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## Preface

Typically, historical studies of the jurisprudence of the Supreme Court take one of a number of standard forms. Some are organized doctrinally, focusing either on a single case or a range of decisions that deal with a particular subject of interest to the author. Other studies cut across a variety of different areas of law, frequently dealing with either the constitutional jurisprudence of a single justice or the work of the Court under one chief justice.

This book has a different format. Rather than focusing on a single doctrinal area or the work of either a single justice or that of the Court as a whole over a long period, the book is an in-depth study of the Court's performance during a single term. The book is intended to situate that performance within the political and jurisprudential context of that period as well as to describe the approaches taken by the different members of the Court and to highlight the interactions that ultimately produced the pattern of decisions during the 1972 term.

I chose to focus on the 1972 term for a variety of reasons. First, the 1972 term was the first complete term that brought the participation of all of the justices who had been appointed by President Richard M. Nixon. Nixon had come into office in 1968 vowing to choose justices who would stem the tide of what he characterized as excessive liberal activism by the Warren Court and instead adopt a jurisprudence of judicial restraint. By the end of December 1971, Nixon had had the opportunity to replace four members of the Warren Court with justices of his own choosing. Although the Nixon justices had the opportunity to participate in some of the decisions of the 1971 term, the 1972 term provided a more complete picture of the judicial philosophies of Lewis F. Powell, Jr., and William H. Rehnquist, the last two Nixon appointees, and the impact that those two appointments in particular had on the evolution of constitutional doctrine.

Not surprisingly, the Nixon appointees substantially changed the ideological balance of the Supreme Court. The Court of the late Warren era

was something of a historical anomaly—an institution dominated by progressives that also lacked any representation from true conservatives. The addition of the Nixon justices created a far more politically diverse Court, including not only committed progressives and conservatives but also justices with a wide variety of more moderate views. Thus, one could reasonably expect the behavior of such a Court to be fairly representative of that of the Court generally over time.

Moreover, one would be hard-pressed to find another term in the late twentieth century in which the Court dealt with so many issues with major implications for the future of constitutional law. The term is best remembered for the decision in *Roe v. Wade*, the abortion decision whose jurisprudential and political impact continues to be felt strongly more than forty years later.<sup>1</sup> However, the Court also handed down important rulings of lasting significance on a wide variety of other issues, including school desegregation, school finance, obscenity, the rights of the poor, gender discrimination, and aid to parochial schools.

On one level, the dynamic that produced the pattern of decisions in these cases can be described in relatively simple terms. Progressives could generally count on the votes of Justices William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall. By contrast, Justice William H. Rehnquist was an equally reliable conservative vote and was usually joined by Chief Justice Warren E. Burger. Thus, the balance of power rested with holdover Justices Potter Stewart and Byron R. White and Nixon appointees Harry A. Blackmun and Lewis F. Powell, Jr., none of whom had views on constitutional law that could be described as either consistently progressive or consistently conservative. Instead, the political orientation of each of these justices depended on the particular issue being considered. Conservatives prevailed whenever they could attract the votes of three of the four centrist judges. Otherwise, the progressives emerged victorious.

Given this reality, any attempt to describe the political or jurisprudential orientation of the decisions of the 1972 term in general terms would be inherently misleading. Instead, the overall pattern of the decisions is nothing more or less than the sum of a number of individual decisions, each of which was produced by interactions among nine men with widely disparate worldviews. After coming to their own conclusions about the appropriate action to take in each case, the justices at times compromised with each other in the interest of generating majority opinions that would both establish strong precedents for the future and provide guidance to the lower courts.

Against this background, this book paints a picture of the 1972 term through a series of independent stories, each of which focuses on the Court's treatment of a specific area of constitutional law. Each chapter describes the political and doctrinal background of a particular set of disputes that came to the Court as well as the interaction among the justices themselves that ultimately produced the final resolution. In the book I will make no effort to evaluate the Court's actions against the hypothetical results that might be mandated by some overarching jurisprudential theory. Instead, the book is designed to provide the reader a sense of the complexity of the forces that shape the responses of a politically diverse Court to ideologically divisive issues.

I am deeply indebted to a number of people whose contributions greatly improved this book. Mark Tushnet read large portions of the manuscript and made a variety of useful suggestions. Rick Garnett, Mark Graber, John Jeffries, Serena Mayeri, and Mike Seidman also provided useful input. In addition, John Jacobs, the archivist of the Lewis F. Powell, Jr., Papers at Washington and Lee University, was unfailingly courteous and patient in dealing with what must have seemed endless requests to digitize Powell's case files.





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# The Coming of the Nixon Court



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## Chapter One

# The Making of the Burger Court

The events of the 1972 term unfolded against the backdrop of the dramatic changes in US constitutional culture that had marked the tenure of Chief Justice Earl Warren. At the time Warren came to the Supreme Court on October 1, 1953, many progressives, haunted by the specter of the *Lochner* era jurisprudence, viewed the concept of judicial activism with deep suspicion. However, by the time Warren E. Burger succeeded Warren as chief justice on June 23, 1969, such activism was almost universally associated with the advancement of the progressive political agenda.<sup>1</sup>

The change began in 1954 with the landmark decision in *Brown v. Board of Education*, in which the Court unanimously held that state laws that required the maintenance of racially segregated schools violated the equal protection clause of the Fourteenth Amendment.<sup>2</sup> Although progressives won a number of significant victories during the early years of the Warren Court, they did not have a truly reliable majority on the Court until Arthur Goldberg took the seat previously occupied by Felix Frankfurter on September 28, 1962. Progressive control became even more complete when Thurgood Marshall replaced Tom C. Clark on October 2, 1967. Thus, during the two terms that followed Marshall's confirmation, progressive stalwart William J. Brennan, Jr., dissented from the judgment of the Court on a total of only seven occasions.<sup>3</sup>

During the late Warren era, a majority of the justices invoked the Constitution in support of the progressive agenda on a variety of different fronts. After some initial reticence, during the late 1960s the Court began to push back more aggressively against Southern efforts to resist the desegregation of public schools. Further, the justices sought to reshape the allocation of political power within the House of Representatives and the state legislatures and dramatically enhanced the protections required to be afforded to

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criminal defendants. In addition, as Warren's tenure as chief justice came to a close, the Court began to hint it was preparing to establish constitutional principles designed to substantially improve the lot of the poor in US society.<sup>4</sup>

The Warren Court also took an active role in the culture wars that wracked the nation during the 1960s. In hindsight, the decision to constitutionalize the right of married couples to use contraceptives would emerge as a critical turning point in the evolution of constitutional doctrine. However, during the Warren era itself, the cases that outlawed prayer in schools and provided significant protection for the right to distribute and possess sexually explicit materials were far more controversial and politically salient.<sup>5</sup>

These doctrinal developments provoked reactions from a variety of different quarters. By the late 1960s, progressive commentators, some of whom initially expressed concern about what they viewed as unprincipled judicial activism, had become increasingly supportive of the idea that the Court should move aggressively to support progressive ideals.<sup>6</sup> But at the same time, the Court's decisions also generated a political backlash in the populace at large.

The significance of this backlash became clear during the presidential campaign of 1968. As part of his effort to position himself as the "law-and-order" candidate during the campaign, Republican nominee Richard M. Nixon focused attention on the Warren Court decisions that expanded the rights of criminal defendants, criticizing the Court for giving the "green light" to "criminal elements in this country." Nixon pledged to appoint justices who were "judicial conservatives" and would not give expansive interpretations to constitutional limitations on government actions.<sup>7</sup>

For obvious reasons, this possibility was anathema to Chief Justice Warren. Fearing a Nixon victory and seeking to deprive Nixon of the potential opportunity to appoint the next chief justice, Warren resigned well in advance of the election, thereby providing President Lyndon Baines Johnson the opportunity to appoint Warren's successor. However, after Johnson's effort to elevate Associate Justice Abe Fortas to the chief justiceship was derailed by a Senate filibuster, and Nixon was in fact victorious in the November election, it became clear that the maneuver had backfired. Rather than paving the way for the selection of a like-minded successor, Warren's resignation provided the newly elected president the ability to immediately select a chief justice with a different jurisprudential perspective. Nixon quickly seized on this opportunity by appointing Warren E. Burger to succeed Warren.

By the end of his first term, Nixon was also able to fill three other seats on the Court. Soon after his nomination to succeed Warren was withdrawn, Fortas resigned in the face of new allegations of unethical behavior and was succeeded by Harry A. Blackmun.<sup>8</sup> In 1971, both John Marshall Harlan and Hugo Black left the Court under more conventional circumstances and were replaced by Lewis F. Powell, Jr., and William H. Rehnquist.

As a result of these changes, by 1972 the overall political orientation of the justices as a group was far more conservative than it had been only four years before. However, even after Nixon's appointments were confirmed, holdovers from the Warren era retained a majority of the seats on the Court. In addition, viewed from a distance at least, Nixon's own choices appear to have been less consistently conservative than they might have been. The relative moderation of the Nixon justices was the by-product of the interaction between two different factors.

First, despite his public attacks on the jurisprudence of the Warren Court progressives, Nixon plainly was not wedded to the idea that he should limit his judicial appointments to those with a demonstrable, unambiguous commitment to conservative ideology. To be sure, Nixon would not have considered appointing an identifiably progressive candidate to serve on the Court, and he appears to have been truly determined to make an effort to change the trajectory of the Warren Court's decisions on criminal procedure. Nonetheless, as Kevin J. McMahon has demonstrated, within those parameters Nixon's choices seem to have been driven as much by political concerns as by ideological imperatives.<sup>9</sup> Thus, among the four Nixon appointees ultimately confirmed by the Senate, only William H. Rehnquist and perhaps Warren E. Burger can appropriately be categorized as being consistent conservatives in the same sense that William O. Douglas, William Brennan, and Thurgood Marshall are generally characterized as consistent progressives. By contrast, although in general the political and jurisprudential orientations of both Harry Blackmun and Lewis Powell were to the right of the justices they replaced, both were perhaps best described as nondoctrinaire conservatives—men who quickly showed that on some issues, their views were more nearly akin to those of Douglas, Brennan, and Marshall than those of Burger and Rehnquist.

Nixon's decision to appoint at least some justices who ultimately agreed with their progressive colleagues on a number of critical issues also reflected the state of constitutional theory at the time he took office. During the late Warren era, John Marshall Harlan was generally viewed as the quintessential conservative on the Warren Court.<sup>10</sup> Yet with the possible

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exception of the conflict over the reapportionment and voting rights cases, in practical terms the differences between Harlan's approach and that of his more progressive brethren were largely ones of emphasis. Thus, for example, although he steadfastly opposed the idea that the Bill of Rights by its terms should be applied to the states, Harlan was willing to intervene in the contraception and school prayer cases in order to protect values he deemed fundamental and also derived significant protections for criminal defendants from the due process clauses of the Fifth and Fourteenth Amendments.<sup>11</sup> Against this background, it was not until the publication of a seminal article by Robert H. Bork in 1971 that a jurisprudential strategy based on the concept of originalism began to gain significant traction as a more conservative alternative to progressive constitutionalism.<sup>12</sup>

In any event, when combined with the holdovers from the Warren era, the Nixon justices created a Court with members whose views spanned the full spectrum of mainstream American politics and jurisprudence. Against this background, any attempt to explain the pattern of the Court's decisions in terms of voting blocs will almost inevitably be misleading. Instead, the pattern of decisions is best understood as reflecting the interaction among nine individuals, each of whom brought a unique perspective to the cases that came before the Court.<sup>13</sup>

### Chief Justice Warren E. Burger

Nixon's choice of Warren Burger to succeed Earl Warren was no surprise to Washington insiders. Burger was in many ways a classic American success story—a self-made man who rose to the pinnacle of his chosen profession.<sup>14</sup> Born into a working-class family on September 17, 1907, by the time that Burger had graduated from high school, he had become something of a Renaissance man. Burger was not only a solid student and an athlete who earned letters in four sports but was also the president of the student council and editor of the school newspaper.

Although Burger was admitted to Princeton, the scholarship that he was offered was not large enough to defray the cost of his college education. Thus, Burger took a job as an insurance sales representative and for the next six years attended undergraduate and law school at night, graduating magna cum laude in 1931 from St. Paul College of Law. After completing law school, Burger joined the St. Paul law firm of Boyeson, Otis, and Farley. He became a partner in the law firm after five years and remained with the firm until he entered public service.

Burger was active in Republican politics, and after Dwight D. Eisenhower was elected president in 1952, Burger came to Washington to serve as head of what was to become the Civil Division of the Justice Department under Attorney General Herbert Brownell. After being nominated in 1955, Burger joined the US Court of Appeals for the District of Columbia in 1956. There he emerged as a leading conservative voice on a generally liberal court, becoming particularly well known for his criticism of the Warren Court's innovations in criminal procedure. Thus, given President Nixon's avowed distaste for these innovations, Burger was a logical choice to succeed Warren after Nixon took office. The confirmation process presented no real difficulties; conservatives were generally pleased with the nomination, while liberals were demoralized by the Fortas debacle and not disposed to attack a nominee whose only apparent vice was that he was relatively conservative. In this benign political climate, Burger was confirmed by the Senate with only three dissenting votes and sworn in as the fourteenth chief justice of the United States on June 23, 1969.

By the beginning of the 1972 term, Burger had already proved to be the generally reliable conservative voice that Nixon no doubt believed that he was appointing in 1969. However, the new chief justice was by no means either a great legal theorist or a gifted writer of opinions. Moreover, by the time Powell and Rehnquist joined the Court, it had already become clear that Burger lacked the skills necessary to become a true leader of an ideologically fractured Court.

### William O. Douglas

William Orville Douglas was by far the most senior justice on the Court in the 1972 term.<sup>15</sup> Douglas was born on October 16, 1898, in Maine, Minnesota. In 1904, his family moved to a town fifty miles from Yakima, Washington. Douglas's father died shortly thereafter, and Douglas spent the remainder of his poverty-stricken childhood with his mother in Yakima.

After receiving his undergraduate degree from Walla Walla College in 1920, Douglas worked for two years as a schoolteacher before entering Columbia Law School, where he graduated second in his class in 1925. Douglas then worked for a major Wall Street law firm for two years before returning to the law school world as an academic, specializing in corporate law at Columbia and Yale from 1929 through 1934.

In 1934, Douglas left Yale to work at the newly formed Securities and Exchange Commission, becoming a commissioner in 1936 and chair in

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1937. He also became a member of the New Deal inner circle and was appointed by President Franklin D. Roosevelt to succeed Louis D. Brandeis on the Court after Brandeis resigned in 1939. Ironically Douglas was chosen for the Court in part because he was viewed as more conservative than his primary competitor for the position, and the votes against his confirmation came from a small group of senators who accused Douglas of being a reactionary tool of Wall Street interests.

Douglas has been described as the “quintessential loner—a lover of humanity who did not like people.”<sup>16</sup> In his interactions with both his staff and other justices, he often seemed to have almost no regard for the feelings of those with whom he was dealing. At the same time, from both political and jurisprudential perspectives, he was also clearly the most liberal of all of the justices on the Court during the 1972 term and the Burger era more generally, at times dissenting alone in cases in which the other justices who were typically characterized as progressives joined their more conservative colleagues.

### William J. Brennan, Jr.

If asked to name the most important proponent of progressive constitutionalism during the 1972 term, most commentators would almost certainly nominate William J. Brennan, Jr.<sup>17</sup> The son of a respected labor leader who was also active in city government, Brennan was born on June 8, 1906, in Newark, New Jersey. He was an outstanding student both in high school and at the Wharton School of Finance of the University of Pennsylvania and in 1931 graduated from Harvard Law School, finishing in the top 10 percent of his class academically. He then joined an established labor law firm in Newark.

After being an important figure in a successful drive for constitutional reform of the New Jersey court system, Brennan was appointed to serve on the state trial court in 1949. He was elevated to the New Jersey Supreme Court three years later. When Sherman Minton retired from the US Supreme Court in 1956, President Eisenhower’s political advisors saw an opportunity to reach out to the Catholic and labor union constituencies in the Northeast. Brennan was the perfect choice to advance this political agenda.

However, Eisenhower purportedly would later describe the appointment as the “biggest damn fool mistake that I ever made.” Brennan quickly emerged as one of the Court’s most consistent progressives and was fre-

quently chosen by Chief Justice Warren to be the legal technician charged with the task of fashioning the doctrinal arguments necessary to attract and hold progressive majorities together. Indeed, during the late Warren era, Brennan's positions on controversial issues essentially defined those of the Court as a whole; during the last two terms of the Warren era, he dissented a total of only 6 times in the 322 cases in which the Court issued opinions.<sup>18</sup>

However, during the 1972 term, Brennan's position was quite different. The four Nixon appointments had shifted the balance of power, and he was far less likely to be in the majority in controversial cases. Thus, he dissented no fewer than 50 times in the 144 cases in which opinions were issued.<sup>19</sup> Moreover, even when Brennan was in the majority, in those cases in which the justices were closely divided, the task of writing the opinion of the Court more often fell to one of his centrist colleagues.

### Thurgood Marshall

Even if he had not become the first African American to serve on the Supreme Court, Thurgood Marshall would have been known as one of the most important figures in twentieth-century American legal history.<sup>20</sup> Born Thoroughgood Marshall on July 2, 1908, in Baltimore, Maryland, he was raised by a schoolteacher mother and a father who worked both as a railroad porter and as a steward at a country club. Marshall received his early education in segregated public schools in Baltimore and at the equally segregated Lincoln University. After receiving his undergraduate degree, Marshall applied to the University of Maryland Law School but was rejected because of his race. He therefore chose to attend Howard University Law School, where he came under the tutelage of civil rights pioneer Charles Hamilton Houston and graduated first in his class in 1933.

Marshall began his career as a solo practitioner but in 1936 took a full-time position on the staff of the National Association for the Advancement of Colored People (NAACP). In 1940 he became the first president director of the NAACP Legal Defense Fund (LDF) and held that position until 1961. As the leader of the LDF, Marshall won a number of signal victories in civil rights litigation. However, he is best remembered for his role in *Brown v. Board of Education*, in which the Supreme Court outlawed racial segregation in public schools.

In 1961, Marshall left the LDF to take a position on the US Court of Appeals for the Second Circuit. At the request of President Johnson,

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Marshall left the Second Circuit in 1965 to accept an appointment as the first African American solicitor general of the United States. Two years later, Johnson chose Marshall to succeed the retiring Clark on the Supreme Court. Despite stiff opposition from representatives of the Southern states, Marshall was confirmed and joined the Court on October 2, 1967.

At the time Marshall took his seat, the Court was already dominated by justices who shared his progressive instincts. He dissented only once during his first term and seven times during the 1968 term. However, as the Nixon appointees joined the Court, like Douglas and Brennan, Marshall found himself disagreeing with a majority of his brethren far more often. Thus, beginning in the 1972 term, Marshall delivered a number of passionate dissents in which he decried the Court's refusal to more aggressively deploy the Constitution to protect the interests of racial minorities and poor people more generally.

### Potter Stewart

Potter Stewart was the only Republican holdover from the Warren Court.<sup>21</sup> Stewart was born while his family was on vacation south of Lansing, Michigan, on January 23, 1915, but spent his early childhood in Cincinnati, Ohio. His father was a prominent politician who served both as mayor of Cincinnati and as a justice on the Ohio Supreme Court. After attending a prestigious prep school in New England, Stewart received his undergraduate education at Yale University, graduating Phi Beta Kappa in 1937. He then went on to Yale Law School, where he became an editor on the *Yale Law Journal* before graduating in 1941.

After a short stint at a Wall Street law firm, Stewart served in the US Navy in World War II before joining a law firm in Cincinnati. There he was active in local politics and was elected to the city council. In 1954, President Eisenhower appointed Stewart to serve on the US Court of Appeals for the Sixth Circuit and four years later chose him to succeed Justice Harold H. Burton, who retired from the Supreme Court on October 13, 1958.

Eisenhower initially granted Stewart a recess appointment that allowed him to serve on the Court pending formal confirmation proceedings by the Senate. Although Stewart was not the first justice to receive a recess appointment from Eisenhower, some senators took the view that the device should not be used to fill a vacancy on the Supreme Court. In addition, Southern Democrats refused to support the nomination after Stewart

endorsed the decision in *Brown v. Board of Education* during his confirmation hearings. Nonetheless, he was ultimately confirmed on a seventy-two to nineteen vote.

Stewart's role on the Court during the 1972 term was quite different than it had been during the late Warren era. In the late 1960s, on many issues Stewart was more conservative than a majority of his brethren and often dissented in cases that adopted the constitutional arguments advanced by progressives. Not surprisingly, after the Nixon appointees took their seats on the Court, Stewart became an integral part of majorities that limited the scope of some of the decisions with which he had disagreed. But in addition, Stewart not only provided indispensable support for some decisions that furthered the progressive agenda but also at times found himself in the unfamiliar position of dissenting in cases in which conservatives prevailed. In short, given the configuration of the Burger Court, Stewart's position was that of a true centrist.

### Byron Raymond White

Even before his nomination to serve on the Supreme Court, Byron R. White was well known to much of the US public for reasons entirely unrelated to either law or politics.<sup>22</sup> White was born in Fort Collins, Colorado, on June 8, 1917, and spent his childhood in Wellington, Colorado, a tiny impoverished mining community in the north of the state, where his father ran a lumberyard. After attending public elementary and secondary schools in Wellington, White earned an academic scholarship to the University of Colorado, where he not only graduated first in his class in 1938 but also earned a total of ten letters in three different sports and was named an All American in football, acquiring the nickname "Whizzer."

After his graduation from college, White played professional football for one year with the Pittsburgh Pirates before spending a year at Oxford University in England as a Rhodes Scholar. Upon returning to the United States, White enrolled at Yale Law School in September 1939. In order to earn money, White left Yale at the end of his first year to return to the National Football League, this time playing for a year and a half with the Detroit Lions until being drafted to serve in the US Navy in the wake of the attack on Pearl Harbor. He returned to Yale at the end of World War II, graduating magna cum laude in 1946. White then spent a year as a law clerk to Chief Justice Frederick M. Vinson before entering private practice

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with a small law firm in Denver, Colorado. There, White quickly showed an interest in local politics and remained deeply involved in those politics throughout his time in private practice.

Although they were by no means close friends, White had met John F. Kennedy in Europe during White's tenure as a Rhodes Scholar, and they had renewed their acquaintance when both were in the Pacific during World War II. Later, White chaired Citizens for Kennedy, a national volunteer organization that was formed to support Kennedy's successful campaign for the presidency in 1960. After Kennedy's victory in the election, White served in the Justice Department as deputy attorney general, where he was charged with the task of evaluating the qualifications, experience, and fitness of potential nominees to the federal bench.

At the time White accepted the position in the Justice Department, he had expected to remain in Washington for only a relatively short time before returning to private practice in Denver. However, his plans changed radically after Justice Charles E. Whitaker resigned from the Supreme Court in 1962, and Kennedy chose White to succeed Whitaker. The nomination was uncontroversial, and White took his seat on the Court after being confirmed by the Senate on a voice vote.

Based only on raw numbers, one might well characterize White's voting pattern during the 1972 term as that of a moderate conservative. Only Lewis Powell dissented less frequently than White did during the term, and White was considerably more likely to have voted with the Nixon appointees than with either Potter Stewart or any of the committed progressives on the Court.<sup>23</sup> However, White's dissents often came in the most politically contentious cases decided by the Court, and in a number of those dissents his position differed from that of the Nixon appointees and closely resembled that of Justices Douglas, Brennan, and Marshall. Thus, although his voting pattern was significantly different from Stewart's, White is also best described as a centrist.

## Harry Andrew Blackmun

Harry A. Blackmun was not Richard Nixon's first choice to succeed Abe Fortas after Fortas was forced to resign from the Court in 1969. Instead, making a conscious decision to attempt to replace Fortas with a Southerner, Nixon nominated Clement Haynsworth of South Carolina, an experienced member of the US Court of Appeals for the Fourth Circuit. Although

Haynsworth was initially expected to be confirmed with relative ease, the nomination was undone by a combination of two different forces. First, because Haynsworth had a relatively conservative voting record, his nomination was predictably opposed by civil rights groups and representatives from organized labor. In addition, some aspects of Haynsworth's record left him vulnerable to charges of unethical behavior. Democrats, still smarting from the defeat of Fortas in 1968, seized on these incidents to charge that Haynsworth lacked the requisite integrity to serve on the Court, and the nomination was ultimately defeated on a fifty-five to forty-five vote.<sup>24</sup>

Nixon then turned to G. Harold Carswell of Georgia, who sat on the US Court of Appeals for the Fifth Circuit. It soon became apparent that the Carswell nomination faced difficulties not with ideology or integrity but rather with simple competence. The high point of the Senate debate was the declaration by one Carswell supporter that mediocre people deserved representation on the Supreme Court. Against this background, a bipartisan coalition united to defeat the Carswell nomination as well.<sup>25</sup>

Publicly complaining about the unwillingness of the Senate to confirm a Southerner, at this point Nixon turned to Blackmun.<sup>26</sup> Born in Nashville, Illinois, on November 12, 1908, Blackmun grew up in a working-class neighborhood of St. Paul, Minnesota, where he was a childhood friend of Warren Burger and later served as best man at Burger's wedding. Blackmun attended college and law school at Harvard, graduating from law school in 1932. He then joined a prominent Minneapolis law firm, where he specialized in tax law and estate planning until he became the general counsel of the Mayo Clinic in 1950. In 1959, President Eisenhower appointed Blackmun to the US Court of Appeals for the Eighth Circuit, and Blackmun remained on that court until his nomination to replace Fortas.

In the wake of the protracted struggle over the Haynsworth and Carswell nominations, the quiet, mild-mannered Blackmun seemed to be a godsend. Generally perceived to be a moderate conservative, he was described by one popular publication as "a judicial superbblend of intelligence, industry, fairness, excellence, and probity." Even the executive director of the progressive American Civil Liberties Union praised Blackmun effusively, declaring that the nominee possessed a "capacity for objectivity and fairness in the highest degree, combined with a high intellect and sharply honed legal mind."<sup>27</sup> Against this background, Blackmun was confirmed unanimously by the Senate.

Standard accounts of Blackmun's career describe him as coming to the Court as one of the so-called Minnesota Twins—a generally reliable ally

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of Warren Burger—who would subsequently move to the left in reaction to the strident conservative reaction to his position on abortion. Although generally accurate, such characterizations tend to obscure subtle differences between Burger and Blackmun that had begun to emerge even before the issue of abortion took on such prominence. To be sure, during the 1972 term, Blackmun was a reliably conservative voice on issues such as criminal procedure and obscenity and joined the chief justice in taking less conservative positions in cases involving sex discrimination and aid to parochial schools. However, at the same time, Blackmun also abandoned Burger to join Douglas, Brennan, and Marshall in significant cases involving school desegregation and welfare rights. In short, although he rejected many of the tenets of progressive constitutionalism, Blackmun was at least marginally less conservative than some of the other Nixon appointees.

### Lewis Franklin Powell, Jr.

Lewis F. Powell, Jr., was the only member of the Burger Court to have spent his entire career in private practice before his appointment to the Court.<sup>28</sup> Powell was born into an affluent family in a suburb of Norfolk, Virginia, on September 19, 1907. Soon after his birth, Powell's family moved to Richmond, where he attended a series of public and private schools before entering Washington and Lee University in 1925. Powell spent six years at Washington and Lee, graduating Phi Beta Kappa and president of his undergraduate class in 1929 before completing law school in 1931.

Powell subsequently spent a year at Harvard Law School before returning to Richmond to enter private practice. After spending a short time practicing in a small firm, Powell joined Hunton and Williams, the most prestigious firm in the city. Except for a hiatus when he served in the US Army during World War II, Powell remained with the same firm from 1935 through 1971, becoming a named partner in 1954.

During his time in private practice, Powell also devoted considerable time and energy to public service. He was the chair of the Richmond School Board during the tumultuous period immediately following the Supreme Court's decision in *Brown v. Board of Education* and also served on the state board of education. Subsequently, he achieved national prominence as president of both the American Bar Association and the American College of Trial Lawyers. Powell also served on President Johnson's Crime Commission and President Nixon's Defense Panel.

Unbeknownst to Powell, he was apparently Richard Nixon's first choice to succeed Abe Fortas in 1969 before writing a letter asking not to be considered. However, in 1971, after some hesitation, Powell agreed to accept a nomination to serve on the Court. Although Powell faced some opposition from civil rights leaders, the simultaneous nomination of William Rehnquist drew most of the fire from liberal activists, and Powell was ultimately confirmed by the Senate with only one negative vote.

Like that of Harry Blackmun, Powell's overall voting record was that of a moderate conservative. During the 1972 term, he was more likely to be in the majority than any other member of the Court.<sup>29</sup> On some issues, Powell's views plainly reflected those held generally by the Southern white aristocracy of which he was a member. For example, he complained bitterly to his colleagues about the preclearance requirement that had been imposed on many of the Southern states by the Voting Rights Act of 1965<sup>30</sup> and had a fierce belief in the efficacy of the basic structures of American government. However, despite his conservative instincts, like Blackmun, Powell showed at least some willingness to support his more progressive colleagues in cases that he viewed as involving profoundly unjust treatment of individual citizens.

### William Hobbes Rehnquist

On the Burger Court, William H. Rehnquist stood at the opposite end of the ideological spectrum from William O. Douglas.<sup>31</sup> Rehnquist was born on October 1, 1924, in Milwaukee, Wisconsin. After spending his childhood in a middle-class suburb of Milwaukee, Rehnquist briefly attended Kenyon College before joining the US Army and serving for three years during World War II. After leaving the army, he received bachelor of arts and master of arts degrees from Stanford University as well as a master of arts from Harvard University. Rehnquist then returned to Stanford for law school, graduating as the class valedictorian in 1952.

After serving as a law clerk to Justice Robert H. Jackson, Rehnquist entered private practice in Phoenix, Arizona. There he became known as an outspoken, politically active conservative, criticizing the Warren Court for "extreme solicitude for the claims of Communists and other criminal defendants" and at one point asserting that open housing laws were an unjustifiable infringement on private property rights. After Richard Nixon was elected president, he chose Rehnquist to head the Office of Legal Counsel

in the Justice Department. While serving in that capacity, Rehnquist often served as the administration spokesperson on controversial legal issues.

Rehnquist's nomination to succeed John Marshall Harlan on the Supreme Court in 1971 was strongly opposed by progressives who were disturbed by his views on civil rights. In particular, opponents of the nomination focused on two aspects of Rehnquist's record. The first was a memorandum Rehnquist had written to Justice Jackson in connection with the Court's consideration of *Brown v. Board of Education* that argued *Plessy v. Ferguson* "was right and should be reaffirmed." The second was Rehnquist's participation in a Republican poll-watching project that challenged voting credentials in Hispanic and African American neighborhoods. Rehnquist responded that Jackson himself had requested a defense of *Plessy* and that he had engaged in no wrongdoing during the poll-watching project. Ultimately, Rehnquist emerged victorious when the opponents of the nomination could only muster twenty-six votes in opposition.

Rehnquist's performance as a justice largely vindicated both the hopes of his conservative supporters and the fears of those who had opposed him. He argued for an originalist approach to constitutional interpretation and was at times characterized as a champion of judicial restraint. In later years, Rehnquist showed a willingness to actively deploy the Constitution in support of conservative values.<sup>32</sup> However, during the 1972 term, disputes that came before the Court involved only efforts to enshrine progressive values in constitutional law. In those cases, Rehnquist was less likely than any other member of the Court to vindicate a constitutional challenge to governmental action.

However, Rehnquist did not have the power to unilaterally determine the outcome of the cases that came before the Court. In order to prevent the progressives on the Court from achieving their objectives, in each case those advocating conservative positions needed to attract the votes of at least four other justices. The chief justice was Rehnquist's most frequent ally in his campaign against progressive constitutionalism. In addition, Burger and Rehnquist often gained the support of the other Nixon appointees.

Throughout the 1972 term, the balance of power was held by Nixon appointees Harry Blackmun and Lewis Powell and holdovers Potter Stewart and Byron White. The positions taken by Justices Blackmun and Powell were not uniformly more conservative than those of Justices Stewart and White. Indeed, in cases involving constitutional challenges to government aid to parochial schools and limitations on access to abortion, White's views were to the right of those of both Blackmun and Powell. Nonetheless,

during the 1972 term, the Court adopted the progressive position in almost every significant case in which either Blackmun or Powell chose to vote with Douglas, Brennan, and Marshall rather than joining with Burger and Rehnquist. Conversely, the conservative position typically prevailed only in cases where the four Nixon appointees voted together and were joined by either Justice Stewart or Justice White. The result was an overall pattern of decisions that defied easy ideological characterization and whose political orientation varied greatly depending on the specific issues being decided by the Court. The outlines of this dynamic began to emerge almost immediately after Powell and Rehnquist were sworn in as justices.



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