First Session

1. We begin the First Session with a look back to a time when the Court was eager to push a liberal agenda. I'm posting a 1964 article from the New York Times that describes how the Warren Court, which unanimously decided *Brown v. Board of Education* in 1954, saw its role and mission. What was it that transformed a Republican led liberal Court into the hard-right conservative Roberts' Court? In 1991 the Republicans still hadn't found their new voice. Chief Justice Warren Burger, a Republican and a conservative, said in an NPR interview that the idea that there was an individual right to bear arms under the 2nd Amendment was a "fraud."

2. Also attached is an excerpt from *The Company They Keep: How Partisan Divisions came to the Supreme Court* which analyses the conservative success in providing the intellectual, organizational and financial support to develop a robust legal culture with shared goals and beliefs. It is no accident that conservatives were much more interested and successful in recruiting judges than were liberals.

3. *Conservatives Coming War on the Supreme Court* summarizes conservative complaints about the Warren Court and prior precedent and the significance of "originalism" in constraining judges from making law.

The 'Warren Court' Stands Its Ground

SEPT. 27, 1964

About the Archive

This is a digitized version of an article from The Times's print archive, before the start of online publication in 1996. To preserve these articles as they originally appeared, The Times does not alter, edit or update them.

A LITTLE old shawl-bedecked, rocking-chair lady in a recent New Yorker cartoon pricked out on a circular sampler "IMPEACH EARL WARREN." At about the same time, a real-life group of Protestant, Catholic and Jewish clergymen united in charging that two Supreme Court anticensorship rulings —one allowing the sale of Henry Miller's "Tropic of Cancer," the other permitting the release of a French film, "The Lovers"—"virtually promulgated degeneracy as the American way of life.

This past summer, the House of Representatives actually passed a bill denying all Federal courts—the Supreme Court, of course, included—the right to rule on any voting-reapportionment case (this bill was fast buried in the Senate); and only a few weeks ago, Barry Goldwater charged that "of all three branches of Government, today's Supreme Court is the least faithful to the constitutional tradition of a limited government and to the principle of legitimacy in the exercise of power." And this, despite the fact that Earl Warren and three of his colleagues were named to the Court by a well-known Republican.

The list of attacks could go on and on—and doubtless it will in the weeks ahead. As the Court comes back to Washington to start a new fall term, it faces a barrage of criticism and disquiet, considerably more substantial than previous outbursts from the Birchers, the pro-school-prayer churchers and the still-sullen segregationists of the South.

Not since the Nine Old Men of unhallowed memory struck down the first New Deal almost 30 years ago—perhaps not since John Marshall's Court put the separate states in their places in order to strengthen an adolescent nation — has any Supreme Court used its politico-legal power so broadly and boldly as did Earl Warren's in the term that ended last June Small wonder, then, that its display of judicial force and authority, coming as the culmination of a decade of constitutional change that began with the school-desegregation decision of 1954, should have caused many to conclude that, and others to wonder whether, the Court had gone too far.

What, then, did the Court do last term to kick up all this fuss? High, though not alone, on the priority gripe and-growl list stands the “one man, one vote” rule for the apportionment of voting districts. Two years earlier the Court had given fair warning that something like this might be in the offing when it held that unfair apportionment could be a denial of “equal protection of the laws” and was therefore a proper subject for scrutiny by Federal courts. But few expected a follow-up decision so mandatory and so sweeping as to require roughly equal representation in both houses of all state legislatures—in obvious contrast to the two houses of Congress.

ALSO, on the hate list were decisions in the racial-discrimination field, where the Court plowed steadily and almost unanimously ahead. The original 1954 school- desegregation ruling was extended a little further when it held that Virginia's Prince Edward County could no longer keep its public schools closed to escape integration. A batch of sit-in convictions was reversed, though on the narrowest possible grounds, leaving still to be faced the crucial question of the possible right of property owners to discriminate against would-be Negro customers. The overturning of a murder conviction against a Negro because of the systematic exclusion of Negroes from the jury was standard and almost routine.

But neither standard nor routine—not, at least, since the days when the Nine Old Men made a habit of it-were two decisions branding parts of acts of Congress unconstitutional. One of these, to the dismay of the John Birch Society and other jingoists, declared void Section 6 of the Subversive Activities Control Act, under which U.S. passports were denied to citizens with Communist ties. The other, more publicized and less deplored, threw out Section 352(a) of the Immigration and Naturalization Act, whereby naturalized U.S. citizens could lose their citizenship by simply staying abroad for a period of years—a penalty never imposed on the native- born. In both instances the Court exercised its ultimate power by overriding, in the name of the Constitution, the will of an equal branch of the Federal Government.

AGAIN, in a whole series of precedent-shattering decisions, the Court extended the protection of parts of the Bill of Rights well beyond old established limits and set aside several past Court rulings to do so. The Fifth Amendment's guarantee against self-incrimination, for instance, was applied whole-hog to state prosecutions; the Sixth Amendment's right to counsel was widened to cover preliminary police questioning; the Fourth Amendment's safeguards against unreasonable searches and seizures were expanded, as in holding state officers to Federal standards in getting search warrants, and so on…All in all, whether one approved or disapproved of this well-nigh unprecedented display of judicial power, it was a memorable term.

In a sense, Earl Warren's Court has been building toward this climax since his appointment 11 years ago. But the building has been slow and mainly below the surface —in the gradually increasing number of dissenters and the increasing vigor of their dissents against those supporting the philosophy of judicial self-restraint (the “take-it-easy boys”) who, except in the desegregation cases, have generally prevailed. The major turning-point came with the retirement in 1962 of Justice Felix Frankfurter, for more than 20

years the Court's most articulate and insistent advocate of self-restraint, and his replacement by free-swinging, libertarian, activist Arthur Goldberg.

The Frankfurter influence waned as first Warren, then William Brennan (both Eisenhower appointees) regularly joined those two old New Deal warhorses, Hugo Black and William O. Douglas, in liberal dissent. The occasional addition to this quartet of Potter Stewart (again Eisenhower's choice) now and then turned potential dissent into majority doctrine. Frankfurter could carry only faithful John Harlan with him in his bitter judicial swansong protesting the Court's first entry into the 'political thicket' of reapportionment in 1962.

TODAY the close civil-liberties cases (as opposed, in legal parlance, to those involving Negroes' civil rights), which used to come down predictably, while Frankfurter still sat, five to four against the liberty claimed, have for the past two terms come down just as predictably five to four the other way. On other matters, too, the conference room no longer echoes with the now eloquent, now shrill voice that so long urged his colleagues to keep 'hands off.' Quiet John Harlan, to whom passed the torch of self-restraint, cannot match his mentor in powers of persuasion. For the first time in the Court's 175-year history, therefore, a consistent—if bare—majority of the justices, scorning self-restraint where individual liberties are at issue, are determined to enforce the Bill of Rights (plus the 14th Amendment) against any Government action, state or Federal, that disregards or infringes its guarantees. From the protection of equal voting rights to the protection even of obscene literature from censorship, it is this determination which has brought down on the Court's head the current storm of protest.

Whoever the protesters, their complaints are commonly couched in abstract phrases familiar to students of political theory and campaign oratory. There is talk of "judicial usurpation of legislative functions so as to dislocate the tripartite separation of Government powers." There is talk of upsetting the constitutional system of checks and balances. There is talk, of course, of improper and unwarranted interference with states' rights. There is talk of an unelected, lifetime appointed autocracy, bending the law and the Constitution to its will—or its whim.

THE chief thing to remember about all this high-toned criticism, no matter how valid in the abstract, is that, translated, it really means: "We don't like what the Warren Court has been doing." That, of course, is the protesters' privilege, and no one would defend it more militantly than the Warren Court, but it does not. become the critics to conceal their real motives—which are usually self-interested and often more emotional than rational — behind convenient, conventional and essentially meaningless shibboleths like "states' rights." (How can a political abstraction like a state, as distinct from the people and the government officials of that state, have rights?)…

THE Warren majority sees its highest duty in militantly upholding, against legislative or executive encroachment, the individual rights and liberties guaranteed by the Constitution. From freedom of speech to fair trials to equal protection of law and all the others, it is these rights that mainly distinguish our Government from dictatorships, right or left.

A century and a half ago the Marshall Court, buffeted by bitter criticism, stood its ground, in the name of the Constitution, for what it believed. History has vindicated it The Warren Court, equally sturdy, will take its chances with history, too.

The Company They Keep:

How Partisan Divisions Came to the Supreme Court

Neal Devins, College of William and Mary Lawrence Baum, Ohio State University

Summary of Book and Argument

On September 12, 2005, Chief Justice nominee John Roberts told the Senate Judiciary Committee that "[n]obody ever went to a ball game to see the umpire. . . I will remember that it's my job to call balls and strikes and not to pitch or bat." Notwithstanding Robert's paean to judicial neutrality, then Senator Barack Obama voted against the Republican nominee. Although noting that Roberts was "absolutely . . . qualified," Obama said that what mattered was the "5 percent of hard cases," cases resolved not by adherence to legal rules but decided by "core concerns, one's broader perspectives of how the world works, and the depth and breadth of one's empathy." But with all 55 Republicans backing Roberts, Democratic objections did not matter.

Today, the dance between Roberts and Senate Democrats and Republicans seems so predictable that it now seems a given that there will be proclamations of neutrality by Supreme Court nominees and party line voting by Senators. Indeed, Senate Republicans blocked a vote on Obama Supreme Court pick Merrick Garland in 2016 so that (in the words of Senate majority leader Mitch McConnell) "the American people . . . [can] make their voice heard in the selection of Scalia's successor as they participate in the process to select their next president." And following Donald Trump's victory and subsequent nomination of Neil Gorsuch, Senate Republicans undid a Democratic logjam by repudiating filibuster rules intended to require supermajority support for Supreme Court nominees. The final vote on Gorsuch: 54 to 45 with every Republican supporting the nominee and all but three Democrats voting no. For his part, Gorsuch condemned those who "cynically describe" judges as "politicians in robes," promising to be "impartial," to "treat all who come to court fairly," and to "seek consensus" and be "neutral and independent." At the end of the Court's 2016 term, the beginning of his tenure, Gorsuch voted most often with conservative Justices Clarence Thomas and Samuel Alito, prompting speculation that he will be "one of the most, or most, conservative Justices." Whether this prediction proves correct, it is certainly true that Gorsuch is more conservative than Merrick Garland and that there is a partisan divide separating Democratic and Republican nominees on the Supreme Court.

This book tells the story of how party polarization turned the Supreme Court into a partisan Court. In so doing, this book explains how the Supreme Court is shaped by the political and social environment in which the justices work. We argue that this environment has a powerful effect on the justices, but one that does not operate in the ways that most scholars and observers of the Court have assumed. We make and support three related points about the Court. First, the partisan and ideological polarization of the current era, polarization that has had its greatest effects in elite segments of American society, has changed the Court in important ways. One effect has been to bring to the Court justices whose ideological views reflect the dominant views in the appointing president's party. Since 2010, and for the first time in its history, the Court has liberal and conservative blocs that fall perfectly along party lines. Correspondingly, since the 1991 appointment of Clarence Thomas, the ideological distance between Democratic and Republican appointees has grown with each new appointment to the Court. Another

effect has been to give the justices stronger ties with ideologically oriented subsets of elites that reinforce their own views.

Before the mid-1980s, ideology played a less pronounced role in Supreme Court appointments. Republican presidents sometimes appointed liberals and Democrats sometimes appointed conservatives. Moreover, during the Burger and early Rehnquist Courts, some Republican appointees became more liberal—reflecting the dominant views of legal and media elites. Since 1991, however, all Republican appointees have been committed conservatives and all Democrats have been liberals. Politically polarized elite social networks have reinforced the conservatism and liberalism of Republican and Democrat appointees.

Second, the justices do not respond primarily to pressures from the other branches of government or the weight of mass public opinion. Rather, the primary influence on them is the elite world in which the justices live both before and after they join the Supreme Court. The justices take cues primarily from the people who are closest to them and whose approval they care most about, and those people are part of political, social, and professional elites.

Conservatives' Coming War on the Warren Court

Matt Ford in The New Republic, March 4, 2019

Led by Clarence Thomas, the Supreme Court's originalists are taking aim at the landmark precedents set by liberal justices decades ago. Two years after Clarence Thomas's bruising confirmation hearing in 1991, The New York Times reported that the Supreme Court justice told two of his law clerks that he planned to serve until 2034. That would give him a record tenure of 43 years on the nation's highest tribunal. But superlatives were not the reason for his goal. "The liberals made my life miserable for 43 years," he reportedly told them, "and I'm going to make their lives miserable for 43 years."

Since joining the court, Thomas has often called for his colleagues to re-visit major precedents that he believes are at odds with the Constitution's meaning. Many of those decisions sprang from the era between 1954 to 1969 when the court's liberal wing, led by Chief Justice Earl Warren, reshaped American society like no other Supreme Court before or since. Thomas's quest has often been a lonely one, thanks to the moderation of conservative justices like Sandra Day O'Connor and Anthony Kennedy. But a series of recent dissents from Thomas and his most conservative colleagues shows how he may yet win.

The Warren Court amounted to a third American revolution of sorts, after the original and the Reconstruction era. Its decisions on the allocation of power in American political life helped transform the United States into a liberal democracy. The justices swept away the legal architecture of American racial apartheid—most famously in *Brown v. Board of Education*, which outlawed segregation in schools, and *Loving v. Virginia*, which overturned laws against interracial marriage—and upheld federal civil-rights legislation. It broke the rural stranglehold on state legislatures by mandating the one man, one vote principle for legislative districts. Americans accused of crimes gained a bevy of new rights: to an attorney even if they couldn't afford it, to toss out illegally obtained evidence, to receive any exculpatory evidence obtained by police. First Amendment protections for newspapers and protesters

grew stronger, and re-productive rights gained constitutional recognition for the first time in *Griswold v. Connecticut.*

It was a halcyon era for American liberals, but not everyone was thrilled. The Warren Court's landmark decisions spurred a backlash on the political right. Social conservatives railed against the court's rulings against prayer in public schools and legalized access to contraception. Southern whites rebelled against desegregation orders, at times prompting the federal government to enforce the Supreme Court's decision by force. Libertarians denounced the vast expansion of federal power at the perceived cost to individual liberty. From this medley of opposition grew the intellectual foundations of the modern Republican Party.

In a way, the legal war against the Warren Court has been underway for decades too. The court, after shifting rightward in the 1970s and 1980s, frequently narrowed major precedents from that era. Conservative legal scholars rallied around originalism, a theory of constitutional interpretation that claims allegiance to the original meaning of the nation's founding charter. Originalists, most prominently Justice Antonin Scalia until his death in 2016, tend to be highly critical of landmark Warren Court rulings for stepping beyond what they think the Constitution allows. With originalism's rising influence on the high court, the war may reach new heights.

Last month, the Supreme Court rejected a request to hear *McKee v. Cosby*, a First Amendment case involving disgraced comedian Bill Cosby. Katherine McKee, who publicly accused Cosby of rape in 2014, sued him for defamation after he and his legal team allegedly leaked a letter that disparaged her truthfulness and character. The lower courts dismissed her case, ruling that her allegations against Cosby had made her a "limited- purpose public figure." Defamation law generally treats public figures like Donald Trump differently than an ordinary private citizen, but also recognizes that private citizens can sometimes become a quasi-public figure when they take part in a matter of public controversy.

The lower courts' finding makes it much harder for McKee to win a defamation claim against Cosby under the Supreme Court's current precedents. In 1964, the Warren Court ruled that the First Amendment blocks defamation claims by public figures unless they can prove the speaker acted with "actual malice," which the justices defined as "reckless disregard" for the truth. The case, *New York Times Co. v. Sullivan* arose during the civil-rights era when Southern officials regularly tried to squelch unfavorable newspaper coverage with egregious libel claims.

Thomas, writing only for himself, said the court had correctly declined to intervene in the case. He then went on to suggest that the landmark libel precedent should be overturned. "[Sullivan] and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law," Thomas wrote, adding that the court should not continue to "reflexively apply" it going forward. "Instead, we should carefully examine the original meaning of the First and Fourteenth Amendments," he continued. "If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we."

A world without *Sullivan* would be a daunting one for American journalists. The actual-malice standard gives broad legal protections to Americans when they go public about the misdeeds of the rich and powerful. I noted last December that in countries with lower thresholds for defamation claims like Australia, the wealthy and powerful can wield the legal system as a cudgel against those who try to

expose their wrongdoing. Without *Sullivan*, the states would be able to set their own legal standards for defamation claims, a prospect that President Trump would likely relish.

In February, Thomas also took aim at Americans' access to legal counsel under the Sixth Amendment. The case, *Garza v. Idaho,* involved an accused man who asked the Idaho courts to intervene after his lawyer refused to file an appeal on his behalf. The lawyer declined because Gilberto Garza had waived his right to appeal during a plea bargain. In a 6-3 ruling, the justices said that the lawyer should have filed the appeal when his client requested it, even though the appeal itself was likely doomed. Thomas, joined by Alito and Gorsuch, wrote in dissent that Garza had waived his right to the appellate process itself during the plea bargain, so his lawyer had acted correctly by not filing anything. Then Thomas went even further.

Gideon v. Wainwright, the 1963 ruling that guarantees criminal defendants a lawyer even if they can't afford it, may be one of the court's most consequential rulings of the past half-century. It effectively forced states and the federal government to create the public-defender system to provide attorneys for defendants who could not afford one themselves. In a section joined only by Gorsuch, Thomas suggested that *Gideon* and the rest of the court's ineffective-counsel rulings since the 1960s should be reconsidered. Instead of reading the Sixth Amendment as guaranteeing legal counsel in all criminal matters, he said the Constitution's drafters only wanted to bar the government from forbidding a defendant from hiring a lawyer at all.

"It is beyond our constitutionally prescribed role to make these policy choices ourselves," he wrote. "Even if we adhere to this line of precedents, our dubious authority in this area should give us pause before we extend these precedents further." With public-defender systems already chronically underfunded, reversing Gideon could prompt some states to shutter them altogether.

Though Thomas had shared this view before, this was the first time another justice had publicly signed on to them. In other areas, however, the court's conservative wing may be moving closer to his position… In the 1971 case *Lemon v. Kurtzman*, the Supreme Court set down a strict test for determining when the government's involvement in religious matters violates the Constitution. That test is often criticized by conservative legal scholars; the Supreme Court has also drifted away from it in the decades since it was handed down. As I noted last week, the plaintiffs proposed scrapping *Lemon* and adopting a test that could give the government far more leeway when entangling itself with religion. The justices seemed unwilling to go quite that far in oral arguments last week. But the Establishment Clause's status quo also seemed rocky. "Is it time for this court to thank *Lemon* for its services and send it on its way?" Gorsuch asked during oral arguments. Thomas, as is his usual practice, did not speak or ask questions.

It's worth noting that Thomas and Gorsuch won't exactly be leading a counterrevolution right away. Justice Samuel Alito joined only one of Thomas's dissents—in *Garza*, the Sixth Amendment case—and explicitly refused to join the portion disavowing the 1960s precedents under fire. But he's made clear his views on the Warren era. In 1985, in a job application to the Reagan Justice Department, Alito wrote that his interest in constitutional law as a college student was "motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment." He seems to be a likely third vote in any majority opinion that chips away at a Warren-era precedent. Chief Justice John Roberts has sided with the court's four liberals more frequently than usual this term, perhaps hoping to shore up the court's public legitimacy after the corrosive effects of Brett Kavanaugh's partisan confirmation battle last fall. Kavanaugh himself has yet to

make his impact fully felt on the court. In 2017, he delivered a glowing lecture on the jurisprudence of William Rehnquist, Roberts's predecessor as chief justice.

Many legal scholars, Kavanaugh said, "do not know about [Rehnquist's] role in turning the Supreme Court away from its 1960s Warren Court approach, where the Court in some cases had seemed to be simply enshrining its policy views into the Constitution, or so the critics charged." Whether Kavanaugh will count himself among those critics remains to be seen. Kavanaugh's confirmation also underscored how conservatives enjoy an actuarial advantage when it comes to the Supreme Court. Thomas, the dean of the court's conservatives, turned 70 years old last summer. Justice Ruth Bader Ginsburg, his liberal counterpart, is 85 and Justice Stephen Breyer is 80. If Democrats capture both the White House and the Senate next year, they may be able to maintain the court's current ideological balance. If Trump wins re-election, however, it's likely that the nation's highest court will drift even further to the right. Some of these landmark precedents may yet survive the Roberts Court's scrutiny in the short term. But time is on the originalists' side.