Prognostication is at best an inexact science. It is doubly so when the object of prophecy is an institution whose membership is subject to change—and as events of the past year suggest—often quite unexpectedly. As is sometimes pointed out, the strength of the academic critic of the judicial process derives almost entirely from his capacity for 20-20 hindsight. One is sometimes able to point out judicial errors. It is usually necessary, restricting somewhat the pens of regular contributors to legal scholarship, that they first be committed.

Professor Thomas Reed Powell used to say that he could analyze Supreme Court opinions by feeling the bumps on the heads of the Justices. However accurate that observation, the bumps on a crystal ball give considerably less guidance.

The Supreme Court's docket for the recent Term indicates that the sharp change in personnel has not been reflected, at least immediately, in a similar change in its business. This may be a temporary situation, for the nine Justices have the enviable opportunity to pick only one hundred cases from the approximately three thousand that are proffered to them each year. On the other hand, it is the kind of business disposed of by the State courts and the lower federal courts that largely determines the substance of the Supreme Court's work.

As in preceding years, the 1969-70 calendar contains problems of administration of criminal justice; problems of racial discrimination; problems of church and state; problems of freedom of expression for dissenters; and problems of reapportionment. In short, the staple of the last few years will continue to confront the "New Court" as it did the old one. But these problems will not come to the Nixon Court with the same virginal qualities they had when the Warren Court first met them. Too much has been done that cannot be undone. Nor will a Court with but two new members—or even four—wish to undertake a broad restructuring of recently made constitutional law. Indeed, the new Court, from what little we know about its new members, is likely to feel more compelled to adhere to the principle of stare decisis than did the Warren Court.

For the most part then, I do not think that there will be any major retreats from recent decisions. The concepts of racial desegregation, of judicial control over reapportionment, of the application of most of the first Eight Amendments to the States are, I think, here with us to stay. But if the Court is not likely to retreat, neither is it likely to break much new ground. It will, I predict, be more cautious than was its predecessor in seeking judicial solutions to society's most difficult problems.

Let me talk then of some of the major areas of problems that will most likely confront the Nixon Court. Certainly the decisions of the Warren Court

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that have aroused the most opposition from the public and the States and, not least, in the halls of Congress are those opinions concerned with appropriate procedures for the administration of criminal justice. It is of importance that myth be dissipated and that catchwords be rejected if the Court is properly to deal with these problems. The myth is that the Court by its decisions is responsible for the increased crime wave in the country. This notion is dependent solely on the fact that during the existence of the Warren Court there has been an increase in the crime rate. The conclusion is offered that because of this coincidence, there must be a cause and effect relation between the two. I submit that there is no validity to this conclusion. The Court can no more be blamed for the increase in crime than it can be blamed for the Vietnam War or the unabated prosperity that also accompanied the tenure of Chief Justice Warren.

On the other hand, to the extent that the Warren Court has not adequately justified its conclusions in these cases and the others that it has decided, it has contributed to a disdain for law and its processes, not only among the criminal elements in the community but equally among the more respectable portions of the community. When three Presidents and five Congresses can condone a war that lacks constitutional sanction, when a Governor of a State can use troops to forestall the effectuation of a federal judicial decree, when unions and other organizations can set their own views as superior to those of the courts and the legislatures, when universities can protect their students against punishment for illegal acts, when police can ignore the requirements of judicial due process by taking punishment into their own hands, we are dangerously close to the dissolution of a society governed by law instead of by will. Lawlessness is indeed rampant. But the Court’s decisions in the areas of criminal procedure cannot bear the responsibility for it.

Nor are we helped by resort to the rhetoric of political campaigns in criticism of the Court. It was long before the Warren Court began its program to make the State courts conform to the same rules that the Constitution makes applicable in the federal courts that Mr. Justice Frankfurter warned us against the danger of using slogans as answers to hard problems. In On Lee v. United States, he said:

Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process. Nor are the needs of an effective penal code seen in the truest perspective by talk about a criminal prosecution’s not being a game in which the Government loses because its officers have not played according to the rule. Of course criminal prosecution is more than a game. But in any event it should not be deemed a dirty game in which “the dirty business” of criminals is outwitted by “the dirty business” of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot water faucet.

As I said, I do not expect the Nixon Court to retreat from the expansion of federal rules of criminal procedure to the State courts. I do think, however, that changes of these structures brought about by legislative action will be readily accepted. If either Congress or the State legislatures were to turn their attention to reform of their criminal procedures in order to achieve the ends of ordered liberty, I expect the Court would be receptive to these efforts. And I would be surprised if the Court would not prove amenable to change if the States were to come up with some means other than the exclusionary rule for effectively policing their police. I do not mean, of course, that anything the legislature does will prove acceptable. Like Senator Sam Ervin, I am dubious that a law authorizing “preventive detention” can be drawn in such a way as to satisfy the clear mandates of the Constitution.

There is one aspect of this field in which, I should
hope, the Court may break new ground. One of the most serious challenges to the efficacy of our systems of criminal law enforcement derives from the failures of these systems to afford speedy justice. I know of nothing that creates such disdain for American criminal law as the failure to impose sanctions within a reasonable period after arrest of a guilty person.

All in all, I believe that the new frontiers that will be pushed back by the Court in the area of administration of criminal justice will be few. These problems are essentially now left with the legislatures and the other branches of the judiciary for successful administration.

In another area of the Warren Court’s efforts, I expect a similar judicial restraint to be exhibited by the new Court. The “simplistic” one-man, one-vote rule—the adjective is Professor Paul Freund’s—has been carried about as far as it can go. The problems to be faced by the new Court here will be different ones. Most important, of course, will be questions of gerrymandering, which the one-man, one-vote rule has made easier, not harder. It was, I submit, the gerrymander that first brought the Warren Court into the “political thicket.”

But *Gomillion v. Lightfoot* was concerned with the most patent use of the gerrymander for imposition on Negroes. It was decided under the Fifteenth Amendment, not the Fourteenth. I should think that gerrymanders that would be brought within the *Gomillion* rule would still be subject to abatement by the Court. On the other hand, the Warren Court itself was reluctant to enter the arena on such questions, and I do not expect that the Nixon Court will be more amenable to such action.

The *Baker v. Carr* line of cases, however, will create another challenge. For, when the one-man, one-vote thesis is combined with the decision striking down California’s infamous “Proposition Fourteen,” they raise questions about all sorts of State and local government procedures that call for more than a majority vote for the promulgation or repeal of legislative acts. I do not expect an outburst of new doctrine from the new Court on these questions. But they will have to be faced. And the proper answers are anything but clearly marked.

In the third major subject of the Warren Court’s business, the effectuation of desegregation, the Nixon Court is unlikely to have need for the creation of new rules. Again, one should not look for a retreat. The problem is now largely in the hands of the national legislature and the national executive. Their powers are far greater than any the Court can bring to bear. And the essential issue of a peaceful resolution of the Negro Revolution is certainly not within the power of the High Court to resolve. Such legislation as Congress enacts or will enact, and such executive action as the President may take, will probably receive sympathetic treatment from the new Court. Whether the Court will be as amenable as the Warren Court was in reading the 1866 legislation or even the 1965 Civil Rights Act may be questioned. But a responsible judiciary will be hard put to find adequate reasons for playing dog-in-the-manger with reference to actions taken, however reluctantly by the politically responsible divisions of the national government. If legislatures, State or federal, should make provisions for “reverse discrimination,” for example, I expect that the Nixon Court will sustain them.

One open question for the Nixon Court may well arise with regard to the church and state cases in the ofing. Strangely, I expect that the new Court will prove more reluctant rather than less to approve aid to parochial schools, a problem certain to reach the Court as a result of *Flast v. Cohen*. On the other hand, I expect the new Court will rely on history—for I doubt that it will be willing, any more than the Warren Court was willing—to sustain the various exemptions from taxation afforded to religious bodies, which will also be subject to attack. I suggest that it will rely on history, for reason is hard put to explain why a direct subsidy by way of relief from obligations that all oth-
ers must bear should be valid. And I expect some form of evasion of the question that will come to it in a multitude of forms—just as the Warren Court evaded the issue by the most blatant rewriting of a Congressional statute—the question whether exemption from military service can rest on religious affiliations or beliefs.

Two starts of the Warren Court can be developed rather freely by the Nixon Court. The first is represented by Shapiro v. Thompson, the case holding invalid a local residence requirement for qualification for certain welfare benefits. There are two ways that the case could expand. One is solely with reference to other similar State requirements of residency, in such highly important areas as voting for example, or with regard to some less important matters, such as hunting and fishing licenses. Any such residency requirements might well fall for the same reason that felled the welfare residence requirement, because of its inhibition on what the Warren Court regarded as the right to travel.

Implicit in Shapiro v. Thompson, however, is a broader doctrine. That case could prove to be the lever to pry open the heretofore closed provisions of the Fourth Article and the Fourteenth Amendment, the Privileges and Immunities Clauses. I think that the Warren Court was reluctant to utilize these clauses because their benefits were, by the very language of the Constitution, confined to citizens. Inasmuch, however, as the Court has already precluded distinctions between citizens and noncitizens because of the demands of the Equal Protection Clause, this reluctance should be dissipated. Moreover, it would seem that the historical intent of the writers of the Fourteenth Amendment was for the Privileges and Immunities to be an explosive principle. Having made Negroes citizens by reason of the first sentence of the Fourteenth Amendment, the Reconstruction Congress expected to protect the rights of the newly-made citizens through other provisions of the Fourteenth Amendment, and not least through the Privileges and Immunities Clause. Shapiro v. Thompson, I submit, can better be read as a Privileges and Immunities case than as a “right to travel” case. For the right to travel might properly be placed, as it once was, in the Privileges and Immunities Clause. Here is a tabula rasa on which the Nixon Court could make its reputation, whatever that reputation might prove to be.

The other open invitation for the Court of the future to impose its own will is to be found in the Warren Court’s revival of the concept of substantive equal protection. Substantive equal protection is, of course, but another name for that hated substantive due process that was supposed to have died when the Nine Old Men were converted into the Roosevelt Court. It had never really disappeared. For, as must be clear to everyone, every legislative, executive, judicial or administrative act involves a problem of classification. Even the so-called void-for-vagueness cases—which I prefer to call the vague-for-voidness cases—can be rationalized in terms of improper classification and, therefore, as a violation of equal protection. If memories of Truax v. Corrigan give rise to doubts as to the desirability of such a doctrine, I can only suggest that they should.

Insofar as the new Court feels bound by precedent, its decisions will be restrained by those made by the Warren Court in the major areas of its operation: criminal procedure, reapportionment, desegregation. But with these two tools, with an expansive Privileges and Immunities Clause and an even more expansive substantive equal protection concept, the Nixon Court will be able to work its will at least as effectively as did its predecessors. But when I say at least as effectively, I do not mean to suggest that the Warren Court has been effective. Segregation is still the rule rather than the exception; police misbehavior is pretty much unreduced; school prayers and similar breaches in the wall of church and state are limited to but a small degree; and, if reapportionment has occurred widely, it has been reapportionment designed by the political parties and not an accommodation to the ideals of representative democracy.
There are a few strong personal beliefs that I have about the Supreme Court. The first is that the Court is not a democratic institution, either in makeup or function. It should be seen for what it is, even at the cost of that grossest of contemporary epithets: “elitist.” It is politically irresponsible and must remain so, if it would perform its primary function in today’s harried society. That function, evolving at least since the days of Charles Evans Hughes, is to protect the individual against the Leviathan of government and to protect minorities against oppression by majorities.

Essentially because its most important function is antimajoritarian, it ought not to intervene to frustrate the will of the majority except where that is essential to its functions as guardian of the interests that would be otherwise unprotected in the government of the country. It must, however, do more than tread warily. It must have the talent and recognize the obligation to explain and perhaps to persuade the majority and the majority’s representatives that its reasons for its frustration of majority rule are good ones.

The Warren Court accepted with a vengeance the task of protector of the individual against government and of minorities against the tyranny of the majority. But it failed abysmally to persuade the people that its judgments have been made for sound reasons. Its failure on this score was due to many causes of which I can catalogue but a few. One is that its docket was so overcrowded with lesser business that it could not concentrate its efforts on the important constitutional questions that came before it. A second is that its communication with the public had to come essentially through the distortions of the news media, who would not invest the time, effort, or space to the careful job that is necessary exactly because the Court has no power base of its own. A third reason for the failure, if I may say so, was the judicial arrogance that refused to believe that the public should be told the truth instead of being fed on slogans and platitudes. The fourth problem was that many of the Justices were incapable of doing better. There is need for intelligence and integrity on the high bench that goes far beyond an average I.Q. and a distaste for venality. For the Court, in performing what is, by definition, an unpopular task, is none the less dependent upon popular support to keep it a viable institution.

If the Court’s substantive function is impaired by these defects, so too is its important symbolic office. Some time ago Felix Frankfurter wrote:

A gentle and generous philosopher noted the other day a growing “intuition” on the part of the masses that all judges, in lively controversies, are “more or less prejudiced.” But between the “more or less” lies the whole kingdom of the mind, the difference between “more or less” are the triumphs of disinterestedness, they are the aspirations we call justice. . . . The basic consideration in the vitality of any system of law is confidence in this proximate purity of its process. Corruption from venality is hardly more damaging than a widespread belief of corrosion through partisanship. Our judicial system is absolutely dependent upon a popular belief that it is as untainted in its workings as the finite limitations of disciplined minds and feelings make possible.

And here again the Warren Court failed us. What Arthur Schlesinger has termed a crisis of confidence clearly extends to the Supreme Court. The restoration of that confidence is vital to the continuance of the rule of law in this country. For above everything else, the Supreme Court is symbolic of America’s preference for law over force as the ruling mechanism of a democratic society. If it fails, the vital center disappears, and we “must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows.”

The Nixon Court has awesome tasks before it: To match the Warren Court aspirations for the protection of individuals and minorities. To restore the confidence of the American people in the rule of law. One or the other is not enough.