REVIEW

Politics, the Constitution, and the Warren Court. PHILIP B. KURLAND. The University of Chicago Press, Chicago, 1970. Pp. xxv, 222. $9.75.

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The occasion of the 1969 Cooley lectures at the University of Michigan gave Professor Philip B. Kurland an opportunity to indict once again the Warren Court (1954-1968) for what he considers its many failures and its consistent misuse of judicial power.

There is nothing novel in sweeping indictments of the Court and its jurisprudential products by both non-academic and professorial critics. The pages of Charles Warren's *The Supreme Court in United States History*[1] chronicle a decade-by-decade series of attacks by those who found the Court unwise or biased in its handling of important social and political issues. Jeffersonians denounced the Marshall Court's centralizing judgments, conservative spokesmen pilloried the Taney Court for its decisions favoring police power, and anti-slavery forces condemned the *Dred Scott* decision[2] for thwarting an acceptable political compromise of the slavery issue.

The trauma produced by *Dred Scott* has never completely disappeared but has, like an albatross, remained hanging over the Supreme Court to give courage to its critics. The unusual and extreme character of that decision should be carefully noted so that overly facile comparisons of that judicial failure and other controversial decisions may be avoided. Not only did the Court through Taney reach out to destroy an existing agreement by the political representatives of the nation on the slavery issue, but, by giving due process protection to the ownership of slaves, it prevented any further legislative attempts to control the spread of slavery. The Court's insistence on a final solution acceptable to only one of the major antagonists clearly was a suicidal assumption of the power to govern that defies comparison with any Supreme Court decision before or after 1857.

In the post-Civil War era, as the Court diluted the freedoms from racial discrimination incorporated in the thirteenth, fourteenth, and fifteenth amendments, and then proceeded to erect safeguards for the free enterprise system against both state and federal social legislation,

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1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1926).

2 Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

controversy swirled around virtually every major decision. Liberals continued in this century to decry pro-business decisions of the pre-1937 Court. The gradual emergence of the Court's concern with civil rights and civil liberties issues in the pre-1937 period failed on the whole to satisfy liberals and hardly occasioned huzzahs from among the general public, to whom protection of minority rights has rarely been an appealing issue.[3] Finally, the decisions of the pre-1937 Court, invalidating New Deal and state social legislation, once again raised the hue and cry against the Court.

Academic critics of the Court have not been lacking in most periods of our history, but it was not until the growth and flowering of the Langdell model law schools around the turn of the last century that academic criticism became a sustained process, with an increasing number of law journals devoting probing comments and essays to developments in the law, including constitutional decisions by the Supreme Court.

The new criticism and analysis reflected more than its authors' agreement or disagreement with the outcome of cases. The commentators carefully examined the logic of decisions and their compatibility with precedents. In addition, a few attempted to define the role of the Supreme Court in the larger scheme of American law and government. Among these, an important place must be reserved for James Bradley Thayer, whose teaching and writings at Harvard before the turn of the century have had continuing influence on later generations of scholars, especially those who had contact with his thinking as students of Thayer or his intellectual successors at Harvard. Among the leading Thayerites was the late Professor Felix Frankfurter, with whom Professor Kurland enjoys intellectual kinship. To understand Kurland, we must grasp the essence of the Thayer-Frankfurter approach.

Thayer's well known article, "The Origin and Scope of the American Doctrine of Constitutional Law," published in 1893 in the *Harvard Law Review*,[4] advocated a judicial policy of "hands-off" with respect to enactments by the legislature. Only a clear mistake by the legislature justified intervention.[5] Of course, this rule merely restated

3 *See* S. KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM 7-53 (1968), for a discussion of the popular bias against freedom.

4 Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

5 Thayer always reserved the power of judicial review, that is, of "fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants." *Id.* at 148.

the question of judicial review in a different form: What is a clear mistake? Thayer spoke in an era that witnessed an increasing willingness by the Supreme Court to invalidate state legislation by finding in due process of law a touchstone that in practice meant "whatever the Justices find reasonable." Their insistence on preventing even slight legislative intrusions into the comfortable economic and social order of post-Civil War America aligned the Justices against those whose slight share of power consisted principally in the privilege of voting with like-minded citizens to gain occasional legislative victories over the opposition of powerful interests. It was against these interferences with the power to govern that Thayer railed, as in his biography of Marshall, where he referred to judicial review of a legislative act in almost reverent terms: "To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act."[6] This panegyric on legislatures sounds somewhat strange to modern ears, given our greater understanding of the workings of legislatures and our increasing knowledge of how the representative function is muted by archaic procedures and distorted by special interest forces. Yet Thayer certainly was correct in asserting that courts cannot govern—that only our elected officials can create policy, leaving courts with their own important role.

Felix Frankfurter tried to carry out Thayer's philosophy as a member of the Court. In many ways, he went further. At times he seemed almost apologetic that an institution without an electoral basis had any significant role in American government. As an advisor and planner in Roosevelt's administration he gained a special appreciation of the political branches and of their role when the Court obstructed social legislation approved by the other branches. As a member of the Court, Frankfurter followed his idol, Holmes, in believing that judges should and could divorce their personal views from those which they took as judges. Although opinion after opinion contains references to his personal views, Frankfurter did not allow them to color his decisions. In civil liberties cases, in which Holmes would occasionally breach his normal rule of self-restraint, Frankfurter found it difficult to abandon his role of judicial diffidence. One of the clearest explications of the importance of judicial self-restraint in Supreme Court history is the Justice's effort to justify a school board's rule compelling school children to join in a flag salute exercise that violated their religious beliefs.[7] On

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6 J. THAYER, JOHN MARSHALL 87-8 (Phoenix ed. 1967).

7 West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (dissenting opinion); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

occasions, however, Frankfurter thought that a political organ had made a "mistake" sufficiently grave to justify invalidation. The "released time" cases[8] come immediately to mind, as do the many criminal justice cases where police action had violated due process standards of fundamental fairness.[9] To Frankfurter there was a legitimate role for the Court, but it was an extremely modest one. The Court's duty was to allow political representatives to govern. Quite often he wrote as though the United States enjoyed, or should accept, a parliamentary system in which the courts would play a meager part analogous to that of their British counterparts.

Justice Frankfurter, as well as his intellectual successor on the Court, Justice John M. Harlan, and a number of academic exponents of the Thayer-Frankfurter philosophy have found in the Warren Court the personification of all that can be wrong in a court. They have condemned both its active support of important individual and social values, and its insistence on providing judicial solutions to problems that might better be handled by political organs. The critics also charge that it uses sweeping announcements of broad principle rather than closely organized, logical analysis to justify its positions. The academic critics have been joined by spokesmen for groups angered by the substance of Warren Court decisions, among them school and other officials opposed to desegregation decisions, local politicians displeased by the outcome of the apportionment cases, law enforcement representatives who resent court intrusion into the pre-trial process, and members of patriotic groups who decry fair play for Communists, aliens, and war opponents. It is the criticism of these groups that largely explains why the Court has suffered in public opinion polls, which the academic critics cite to show the failure of the Warren Court. It is unreasonable to assume that better written opinions or greater respect for precedents by the Warren Court would have satisfied groups whose chief values and goals seemingly have been rejected by the Court. Moreover, although any Court must pay heed to public reactions to some extent, if only because Congress may be moved to act against the Court, is it not one of the virtues of a non-elected, life-tenured body that it can take the long view, largely impervious both to public opinion polls—to which Professor Kurland gloomily refers[10]—and to the vote-seeking imperatives of the elected branches? Apart from their understandable concern as pedagogues with the Court's opinion-writing abilities and

8 Zorach v. Clauson, 343 U.S. 306, 320 (1952) (dissenting opinion); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (concurring opinion).

9 *E.g.*, Rochin v. California, 342 U.S. 165 (1952).

10 P. xxiii.

their dismay that so many precedents were overruled (were the precedents "correct," or is it wrong to reject so many precedents simply as a matter of constitutional principle?), what exactly do the critics, exemplified by Professor Kurland, regard as the chief faults of the Warren Court? What are the "wrong" decisions of that Court, or, the easier question, did it succeed in doing anything right?

The general mode of attack comes down to this: If the Court did anything for which it might claim credit for courage or imagination, its decisions simply built on the past (desegregation, apportionment, Bible reading).[11] Where there might be wide agreement among knowledgeable observers on the desirability of a decision (school desegregation), the results have not been as satisfactory as one might wish. Query: If the Court had been even more intrusive with respect to state school policies, would this not have been a mistake in the eyes of many critics since it would have helped bring about a higher degree of centralized control?

Almost as an afterthought dictated by the demands of academic fair play, Professor Kurland admits that "[o]ne must be careful, however, not to overplay the ineffectiveness of the Court's actions. If it has used old doctrines it has used them in new applications. And the Court must be given its due in helping to spark and sustain the Negro social revolution that engulfs us at the moment. And certainly, too, the Court has made major contributions to the egalitarian ethos that is becoming dominant in our society."[12]

This concession aside, Professor Kurland turns to his major critique, divided, like Gaul, into three parts.

First, he faults the Court for failing "to adhere to the step-by-step process that has long characterized the common-law and constitutional forms of adjudication. . . . It preferred to write codes of conduct rather than resolve particular controversies."[13] The one-man, one-vote formula in reapportionment cases is cited as an example. Yet the Court followed a precisely opposite tactic in the desegregation decisions and has been charged with being derelict as the result.[14] Case-by-case adjudication in the criminal justice arena, which began long before the Warren era with the strong support of Justice Frankfurter and other pre-Warren justices, left law enforcement officials and trial judges at sea as to the requisite constitutional standards. At least the Warren Court tried to

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11 Pp. xvi-xviii.

12 P. xx.

13 *Id.*

14 This is not intended to applaud the Court's overly rigid approach to a complex problem, but it does show the difficulty of appeasing critics.

provide standards more explicit and more applicable than had been provided by the case-by-case "fair trial" rule of predecessor Courts.

His second charge is that the Court "has failed to recognize the incapacities that inhere in its structure."[15] This criticism arises from the obvious facts that the Court has no independent staff to assist in shaping policy-oriented decisions, cannot administer its own decrees, and, hence, must rely on lower courts and other branches. The lesson seems to be that the Court should decide only those cases in which the litigants are good sports and the loser will take his medicine like a man. Apparently, the Court's duty, when it is presented with great issues that require more than a Supreme Court decree based on briefs of counsel, is to refer them to the political branches. What Professor Kurland seems to ignore is that the states and other branches have carried out court mandates, however reluctantly. It is they, not the Court, that bear responsibility for using staffs creatively.

The Warren Court's third weakness was its failure to persuade. "The Court's opinions have tended toward fiat rather than reason."[16] One may wonder whether, law professors aside, the Court could have written any opinion that would convince most southerners (or northerners) that segregated schools are discriminatory. Can judicial appeal to reason, unaided by the other branches, succeed in inducing the belief in John Q. Public that those accused of crime have rights that must be protected, or that freedom of expression is a right that protects all of us, including spokesmen for unpopular views? Public opinion in these matters is the product of the results of judicial decision. What years of education and acres of public pronouncements have failed to achieve—belief in equality, justice, and individual rights—is unlikely to follow even the greatest of judicial opinions. Is the Court's proper stance, then, one of selecting and deciding only those cases in which popular approval will follow because of the result obtained? Is the Constitution, then, far from an auxiliary protection against the excesses of majoritarian rule, to serve only as a means of rationalizing whatever vox populi demands? This may sound extreme, but what are we to make of this plea by Professor Kurland about the Court's credibility gap? "The Supreme Court has been and must continue to be a strong force in the vital center that provides cohesion for a democratic society."[17] And then comes the clincher: "Above all it must emphasize individual interests against the stamp of governmental paternalism and confor-

15 P. xxi.

16 P. xxii.

17 Pp. xxiii-xxiv.

mity. At the same time, it must retain the confidence of the American people."[18]

This conclusion is paradoxical in light of the sustained criticism of the Court by so many Americans (who don't read Court opinions) because the Warren Court asserted and defended the rights of minorities and individuals against a conformist, and hardly paternalistic, government. What individual interests can Professor Kurland have in mind? Do any decisions of the Warren Court fit his prescription? We are not given an answer. "It is not survival of the Court that is at stake, but the survival of the primacy of individual liberty that is in question,"[19] Professor Kurland tells us. If this means anything, it is that the Court must pull back, avoid unpopular decisions, and try to make itself popular in order some day to do something in support of individual liberty which, if it does, will embroil it in the kind of troubles experienced by the Warren Court. On the contrary, it is the role of the Court to act as guardian of the rights explicitly and implicitly set forth in the Constitution. So long as it does not thwart the power of coordinate branches to govern, as did the pre-1937 Court, its insistence that the ideals of the Constitution must become operative is in the best tradition of a constitutional court.

The comments thus far are responses to the introduction which, in this reviewer's opinion, has an abruptness of tone and judgment that is not sustained in the body of the discourse, which, on the whole, is relatively balanced and almost consistently interesting and informative. Only a few of the many themes and conclusions can be touched on here.

Some of Professor Kurland's political conclusions are debatable. Students of the modern presidency will be startled to learn that the "Congress . . . has tended to become the tool of the White House,"[20] a conclusion valid only for the first-term New Deal, during wartime, and in the conduct of foreign policy. His comment that "if the history of the origins of our Constitution teach us anything, it must be that one great fear of the Constitution's makers was the danger of a strong and arbitrary executive"[21]—which he cites to justify his plea for a stronger Court role vis-à-vis the President—obscures the fact that the primary purpose of the framers in setting up a government of balanced and shared powers was to inhibit at the national level legislative dom-

18 *Id.*
19 *Id.*
20 P. 17.
21 *Id.*

inance of the type revealed by post-independence state assemblies.[22] As to his desire to increase control with respect to the President, we may ask whether Professor Kurland would have applauded the Warren Court if it had chosen to examine the legality of the Vietnam War? If not, what executive acts does he deem worthy of judicial rebuke? We are not enlightened on this very interesting point.

In a chapter examining the Warren Court's relationship with the Congress and the President, Professor Kurland concedes that although a substantial number of congressional enactments were held invalid, the Court's action did not cut into the power to govern—a point frequently overlooked by critics. He rightly notes that it was *Brown v. Board of Education*[23] that solidified the hard core of very influential opposition to the Court.[24] It was a series of decisions limiting the search for and punishment of Communists that added to congressional ire. The *Watkins* decision,[25] more an exercise in judicial rhetoric than a real assault on the investigatory power, caused deep offense to those in Congress who craved the favorable publicity that "red-hunting" provided. The narrow defeat of the Jenner bill,[26] which was designed to reverse many of these unpopular decisions, showed how much the Court had to fear from an aroused Congress. As a consequence, the Court appears to have receded from its more exposed positions,[27] although Congress, as Professor Kurland observes, "continues to be frenzied by the Court's opinions in the desegregation areas" and shows "rancor at the decisions in the obscenity cases . . . ."[28]

Having examined Warren Court cases that subordinated state power to national power, Professor Kurland concludes: "Federalism is dead and the Supreme Court has made its contribution to its demise."[29] He treats this development as a blow to the protection of liberty, quoting such worthies as Lord Acton and K. C. Wheare. Whatever the theoretical merits of federalism, there is much evidence to suggest the failure of state and local governments in this country, handicapped as they are by insufficient financial resources and impotence in dealing with problems that cannot be solved effectively except on a national basis. In addition, large economic interests (business and labor) seem

22 R. BERGER, CONGRESS V. THE SUPREME COURT 8-15 (1969), presents a succinct statement of the fears of legislative "despotism."

23 347 U.S. 483 (1954).

24 Pp. 26-7.

25 Watkins v. United States, 354 U.S. 178 (1957).

26 S. 2646, 85th Cong., 1st Sess. (1957).

27 *See* Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959).

28 P. 31.

29 P. 96.

to mold the states readily to suit their own purposes. But where is the empirical support for the pro-freedom fruits of federalism? The federal justice system, whatever its shortcomings, is a model providing a greater degree of justice than the systems of most states. Local welfare departments and other agencies with power over the poor have shown little sympathy, and at times an overt contempt, for legality in ministering to their charges. As to civil liberties, the threat has often been greater the closer government has been to the people. The "red-hunts" following World Wars I and II and the Japanese-American relocation scheme of World War II are the most serious blots on the federal record, while towns and cities throughout the United States have continually sought to suppress nonconformists and advocates of unpopular causes.

The reapportionment cases, undercutting state legislatures' long-time power to distort political representation, are criticized by Professor Kurland, perhaps justly, as dealing with some of the less pressing problems of the post-World War II era. Yet in insisting on fairer representation, the Court at least recognized that the subject was important enough to deserve something better than the grossly undemocratic rules used in the past. Professor Kurland criticizes *Lucas v. Colorado General Assembly*,[30] in which the Court invalidated a referendum allowing one house to be selected by a system other than, one-man, one-vote, as an example of the manner in which "legal doctrine originated to assure majority rule was thus held to preclude a right of the majority to establish its role."[31] This analysis overlooks the limited choice given the voters of Colorado in that referendum, since the more equal system offered as an alternative required multi-member districts of considerable size.

Both the chapter on "Egalitarianism and the Warren Court" and the concluding chapter on "Problems of a Political Court" apply familiar themes. Professor Kurland opposes the use of equal protection to limit the legislatures' power to classify on the ground that the new substantive equal protection gives the Court too much power. No less an authority than Geoffrey Gorer is summoned to testify to the dangers of an overemphasis on equality,[32] testimony that may seem misplaced to those shouldered aside by legislative classifications.

The concluding chapter raises new issues and reiterates a number of themes mentioned earlier. "[T]he Court is not a democratic institution, either in make up or in function."[33] Its chief task is "to protect

30 377 U.S. 713 (1964).

31 P. 85.

32 Pp. 168-69.

33 P. 204.

the individual against the Leviathan of government and to protect minorities against oppression,"[34] but apparently it is not to do this in ways that pose risks for the Court, either at the hands of the people or of Congress. We need a Court in which the people can have confidence, and yet, Kurland concludes, it must "match the Warren Court attainments in the protection of individuals and minorities . . . ."[35] So, at the very end we learn that something valuable did result from the labors of the Supreme Court in the years between 1954 and 1968. Whether the results will seem good, bad, or negligible to future generations requires a judgment on the nature of our future society. My guess is that the Warren Court will come through with relatively high marks. While Presidents faltered and Congress blundered on its largely conservative way, the Court alone held fast to ideals that hopefully are still a basic part of the American creed. It is no small achievement to have kept alive and expanded the concepts of fairness, equality, and freedom as part of the living law of our Constitution. Yet Professor Kurland is right to remind the Justices of the risks they run when they persist for long in taking an expansive view of their powers. They are part of a complex web of relationships in which each branch is continuously under pressure to define and redefine its role in a national system complicated by the demands and problems of a troubled federalism. While it may be wrong for the Court to assume that it should reach out to solve all problems ignored or mishandled by the other branches, it is, in this reviewer's judgment, equally erroneous to act as though it were an essentially illegitimate partner in our tripartite national scheme. The hardest fact to grasp—one taught by history rather than by purely rational analysis—is that the dynamics of our polity deny the luxury of a once-and-for-all definition of the role of each of the constituent members of our government. Presidents, Congresses, and Courts have each acted and interacted to provide examples of strong and weak institutional patterns.[36] Each must gauge the limits of its reach, but there is no rigid and precise pattern of behavior commanded by anything in our Constitution or our political system. And in the long eye of history, results tend to count most heavily.

Professor Kurland's book deserves wide reading, for it deals with matters of the first importance. Its theses, as the foregoing testifies, are not those of the reviewer, but these are matters which reasonable men have argued and will continue to treat contentiously. Students

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34 *Id.*

35 P. 206.

36 An excellent recent account of this dynamism is H. SEIDMAN, POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION (1970).

of the Court will welcome it as a fuller statement of the position Professor Kurland has sketched in numerous other writings. For these and many other contributions, among them the editorship of Justice Frankfurter's writings and, perhaps most of all, for his initiation and editing of the *Supreme Court Review*, of which eleven annual publications have appeared, we are deeply in his debt. His ideas and his conclusions deserve to be treated with the seriousness the subject deserves. Students, especially law students, should pay particularly close attention to what he and other academic critics of the Warren Court are saying. For it is largely the students who will determine, by their behavior as counsel, judges, legislators, and other officials, what the Constitution shall mean in the years ahead. They will have to decide whether the American people will accept a vigorous Court committed to the protection of important social ideals and values, or will demand a modest, compliant Court, mindful of the hazards of activism and devoted to the belief that other political institutions must bear the burden of governing.