreme Court seemed to have gutted it along with other laws designed to end racial discrimination in wide areas of public and private life in the Civil Rights Cases of 1883.[15] Little was done about racial discrimination in housing for the next eighty years, until President Kennedy signed an executive order in 1962 barring racial discrimination in housing built with federal funds. But important as it may have been, this provision covered less than 1 percent of existing housing, and only 15 percent of new construction.[16] Even the Civil Rights Act of 1964, passed two years later, did little more than speak loudly and swing a small stick. In part this was because most housing was in private hands, and the understanding was that the Court had foreclosed any possibility of national power reaching purely private transactions. Any real change, therefore, would seem to require both a very aggressive legislative effort (to overcome a certain filibuster in the Senate) and a significant judicial reversal.

This time, the Court moved first. Concurrences in a 1964 sit-in case (*Bell v. Maryland*) along with the Court's rulings in cases testing the Voting Rights Act in 1965 suggested that though the Warren Court would not single-handedly eliminate housing discrimination through judicial interpretation, some of the justices might be open to new laws that would attack the problem through the Fourteenth Amendment.[17]

Justice Brennan seemed to make the invitation rather explicit in a 1966 case, *U.S. v. Guest*. "Viewed in its proper perspective," Brennan insisted, Section 5 of the Fourteenth Amendment "appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." The remedy, Brennan wrote, "is for Congress to write a law" that would properly build on the correct foundation.

The invitation was sent, and the guests were arriving. The Court was standing at the altar, apparently ready to work together with Congress. But a wedding still requires two participants. Would Congress walk down the aisle?

The opportunity to do so came quickly. About six weeks after the Court handed down *U.S. v. Guest*, President Johnson proposed the Civil Rights Act of 1966, which, among other things, would have significantly expanded fair housing guarantees.

But we don't talk much about the great Civil Rights Act of 1966. That's because it never came to a vote. And that's because of Senate Rule XXII – the Senate filibuster.

Two years later, after a long, hot summer of urban riots that devastated Detroit and Newark, there was broad public demand for legislative action. A new civil rights law moved quickly through the House and reached the Senate floor in January 1968, where it, too, promptly ran into a filibuster.

But this time, with the Kerner Commission's famous report ("We are two nations, separate and unequal . . . ") fresh off the press, GOP Minority Leader Everett Dirksen signaled that he was willing to compromise, and defeat the Southern Democratic filibuster. But he would do so only if the housing provisions were significantly watered down and another seven million residences were excluded, in addition to the exemptions already built into the original bill.

As the House Rules Committee opened hearings on this new, compromised bill, across the street, the U.S. Supreme Court was hearing oral argument in a housing discrimination case called *Jones v. Alfred H. Mayer Co.*

14 The stretching of the commerce clause would eventually snap, in *United States v. Lopez*, 514 U.S. 549 (1995) and again in *United States v. Morrison*, 529 U.S. 598 (2002), where the Court struck down efforts to extend the reach of the commerce clause to cover laws banning handguns near schools and violence against women.

15 *The Civil Rights Cases* 109 U.S. 3 (1883) consolidated five cases coming from Kansas (*United States v. Stanley*), California (*United States v. Ryan*), Missouri (*United States v. Nichols*), New York (*United States v. Singleton*), and Tennessee (*Robinson v. Memphis & Charleston Railroad Co.*). The question of the reach of congressional power to private discrimination was revisited in *Hurd v. Hodge* 334 U.S. 24 (1948).

16 Executive Order 11063, November 20, 1962: Equal Opportunity in Housing. Available online through the Department of Housing and Urban Development at www.hud.gov/offices/fheo/FHLaws/EXO11063.cfm. See George Metcalf, *Fair Housing Comes of Age* (New York: Greenwood Press, 1988), 38.

17 *South Carolina v. Katzenbach* and *Katzenbach v. Morgan*.

Joseph Jones had sued the Mayer Company, a private developer that refused to sell Mr. Jones a house because of his race. The problem was – just what law had the Mayer Company violated?

The 1968 bill would address this, but it was still in limbo at the Rules Committee, and its future was far from certain. This left lawyers for Mr. Jones to search for an alternative foundation for their argument. Looking back – way back – they found a nearly forgotten provision of the Civil Rights Act of 1866 that stated that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[18]

For better or worse, the American constitutional system is designed to make change hard.

But would the Court be willing to enforce this long-ignored statute? Would the justices use the statute to enforce what Congress seemed reluctant to pass in a bill under current consideration?

Before the Court could arrive at a decision, race relations in the United States were thrown into a very different light. Just two days after oral argument ended in *Jones V. Alfred H. Mayer Co.*, and just hours after the Rules Committee recessed for the week without taking a final vote on the new law, everything changed when the Rev. Dr. Martin Luther King stepped out onto the balcony of the segregated Lorraine Motel in Memphis, Tennessee, and was shot and killed by an assassin's bullet.

The King assassination set off a tidal wave of rioting, nowhere more intensely than in Washington, D.C., where, according to *The New York Times*, whole city blocks went up in flames with looting and fires reaching within two blocks of the White House. The *Times* also reported that a detachment of troops from among eleven thousand soldiers of the 82nd Airborne, the 3rd Infantry Regiment, and the 6th Armored Cavalry joined by the National Guard "ringed the Capitol and set up a machine-gun post on the Capitol's west steps, overlooking the Mall," forcing members of Congress to skirt sandbagged gun installations to get to their committee meetings.

18 42 U.S.C. 1982.

One of those congressmen was Illinois Republican John Anderson, a member of the Rules Committee. Just days after the assassination, Anderson bucked his own constituents and his state's delegation, switching his vote in the Rules Committee and sending the unamended Civil Rights Act of 1968 to the House floor, where it was quickly approved and, within twenty-four hours, signed into law by President Johnson.

As important as this legislation was, it was a shadow of its original self, and far less than a majority in either House would have willingly endorsed, particularly in the wake of King's death.

It was at this point that the Warren Court came back into the picture. The *Jones* case was still pending, and the Court took it as an opportunity to actually use legislative precedent (the old and ignored provision of the 1866 law) to put back some of the meat Congress had compromised off the bones of the 1964 and 1968 legislation – and even to add some flesh the legislators hadn't dared to attempt in their original proposals.

For those eager to end discrimination in housing, this certainly seemed like a promising way to go. But because the Court was merely enforcing a statue rather than a constitutional mandate, it also meant there was a risk: If Congress really didn't want to go this far or this fast, what would stop civil rights opponents from repealing the earlier statute by a simple majority vote? What would happen if Congress really didn't want that meat – which had been painfully compromised off the bone – put back there by the Court?

This was, of course, technically possible. But this is where the Court in effect turned the pig's ear of Senate Rule XXII into a silk purse of more extensive civil liberties than even a majority in Congress could have achieved on its own. First, because civil rights opponents would now need to actually pass legislation rather than merely block it, they would need to assemble a majority, which was quite unlikely under the circumstances. But even if they could have managed to do that, any law would have faced a certain filibuster – this time from civil rights advocates. The Court had performed the neat trick of putting the shoe on the other legislative foot, without having to expand (or contract) any clause of the U.S. Constitution.

Here, the Warren Court together with Congress had done far more than either, alone, could have done. It certainly was not a collaboration. But both were necessary and neither was sufficient.

A Separation of Powers Success Story? A Model for Relations between Court and Congress?

These cases seem to paint a rather appealing portrait: two independent branches working to advance American public policy in a way neither alone could, or perhaps should. The problem with this as a model of how the government could (and perhaps should) develop important policy initiatives is that it was only possible because of a most extraordinary confluence of circumstances and individuals. This is, in fact, anything but a model of the way we might expect the system to work.

This moment of Congress together with the Court required an active and liberal court with a politically skilled chief justice; an active and liberal president with extraordinary political skill and a unique ability to manage the Congress, and particularly the Senate; and a congressional supermajority willing to expend significant political capital. And that required a set of truly extraordinary (and one can only hope unique) set of events:

- First, the assassination of John F. Kennedy in 1963 and the televised brutality of Bull Connor's Birmingham police dogs (which paved the way to end the filibuster and pass the Civil Rights Act of 1964).

- Then the extreme violence unleashed against nonviolent protesters in the South, culminating in the police attack at the Edmund Pettis Bridge during the March on Selma. This led to the vote to end the filibuster and pass the Voting Rights Act of 1965.

- Then the 1965 Watts riots in Los Angeles, followed by the 1966 urban riots in Chicago and Cicero, Illinois, and the 1967 riots that destroyed Newark and Detroit. And finally, and tragically, the assassination of Martin Luther King in 1968 and the riots that followed that event. All this led to the Civil Rights Act of 1968, which included fair housing provisions and the Court's expansive reading of the 1866 civil rights provisions in *Jones v. Alfred H. Mayer Co.*

This was an era where circumstances made it possible, even necessary, for extraordinary individuals to do extraordinary things, despite the institutional and constitutional impediments designed to frustrate this sort of change. None of these institutions – not the president, not Congress, not the Warren Court – could have done this alone. And even together it is almost impossible to imagine they would have done it absent these extraordinary and tragic circumstances.

For better or worse, the American constitutional system is designed to make change hard. Not impossible, but awfully hard. No one branch of the American government is capable of making significant and lasting changes on its own – and that is as it was designed to be. The branches of the national government can and do work together with the others, not only in obvious collaborative ways, but in iterated ways, each building on the work of the other, each constrained by the work the other has done and is likely to do. The Warren Court together with Congress and the president proved that the American system is capable of action – but also showed how difficult and unusual it is for the system to actually generate significant change. The Warren Court era provides an excellent set of case studies that might help us decide if this is an inherent flaw in the American constitutional system, or one of the system's most important safeguards against the abuse of power.

Neal Devins

What does it mean for the Supreme Court to "work with Congress"? Must a Court that works with Congress, for example, uphold federal legislation? Alternatively, does it mean that when reviewing legislation it considers constitutionally problematic, the Court should make use of avoidance techniques that limit congressional prerogatives without invalidating federal law? Finally, is it possible for the Supreme Court to strike down scores of (recently enacted) federal laws but nonetheless work with Congress?

In papers examining Warren Court – Congress relations, Gordon Silverstein and Philip Frickey suggest that a Court that "works with Congress" ought not to invalidate federal laws. Silverstein, for example, looks to mid-1960s decisions upholding and expanding lawmakers' efforts to prohibit race discrimination in housing and public accommodations. Contrasting these rulings (where "the Court together with Congress made a difference in civil liberties") to Rehnquist Court rulings invalidating gun control and domestic violence legislation, Silverstein claims that the "Warren Court era was extraordinary, and quite possibly unique." For his part, Frickey examines late-1950s Warren Court efforts to limit anti-communist legislative initiatives. Applauding the Court's use of "subconstitutional" avoidance, Frickey claims that "the Court used techniques that might defuse political opposition" and, in so doing, the justices "avoid[ed] the sharpest confrontations with Congress and with each other."

The lesson here is simple. The Court takes what Congress will give it. This is the Warren Court's legacy and, not surprisingly, Rehnquist Court decision making follows a similar pattern.

The facts relied upon by Silverstein and Frickey, however, support an alternative theory of Court-Congress relations, namely: The Supreme Court is not especially interested in having a true constitutional dialogue with Congress. Rather, the Court looks to Congress to see what it can and cannot do. Based on that assessment, the Court seeks to advance its own agenda in ways that will not prompt a legislative backlash. This was true of the Warren Court and it is true today. In other words, the Rehnquist Court's reinvigoration of federalism-based limits on Congress is very much in keeping with Warren Court traditions. That the Rehnquist Court is using constitutional law to invalidate federal legislation is beside the point. What matters is that the Rehnquist Court, like the Warren Court, looks to signals from Congress to sort out ways in which it can advance its agenda.

Consider, for example, the Warren Court's use of avoidance techniques. Rather than seeking to forge a constructive dialogue with Congress, the Court relied on subconstitutional avoidance as a possible escape hatch if Congress disagreed with the Court. In particular, the Court would not be saddled with a politically unworkable constitutional ruling. Consequently, it would not need to overrule itself in order to uphold analogous legislation.

There is good reason to think that this is precisely what the Warren Court was doing in its review of anti-communist legislation. At that time, Southerners in Congress were enraged by the Court's decision in *Brown*. This outrage took many forms, including polls showing that 86 percent of Southern lawmakers thought that Congress should not defer to Court interpretations of the Constitution. More generally, 40 percent of lawmakers thought that the Court should not second-guess congressional interpretations of the Constitution.

Put another way, when the Warren Court ruled against Congress in several "Red Monday" cases, it had good reason to fear that Congress would respond by enacting Court-stripping legislation. That the Court made use of subconstitutional avoidance would not – as Professor Frickey shows – defuse congressional opposition to Court decision making. The Court's moderates, Frankfurter and Harlan, may well have understood this phenomenon. For this very reason, they pushed for the use of subconstitutional avoidance and, once Congress signaled its disapproval of the Court, they beat a hasty retreat through the avoidance escape hatch. Following the Red Monday decisions, Harlan and Frankfurter shifted their votes to pro-Congress positions in order to stabilize Court-Congress relations.

Likewise, the Warren Court's 1962 jettisoning of avoidance in favor of constitutional invalidations of anti-communist legislation speaks to the Court's uninterest in a true dialogue with Congress. At that time, an increasingly liberal Congress was unlikely to resist such judicial innovations. Moreover, with the appointment and confirmation of Arthur Goldberg, elected government helped move the Court to the left.

What then of mid- to late-1960s rulings upholding and expanding the scope of federal civil rights legislation? At this time, of course, the Court and Congress both supported nationalist solutions to eradicate race discrimination. For example, by upholding the public accommodations provisions of the just enacted 1964 Civil Rights Act, the justices validated both their own and Congress's preferences.

A more interesting and revealing case is *Jones v. Alfred H. Mayer Co.* As detailed by Professor Silverstein, *Jones* extended housing discrimination protections beyond those just enacted by Congress. Specifically, rather than embrace a legislative compromise that limited the reach of fair housing requirements, the Court transformed a Reconstruction era civil rights statute into a sweeping prohibition against housing discrimination. Knowing that a majority of lawmakers supported the Court, the justices recognized that they would not be slapped down for their pursuit of a more ambitious housing law than the one Congress was able to enact.

The lesson here is simple. The Court takes what Congress will give it. This is the Warren Court's legacy and, not surprisingly, Rehnquist Court decision making follows a similar pattern.

In thinking about the Rehnquist Court's revival of federalism, consider the following: A 2000 poll revealed that only 13.8 percent of lawmakers think that the Court should defer to congressional interpretations of the Constitution. In 1964 76 percent of those polled thought the federal government could be trusted "just about

always" or "most of the time"; by 2001, only 27 percent of those polled thought the government trustworthy. Indeed, the 1994 Republican takeover of Congress was tied to voter dissatisfaction with Washington. Running on the so-called Contract with America, House Republicans pledged a smaller federal government and a larger role for the states.

Not surprisingly, there has been no backlash to Rehnquist Court decisions striking down federal laws. If anything, Congress seems to support the Court. Congress has shown relatively little interest in rewriting statutes that have been struck down, and when Congress has revisited its handiwork, lawmakers have paid close attention to the Supreme Court's rulings, limiting their efforts to revisions the Court is likely to approve.

I do not mean to suggest that today's Congress wants the Court to overturn its enactments. Instead, just like the Warren Court before it, the Rehnquist Court is pursuing favored doctrinal innovations in ways that will not prompt a legislative backlash. In some measure, of course, the Court's assessment of what it can and cannot do makes clear that Congress plays a pivotal role in shaping Court decision making. At the same time, neither the Rehnquist nor the Warren Court has seemed especially interested in engaging Congress in a true dialogue about the Constitution's meaning.

Nelson W. Polsby

For the purposes of this brief comment, I am proceeding on the assumption that no account of judicial-legislative relations during the Warren era can be complete without consideration of the two major cases in which these relations appeared most explicitly on the agenda. I refer to *Baker v. Carr*,[1] which opened the door to an ever-lengthening line of cases where the Court has found it necessary to intervene directly in the representation process, first at the state level and later more comprehensively;[2] and *Powell v. McCormack*,[3] in which the Court went on record specifying (and presumably restricting) the qualifications for membership in Congress. Both cases throw a different light on Court-Congress relations than those cases described by my learned colleagues that lead to a picture of Court-Congress cooperation and of Court deference to Congress.

The question that for many years has nagged at me is whether the Court could have found grounds for requiring the state of Tennessee to follow its own constitution without judicial supervision as stringent as "one person, one vote" has proved to be.

Curiously, neither case needed to be decided in as intrusive a manner as it was. By that I mean simply that in both cases roughly the same short-run substantive result was available without the Court's moving so far into the political thicket.

Powell v. McCormack, Earl Warren's last opinion, is the simpler of the two cases. Adam Clayton Powell, a representative from New York duly elected in 1966 to the 90th Congress, was prevented from taking his seat by a majority vote of that Congress on grounds that were evidently compelling to his colleagues, though not particularly relevant here. He sued. By the time the case reached the Supreme Court, Powell had been elected to the 91st Congress and had been seated without incident. Earl Warren's decision for the Court held that despite the unavailability of an appropriate remedy (since the 90th Congress was no more), the case was not moot since there was still the outstanding issue of the reimbursement of Powell's back pay. Clearly the Court did not consider this an issue of great constitutional moment, since the justices remanded it to the court below for final determination. Instead, the Court availed itself of the opportunity to announce that grounds for exclusion from Congress were limited to those specified in the Constitution: age, citizenship, and residency.

This interpretation came in handy when the Court was faced with term-limit cases several decades later,[4] but this did not change the fact that Adam Powell's case was clearly moot. Powell was already sitting in Congress (though not the same Congress for which relief was asked) when the decision was announced. The Court could do nothing about that. I conclude that in this instance the Court, under Earl Warren's leadership, went well out of its way to admonish Congress on an occasion when the Court's decision could have no practical effect. No practical effect was equally available to the Court by acknowledging the obvious mootness of this case and keeping its powder dry for a future that included the issue of term limits.

Baker v. Carr (1962) is the more complicated of the two cases. It deserves a broad and careful discussion, which I will not provide here. Instead, I will limit my comments to a few basic points, relying on the general knowledge about this case and its successors that has diffused into the community. *Baker v. Carr* was not a direct attack on Congress, because it dealt with the apportionment of the Tennessee legislature – but it opened the Pandora's box of equal protection as the grounds for judicial intervention. This soon led to deep Court involvement in districting issues all over the political system and to more and more detailed specification of the practical meaning of equality.

This case raises the interesting procedural issue of how much detail the Court needs to provide in laying out criteria that other political actors must meet in order to satisfy the Constitution. "One person, one vote," the criterion that soon (in *Wesberry v. Sanders* and *Reynolds v. Sims*) fortified the Court as it charged into the political thicket, has in practice turned out to be an unwieldy measure of equal protection, an outcome that justices may or may not fully have anticipated when they fastened upon this measure as the sovereign test of political equality. It is certainly true that in *Baker v. Carr* the facts supported some sort of judicial response. The Tennessee legislature was grossly malapportioned, and the state of Tennessee had not followed its own constitution, which explicitly required periodic reapportionments.

The question that for many years has nagged at me is whether the Court could have found grounds for requiring the state of Tennessee to follow its own constitution without judicial supervision as stringent as "one person, one vote" has proved to be. One possibility, which

1 *Baker v. Carr*, 369 U.S. 186 (1962).

2 *Gray v. Sanders*, 372 U.S. 368 (1963), prohibiting the unequal weighting of votes in statewide elections; *Wesberry v. Sanders*, 376 U.S. 1 (1964), mandating the equal population of congressional districts within states; *Reynolds v. Sims*, 377 U.S. 533 (1964), requiring that legislative districts at all levels of government be drawn on the basis of equal population; *Karcher v. Daggett*, 462 U.S. 725 (1983), introducing a standard for population deviation in congressional districts which is admittedly more stringent than the margin of error of federal census data.

3 *Powell v. McCormack*, 395 U.S. 486 (1969).4 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001).

4 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001).

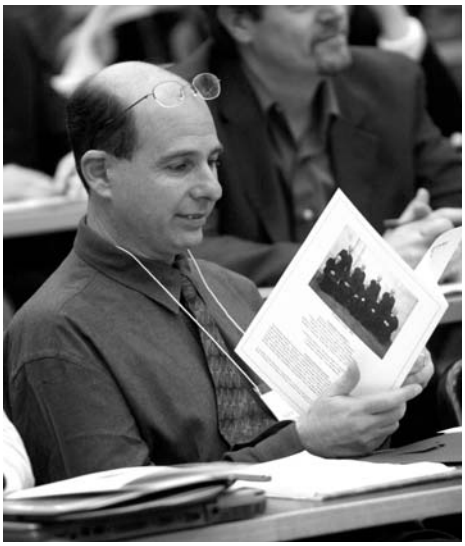
occupies an exceedingly small niche in the literature,[5] would have been for the Court to invoke Article IV, Section 4 of the U.S. Constitution requiring the states to provide their inhabitants with a "republican form of government." This was a course of action presumably blocked by the Court's decision in *Colegrove v. Green* (1946),[6] and explicitly rejected in favor of equal protection in *Baker v. Carr*. It would have left the means of compliance sufficiently open to give a little wiggle room for political decisions using the traditional districting criteria of contiguity, compactness, accommodation of natural communities, incumbency protection, and so on. *Baker v. Carr* did not itself outlaw the construction of bicameral legislatures along the lines of the Connecticut Compromise, but it did set the Court on a path that eventually led to this outcome. I take the point in Justice Brennan's *Baker* opinion that "the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a state's lawful government,"[7] but in light of subsequent developments, I think this might have been less burdensome a problem than judicial management under equal protection has proved to be.

How are we to reconcile these two cases with the account my colleagues have offered of Fred Astaire – Ginger Rogers relations between the judiciary and the legislative branch in Earl Warren's time? ■

5 See Jerold Israel, "On Charting a Course Through the Mathematical Quagmire: The Future of *Baker v. Carr*," *Michigan Law Review* 61 (1962): 135.

6 *Colegrove v. Green*, 328 U.S. 549 (1946).

7 *Baker v. Carr*, 369 U.S. 186, at 223.



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Jesse Choper (UC Berkeley), Scott Bice (University of Southern California), The Honorable James Browning (U.S. Court of Appeals, Ninth Circuit), and Ira Michael Heyman (UC Berkeley)